The Phages of American Law

Gil Grantmore[*]

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[*] Henry J. Fletcher and James L. Krusemark Professor of Law, University of Minnesota Law School; Yale Professor of Law Emeritus, Sterling Law School. The author may be reached at grantmore@hotmail.com. Carl T. Bogus, Dale Carpenter, Michael C. Dorf, Richard Frase, Oren Gross, Timothy Hadley, Thomas J. Howard, Linda Bosse Pope, Robert Saxton, and David Albert Westbrook supplied helpful comments. So did Wayne R. LaFave, after a fashion. *Contra* Wayne R. LaFave, *Livrebleu 17: Les Conséquences Tragiques Forgées par le Professeur Répugnant Nommé Grantmore*, 2001 U. ILL. L. REV. 857. Mary Pat Byrn supplied very capable research assistance. April Schwartz likewise provided excellent service from the reference department of the University of Minnesota Law Library. Special thanks to Caitlín ni Coileann, who introduced me to horses, zebras, and other wonders of the macro- and microbiological worlds. If ever I spy a unicorn, I will owe the privilege entirely to her.

Regardless of any other views expressed in this article, I wish to declare unambiguously my sympathy for and solidarity with the victims of the terrorist acts committed against the United States and against humanity on September 11, 2001.

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I. NEW WORLD ORDER, OLD WORLD MORALS

September 11, 2001, ostensibly changed the world.[1] Thousands died that day; millions of others, perhaps billions, live in fear that will never fully subside. Back home, or at least on campus, many things stayed the same. Ideological idiocy[2] still infects both ends of the admittedly skewed political spectrum of American intelligentsia. The elite left can scarcely bring itself to call terrorism and murder by their proper names,[3] even as their lunch-pail counterparts urge the global dissemination of liberal values.[4] One speculates whether the contemporary left, invigorated at the turn of the millennium by the terror of globalization,[5] can muster any meaningful

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[1] *See, e.g.*, W. Michael Reisman, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833, 833 (2001) (asserting that the attacks targeted the "social and economic structures and values of a system of world public order" and that the attacks may have "shattered" that system's "emotional foundation"). *Compare* THE ECONOMIST, Sept. 15-21, 2001 (running a cover titled, "The Day the World Changed"), *with* THE ECONOMIST, Oct. 27-Nov. 2, 2001 (running a cover titled, "How the World Has (and Hasn't) Changed").

[2] Dare I call it "ideocy"? For *The New Republic*'s darkly amusing collection of "the dumbest and most outrageous comments made about America's war on terrorism by politicians, pundits, movie stars, athletes, etc." *see* http://www.thenewrepublic.com/online/idiocy.html.

[3] *See, e.g.*, Michael Kazin, *After the Attacks, Which Side Is the Left On?*, N.Y. TIMES, Oct. 7, 2001, § 4, at 4; Edward Rothstein, *Attacks on U.S. Challenge the Perspectives of Postmodern True Believers*, N.Y. TIMES, Sept. 22, 2001, at A17; Yaroslav Trofimov, *Antiglobalization Campaigners Vow to Carry Out Protests This Month*, WALL ST. J., Sept. 14, 2001, at A8 (reporting that "European antiglobalization campaign organizers vowed to pursue their protest as scheduled" during fall 2001 and insisted that the terrorist attacks against the United States "were a direct result of U.S. foreign policy and that only an end to global capitalism will ensure safety for all"); *Tuesday, and After*, NEW YORKER, Sept. 24, 2001, at 27, 32 (quoting Susan Sontag: "this was not a 'cowardly' attack on 'civilization' or 'liberty' or 'humanity' or 'the free world' but an attack on the world's self-proclaimed superpower, undertaken as a consequence of specific American alliances and actions").

[4] *See, e.g.*, Press Release, Kim Gandy, NOW President, National Organization for Women Denounces Religious Extremism in Wake of Terrorist Attack (Sept. 14, 2001) *available at* http://www.now.org/press/04-01/09-14.html (denouncing the "Taliban government of Afghanistan" for "subjugat[ing] women and girls, and depriv[ing] them of the most basic human rights"); Press Release, John J. Sweeney, President, AFL-CIO, Statement on Tolerance (Sept. 14, 2001), *available at* http://www.aflcio.org/publ/press2001/pr0916.htm (urging that Americans "let our anger be directed at the real enemy — the terrorists and those who supported them"); *cf.* Sarah Wildman, *Arms Length*, NEW REPUB., Nov. 5, 2001, at 23 (pondering why "[b]rand-name feminists" did not more enthusiastically support American military action in Afghanistan and concluding that "the war between women's rights and feminist dogma" would end in a victory for the dogmatic feminists).

[5] Perhaps more so than that of any other political perspective drawn from the Western tradition of pluralist democracy, the antiglobalization movement's worldview is frighteningly close to that of Osama bin Laden, Al Qaeda, and the Taliban. The September 11 terrorists' ideological target, after all, was "globalization itself." Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329 (2002). *See generally* Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 179-83 (2000) (comparing the Taliban

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response to the globalization of terror.[6]

But the radical left's response to September 11 is just that, the radical left's response.[7] Left-lurching discontents in America don't win elections; they throw them.[8] So unlikely is the far left to incite or produce imminent legal change that we can safely ignore its objections to the projection of American influence overseas.[9] The political right, on the other hand, has amply demonstrated its power to steal elections and influence policy. To mock the Republicans' reliance on judicial process to snatch the 2000 election is also to concede the preeminence of right-of-center arguments in today's legal culture.[10] What the right lacks in academic leverage and prestige, it offsets with the power to make the laws of the United States, the power to say what the law is, and the discretion to take care that the laws be faithfully executed. Neither mass media dominance nor a virtual monopoly on doctorates in the humanities can outweigh control of all three branches of the federal government.

In these times of pressing concern over national defense and homeland security, the left-leaning academy and the right-leaning government stand united on gun control.[11] America's legal elite now believes that the Constitution guarantees a personal right "to keep and bear Arms."[12] Akhil Amar,[13] Randy Barnett,[14] Brannon Denning,[15] Sanford Levinson,[16] Glenn

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and other religious extremists — before the Western world fully perceived the lethal nature of their hate — with the protest movement against globalization).

[6] Lexington, *Treason of the Intellectuals?*, THE ECONOMIST, Oct. 6, 2001, at 36, 36 (predicting that the intellectual left's "lack of any plausible answer to the challenge of terrorism will surely limit their effectiveness").

[7] *Cf.* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980) ("The comments in the dissenting opinion about . . . the correct statement of the equal protection rational-basis standard . . . are just that: comments in a dissenting opinion.").

[8] *See* RALPH NADER, CRASHING THE PARTY: HOW TO TELL THE TRUTH AND STILL RUN FOR PRESIDENT (2001).

[9] *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (*per curiam*) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[10] *See* Bush v. Gore, 531 U.S. 98 (2000).

[11] *Compare* THE BEATLES, *Come Together, on* ABBEY ROAD (EMD/Capitol 1969), *with* THE BEATLES, REVOLVER (EMD/Capitol 1966), *and* THE BEATLES, *Happiness Is a Warm Gun, on* THE WHITE ALBUM (EMD/Capitol 1968).

[12] U.S. CONST. amend. II.

[13] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 46-59 (1998) [hereinafter AMAR, CREATION]; AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 170-80 (1998); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992) [hereinafter Amar, *Bill of Rights*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-75 (1991) [hereinafter Amar, *Constitution*]. *But cf.* Morris B. Hoffman,

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Harlan Reynolds,[17] Scot Powe,[18] Laurence Tribe,[19] William Van Alstyne,[20] and Eugene Volokh[21] have all endorsed some version of the so called "individual right" interpretation of the Second Amendment.[22] The rather sudden and thoroughly shocking collapse of the competing "collective right" theory aligns America's constitutional law mandarins with the National Rifle Association (NRA).[23] Indeed, the constitutional status of gun ownership may be the sole point on which a majority of American law professors agrees with Attorney General John Ashcroft.[24] In the face of such a widespread and ideologically diverse consensus, the Supreme Court's ambivalence scarcely matters.[25]

Populist Pabulum, 2 GREEN BAG 2d 97, 97 (1998) (reviewing AMAR & HIRSCH, *supra*) ("Law students who read this book and believe it will flunk constitutional law . . . Citizens who read it, believe it, and act on it, will be arrested and convicted. Judges who read it have too much time on their hands and need more cases on their dockets.").

[14] *See* Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

[15] *See, e.g.*, Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719 (1998).

[16] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

[17] *See, e.g.*, Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1736 (1995).

[18] *See* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

[19] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 898-99 n.213, 901-02 n.221 (3d ed. 2000).

[20] *See* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

[21] *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

[22] *See generally* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000).

[23] The NRA, of course, has always believed that the Second Amendment confers a personal right to own guns. The Association's website advances this belief both overtly and subliminally. Any visitor who types in the most obvious address, http://www.nra.org, will be redirected to a much more personal address, http://www.mynra.com.

[24] *See* Dan Eggen, *Ashcroft: Gun Ownership an Individual Right*, WASH. POST, May 24, 2001, at A13; Fox Butterfield, *Broad View of Gun Rights Is Supported by Ashcroft*, N.Y. TIMES, May 24, 2001, at A13.

[25] *See* United States v. Miller, 307 U.S. 174, 178 (1939); Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1876); *see also* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (characterizing *Miller* as holding 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"). Misguided and regrettable as the practice may be, the law still favors judicial precedent over academic commentary. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (noting that a law may be unconstitutional even if "supported by all the law professors in the land"); Kazmier v. Widmann, 225 F.3d 519, 531 (5th Cir. 2000) ("[T]he

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Exactly five weeks after September 11, the individual right theory of the Second Amendment received its greatest boost ever. In *United States v. Emerson*,[26] the Fifth Circuit opined that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms."[27] The court eventually concluded that the federal government overcame a Second Amendment objection, "albeit likely minimally so," to defendant Timothy Joe Emerson's conviction under a statute barring the shipment, transportation, or receipt in interstate commerce of any firearm or ammunition by a person subject to a court order prohibiting the actual, attempted, or threatened use of physical force against an intimate partner or child.[28] But these doctrinal details are beside the point. The United States District Court for the Northern District of Texas[29] had already done "something no federal court had done in more than 60 years": it held "that the Second Amendment guarantees an individual's right to own a gun."[30] Despite reversing, the Fifth Circuit endorsed much of the district court's startling constitutional analysis. Against an overwhelming body of circuit court precedent,[31] *Emerson* gives

support of even [a] prominent... academician is an inadequate substitute for... recent Supreme Court precedent."); Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir. 1998) (noting that the Supreme Court's opinion is the law, "whatever law professors or even professional historians may say"), *vacated per curiam on other grounds*, 165 F.3d 593 (7th Cir. 1999). *See generally* Scott C. Idleman, *Of Judicial Supremacy and Academic Inadequacy*, 18 CONST. COMMENT. 5 (2001).

[26] 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002). The Fifth Circuit decided *Emerson* on October 16, 2001.

[27] *Id.* at 260.

[28] *Id.* at 264-65.

[29] *See* United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

[30] Wade Maxwell Rhyne, Note, United States v. Emerson *and the Second Amendment*, 28 HASTINGS CONST. L.Q. 505, 505 (2001).

[31] *See, e.g.*, Silveira v. Lockyer, No. 01-15098, 2002 U.S. App. LEXIS 24612 (9th Cir. 2002); United States v. Haney, 264 F.3d 1161, 1165 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002); United States v. Baer, 235 F.3d 561, 564 (10th Cir. 2000); United States v. Napier, 233 F.3d 394, 402 (6th Cir. 2000); Gillepsie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); United States v. Wright, 117 F.3d 1265, 1272-74 (11th Cir. 1997), *amended*, 133 F.3d 1412 (11th Cir. 1998); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992); United States v. Tot, 131 F.2d 261, 266-67 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). For an argument that the lower federal courts have systematically misconstrued the Second Amendment and United States v. Miller, 307 U.S. 174 (1939), *see* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1995-96). For a contrary view, one chastising "legal priests and priestesses" for failing to counter "the gun lobby's chorus concerning 'the right to bear arms' with analysis of "the judicial consensus rejecting that expansive view," *see* Andrew D. Herz, *Gun Crazy:*

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the individual right theory of the Second Amendment its strongest support in positive law and its best prospect for eventual recognition by the Supreme Court.

Emerson may have been the first prominent pronouncement on civil liberties by the federal judiciary after September 11, 2001. I come not to bury *Emerson*, but to praise it. The Fifth Circuit's opinion is satisfying as a matter of constitutional text, legal precedent, and framers' intent.[32] The court marshaled copious historical evidence demonstrating that the Second Amendment guarantees a personal right to keep and bear arms, without regard to an individual's participation *vel non* in any official military organization. Against the high-caliber scholars who have shaped the new, dominant Second Amendment paradigm, I could offer no more than scattershot resistance. Inspired by the example of the concurring judge in *Emerson*,[33] I shall assume — if only momentarily and solely for argument's sake — the correctness of the individual right theory of the Second Amendment.

This article explores *Emerson* in a larger legal and real-world context. Part II explores the constitutional implications of treating gun ownership as a protected individual right. Ruthlessly pursuing the logical consequences of *Emerson* yields three surprising conclusions. First, at a minimum, the individual right theory undermines one of the leading decisions in which the Supreme Court invalidated a federal gun-control statute. Second, the logic underlying *Emerson* suggests that the Second Amendment should not be incorporated against the states via the Fourteenth Amendment. Finally, insofar as the individual right theory of the Second Amendment rests upon an expansive definition of the word "militia" for purposes of constitutional interpretation, *Emerson* portends the recognition of a stunningly fecund font of federal police power.

This extension of *Emerson* almost certainly upsets the political preferences of the Second Amendment's most vigorous advocates. In response, Part III of this article shifts the spotlight from legal doctrine to the empirical underpinnings of the individual right theory. Because law,

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Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. REV. 57, 118 (1995).

[32] *Contra* Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENT. 307, 309 (1986) (asserting that "[n]o one with good enough test scores to get into law school would be stupid enough to imagine that any law review in the country would publish" a passage resembling the sentence accompanying this footnote).

[33] *See* United States v. Emerson, 270 F.3d 203, 272-74 (5th Cir. 2001) (Parker, J., specially concurring) (reasoning that challenged statute, 18 U.S.C. § 922(g)(8) (2000), could be upheld as "a reasonable restriction on whatever right" defendant Emerson might have enjoyed under the Second Amendment), *cert. denied*, 122 S. Ct. 2362 (2002).

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"[u]nlike physics, . . . does not lend itself to a 'standard model,'" I forswear any pretense to "a grand unified theory" of the Second Amendment or the Constitution at large.[34] Rather, Part III focuses strictly on a "fundamental novelt[y] of fact and theory,"[35] an inconsistency of the sort that sparks intellectual crises and shakes established paradigms. I wish simply to identify a singular contradiction of the assumption that widespread gun ownership deters violence. Before September 11, 2001, federal law successfully imposed a comprehensive gun-free zone on one of the principal channels of interstate commerce: air travel. Except a volatile proposal to arm pilots, commercial aviation after September 11 remains gun-free. Nothing in the United States' hastily revamped security matrix permits, let alone encourages, civilian travelers to arm themselves. American aviation therefore continues to challenge the idea of public security through widespread deployment of personal firearms. If total civic disarmament not only promises but actually delivers freedom from violence, broad gun ownership — to say nothing of its protection through constitutional law — loses much of its appeal.

Finally, Part IV of this article attempts to reconcile legal and practical reasoning with post-September 11 realities. As a legal matter, *Emerson* establishes a modest new civil liberty in exchange for an expansive congressional power. American civil aviation in practice subverts the individual right theory's approach to public safety. The leading threat to American security today comes from terrorism and asymmetrical warfare.[36] This look at the Second Amendment does indeed address these concerns, albeit in ways far from the imagination of the theorists and jurists who have promoted the individual right theory. September 11 has changed our perspective on private violence and its place in the American constitutional scheme.[37] Neither that scheme nor September 11 justifies the treatment of private gun ownership as a pillar of national security.

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[34] Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 194 (2000).

[35] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52 (2d ed. 1970).

[36] *See generally* SPIRIT, BLOOD, AND TREASURE: THE AMERICAN COST OF BATTLE IN THE 21ST CENTURY (Donald E. Vandergriff ed., 2001) (describing the transition from the Cold War to the contemporary phenomenon of asymmetrical warfare). Of course, asymmetry can work in both directions. One observer of the U.S. military has argued that the United States, between its own Civil War and World War II, successfully conducted small wars on its own western frontier and in China, Russia, Latin America, and the Caribbean. *See generally* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2002).

[37] *See generally* David Albert Westbrook, *Triptych: Three Meditations on How Law Rules After Globalization*, 12 MINN. J. GLOBAL TRADE (forthcoming 2003).

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II. AVE CAESAR, POTENTIA PLENA

The Second Amendment of the United States Constitution provides in full: "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."[38] *Emerson* rested on a close reading of the Second Amendment. The Fifth Circuit reasoned that "the people," a term of art found throughout the Constitution,[39] "refers to individual Americans."[40] The court further reasoned that the phrase "to keep and bear Arms" "refers generally to the carrying or wearing of arms," and not merely to the possession of arms "only during periods of actual military service or only [by] those who are members of a select militia."[41]

This straightforward reading of the Second Amendment's "operative" clause shifts interpretive weight to the amendment's "justificative" preamble: "A well regulated Militia, being necessary to the security of a free State . . . ." The justificative preamble cannot be fairly construed to limit the operative portion of the Second Amendment. As the *Emerson* court observed, the preamble at most supports an interpretation of the entire amendment "which tends to enable, promote or further the existence, continuation or effectiveness of that 'well-regulated Militia' [*sic*] which is 'necessary to the security of a free State.'"[42] Though the "justification clause may inform our interpretation of" an ambiguous operative clause, "the justification clause can't take away what the operative clause provides."[43] One response posits that the "right of the people" contained in the Second Amendment's operative clause "referred not to disconnected individuals but to the people considered as a unified, homogeneous, organic, collective body, devoted to the common good."[44] But accepting this argument simply returns us to the collective right theory that is rapidly losing its appeal within the legal academy.

Unwilling, at least for the moment, to endorse the collective right approach, I shall offer no resistance to the logic underlying the individual right theory. The preamble's references to a "well regulated Militia" and "the security of a free State" fail to negate a personal right to keep and bear

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[38] U.S. CONST. amend. II.

[39] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (describing the use of "the people" in the Preamble and the Second, Ninth, and Tenth Amendments).

[40] United States v. Emerson, 270 F.3d 203, 229 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

[41] *Id.* at 231-32.

[42] *Id.* at 233.

[43] Volokh, *supra* note 21, at 807.

[44] David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 824 (1998).

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arms. Lacking either the diction or the syntax that would befit a limitation, the preamble operates at most to clarify the purpose of the Second Amendment.[45] By the same token, both the *Emerson* court and the legal academy have failed to explore all the implications of the Second Amendment's preamble. The preamble must mean *something*: "as a matter of textual analysis," it is "highly significant that [none] of the several [other] great entitlements enunciated in the first eight amendments . . . is hedged by a conditional or explanative clause."[46] The collective right theory having fallen out of intellectual favor, let us consider another possibility: linking the Second Amendment to the federal legislative power that inspired its inclusion in the Bill of Rights. The very language that enables the Second Amendment to curb federal influence over private gun ownership also animates two of the Constitution's affirmative grants of congressional power.[47]

The Supreme Court in *United States v. Miller*[48] explained the structural significance of the Second Amendment's preamble. *Miller* observed that the preamble's reference to the "Militia" connected the Second Amendment directly with two provisions of Article I, Section 8 of the Constitution:

> The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .[49]

The *Miller* Court observed, "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces

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[45] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419-20 (1819) (Marshall, C.J.) (reasoning that a "necessary and proper" clause "placed among the powers of Congress, not among the limitations on those powers" should be read so as "to enlarge, not to diminish the powers vested in the government").

[46] H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 420 (2000).

[47] *See generally* Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (recommending the comparison of similarly worded but structurally distinct constitutional provisions as a means of clarifying their meaning).

[48] 307 U.S. 174 (1939).

[49] U.S. CONST. art. I, § 8, cls. 15-16.

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the declaration and guarantee of the Second Amendment were made."[50] Accordingly, any interpretation of the Second Amendment "must be . . . applied with that end in view."[51]

The Supreme Court rendered its definitive interpretation of Article I's Militia Clauses in the 1990 case of *Perpich v. Department of Defense*.[52] The first of these clauses, *Perpich* held, "empowers Congress to call forth the militia 'to execute the Laws of the Union, suppress Insurrections and repel Invasions.'"[53] The second "enhances federal power in three additional ways."[54] "First, it authorizes Congress to provide for 'organizing, arming and disciplining the Militia . . . . Second, the Clause authorizes Congress to provide for governing such part of the militia as may be employed in the service of the United States."[55] Finally, although the clause reserves for the states the power to appoint officers and train the militia, it simultaneously empowers Congress to prescribe the discipline by which the militia is to be trained.[56] These powers do not constrain Congress's independent powers "to declare war; . . . to raise and support armies . . . ; [and] to make rules for the government and regulation of the land and naval forces."[57] Indeed, the Constitution consistently distinguishes between the federal military and the militia.[58] "[F]ar from being a limitation on" Congress's other military powers, "the Militia Clauses are — as the constitutional text plainly indicates — additional grants of power to Congress."[59]

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[50] 307 U.S. at 178; *accord* United States v. Emerson, 270 F.3d 203, 225, 233 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

[51] 307 U.S. at 178.

[52] 496 U.S. 334 (1990). *See generally* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

[53] 496 U.S. at 349.

[54] *Id.* at 350.

[55] *Id.*

[56] *See id.* at 350-51.

[57] The Selective Draft Law Cases, 245 U.S. 366, 377 (1918) (quoting U.S. CONST. art. I, § 8, cls. 11-14); *accord Perpich*, 496 U.S. at 349; Cox v. Wood, 247 U.S. 3, 6 (1918); *cf.* United States v. Butler, 297 U.S. 1, 65-66 (1936) (interpreting Congress's powers to tax and to regulate interstate commerce under U.S. CONST. art. I, § 8, cls. 1, 3, as mutually independent powers).

[58] *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, *and of the Militia of the several States*, when called into the actual Service of the United States" (emphasis added)); *id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, *or in the Militia*, when in actual service in time of War or public danger . . ." (emphasis added)); *see also* Perpich v. United States Dep't of Def., 880 F.2d 11, 23 n.16 (8th Cir. 1989) (en banc) (Heaney, J., dissenting) (making this structural observation), *rev'd sub nom.* Perpich v. Dep't of Def., 496 U.S. 334 (1990).

[59] *Perpich*, 496 U.S. at 349; *see also Cox*, 247 U.S. at 6 (recognizing "no limit deduced from [the] separate and . . . wholly incidental, if not irrelevant and subordinate, provision

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At a minimum, the Militia Clauses enable Congress to assimilate members of the National Guard within the federal military.[60] The full reach of the Militia Clauses, however, depends on how we define "the Militia" as that term is used in Article I, Section 8. To answer this question, let us return to the Second Amendment and to *Miller*. After reviewing "the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators," the *Miller* Court concluded that the term "Militia" "comprised all males physically capable of acting in concert for the common defense."[61] Lest this definition be discredited by its vintage and by its sex-specificity,[62] let us consult Title 10 of the United States Code for the federal government's contemporary definition of the militia:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> (b) The classes of the militia are — (1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.[63]

Cast aside for now this statute's retention of the historical distinction between men and women. I leave for another time and almost certainly another scholar a complete exegesis on sex-based classifications in military

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concerning the militia").

[60] *See Perpich*, 496 U.S. at 347 (noting the "unchallenged validity of the dual enlistment system" by which members of the National Guard simultaneously belong to a state militia and to the armed forces of the United States); Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 46-47 (1965), *vacated*, 382 U.S. 159 (1965).

[61] United States v. Miller, 307 U.S. 174, 179 (1939); *accord, e.g.*, United States v. Emerson, 270 F.3d 203, 225, 234 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002); Owens v. Markley, 186 F. Supp. 604, 607 (S.D. Ind. 1960).

[62] *Cf.* U.S. CONST. amend. XIV, § 2 (providing, as a remedy for denial of "the right to vote" in federal elections "to any of the *male* inhabitants of [a] State," for the reduction in that state's delegation in the House of Representatives (emphasis added)). Akhil Amar suggests that the Fourteenth Amendment's reference to male adults as voters "appear[s] to preserve" the Second Amendment's alleged "linkage between the militia and voting." AMAR, CREATION, *supra* note 13, at 218.

[63] 10 U.S.C. § 311 (2000). The militia also includes men as old as 64 who are "former member[s] of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps." *See id.* § 311(a); 32 U.S.C. § 313 (2000).

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and quasi-military settings.[64] Even if halved by the traditional but dubious limit on female participation, this definition of the militia is impressively broad. *Perpich* and *Miller* leave little doubt of Congress's ability to cast an even wider net. If Congress were to lift sex- and age-based limits on the membership of the militia, the Supreme Court would assuredly approve such a decision. Of the myriad "imperative obligations of citizenship" that "Congress in the exercise of its powers may constitutionally" demand, "[o]ne of the most important... is to serve the country in time of war and national emergency."[65] Indeed, the founders of the Constitution probably intended the term "militia" to denote an armed force conscripted from a broad cross-section of the public, as distinct from an "army" consisting of enlisted volunteers.[66] In one of its rare forays into Second Amendment jurisprudence, the Supreme Court has opined that "*all* citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states."[67]

To be sure, the current statutory definition of the unorganized militia "has no functional significance"; it "does not provide for the arming, equipping, organizing, training, or funding of the unorganized militia."[68] "In fact," the statutory definition "seems to do only one thing: it allows those citizens who fit the statutory definition to proclaim that they are members of the militia."[69]

One might imagine that the practice of claiming militia membership, which runs rampant within the right-wing fringe "militia" movement, would be utterly alien to the legal academy. One would be wrong. In the immediate wake of September 11, a prominent academic advocate of robust gun-ownership rights invoked the contemporary definition of the militia. In the September 18, 2001, issue of *National Review Online*, Randy Barnett hailed the "members of the general militia... who successfully

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[64] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Rostker v. Goldberg, 453 U.S. 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); *cf.* Bennett L. Saferstein, *Revisiting* Plessy *at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 656 (1993) (describing the use of the term "diversity" in the VMI litigation as "a clever rhetorical device" designed to evoke "positive, politically correct connotations" of "a diverse student body or diverse academic offerings").

[65] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963).

[66] *See* AMAR, CREATION, *supra* note 13, at 53-55; Amar, *Constitution*, *supra* note 13, at 1163-75.

[67] Presser v. Illinois, 116 U.S. 252, 265 (1886) (emphasis added) (describing this proposition as "undoubtedly true").

[68] David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 898 n.81 (1996).

[69] *Id.*

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prevented Flight 93 from reaching its intended target" in Washington.[70] In his *National Review Online* essay and in his larger body of Second Amendment scholarship,[71] Professor Barnett plainly contemplates that defining the militia to embrace a huge swath of the United States' adult population would correspondingly expand the right to keep and bear arms. And so it would. What Professor Barnett has failed to articulate, however, is how a comprehensive definition of the militia would also give Congress a most impressive police power.[72]

To recapitulate *Perpich*: The Militia Clauses give Congress four distinct powers — (1) to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions," (2) to organize, arm, and discipline the militia, (3) to govern such part of the militia "as may be employed in the Service of the United States," and (4) to prescribe the discipline by which the states may exercise their reserved authority to train the militia. When "called into the actual Service of the United States," members of the militia must answer to the President as Commander in Chief.[73] Moreover, when actually serving the United States "in time of War or public danger," members of the militia may lose such protections as the Fifth Amendment would otherwise provide against accusations of "a capital, or otherwise infamous crime."[74] On both of these issues, members of the militia, once pressed into federal service, fare no better than regular members of the federal armed forces. Of all "relation[s] between the Government and a citizen," none "is more distinctively federal in character than that between it and members of its armed forces."[75] It seems all the rage of late to convene "military tribunals" for noncitizen terrorists accused of "violations of the laws of war."[76] Given a sufficiently expansive

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[70] Randy E. Barnett, *Saved by the Militia: Arming an Army Against Terrorism*, NAT'L REV. ONLINE, Sept. 18, 2001, *available at* http://www.nationalreview.com/comment/comment-barnett091801.shtml (quoting 10 U.S.C. § 211 (2000)).

[71] *See* sources cited *supra* note 14.

[72] *Cf.* United States v. Lopez, 514 U.S. 549, 567 (1995) (expressing reluctance to confer upon Congress "a general police power of the sort retained by the States").

[73] U.S. CONST. art. II, § 2, cl. 1.

[74] *Id.* amend. V.

[75] United States v. Standard Oil Co. of Cal., 332 U.S. 301, 305 (1947); *accord* Feres v. United States, 340 U.S. 135, 143-44 (1950).

[76] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 1(e), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001). *See generally Ex parte* Quirin, 317 U.S. 1 (1942) (prescribing the conditions under which the federal government may conduct military tribunals for violations of international law during wartime). For extended scholarly commentary, see Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); Christopher M. Evans, *Terrorism on Trial: The President's Constitutional Authority to Order the*

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definition of the militia, the Militia Clauses might enable the federal government to prescribe military justice for an even broader segment of the American population.[77] So much for the suggestion that "noncitizens' liberties" are the true "first casualty of war":[78] aggressive use of the militia power would level the constitutional playing field by subjugating citizens and aliens equally.

Even though "emergency powers [do] tend to kindle emergencies,"[79] extreme emergencies justify extreme measures. Any fear of congressional hyperextension can be soothed with the reminder that "it is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."[80] In times like these, the Militia Clauses can be a congressional hawk's best friend. Even if terrorist attacks do not qualify as "Insurrections" or "Invasions," Congress has already authorized the President to take "all necessary and appropriate force" in retaliation for the attacks of September 11.[81] Congress has also passed the sweeping USA

Prosecution of Suspected Terrorists by Military Commission, 51 DUKE L.J. 1831 (2002); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345 (2002); Wedgwood, *supra* note 5.

[77] *See generally* ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970). Generally speaking, military tribunals and other institutions of war "should always be kept in subjection to the [civilian] laws of [this] country," and "he is no friend to the Republic who advocates to the contrary." Dow v. Johnson, 100 U.S. 158, 169 (1879); *accord* Duncan v. Kahanamoku, 327 U.S. 304, 322-23 (1946).

[78] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002).

[79] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring); *cf., e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting) ("[T]he greatest threats to our constitutional freedoms come in times of crisis."); United States v. Robel, 389 U.S. 258, 263 (1968) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (cautioning against quick resort to the "war power" because it "is the most dangerous one to free government in the whole catalogue of powers," is "usually . . . invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult," often "is executed in a time of patriotic fervor that makes moderation unpopular," and, "worst of all, . . . is interpreted by the Judges under the influence of the same passions and pressures"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935) ("Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.").

[80] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344 (1816).

[81] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (Sept. 18, 2001) (to be codified at 50 U.S.C. § 1541 note) (describing the terrorist acts of September 11, 2001, as "an unusual and extraordinary threat to the national security and foreign policy of the United States").

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PATRIOT Act,[82] which (among many other things) authorizes enhanced surveillance procedures, targets money laundering, tightens the nation's borders, restricts immigration, and strengthens criminal penalties for terrorism.[83] Presumably Congress could direct the militia to enforce these laws. In any event, *Perpich* hinted that Congress acted lawfully when it "authorize[d] the President to call forth the entire membership of the [National] Guard into federal service during World War I, even though the soldiers who fought in France were not engaged of any of the three . . . purposes" specified in the first Militia Clause.[84] Nor does it matter whether international tribunals or domestic courts characterize American military exercises in Afghanistan as acts of war, much less whether captives detained at Guantánamo Bay are "prisoners of war" within the meaning of the Geneva Convention[85] and other sources of public international law.[86] The Bill of Rights recognizes times of "public danger" distinct from "time[s] of War."[87] If ever there were a time of public danger in American history, this is it.[88]

Standing alone, however, the existence of a "time of . . . public danger" has no constitutional significance. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men [and women], at all times, and under all circumstances."[89] The Supreme Court has recognized an

[82] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

[83] *See generally* Matthew Purdy, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1.

[84] Perpich v. Dep't of Def., 496 U.S. 334, 349 (1990). *See generally* Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191 (1996).

[85] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

[86] *See generally In re* Yamashita, 327 U.S. 1, 7-9 (1946); *Ex parte* Quirin, 317 U.S. 1, 27-28 & n.5 (1942); The Prize Cases, 67 U.S. (2 Black) 635, 666-67 (1862). On *Quirin, see generally* Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980).

[87] U.S. CONST. amend. V.

[88] *See* Proclamation No. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks (Sept. 14, 2001); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (deeming the acts of September 11, 2001, and "the continuing and immediate threat of further attacks" to "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States"); Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, § 1(g), 66 Fed. Reg. 57,833, 57,833-34 (Nov. 13, 2001) (determining that "an extraordinary emergency exists for national defense purposes").

[89] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866); *accord* Duncan v. Kahanamoku, 327 U.S. 304, 322, 324 (1946); *see also* Toth v. Quarles, 350 U.S. 11, 23 (1955) ("Congress cannot

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important limitation on the spatially and temporally universal applicability of the Constitution: neither Article III nor the Bill of Rights restrains Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[90] Congress enjoys a comparable degree of freedom in "organizing, arming, and disciplining, the Militia, and ... governing such Part of them as may be employed in the Service of the United States."[91] The Fifth Amendment explicitly withholds the right to "presentment or indictment [by] a Grand Jury" from those who serve "in the land or naval forces, or in the Militia, ... in time of War or public danger."[92] This language, though absent from the Sixth Amendment, limits that amendment's "right of trial by jury ... to those persons who were subject to indictment or presentment in the fifth."[93] By parallel constitutional reasoning, there is no basis for distinguishing members of the militia (whom Congress may regulate under Article I, Section 8, Clause 16) from members of the land and naval forces (whom Congress may regulate under Article I, Section 8, Clause 14) on questions of military discipline. The suspension of "the civil safeguards of the Constitution" therefore applies to any person who falls within the "proper sphere" of military government permitted by the Constitution.[94] That sphere embraces not only Congress's power to govern and regulate the land and naval forces, but also its power "to provide for governing such part of the militia as may be in the service of the United States."[95] Those who brandish their membership in a militia as broad as the American citizenry in order to claim a constitutional right to keep and bear arms therefore expose themselves to comprehensive federal regulation, far beyond the Constitution's aegis, whenever Congress sees fit to sweep them into actual service in times of war or public danger. Where a status-based claim of a civil liberty "is inextricably intertwined with the" obligations that accompany Congress's power to regulate that status, the claimant "must take the bitter with the sweet."[96]

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subject civilians ... to trial by court-martial."); *cf.* Reid v. Covert, 354 U.S. 1, 6 (1957) (plurality opinion) (refusing to lift "the shield" provided by "the Bill of Rights and other parts of the Constitution" from a citizen who "happens to be in another land").

[90] U.S. CONST. art. I, § 8, cl. 14; *see Reid*, 354 U.S. at 19 (plurality opinion); *Ex parte* Reed, 100 U.S. 13, 21 (1879); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[91] U.S. CONST. art. I, § 8, cl. 16.

[92] U.S. CONST. amend. V.

[93] *Milligan*, 71 U.S. (4 Wall.) at 123.

[94] *Id.* at 137 (Chase, C.J., dissenting).

[95] *Id.*

[96] Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (Rehnquist, J., plurality opinion).

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What measures might Congress adopt for purposes of training the militia? Strictly as a matter of communitarian political theory, two prominent scholars have advocated laws mandating firearm ownership by the public at large.[97] It is no less realistic to imagine that Congress might subject the same public to an aggressive regimen of sensitivity training and diversity exercises. A Congress that immediately condemned discrimination against Arab and Muslim Americans in the wake of September 11 may well add teeth to this symbolic gesture.[98] At the very least, Congress might condition post-September 11 grants on the implementation of antidiscrimination programs by states accepting federal financial aid.[99] A commitment to multiethnic pluralism, traceable at least in part to remorse for the abuse of Japanese-Americans during World War II,[100] lies deep in the American psyche. In this realm, political preferences do more to limit Congress than the Constitution does. Neither mandatory gun ownership nor diversity training lies beyond Congress's reach under the Militia Clauses.

Two final legal consequences are worth noting. First, at a minimum, an aggressive interpretation of the Militia Clauses and a broad definition of militia invite reconsideration of *Printz v. United States*.[101] The second of two contemporary Supreme Court decisions that invalidated a federal gun-control statute,[102] *Printz* held that Congress may never commandeer the

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[97] *See* Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Compulsory Arms-Bearing*, 5 WM. & MARY BILL RTS. J. 185 (1996).

[98] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 102, 115 Stat. 272, 276-77 (2001).

[99] *Cf.* South Dakota v. Dole, 483 U.S. 203 (1987).

[100] *See Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Act of Aug. 10, 1988, Pub. L. No. 100-338, 102 Stat. 903 (1988) (providing reparations for the forced evacuation and internment of Japanese-Americans); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (overturning Fred Korematsu's conviction for violating a wartime curfew on all persons of Japanese ancestry on the Pacific coast). *See generally* ROGER DANIELS, CONCENTRATION CAMPS NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II (1993); JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed. 1989); PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945). *Watch also* EMIKO OMORI, RABBIT IN THE MOON (New Day Films 1999).

[101] 521 U.S. 898 (1997).

[102] *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act lay beyond Congress's power to regulate interstate commerce); *cf., e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 748 n.6 (1997) (intimating "serious qualms about [the] constitutionality under the Second Amendment" of a federal statute applied so as to punish "adults transporting guns on public streets, perhaps in their vehicles, within 1000 feet of a public school").

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executive officers of the states to enforce a federal law.[103] If we recharacterize the chief law enforcement officers of the states and their subdivisions as members of the militia, surely Congress could command them "to execute the Laws of the Union."[104] It is already unexceptional to note that National Guard members "lose their status" under state law "during their period of active duty" in the federal military.[105] Once Congress chooses to designate a county sheriff as a member of the militia for purposes of "execut[ing] the Laws of the Union," that chief law enforcement officer would similarly cease to act as an executive officer of state government. Of course, it would be odious to condition enforcement of the Brady Bill or any other federal law upon the age or sex of a chief law enforcement officer. But that concern merely counsels expanding the statutory definition of the militia to embrace all able-bodied adult Americans. Perhaps the federal government's call for the entire population to participate via the Terrorist Information and Prevention System in gathering antiterrorist intelligence hints at the mere tips of the Militia Clause iceberg.[106] At a minimum, reliance on the Militia Clauses could help federal law enforcement officials discipline local counterparts who have refused to cooperate in the effort to quash terrorism.[107] In maneuvering around the contemporary Supreme Court's stringent rules on federalism, the national government now enjoys an option besides unilateral expansion of its bureaucracy.[108] It therefore behooves the Supreme Court to revisit *Printz*, though not for the purpose of considering whether "the right to bear arms" properly serves "as the palladium of the liberties of a republic."[109]

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[103] *See Printz*, 521 U.S. at 935.

[104] U.S. CONST. art. I, § 8, cl. 15.

[105] Perpich v. Dep't of Def., 496 U.S. 334, 347 (1990).

[106] *See* Andy Newman, *Citizen Snoops Wanted (Call Toll-Free)*, N.Y. TIMES, July 21, 2002, § 4, at 1.

[107] *See* Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7 (reporting the refusal of the Portland, Or., police to cooperate with the FBI's effort to interview 5000 men of Middle Eastern origin because such action purportedly would violate state-law restrictions on racial profiling). *See generally* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

[108] *See Printz*, 521 U.S. at 959 (Stevens, J., dissenting) (noting that a *per se* rule against the supposed commandeering of state-law executive officers by the federal government seems "[p]erversely . . . more likely to damage than to preserve the safeguards against tyranny" by "creat[ing] incentives for the National Government to aggrandize itself" and to "create vast national bureaucracies to implement its policies"); *id.* at 977 (Breyer, J., dissenting) (asking "[w]hy, or how, . . . the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy [would] better promote either state sovereignty or individual liberty").

[109] *Id.* at 939 (Thomas, J., concurring) (quoting 3 JOSEPH STORY, COMMENTARIES § 1890, at 746 (1833)).

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Second, nothing in this analysis supports incorporation of the Second Amendment against the states through the Fourteenth Amendment. The Supreme Court has squarely addressed this issue in two of its rare forays into Second Amendment jurisprudence. In *United States v. Cruikshank*,[110] and again in *Presser v. Illinois*,[111] the Court held that the Second Amendment limits only the federal government and not the states.[112] The Court further held that any right *vis-à-vis* Congress to keep and bear arms did not qualify as one of the privileges or immunities of national citizenship protected by the Fourteenth Amendment.[113]

There is at least a superficially plausible case for incorporating the Second Amendment. The nineteenth-century cases holding to the contrary predated the Supreme Court's project "of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment."[114] Gun ownership may indeed be "implicit in the concept of ordered liberty,"[115] so essential to our legal system that "neither liberty nor justice would exist if they were sacrificed."[116] Gun ownership might even compare favorably with abortion and contraception in the derby of rights seeking shelter within the penumbras and emanations of the Bill of Rights.[117] The "greater textual support" that "an individual right of firearm ownership and possession" enjoys *vis-à-vis* those other rights gives rise to a "perception of a political double-standard" that "infuriates the individual right scholars who oppose gun control — and embarrasses those who favor it."[118]

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[110] 92 U.S. 542 (1876).

[111] 116 U.S. 252 (1886).

[112] *See id.* at 265; *Cruikshank*, 92 U.S. at 553; *see also* Miller v. Texas, 153 U.S. 535, 538 (1894) (citing *Cruikshank* for the proposition that "the restrictions" of the Second and Fourth Amendments "operate only upon the federal power, and have no reference whatever to proceedings in state courts"); United States v. Sanges, 48 F. 78, 85 (C.C.N.D. Ga. 1891) (same).

[113] *See Presser*, 116 U.S. at 267; *Cruikshank*, 92 U.S. at 553; *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74-79 (1872) (defining the privileges and immunities of national citizenship); *cf.* Saenz v. Roe, 526 U.S. 489, 501-04 (1999) (defining the privileges and immunities of state citizenship protected by U.S. CONST. art. IV, § 2, cl. 1).

[114] United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002); *see also, e.g.*, Levinson, *supra* note 16, at 653. *See generally, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947).

[115] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[116] *Id.* at 326.

[117] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[118] Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 345 (2000); *see also id.* at 346 (describing interpretive reliance on the "superficial support" lent by the Supreme "Court's discussion of 'penumbras' and 'emanations'" in its substantive due process cases as a "deeply flawed" and ultimately "unsuccessful effort to banish value judgments from constitutional interpretation").

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Deeper analysis, however, cinches the case against incorporation. The Second Amendment, perhaps alone among the provisions of the Bill of Rights, was consciously designed to check the power of the federal government in general *vis-à-vis* the states as states and to curb the power of a standing federal army in particular.[119] Requiring states to accord the privilege of gun ownership to their citizens would not shield state sovereignty against federal encroachment. Indeed, crafting any new federal constitutional right favoring individuals — including that of private gun ownership — has precisely the opposite effect.[120] At a minimum, no respectable reading of the term "Militia" in the Second Amendment's preamble lends any weight toward incorporation of the Second Amendment's substantive guarantee against the states. It is well-nigh impossible to extract an incorporation theory covering the Second Amendment from a Fourteenth Amendment that "reflect[s] a much more sympathetic view of a national army and a much more skeptical view of state organized militias."[121] As the Supreme Court's drive to incorporate the Bill of Rights peaked during the New Deal, recognition of "an individual right to bear guns fit poorly with the" broader jurisprudence of that age.[122] "With another Great War looming, the Founders' preference for state militias over a national army must have seemed quaint to say the least."[123] Incorporation of the Second Amendment, so it seems, lacks both doctrinal and theoretical support. A more formidable pair of obstacles to

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[119] *See* Perpich v. Dep't of Def., 496 U.S. 334, 340 & n.5 (1990); United States v. Miller, 307 U.S. 174, 178-79 (1939); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 572-74 (1991) [hereinafter Williams, *Civic Republicanism*]; *see also* Amar, *Constitution*, *supra* note 13, at 1168-69 (contrasting the word "army," which in 1789 denoted a standing force of enlisted mercenaries, with the word "militia," which at that time referred to a force of conscripted citizens); *cf.* Jack N. Rakove, *Whose Right on Bearing Guns? Founders Meant "The Militia,"* BOSTON GLOBE, Nov. 25, 2001, at D8 (arguing that the "best reading of the Second Amendment . . . would recognize that it was designed to oblige the national government to maintain and support . . . state-based militia" so that the national government would not "rel[y] solely on a dreaded 'standing army,' which many Americans believed would be inimical to liberty"). *See generally* Uviller & Merkel, *supra* note 46, at 495-510.

[120] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting); Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); *id.* at 221-22 (White, J., dissenting); Katzenbach v. Morgan, 384 U.S. 641, 670-71 (1966) (Harlan, J., dissenting).

[121] AMAR, CREATION, *supra* note 13, at 59; *cf. id.* at 217 (acknowledging that "the overall architecture of the Fourteenth Amendment seems to pull . . . apart" the Second Amendment's implicit fusion of "arms bearing, militia service, and . . . political participation").

[122] David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 665 (1998).

[123] *Id.*

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legal validity can scarcely be imagined. Until further notice, therefore, *Cruikshank* and *Presser* remain the law of the land.[124]

Indeed, closer examination of the Fourteenth Amendment suggests that the constitutional transformation occasioned by the Civil War and Reconstruction may have implicitly repealed the Second Amendment in its entirety. Section Three of the Fourteenth Amendment disqualifies from federal office any person who, despite "having previously taken an oath . . . to support the Constitution of the United States," has "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."[125] Sections Two and Four bring further legal opprobrium against "insurrection," "rebellion," and "other crime[s]."[126] Though the Fourteenth Amendment does not in so many words reject the citizen-militia that the Framers favored, it hardly endorses that vision. The exclusion from political life of those who take up arms against the federal government strongly negates the political philosophy that would have supported a personal right to bear arms as a check against federal hegemony. In all fairness, it does stretch credibility to interpret the Fourteenth Amendment's negative references to "rebellion" and "insurrection" as an unequivocal rejection of the citizen-soldier vision underlying the Second Amendment. But this structural approach to constitutional interpretation is no more absurd than using intratextual analysis to construe the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments as protecting a right to vote on juries,[127] or to interpret the First Amendment's Free Speech Clause according to the Speech or Debate Clause of Article I, Section 6.[128]

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[124] *See, e.g.*, Peoples Rights Org. v. City of Columbus, 152 F.2d 522, 538 n.18 (6th Cir. 1998); Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 729-30 (9th Cir. 1992); Quilici v. Vill. of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); State v. Sanne, 116 N.H. 583, 584, 364 A.2d 630, 630 (1976) (argued for New Hampshire by state attorney general David H. Souter); Burton v. Sills, 53 N.J. 86, 95-101, 248 A.2d 521, 521-29 (1968), *appeal dismissed*, 394 U.S. 812 (1969); Citizens for a Safer Cmty. v. City of Rochester, 164 Misc. 2d 822, 827-28, 627 N.Y.S.2d 193, 197 (N.Y. Sup. Ct. 1994); Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 41, 616 N.E.2d 163, 168 (1993); Uviller & Merkel, *supra* note 46, at 412.

[125] U.S. CONST. amend. XIV, § 3.

[126] *Id.* §§ 2, 4.

[127] *See* Amar, *Intratextualism*, *supra* note 47, at 789-92.

[128] *See id.* at 816-17 (comparing U.S. CONST. amend. I with *id.* art. I, § 6, cl. 1). For a succinct and eminently correct assessment of these propositions as "absurd," see Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 923-25 (2001). Outrageous intratextualism is merely one manifestation of a deeper pathology: "the fallacy of hyper-integration — of treating the Constitution as a kind of seamless web." LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24 (1991).

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Nor should we forget the Civil War and Reconstruction themselves as constitutionally significant events. In case anyone has forgotten — and the overwhelmingly white and Southern membership of the gun lobby might need a reminder[129] — the Union won the Civil War. Those who fell defending the Union did not die in vain; they sacrificed their lives, as the Gettysburg Address reminds us, so that the United States might experience "a new birth of freedom." What that birth signifies is admittedly contestable. How "few of us would march our sons and daughters off to war to preserve the citizen's right to see" erotic images?[130] Justice Potter Stewart probably spoke for a large part of the American public when he effectively suggested that Abraham Lincoln did not work to save the Union so that future generations could get contraceptives and abortions.[131] But this much is certain: the Grand Army of the Republic did not get wasted at Shiloh so that insurrection-minded rebels-in-waiting might bear arms anew against the people and government of the United States of America.

Let us sum up. The individual right theory of the Second Amendment hinges on treating the amendment's justificative preamble, which refers to a "well regulated Militia" and its centrality "to the security of a free State," as something other than a limitation on the operative language of the Second Amendment. This broad interpretation of the term "Militia" directs attention to the Militia Clauses of Article I and arguably dictates an enlarged view of congressional power under those clauses. Constitutional history and contemporary federal law support an expansive rather than restrictive view of the militia's membership. At a minimum, the resulting federal police power provides a basis for revisiting and overruling *Printz v. United States*. The outer limits of Congress's militia power are hard to perceive and probably will not be reached in the post-September 11 war on terror. Finally, no matter how far Congress may reach in acting under the Militia Clauses, a broad definition of the term "Militia" provides no basis for incorporating the Second Amendment against the states, let alone overruling the Supreme Court decisions that have squarely rejected that proposition. If anything, the Fourteenth Amendment affirmatively suggests that the Civil War, Reconstruction, and the constitutional cataclysm arising from those events may have tacitly repealed the Second

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[129] *See* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1365-66 (1993); Herz, *supra* note 31, at 116-17.

[130] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976); *accord* City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000).

[131] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 165-89, 234 (1979) (recounting the Justices' deliberations over what was then the prospect of a substantive due process right to abortion).

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Amendment.

Hail Caesar, full of power. The Senate and people of the American republic have spoken.[132]

III. AIRPORTS ARE FASCIST . . . AND IT'S A GOOD THING TOO

Thus far I have described the logical consequences of *Emerson* without taking a normative stand on the Second Amendment or on the expansion of federal police power that flows from acceptance of the individual right theory. In so doing, I have heeded Karl Llewellyn's pedagogical advice of instituting the "*[t]emporary* divorce of Is and Ought for purposes of study."[133] I now wish to close that divide, which should be as momentary as it is artificial. Most advocates of the individual right theory would surely take umbrage at the commandeering of their Second Amendment vision to expand the powers of Congress. So unpalatable is this suggestion that even unregenerate legal formalists might welcome an altogether nonlegal look at the theory of public safety that animates the case for widespread gun ownership.[134]

Emerson and its supporting literature implicitly endorse the proposition that private deployment of guns can deter crime and reduce bloodshed. Such is the conclusion of one economist who has taken empirical aim at the problem.[135] The shift from a collective to an individual vision of the Second Amendment draws much of its rhetorical power from this depiction of deterrence through self-defense.

But does it work? "Like all other questions, the question of how to promote a flourishing society [should] . . . be answered as much by experience [as by] theory."[136] Theory alone cannot establish whether protecting individual gun ownership affirmatively promotes public safety.

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[132] *Cf.* Wesberry v. Sanders, 376 U.S. 1, 7-8 & n.9 (1964) (contrasting the constitutional command "that Representatives be chosen 'by the People of the several States'" with the Constitution's provisions regarding the election of Senators (quoting U.S. CONST. art. I, § 2, cl. 1)).

[133] Karl N. Llewellyn, *Some Realism About Realism —Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1944) (emphasis added); *cf.* LON FULLER, THE LAW IN QUEST OF ITSELF 64 (1940) ("[I]n the moving world of the law, the *is* and the *ought* are inseparably linked.").

[134] *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

[135] *See* John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. LEGAL STUD. 221 (1998); John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U. L. REV. 355 (1997); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

[136] Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1347 (1988).

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If we must "wager our salvation upon some prophecy based upon imperfect knowledge," let us conduct an "experiment, as all life is an experiment."[137] Where could we conduct such an experiment? Whatever the extent of gun ownership during earlier periods of American history,[138] firearms flourish today. There may be exactly one commonplace American setting that is generally free of privately owned guns: commercial aviation.

Insofar as civilian air passengers are barred from bearing (let alone deploying) firearms, commercial aviation is probably America's largest gun-free zone. Millions of travelers pass through America's airports every year. Nearly 683 million, to be exact, boarded commercial flights at the United States' 422 "primary airports" in calendar year 1999.[139] Collectively, these airports handle as much traffic as a metropolis. Indeed, with millions aloft each day, "the American sky is like a 51st state."[140] By all accounts, however, the aeronautical equivalent of road rage is far tamer than its automotive counterpart.[141]

Until September 11, 2001, the United States' air passenger safety systems successfully contained the violence. Commercial airlines in 1997 reported 921 incidents of "air rage," also known as "disruptive passenger syndrome."[142] Federal law imposes up to 20 years' imprisonment for assaulting or intimidating an aircraft crew member or flight attendant of an aircraft — and as much as life imprisonment if a "deadly weapon" is used.[143] From 1995 to 2000, the Federal Aviation Administration (FAA)

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[137] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[138] For a source reaffirming the received view of colonial and frontier America as a gun-happy society, see JOYCE LEE MALCOM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994). Another source suggests that guns were not as commonplace during the eighteenth and nineteenth century as conventionally believed, but its author has struggled to quell doubts about the integrity of his research. *See* James Lindgren, *Fall From Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002). Under those circumstances it would be uncharitable to cite MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000). So I won't.

[139] *See* Federal Aviation Admin. & Department of Transp., Primary Airport Enplanement Activity Summary for CY1999, at 7 (Dec. 7, 2000), *available at* http://www.faa.gov/arp/planning/stats/index.cfm?ARPnav=stats.

[140] Brian Karem, *Air Sick*, PLAYBOY, June 2002, at 77, 77.

[141] *See generally* http://www.skyrage.org; http://airsafe.com/issues/rage.htm; *Problems of Passenger Interference with Flight Crews and a Review of H.R. 3064, the Carry-on Baggage Reduction Act of 1997: Hearings Before the Subcomm. on Aviation of the House Comm. on Transp. & Infrastructure*, 105th Cong. (Statement of Capt. Stephen Luckey, Chairman, Nat'l Sec. Comm., Air Line Pilots Ass'n).

[142] Donato J. Borrillo, *Air Rage: Modern-Day Dogfight*, 99-2 FED. AIR SURGEON'S MED. BULL. 1, 1 (Summer 1999).

[143] 49 U.S.C. § 46504 (2000); *see also* 14 C.F.R. § 91.11 (2001) ("No person may assault,

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pursued an annual average of 250 enforcement actions against unruly passengers.[144] The extraordinary events of September 11 aside, the level of violence in American aviation has remained quite low.

Why has air travel remained so safe despite being such a cauldron of fear, boredom, and anxiety? Consider this anecdote: "an executive from an airplane-manufacturing company . . . made a bet [over] how long it would be before an argument over a canceled flight or a lost bag led one frustrated person to kill another in an airport."[145] Despite all the indignities endured by commercial airline passengers,[146] the executive won his bet. "It would have happened already," he observed, "except that airport security gates keep passengers from bringing in guns."[147]

To be sure, a gunman killed two travelers at Los Angeles International Airport on July 4, 2002, and was in turn fatally shot by El Al security guards.[148] The LAX shooting, however, took place in an unsecured area of the airport. And then there is the small matter of Jonathan Burton, who died at the hands — and feet — of his fellow passengers on a commercial flight.[149] After Mr. Burton assaulted members of the flight crew and kicked down the cockpit door, other passengers restrained him a bit too vigorously. The incident sparked a brief discussion on the role of crew and fellow passengers in restraining unruly air travelers, but it quickly dropped

threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated"); *id.* §§ 121.580, 135.120 (same).

[144] To be exact, 1,568 enforcement actions in the years 1995-2000 inclusive. *See* http://www1.faa.gov/index.cfm/apa/1077 (last visited October 6, 2002) (reporting 146 actions in 1995, 188 in 1996, 321 in 1997, 282 in 1998, 310 in 1999, and 321 in 2000).

[145] James Fallows, *Freedom of the Skies*, ATLANTIC MONTHLY, June 2001, at 37, 37.

[146] *See* Borrillo, *supra* note 142, at 11 (attributing passengers' "antisocial behavior" to "stress and 'loss of control'" resulting from "a decline in airline service to 'no frills' accommodations, flight over-booking, and increasingly crowded flights"); *cf.* Northwest Airlines, Inc. v. Duncan, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting from denial of cert.) (lamenting the Supreme Court's failure to address that portion of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2000), which "pre-empts any state law 'related to a price, route, or service of an air carrier'").

[147] Fallows, *supra* note 145, at 37.

[148] *See* Rick Lyman & Nick Madigan, *Los Angeles Gunman Slays 2 and Is Killed by Guard at El Al*, N.Y. TIMES, July 5, 2002, at A1; *see also* Eric Lichtblau, *Airport Shooter Told I.N.S. of Accusation of Extremism*, N.Y. TIMES, Sept. 25, 2002, at A1 (revealing the failure of U.S. immigration officials to investigate Hesham Mohamed Hadayet's connection to known terrorists).

[149] *See* L. Anne Newell, *Crew's Role in Fatal Incident Involving LV Man on Flight Probed*, LAS VEGAS REV.-J., Sept. 29, 2000; Joe Sharkey, *An Apparent Case of Air Rage on Southwest Airlines Ends in What Is Later Ruled Homicide*, N.Y. TIMES, Sept. 20, 2000, at C5; *cf.* Michael Janofsky, *Neighbors' Gentler View Of Man Killed on Plane*, N.Y. TIMES, Sept. 23, 2000, at A8; Melanie Trottman & Chip Cummins, *Flight Crews Urged to Let Passengers Help Subdue Unruly*, SAN DIEGO UNION-TRIB., Oct. 8, 2000, at D-7.

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off the public's radar.[150] Regardless, Mr. Burton's death by airborne asphyxiation hardly contradicts the greater success of commercial aviation *vis-à-vis* gun ownership in preventing violence. "It would be a very easy and cheap display" of actuarial science to puncture the gun advocates' claims.[151] In all fairness, though, the Burton episode does support a proposition that has evidently united so many constitutional law professors with the NRA: "Guns don't kill people; people kill people."

After the carnage of September 11, 2001, it may seem obscene to treat American aviation as an avatar of public safety. But the attacks perpetrated that day were extraordinarily frightening precisely because they penetrated what had been considered secure. All around the world, civil aeronautics provides some of the safest physical environments. "The airport is the most protected site in [many a] country — the holy of holies. If [terrorists] can get in there, no place is safe."[152] Moreover, within the terms of its mandate, the American airport security system worked. Before September 11, air travel in America seemed remarkably immune from violence. Admittedly, the September 11 terrorists exploited several points of weakness. First, passenger screening for guns failed to filter out more primitive but equally effective weapons (knives and box-cutters). Second, no one had seriously reckoned that suicidal hijackers would transform the planes themselves into instruments of murder. Third, American commercial air carriers had never installed secure doors separating flight decks from passenger compartments. Though bruised that day, American aviation still boasts a strong safety record. Airports and commercial airliners remain bastions of officially sanctioned, thoroughly regulated safety.

The Aviation and Transportation Security Act,[153] passed scarcely two months after the terrorist attacks, addresses some of the more salient security gaps. Among other provisions, the Act requires air carriers to install a secure door between the flight deck and the passenger compartment on each aircraft.[154] The Act also restricts the ability of aliens and other designated individuals to seek flight training for aircraft whose certified takeoff weight exceeds 12,500 pounds.[155] Most important, at all but

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[150] *See* Trottman & Cummins, *supra* note 149.

[151] Regina v. Dudley & Stephens, 14 Q.B.D. 273, 287 (1884).

[152] Celia W. Dugger, *Rebel Attack on Airport Shocks Leaders of Sri Lanka*, N.Y. TIMES, July 25, 2001, at A3 (quoting "a Western diplomat").

[153] Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001).

[154] *See id.* § 104(a)(1), 115 Stat. at 605-06.

[155] *See id.* § 113(a), 115 Stat. at 622 (adding 49 U.S.C. § 44939); Screening of Aliens & Other Designated Individuals Seeking Flight Training, 67 Fed. Reg. 41,140 (June 14, 2002).

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five airports,[156] the federal government will assume responsibility for security screening of passengers and baggage.[157] After two years, airports may opt out of the federally operated security system and revert to screening by federally sanctioned private companies.[158] Right-of-center discomfort with the federal government's expanded role after September 11 prevented a wholesale federal takeover of airport security.[159] The Senate had originally passed, on a unanimous vote, a security bill calling for complete federalization of airport security screening. After intense lobbying from the White House and Republican congressional leadership, the House passed a rival bill preserving the role of private security companies. The resulting compromise adopts the Senate's approach in the first instance and permits slow, piecemeal reversion to the private model that the House preferred.[160]

Of central interest is the Act's approach to firearms in air travel security. The new scheme for security screening by federal employees calls for the deployment of armed law enforcement personnel at screening sites.[161] The Act also facilitates the presence of armed federal air marshals on flights.[162] The legislation demands "a uniform system of identification for all State and local law enforcement personnel for use in obtaining permission to carry weapons in aircraft cabins and in obtaining access to a secured area of the airport, if otherwise authorized to carry such weapons."[163]

For Second Amendment purposes, the crucial aspect of the Aviation and Transportation Security Act is its adherence to tight restrictions on guns in the air transport system. The Act does permit a properly trained

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[156] *See* Aviation and Transportation Security Act, § 108, 115 Stat. at 611-13 (establishing a "pilot program" — the statute's unwittingly punny term, not mine — for the provision of airport security services by private companies).

[157] *See id.* § 110(b), 115 Stat. at 614-16 (amending 49 U.S.C. § 44901); Civil Aviation Security Rules, 67 Fed. Reg. 8340 (Feb. 22, 2002). For a journalistic account of the transition, *see Exclusive Report: 28 Delayed Flights and 23 Hours of Waiting*, USA TODAY, Apr. 10, 2002, at 1A.

[158] *See* Aviation and Transportation Security Act, § 108, 115 Stat. at 605-06 (adding 49 U.S.C. § 44920).

[159] *See generally* Alison Mitchell & Richard L. Berke, *Some in G.O.P. Balk at Growing Federal Role*, N.Y. TIMES, Oct. 5, 2001, at B8.

[160] *See generally* H.R. CONF. REP. NO. 107-296, at 63-64 (2001), *reprinted in* 2001 U.S.C.C.A.N. 589; Robert Pear, *Congress Agrees to U.S. Takeover for Air Security*, N.Y. TIMES, Nov. 16, 2001, at A1.

[161] *See* Aviation and Transportation Security Act, § 110(b), 115 Stat. at 615 (adding 49 U.S.C. § 44901(g)).

[162] *See id.* § 105, 115 Stat. at 606-08 (adding 49 U.S.C. § 44917).

[163] *Id.* § 109(a)(2), 115 Stat. at 613; *see also id.* § 131, 115 Stat. at 635 (adding 49 U.S.C. § 44944, which in turn provides for the implementation of a program to permit the provision of emergency services on commercial flights by law enforcement officers, firefighters, and emergency medical technicians).

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commercial pilot to carry firearms if both the Under Secretary of Transportation for Security and the pilot's airline approve.[164] Congress has also directed the National Institute of Justice to explore the prospect of providing "less-than-lethal weapons" to flight deck crews.[165] These departures from governmental exclusivity in firearm deployment are modest insofar as the federal government retains the discretion to deny any pilot (or all pilots) permission to pack heat.

Some advocates of gun ownership have begun the push to arm airline pilots.[166] Despite opposition from Secretary of Transportation Norman Y. Mineta, Director of Homeland Security Tom Ridge, and the airline industry at large, members of Congress have joined the call to permit pilots to carry guns.[167] True to the individual right theory of the Second Amendment, this movement has enlisted popular support by inviting like-minded citizens to sign online petitions.[168] As of September 11, 2002, the first anniversary of the terrorist attacks, both houses of Congress have passed bills to authorize pilots to carry firearms into their cockpits.[169]

This legislative embrace of airborne armament represents a huge leap of faith. Neither the less drastic alternative of stun guns nor countervailing concerns over the incompatibility of guns with aviation have dissuaded gun advocates from extending their preferred solution of individual armament to the cockpit. By the same token, the usual political alliances have fractured over this highly volatile and speculative method for deterring in-flight terrorism. Conservative stalwart George F. Will appears to have expressed some doubt over the prospect of arming pilots, noting that the Israeli national airline, El Al, has compiled a thirty-four-year record of freedom from hijacking without cockpit guns and emphasizing that some American pilots are advocating a different

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[164] *See id.* § 128, 115 Stat. at 633. On the creation of the Transportation Security Administration and the position of Under Secretary of Transportation for Security, see *id.* § 101(a), 115 Stat. at 597-602 (adding 49 U.S.C. § 114).

[165] *See id.*, § 126, 115 Stat. at 632. *See generally* Firearms, Less-than-Lethal Weapons, & Emergency Servs. on Commercial Air Flights, 66 Fed. Reg. 67,620 (Dec. 31, 2001) (requesting comments on the deployment of firearms among pilots and less-than-lethal weapons among flight deck crewmembers).

[166] *See* John R. Lott, Jr., *Arming Pilots Is the Best Way to Get Air Security*, L.A. TIMES, Mar. 11, 2002, at 11.

[167] *See* Matthew L. Wald, *4 Lawmakers Urge Transportation Dept. to Allow Pilots to Carry Guns*, N.Y. TIMES, May 3, 2002, at A20.

[168] *See* http://www.petitiononline.com/apsa/petition.html; http://www.secure-skies.org.

[169] *See* H.R. 4635, 107th Cong., 2d Sess. (passed July 10, 2002); Arming Pilots Against Terrorism and Cabin Defense Act, S. amend. 4491, 107th Cong., 2d Sess. (passed Sept. 5, 2002).

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"overriding priority": "to guarantee that cockpits are sealed behind bulletproof doors."[170]

Allowing guns into the cockpit of a commercial airliner also introduces an uncontrollable human element into air safety: the pilot. Advocates of armed cockpits laud pilots as the last line of defense against airborne terrorists. But the pilot himself may represent the source of danger. It has become amply clear that EgyptAir 990, which crashed into the Atlantic south of Nantucket on October 31, 1999, was deliberately downed by one of its pilots.[171] It is supremely arrogant and stupid to assume that no American pilot would ever duplicate Gameel al-Batouti's intentional destruction of EgyptAir 990. No race, nationality, creed, or religion has cornered the market on insanity, violence, or hatred. Arming the cockpit simply brings a suicidal pilot that much closer to commandeering an American airliner and transmogrifying it into a lethal missile.

Regardless of the outcome of the debate over arming airline pilots, the rest of American civil aeronautics will remain gun-free. Passengers, of course, must remain disarmed. The Aviation and Transportation Security Act criminalizes interference with security screening personnel along lines similar to existing penalties for interference with flight crews. In particular, the Act prescribes a life sentence for any passenger who uses a dangerous weapon to obstruct either a crewmember or a security-screening employee.[172] Popular uprisings against hijackers — of the sort that probably kept one of the September 11 airliners from reaching its hijackers' intended target — remain possible, but passengers will have to make do without firearms. Indeed, when Richard Reid attempted to detonate a shoe bomb aboard a Paris-to-Miami flight in December 2001, passengers and crewmembers successfully thwarted him with belts and bare hands.[173] The government retains its presumptive monopoly on lethal force and will yield it only under the most tightly controlled of circumstances.

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[170] George F. Will, *Armed (and Dangerous) Pilots*, WASH. POST, May 30, 2002, at A25.

[171] *See* William Langewiesche, *The Crash of EgyptAir 990*, ATLANTIC MONTHLY, Nov. 2001, at 41.

[172] *See* Aviation and Transportation Security Act, § 114, 115 Stat. at 623 (adding 49 U.S.C. § 46503, which imposes as much as ten years imprisonment for interference with security screening personnel and as much as life imprisonment if a dangerous weapon is used).

[173] *See* Pam Belluck, *Crew Grabs Man; Explosive Feared*, N.Y. TIMES, Dec. 23, 2001, at A1; David Johnston, *Al Qaeda Trained Bombing Suspect, Indictment Says*, N.Y. TIMES, Jan. 17, 2002, at A1 ("Attorney General John Ashcroft credited several passengers and crew members aboard Flight 63 with preventing Mr. Reid from detonating the explosives hidden in his sneakers."); Kate Zernike et al., *Passenger With Shoe Bombs First Raised Only Eyebrows*, N.Y. TIMES, Dec. 27, 2001, at A1.

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The security system that predated the Aviation and Transportation Security Act failed catastrophically. From an actuarial perspective, we should expect the recently and radically revamped system to fail as well. Blame for these failures, however, cannot justly be laid at the feet of the system's designers. "Logistically, an all-encompassing security system is probably impossible."[174] Improved security and "[b]etter law enforcement [do not] eliminate crime;" they merely "force[] the criminals who remain to come up with something else" — "all too frequently, . . . something worse."[175] The impossibility of the task, of course, scarcely deters efforts to improve aviation security. Nor should it.[176] Those entrusted to guard the safety of the flying public must commit themselves to learning what works — and to covering the inevitable gaps in the system as they emerge. These repeated cycles of security, breach, and response (or thesis, antithesis, and synthesis, if you prefer the Hegelian nomenclature) teach two enduring lessons. The first is the persistence of centralized elements in any workable, effective approach to security. The second is the impossibility of an alternative based on arming the citizenry at large.

In the worldview implicit in the individual right interpretation of the second amendment, airports are "fascist."[177] Guns are outlawed,[178] and only the government has guns.[179] Lethal self-defense is a virtual impossibility. Passengers in transit must part with their personal weapons. Whether or not you carry American Express, you really do leave home without your guns.[180] With all apologies due to Southwest Airlines, air

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[174] Malcolm Gladwell, *Safety in the Skies*, NEW YORKER, Oct. 1, 2001, at 50, 53.

[175] *Id.*

[176] *See generally* ALBERT CAMUS, THE MYTH OF SISYPHUS, AND OTHER ESSAYS (Justin O'Brien trans. 1955).

[177] I use "fascist" in the sense of the epithet that disgruntled citizens of all political inclinations hurl at the government. My use of the term should not be mistaken as shorthand for a serious political argument.

[178] *See* 18 U.S.C. § 844(g) (2000) (prohibiting possession of "an explosive in an airport"); *id.* § 922(p)(1)(B) (making it unlawful for any person to "manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm . . . any major component of which, when subjected to inspection by the type of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of that component"); 14 C.F.R. § 107.21(a) (2001) (providing that "no person may have an explosive, incendiary, deadly or dangerous weapon" within the secured "sterile area" of an airport).

[179] *See* 49 U.S.C. § 44901 (2000) (establishing the FAA's authority to set up security checkpoints at airports); *id.* § 44903(d) (authorizing airport law enforcement personnel to carry firearms); 14 C.F.R. § 107.21(b)(1) (2001) (exempting law enforcement personnel from a general ban on explosives, incendiaries, and weapons within the sterile areas of airports).

[180] *Cf.* Muscarello v. United States, 524 U.S. 125, 132 (1998) (describing 18 U.S.C. § 924(c), which punishes the use or carriage of a firearm in connection with a violent crime or drug-trafficking offense, as intended "'to persuade the man who is tempted to commit a Federal

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travel is assuredly not a symbol of freedom. The Beat Generation heard the call of Jack Kerouac's *On the Road*. Generation X has not responded with a breathless portrait of air travel called *At the Gate*.[181] Presumably it never will:

> Two lonely hearts in the airport knowing
> Neither cares where that other heart is going . . .
> These broken wings are gonna leave me here
> To stand my ground
> And you can have this ticket for that lonely plane
> That's flying out[182]

The Second Amendment and the fascist notion of civil disarmament come together at the busiest airport serving the nation's capital.[183] At the airport formerly known as Washington National, Congress has forever connected the name of the President most closely associated with the individual right theory of gun ownership with America's most fascist and gun-free institution, civil aeronautics.[184] And what could be more fascist than naming public buildings and places after greater-than-life politicians?[185]

Ah, airports.[186] Travelers deposit more than luggage at airports. They also check their constitutional rights at the gate.[187] This much was true before September 11, 2001; the new security calculus further abridges passengers' freedom. The curtailment of civil liberties goes well beyond the loss of the putative right to keep and bear arms. It is not even sporting to mention the Fourth Amendment. At airport security checkpoints,

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felony to leave his gun at home'"); Busic v. United States, 446 U.S. 398, 405 (1980) (same); Simpson v. United States, 435 U.S. 6, 13-14 (1978) (same).

[181] *But see* WALTER KIRN, UP IN THE AIR (2001).

[182] *Hear* NANCI GRIFFITH, *Outbound Plane*, *on* LITTLE LOVE AFFAIRS (MCA 1988); *hear also* STEVE MILLER BAND, *Jet Airliner*, *on* BOOK OF DREAMS (EMD/Capitol 1977).

[183] *See generally* Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 256 & n.2 (1991) (describing National Airport's advantages *vis-à-vis* Dulles International and Baltimore Washington International).

[184] *See* Ronald Reagan Washington National Airport Naming Act, Pub. L. No. 105-154, 112 Stat. 3 (1998) (amending scattered sections of 49 U.S.C.).

[185] *Cf.* Lexington, *Graven Images*, THE ECONOMIST, July 5, 2001, at 36 (reporting Ronald Reagan's "belief that politicians should be dead for at least 25 years before being" honored with a public memorial).

[186] On the social meaning of airports, *see* generally DAVID PASCOE, AIRSPACES (2001).

[187] Among many other things. *See* Sara Rimer, *As Security Tightens, the Race Goes to the Savviest*, N.Y. TIMES, Jan. 20, 2002, § 1, at 18 (describing the astute responses of the most experienced air travelers to post-September 11 security measures).

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constitutional protections against unreasonable searches and seizures are scarcer than tasty meals in coach.[188] Air passengers are likelier to lose even more privacy as improved sensing technology enables airport security officers to conduct electronic "frisks" at ever greater distances.[189] Congress's new mandate that "airports . . . maximize the use of technology . . . designed to detect or neutralize potential chemical or biological weapons" will further diminish air travelers' zone of privacy.[190] Even drivers, the usual punching bags of Fourth Amendment jurisprudence, enjoy more generous protection against roadblocks.[191]

Subtler ways of suppressing constitutional rights abound. Consider, for instance, the rights of consumers to a vibrant national marketplace, free from state and local harassment.[192] Robust when applied to virtually every other mode of interstate transport — boat[193] or bus,[194] train[195] or truck[196] — the Dormant Commerce Clause shrivels when it comes within sight of a runway.[197] Even though "a proliferation of local taxes" on airports and air passengers impedes the free flow of commerce within the national air

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[188] *See, e.g.*, Lopez Lopez v. Aran, 844 F.2d 898 (1st Cir. 1988); United States v. McKennon, 814 F.2d 1539 (11th Cir. 1987). *But cf.* United States v. Doe, 61 F.3d 107 (1st Cir. 1995) (invalidating a warrantless search of carry-on luggage seized at an airport security checkpoint but then removed to a police station).

[189] *See generally* David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1 (1996); Sam Kamin, *Law and Technology: The Case for a Smart Gun Detector*, 59 LAW & CONTEMP. PROBS. 221 (Winter 1996). *But cf.* Kyllo v. United States, 533 U.S. 27 (2001) (invalidating the use of sense-enhancing technology to gather information from the interior of a private residence). For an elaboration of the Fourth Amendment issues raised by *Kyllo*, compare Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance After* Kyllo, 86 MINN. L. REV. 1325 (2002) with Susan Bandes, *Power, Privacy, and Thermal Imaging*, 86 MINN. L. REV. 1379 (2002).

[190] Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, § 120, 115 Stat. 597 (amending 49 U.S.C. § 44903(c)(2)(C)).

[191] *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Delaware v. Prouse, 440 U.S. 648 (1979).

[192] *Cf.* Jim Chen, Filburn's *Forgotten Footnote — Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 306 (1997) ("If history's various economic wars . . . teach us anything, it is the enduring value of free trade.").

[193] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[194] *See* Buck v. Kuykendall, 267 U.S. 307 (1925).

[195] *See* Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R., 393 U.S. 129 (1968); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[196] *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959). *But see* S. Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[197] *But cf.* City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973) (holding that federal regulation of aircraft noise preempts airport noise regulation under state and local law).

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traffic network,[198] the Supreme Court initially insulated virtually all state and local taxation of airports from Dormant Commerce Clause review.[199] Congress's attempt to tilt the playing field back in favor of air travelers[200] has fallen short, thanks to a grudging interpretation of the corrective statute.[201] Oppressed travelers will find no succor in off-airport concessionaires such as second-tier car rental agencies. In the economic penumbra surrounding most airports, the Constitution's limits on state and local taxing authorities are even feebler.[202]

And this is to say nothing of the liberty-eroding effect of public subsidies. The billions in direct and indirect subsidies to the entire system of civil aeronautics have only grown after September 11. Because "[a]irlines in this country and abroad have long been regarded as national symbols," they are probably more heavily subsidized than even the federal government's "own transportation babies, like Amtrak."[203] And "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[204]

Finally, airports simply do not qualify as emblems of free speech, democracy, and romance.[205] As long as airport administrators do not fatuously ban all "First Amendment activities,"[206] they enjoy ample room to avoid "the designation of a forum for solicitation and distribution

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198 Aloha Airlines, Inc. v. Dir. of Taxation, 464 U.S. 7, 9-10 (1983).

199 *See* Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

200 *See* Anti-Head Tax Act, 49 U.S.C. app. § 40116 (2002) ("A state, a political subdivision of a state, and any person that has purchased or leased an airport..., may not levy or collect a tax, fee, head charge, or other charge on — an individual traveling in air commerce; the transportation of an individual traveling in air commerce; the sale of air transportation; or the gross receipts from that air commerce or transportation."); *see also* Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 14 (1986) (Burger, C.J., concurring in part and concurring in the judgment) (describing congressional disapproval of *Evansville* and its effects on interstate air passenger traffic); S. REP. NO. 93-12 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1446-51 (same); Stephen E. Creager, Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 319 (1983) (describing the Anti-Head Tax Act as an attempt to shift "the administrative regulatory burden associated with the regulation of air transportation from airlines to airports").

201 *See* Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994).

202 *See, e.g.*, Alamo Rent-A-Car, Inc. v. City of Palm Springs, 955 F.2d 30 (9th Cir. 1992); Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); Enter. Leasing Co. v. Metro. Airports Comm'n, 92 F. Supp. 2d 936 (D. Minn. 2000).

203 Edward Wong, *The Impossible Demands on America's Airlines*, N.Y. TIMES, June 16, 2002, § 4, at 4.

204 Wickard v. Filburn, 317 U.S. 111, 131 (1942).

205 *See generally* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

206 *See* Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

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activities."[207] Although the contemporary "airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public,"[208] courts have given local governments free rein to suppress speech inside airports.[209] Many a local transportation authority may "operat[e] a shopping mall as well as an airport,"[210] but the Supreme Court long ago drained shopping centers of civil liberties.[211] "*La vraie liberté, c'est le vagabondage*"?[212] In air travel as with so much else, Francophone philosophy is wrong.

IV. THE PHAGES OF AMERICAN LAW

September 11, it must be remembered, really did change things. Legal scholars will long ponder the constitutional ramifications of that dreadful day. The framers of the Constitution foresaw the need to protect the land against myriad threats, foreign and domestic. The Second Amendment and the Militia Clauses of Article I suggest that they contemplated full civic armament as a crucial element of America's collective defense. No less than the rest of the Constitution, these provisions create "a covenant running from the first generation of [citizens] to us and then to future

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[207] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992).

[208] *Id.* at 698 (Kennedy, J., concurring); *cf.* Prince v. Massachusetts, 321 U.S. 158, 169 (1944) ("Street preaching, whether oral or by handing out literature, is not the primary use of the highway.").

[209] *See, e.g.*, ISKCON Miami, Inc. v. Metro. Dade County, 147 F.3d 1282 (11th Cir. 1998); Christian Sci. Reading Room v. City & County of San Francisco, 784 F.2d 1010 (9th Cir. 1986).

[210] *Lee*, 505 U.S. at 689 (O'Connor, J., concurring); *see also* Joe Sharkey, *The Airport Wants You to Shop Till You Drop*, N.Y. TIMES, July 8, 2001, § 4, at 5 (reporting "$1.9 billion in sales, exclusive of duty-free items, at America's 22 busiest domestic airports" in 1999, "a 12 percent increase over 1998"); *cf.* Sara Rimer, *Extra Waiting Time Is Turning Fliers into Buyers*, N.Y. TIMES, Feb. 4, 2002, at A16 (noting that commercial air passengers have been patronizing airport retailers during the extra "dwell time" at airports occasioned by security measures undertaken after September 11).

[211] *See* Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (overruling Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)); *see also* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[212] "Real liberty lies in wandering." *Cf.* Saenz v. Roe, 526 U.S. 489 (1999); Shapiro v. Thompson, 394 U.S. 618 (1969). This popular slogan, which adorns many travel posters in France and Québec, appears to be derived from the following passage by Isabelle Eberhardt: "Un droit que bien peu d'intellectuels se soucient de revendiquer, c'est le droit à l'errance, au vagabondage. Et pourtant, le vagabondage, c'est l'affranchissement, et la vie le long des routes, c'est la liberté." 1 ISABELLE EBERHARDT, ÉCRITS SUR LE SABLE 27 (Marie-Odile Delacour & Jean-René Huleu eds., 1988). Herewith a freely rendered English translation: "A right that very few intellectuals bother to demand is the right to roam, to wander. Yet wandering is the essence of empowerment, and the life of the road is liberty itself." For very helpful information on Isabelle Eberhardt, I thank Professor Catherine Perry of the University of Notre Dame.

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generations."[213] If indeed the Constitution's "written terms embody ideas and aspirations that must survive more ages than one,"[214] if the Constitution is "intended to endure for ages to come" without regard "to the various crises of human affairs,"[215] then we should interpret our fundamental law as if it had been adopted "in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity."[216] The framers of the Constitution scarcely contemplated how their heirs would develop a "mania for motion and speed."[217] As a matter of political relevance, if not also as a matter of doctrinal validity, the right to keep and bear arms must satisfy the rapidly evolving demands of a world in upheaval.[218]

Today and tomorrow as yesterday, the Constitution abides so that "the People of the United States" may "insure domestic Tranquility" and "provide for the common defense."[219] In a world gripped by terrorism, however, the relevant question is, "Defense against whom?" Rather amazingly, Second Amendment history and rhetoric identify the federal government as the greatest threat. In a mistaken but revealing effort to quote a traditional pro-gun slogan,[220] one leading scholar has urged his peers to heed the supposed warning, "If guns are outlawed, only the government will have guns."[221] Several other scholars have gone so far as

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[213] Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992).

[214] *Id.*

[215] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.).

[216] U.S. CONST. pmbl.; *accord, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124 (1866) (asserting that "watchful . . . guardianship of the Constitution and laws" is the only way to "transmit to posterity unimpaired the blessings of liberty"). *See generally* Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127 (1991).

[217] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 140-41 (1927). *See generally, e.g.*, JAMES GLEICK, FASTER: THE ACCELERATION OF JUST ABOUT EVERYTHING (1999); Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 33 (2000); William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. (forthcoming 2002).

[218] *Cf.* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (urging the Court to take account of "evolving standards of decency" in gauging the scope of civic protection against cruel and unusual punishment).

[219] U.S. CONST. pmbl.; *accord, e.g., Ex parte* Quirin, 317 U.S. 1, 25-26 (1942).

[220] The usual form of the shibboleth reads: "When guns are outlawed, only outlaws will have guns."

[221] Sanford Levinson, *Democratic Politics and Gun Control*, 1 RECONSTRUCTION 137, 141 (1992) (creatively rephrasing a purportedly common bumper sticker); *cf.* Paul D. Carrington, *The Twenty-First Wisdom*, 52 WASH. & LEE L. REV. 333, 350 (1995) ("We often hear that when guns are outlawed, only outlaws will have guns; it may be more nearly true that as we outlaw drugs, we assure that outlaws will have both drugs and guns."); E. Judson Jennings, *Saturday Night. Ten P.M.: Do You Know Where* Your *Handgun Is?*, 21 SETON HALL LEGIS. J. 31, 43 (1997) ("The National Rifle Association admonishes that if guns are outlawed, only outlaws will have guns. That's not quite right. If guns are outlawed, only the military, the police, and outlaws will have guns . . . .").

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to suggest that gun ownership by the population at large can deter government-sponsored genocide.[222] These intellectual voices echo the sentiments of the commander of the so-called Militia of Georgia, who disdains the new Office of Homeland Security: "'We already have homeland defense. It's called militias."[223] In treating guns as a counterweight to officially sanctioned rather than criminally motivated violence, legal scholars outflank diehard gun advocates in exhibiting a "genuine insurrectionist bent."[224]

The individual right theory of the Second Amendment ultimately fails because it not only misdiagnoses the greatest contemporary threat to American security, but also prescribes the wrong remedy. Once again, the antidote to the monstrous illogic of constitutional scholars lies in civil aeronautics as empirical tonic. True to the functional expansion of "many airports . . . beyond merely contributing to efficient air travel,"[225] let us treat airports as actual and as metaphorical vectors of disease. After all, public health has long been recognized as a valid basis for massive governmental intervention,[226] particularly when health concerns touch "channels" and "instrumentalities" of interstate commerce.[227] Constitutional integrity is a

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[222] *See* JAY SIMKIN, AARON ZELMAN & ALAN M. RICE, LETHAL LAWS (1995); Don B. Kates, Jr. & Daniel D. Polsby, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY 247, 247 (1995) (reviewing SIMKIN ET AL., *supra*); Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1241-42 (1997).

[223] Jane O. Hansen, *Sept. 11 Attacks "A Boon" to Militia*, ATLANTA J.-CONST., Nov. 25, 2001, at 10A (quoting Jimmy Wynn, who as "commander of the Militia of Georgia . . . keeps his finger on the pulse of those who distrust government and see a broad conspiracy to strip people of their individual rights").

[224] Bogus, *supra* note 22, at 13.

[225] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992); *cf.* Indianapolis Airport Auth. v. Am. Airlines, Inc., 733 F.2d 1262, 1267-68 (7th Cir. 1984) (Posner, J.) (analyzing the significance of concessions and "meeting facilities that attract nonpassengers" to an airport); Michael Sorkin, *The Architecture of Air Travel*, N.Y. TIMES, Apr. 14, 2002, § 4, at 6 (describing the architectural evolution of airports from classically inspired "vast temples of distribution" into "variations on [shopping] malls" with suddenly heightened security concerns. For other instances of law's "edifice complex" — namely, its affinity for architectural metaphors — *see* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J. L. & PUB. POL'Y 245 (1996) (observing how architectural design practically dictates law school culture); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

[226] *See, e.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); *cf.* Kimmish v. Ball, 129 U.S. 217, 222 (1889) (upholding a state-law ban on the introduction of diseased livestock in the face of a Dormant Commerce Clause challenge).

[227] United States v. Lopez, 514 U.S. 549, 558 (1995); *see, e.g.*, Stafford v. Wallace, 258 U.S. 495 (1922); Caminetti v. United States, 242 U.S. 470, 491 (1917); S. Ry. Co. v. United States, 222 U.S. 20 (1911); Swift & Co. v. United States, 196 U.S. 375 (1905); *cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

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concern in medicine as well as law. In diagnosing the ailments of the body politic, we should borrow what we can from our knowledge of the body physick.

First, consider air travel as an epidemiological phenomenon in itself. Unless managed with an iron fist, all aspects of air travel pose a serious risk to human health.[228] Airports form a travel network not only for humans but also for their pests and parasites. The natural world harbors "slate-cleaning" viruses, any of which could slay billions of humans if borne by a single host into the global web of airports.[229] "All of the earth's cities are connected by a web of airline routes. . . . Once a virus hits the [web], it can shoot anywhere in a day — Paris, Tokyo, New York, Los Angeles, wherever planes fly."[230] The smallest, most remote nodes in this network are the hardest to defend. Sadly, the September 11 terrorists realized as much: those assigned to attack New York began their fatal day at the Portland, Me., airport.[231] Airplane cabins excel in breeding and transmitting communicable diseases.[232] Regardless of whether federal courts perceive airports as vectors for the transmission of anything besides human passengers, the viruses of the world have their own agenda. Nor are viruses alone in their propensity to hitch a ride; what is left of Guam's avian population knows too well the dangers posed by snakes arriving by plane.[233] Should airborne pests ever break loose, woe be unto humans and flightless endemic birds alike.

Even greater rewards lie in the consideration of airports as metaphorical vectors of disease. Of September 11's many surprises, few were greater than the ease with which a dedicated cell of terrorists, using perhaps no more than $500,000 and little direct support from any nation-state, wrought such havoc on the world's only superpower. "The assault of September 11th was technological jujitsu. Operating in the frictionless ether of the modern world (with its freedom of movement, its free market, its electronic nervous system of instantaneous communication and information), a score

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[228] *See* LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE 569-71 (1994).

[229] RICHARD PRESTON, THE HOT ZONE 12 (1994).

[230] *Id.*; *watch also* TWELVE MONKEYS (MCA 1995).

[231] *Cf.* Sara Rimer, *Just Three Flights a Day, but an Eye on the Big Picture*, N.Y. TIMES, Mar. 10, 2002, § 1, at 28 (describing the new security routine at Lancaster County Airport in Lititz, Pa.).

[232] *See* GARRETT, *supra* note 228, at 569-70.

[233] An airplane-borne snake has spelled doom for many of Guam's endemic birds. *See* ROBERT DEVINE, ALIEN INVASION: AMERICA'S BATTLE WITH NON-NATIVE ANIMALS AND PLANTS 72 (1998); Julie A. Savidge, *Extinction of an Island Forest Avifauna by an Introduced Snake*, 68 ECOLOGY 660 (1987); Eric Biber, Note, *Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States*, 18 VA. ENVTL. L.J. 375, 380 (1999).

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of terrorists turned the materials of that world against it."[234] Western civilization's infrastructure enabled Al Qaeda and Osama bin Laden to wage lopsidedly asymmetrical warfare: a clandestine cabal making no claim to territorial sovereignty attacked the United States, the very paragon of the Westphalian nation-state.[235]

The natural world's most obvious analogue for asymmetrical warfare through terrorism is the virus.[236] Terrorist cells fall far short of acquiring sovereignty and recognition under international law. Viruses likewise contain nucleic acid but lack most other attributes of living things. On September 11 Osama bin Laden's henchmen initiated what a virologist might compare to the lytic cycle of a bacteriophage. Just as a phage (microbiological shorthand for bacteriophage) consumes its host cell in order to propagate itself, the hijackers commandeered four doomed planes, the speediest engines in America's transportation network, and turned them into instruments of destruction. Having achieved their initial success, the terrorists may be retreating into an insidious and ultimately even more virulent lysogenic cycle:

> [Terrorist] groups are protean; they change their shape like the AIDS virus. The way they communicate or carry out one operation is not the way they carry out the next one. And many of them . . . are so integrated into Western society, even eating pork, drinking and wearing Western clothes as a cover, that they are almost impossible to discover beforehand.[237]

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[234] Hendrik Hertzberg & David Remnick, *The Trap*, NEW YORKER, Oct. 1, 2001, at 37, 38.

[235] *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

[236] Admittedly deficient in biological expertise, I consulted standard collegiate texts in order to enhance my understanding of viruses and the human body's defenses. *See generally* NEIL A. CAMPBELL, BIOLOGY 344-55 (3d ed. 1993) (describing viruses); *id.* at 850-72 (explaining the body's defenses, including the immune system); JACQUELYN G. BLACK, MICROBIOLOGY: PRINCIPLES AND APPLICATIONS 265-91 (2d ed. 1993) (viruses); *id.* at 473-507 (immunology). Professional biologists and historians have noted how little separates microbial life from the contemporary human condition. *See, e.g.*, CARLO M. CIPOLLA, THE ECONOMIC HISTORY OF WORLD POPULATION 114-15 (6th ed. 1974) (describing how a biologist likened a long-range chart of human population growth as akin to "the growth curve of a microbe population in a body suddenly struck by some infectious disease"); David Christian, *The Case for "Big History,"* 2 J. WORLD HIST. 223, 231 (1991) ("Why did this particular large species of mammal suddenly begin to display the demographic behavior of a plague species?").

[237] Chris Hedges, *A Powerful Combatant in France's War on Terror*, N.Y. TIMES, Nov. 24, 2001, at B4 (quoting Jean-Louis Bruguière, France's chief antiterrorism judge); *see also* Steven Erlanger, *America the Invulnerable? The World Looks Again: Europe as Competitor*, N.Y. TIMES, July 21, 2002, § 4, at 3 (attributing to François Heisbourg, director of the Foundation for Strategic Research in Paris, the argument "that Al Qaeda is more like a mutating virus than a bear" and therefore "requires a varied quiver to fight, including intelligence, counter-

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By embedding the viral genome within a host cell and transforming that cell into a "prophage," the lysogenic cycle enables bacteriophages "to propagate without eliminating the host cells upon which they depend."[238] Other viruses accomplish a similar feat by transforming animal cells (rather than bacteria cells) into "proviruses."[239] Retroviruses such as human immunodeficiency virus (HIV) and human *T* lymphocyte virus (HTLV) are especially adept in remaining dormant within their hosts until physical or emotional stress triggers an active infection.[240]

As befits their analogues among phages and retroviruses, terrorists temporarily assimilate into the life cycle of their hosts.[241] Extremists willing to die in the name of Islam paradoxically spend their final moments drinking, smoking, and cavorting in strip joints. At some point, the latent fury of the terrorists will lash out again — like that of phages moving from a lysogenic cycle into a new lytic cycle or that of reawakened retroviruses — and the bloodshed will begin anew. Animal viruses provide an even closer analogy. Some viruses damage or kill cells by causing cells to produce toxins or to release hydrolytic enzymes from lysosomes; other viruses contain toxic components such as viral envelope proteins.[242] The September 11 terrorists commandeered ordinarily peaceable instruments of American commerce to inflict death. Their successors may wield specially designed weapons, whether conventional, biological, chemical, or nuclear.[243] In this regard, it is especially disconcerting to consider that only two percent of the world's standardized shipping containers, which account for ninety percent of global cargo by value, are inspected.[244] Terrorists have not come close to exhausting the possibilities within American aviation, let alone the rest of the United States' transportation system. General aviation and trucking enjoy free access throughout the country. As a result, so do terrorists and their payloads.

Nor does the biological analogy stop with the terrorists. Like any animal, American society at large deploys multiple defense mechanisms. Skin, mucous membranes, and mucous secretions provide the human body with

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terrorism and financial expertise").

[238] CAMPBELL, *supra* note 236, at 350.

[239] *See id.* at 351.

[240] *See* BLACK, *supra* note 236, at 272-73.

[241] *See generally* STEVEN EMERSON, AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US (2002).

[242] *See* CAMPBELL, *supra* note 236, at 352.

[243] *See generally, e.g.*, Gregg Easterbrook, *The Big One*, NEW REPUB., Nov. 5, 2001, at 24 (describing nuclear attack as "the real threat"); Bill Keller, *Nuclear Nightmares*, N.Y. TIMES, May 26, 2002, § 6, at 22 (describing the prospects of nuclear or radiological attack).

[244] *See When Trade and Security Clash*, THE ECONOMIST, Apr. 6, 2002, at 59.

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a primary line of nonspecific defense.[245] Phagocytic leukocytes and antimicrobial proteins form a secondary defensive line.[246] Finally, antibodies and lymphocytes comprise the immune system, providing humoral and cell-mediated immunity.[247] Unlike general lines of defense, the immune system responds to specific pathogens by drawing upon the body's deep and diverse reserves of antibodies and lymphocytes.[248] The seas, the American nuclear umbrella, the standing army and navy, and more intricate schemes of security and law enforcement share different aspects of all three of the body's defense systems.

The cyclical nature of terrorism and civilized society's response completes the biological analogy. The Red Queen hypothesis, a bedrock principle of modern evolutionary biology,[249] confirms the impossibility of anticipating and deterring every new terrorist threat. Like the chess piece in Lewis Carroll's *Through the Looking Glass*, who keeps running without going anywhere because the landscape moves with her,[250] no organism in earth's brutally competitive biosphere ever gets a chance to savor victory in a putative battle for "survival of the fittest."[251]

Under the Red Queen's unforgiving reign, living organisms struggle constantly against predators, competitors, and parasites. Humans have so successfully vanquished their predators and competitors that the greatest threat to human health is microbial and viral.[252] Diagnosing disease is akin to the proper classification of common, exotic, and mythical *perissodactyla*:[253]

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[245] *See* CAMPBELL, *supra* note 236, at 850-51.

[246] *See id.* at 851.

[247] *See id.* at 851, 855-56.

[248] *See id.* at 855-63.

[249] *See generally, e.g.*, MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE (1993); Leigh Van Valen, *A New Evolutionary Law*, 1 EVOLUTIONARY THEORY 1 (1973).

[250] *See* LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE (London, MacMillan 1872).

[251] *See, e.g.*, STEPHEN JAY GOULD, FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN 73 (1996).

[252] *See* BLACK, *supra* note 236, at 294 (reporting that parasitic infections and their complications account for one-fourth of the world's annual toll of 60,000,000 human deaths); *see also* EDWARD O. WILSON, THE DIVERSITY OF LIFE 272 (1992) (reporting that humans now consume 20 to 40 percent of the solar energy captured by plants). *See generally* PAUL W. EWALD, PLAGUE TIME: HOW STEALTH INFECTIONS ARE CAUSING CANCERS, HEART DISEASE, AND OTHER DEADLY AILMENTS (2000) (suggesting that the viral assault on humanity extends to a wide variety of common ailments not ordinarily assumed to have a pathogenic origin).

[253] *Perissodactyla* is the order of placental mammals characterized by hooves with an odd number of toes on each foot. Horses, zebras, tapirs, and rhinoceroses belong to this order. Sheep, swine, cattle, and deer belong to the competing order *artiodactyla*, whose members have hooves with an even number of toes on each foot. *See* CAMPBELL, *supra* note 236, at 656, 658-59. The elusive single-horned equid would belong to *perissodactyla*, if only it were real.

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horses, zebras, and unicorns. When a physician hears the hooves of disease,[254] she should think first of horses rather than zebras.[255] Under normal circumstances, influenza is more common than anthrax. If bioterrorism ever takes firm root, however, anthrax may become as common as Clydesdales and will transmogrify from a zebra to a horse within the pathologist's metaphorical menagerie. For their part, unicorns are wholly legendary;[256] phenomena described as unicorns are strictly products of the imagination.[257] "If wishes were horses, I would ride, ride, ride."[258]

So too with constitutional prescriptions. The practical impact of Second Amendment jurisprudence hinges on two crucial questions. The first is whether the individual right theory has identified the greatest threat to

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Cf. MARGERY WILLIAMS, THE VELVETEEN RABBIT (1958).

[254] *Cf. Rev.* 6:8 (New American Bible) ("I looked, and there was a pale green horse. Its rider was named Death, and Hades accompanied him. They were given authority over a quarter of the earth, to kill with sword, famine, and plague, and by means of the beasts of the earth.").

[255] Horses, Zebras & Unicorns Inc., offers the following explanation of the diagnostic principle from which the medical management consulting company derives its name: "Common things happen commonly. If you're standing in the middle of a field in Montana, and you hear hoofbeats, think horses, not zebras or unicorns. You'll be trampled to death by the horses before you ever see a unicorn. It's an aphorism for the Pareto principle, Bayes theorem, and good ole common sense." *Available at* http://www.hzu.com/more%20about.htm#top.

Dr. Michael L. Richardson, who teaches at the University of Washington School of Medicine, has connected the horses/zebras/unicorns principle with Sutton's Law, which is derived from bank robber Willie Sutton's explanation of why he robbed banks: "Because that's where the money is." *See* WILLIE SUTTON, I, WILLIE SUTTON (1952); *available at* http://richardson.editthispage.com/stories/storyReader$39.

[256] *But cf.* PETER S. BEAGLE, THE LAST UNICORN 1-2 (1968) (describing unicorns as "a little vain, knowing themselves to be the most beautiful creatures in all the world, and magic besides").

[257] Along with white tigers, unicorns figure prominently in antitrust policy, particularly with respect to predatory pricing. *Compare Federal Trade Commission Authorization: Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 1st Sess. 29 (1987) (statement of Commissioner Mary Azcuenaga) (describing predatory pricing as a "white tiger," a much feared but exceedingly rare animal) *with id.* at 12, 23 (statement of Commissioner Terry Calvani) (describing predation as a "unicorn," a widely discussed but never actually observed mythical beast). *Cf.* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264 (1981) (characterizing predation as a "dragon" — a widely discussed but never actually observed mythical beast).

Once a unicorn, always a unicorn. It would be senseless to subject any unicorn to a horn-removing operation "to make him [or her] feel less . . . freakish" and "more at home with . . . other horses, the ones that don't have horns." TENNESSEE WILLIAMS, THE GLASS MENAGERIE 86 (New Directions Books 1999) (1945).

[258] *Hear* Claire Lynch, *If Wishes Were Horses*, *on* O SISTER! THE WOMEN'S BLUEGRASS COLLECTION (UNI/Rounder 2001).

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public security in the United States. The framers of the Bill of Rights evidently expected the Second Amendment to counter the federal government's propensity to use its armed forces against the citizenry. The second is whether the Second Amendment's implicit policy prescription — widespread gun ownership — affirmatively enhances domestic tranquility and the common defense.

The individual right theory of the Second Amendment fails on both counts. Modern terrorists behave like retroviruses. Small, nongovernmental actors determined to inflict violence can blend into society at large for long periods of dormancy, only to erupt in vicious spasms. In their latent and active cycles alike, terrorists depend wholly on the legal, economic, and cultural mechanisms of the society they seek to destroy. By contrast, the old prescription of widespread gun ownership is rooted in a distant memory of the cultural equivalent of systemic lupus erythematosis, a disease in which the immune system attacks nucleic acids released by the normal breakdown of bodily tissues.[259] Once it loses the ability to distinguish the body's own components from foreign antigens, the immune system turns coat and destroys the body's own tissues.[260] Because "it is simply fantastic to suppose that a power bent on occupying [or destroying] the United States would be undeterred by our conventional and nuclear military forces, yet given pause by the prospect of resistance from individuals," the contemporary "insurrectionist claim for arms" must arise from their putative "utility in resisting tyranny by our own government."[261]

This argument, not to put too fine a point on it, is ridiculous. However palpable the prospect of official oppression might have been immediately after the American Revolution, the political equivalent of lupus poses no realistic threat today. The notion that the United States government would dispatch the Army, Navy, Central Intelligence Agency, Federal Bureau of Investigation, and various divisions of the Department of the Treasury to crush the citizenry is the unicorn of contemporary constitutional analysis.[262] It is an unfiltered fabrication fit only for the most paranoid of right-wing

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[259] *See* CAMPBELL, *supra* note 236, at 869.

[260] *See id.*

[261] Dorf, *supra* note 118, at 330.

[262] Or at best the eohippus. Perhaps the founders of the republic had reason to dread the potential abuse of federal military power. That threat, however, like the Eocene equid, has passed into the mists of time. This is not to suggest that the substitution of an extinct bugbear for a mythical one represents a genuine improvement. It makes no greater sense to fear *Tyrannosaurus rex* than to fear centaurs.

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conspiracy fantasies.[263] The response of the individual right theory to this fanciful prospect is even more absurd: for the populace to raise effective resistance against a federal government gone berserk, "we would have to" interpret the Second Amendment "to guarantee a private right to possess launchers and attack helicopters."[264] Not even *Emerson*, the most aggressive Second Amendment decision in history, makes such an extravagant claim.[265]

Terrorism, not official oppression, threatens the American public. At best, the continued fixation with gun ownership has become a national neurosis, the sort of unhealthy obsession that diverts policymakers and scholars from meatier matters. Even secession would be likelier than organized federal oppression of the masses.[266] At worst, the individual right theory threatens to make a splendid bauble of the Constitution,[267] a tool for deceiving the public into accepting practices that do nothing to enhance security and, indeed, constitute a significant menace in their own right.

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[263] *See generally, e.g.*, Mark Edward DeForrest & James M. Vache, *Truth or Consequences Part Two: More Jurisprudential Errors of the Militant Far-Right*, 35 GONZ. L. REV. 319 (1999-2000); Joseph Z. Fleming & Peter Demos, *The Militia in the Courts: Was Walter Mitty a Freeman?*, 28 URB. LAW. 631 (1996); Daniel Lessard Levin & Michael W. Mitchell, *A Law unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9 (1999); James W. Paulsen, *If at First You Don't Secede: Ten Reasons Why the "Republic of Texas" Movement Is Wrong*, 38 S. TEX. L. REV. 801 (1997); James M. Vache & Mark Edward DeForrest, *Truth or Consequences: The Jurisprudential Errors of the Militant Far-Right*, 32 GONZ. L. REV. 593 (1996-1997); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996).

[264] Williams, *Civic Republicanism*, *supra* note 119, at 608.

[265] *See* United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001) ("Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable . . . ."), *cert. denied*, 122 S. Ct. 2362 (2002); *see also* Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) (opining that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons").

[266] *Cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 947 (1994) ("Nebraska and New Jersey are not going to break away from the United States, and we will continue to debate and decide the issues that confront us as a single polity."). Rubin and Feeley conclude that scholarly attention devoted to federalism grossly outweighs the contemporary significance of this constitutional concept. So too with the insurrectionist ideal that drives the individual right theory of the Second Amendment.

To be sure, this article aggravates the national neurosis over gun ownership by taking the Second Amendment seriously enough to devote roughly 50 pages of fully footnoted prose to the subject. Sometimes, though, the best strategy really is *"sauter pour mieux reculer"* ("Advance in order better to retreat."). *Contra* Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107, 127 & n.118 (1990).

[267] *Cf.* The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.).

"In the [connection] between" private gun ownership and public safety "lies the promise of liberty."[268] Or so the individual right theory of the Second Amendment promises. Yet this is an illusory promise, rooted in the mirage of self-control.[269] Gun ownership as a security measure is as rational as avoiding the risks of air travel by driving. All it nets a gullible public is the illusion of control, at the price of substantial losses in real safety. Properly understood, the "republican tradition that lies behind the Second Amendment" acknowledges a different — and utterly "terrifying" — truth: "humans are never wholly in control of their own destinies."[270]

To be sure, it is all a matter of human instinct. Humans systematically overestimate remote probabilities and underestimate the frequency of commonplace events.[271] They also overestimate their own capacities, both in absolute terms and in relation to the capacities of their counterparts.[272] "[N]ovelty, sense of helplessness and lack of warning" will all profoundly affect the American public's adaptability to the realities of a world besieged by terrorism.[273] "Targets of terrorism tend to become most demoralized when their society appears to be helpless to protect them."[274] To the extent that arming the self increases the perception (if not the reality) of preparedness against terrorism, widespread gun ownership is an

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[268] Gregory v. Ashcroft, 501 U.S. 452, 459 (1991); *accord* United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

[269] For an illustration of the pitfalls of attempting to seize control in the context of environmental protection, *see* Marc Miller & Gregory Aplet, *Biological Control: A Little Knowledge Is a Dangerous Thing*, 45 RUTGERS L. REV. 285 (1993).

[270] Williams, *Civic Republicanism*, *supra* note 119, at 553.

[271] *See generally, e.g.*, MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 95-96 (4th ed. 1998); ROBIN M. HOGARTH, JUDGEMENT AND CHOICE (2d ed. 1988); Daniel Kahneman & Amos Iversky, *Prospect Theory: An Analysis of Decision Under Risk, in* CHOICES, VALUES AND FRAMES 17 (Daniel Kahneman & Amos Iversky eds., 2001); Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463 (Daniel Kahneman et al. eds., 1982); Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1773-75 (1998).

[272] *See, e.g.*, David Dunning et al., *The Overconfidence Effect in Social Prediction*, 58 J. PERSONALITY & SOC. PSYCHOL. 568 (1990); Robert P. Vallone et al., *Overconfident Prediction of Future Actions and Outcomes by Self and Others*, 58 J. PERSONALITY & SOC. PSYCH. 582 (1990); *cf.* John Z. Ayanian & Paul D. Cleary, *Perceived Risks of Heart Disease and Cancer Among Cigarette Smokers*, 281 J.A.M.A. 1019, 1020-21 (1999) (reporting that smokers underestimate both the absolute levels of risk of heart disease and cancer attributable to cigarette smoking and their own level of risk relative to that of other smokers); Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules, in* BEHAVIORAL LAW AND ECONOMICS 288, 291-92 (Cass R. Sunstein ed., 2000) (reporting similar results in a survey of individuals' perceived economic well-being).

[273] Jared Diamond, *Keeping Panic at Bay*, N.Y. TIMES, Oct. 21, 2001, § 4, at 15 (identifying "at least three factors" that vary the impact of terrorism on targeted societies).

[274] *Id.*

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understandable yearning.

That the desire to pack heat is understandable, however, has no bearing on its effectiveness. At an annual rate of 14.24 firearm deaths per 100,000 persons, eight times the rate in economically comparable countries, the United States holds the dubious distinction of the developed world's leading rate of death by gunfire.[275] In 1997 more than 32,000 Americans died by gunfire.[276] That number exceeds the death toll from September 11 by an order of magnitude. Even NRA membership levels correlate with murder rates, probably because "guns are more accessible" in localities "with a large NRA membership" and "can therefore serve as the weapon of choice in violent confrontations."[277] Though advocates for robust gun-ownership rights do acknowledge the United States' exceptionally high homicide rate, they typically refuse "to lay this difference . . . at the doorstep of weapons policy."[278] Occam's razor, however, strongly favors the simple explanation.

Whether out of instinctive self-preservation or as a matter of fulfilling obligations owed to the community of nations, America after September 11 must engage the world at large. Would it be that America could present a less violent image of itself. "There is a world outside this room and when you meet it promise me you won't meet it with your gun."[279] Perhaps our next contribution to global peace could begin with the development of a distinctly American brand of constitutionalism built on some foundation besides a textual enshrinement of gun ownership rights and the unthinking insistence of certain citizens and scholars on those rights. One promising starting point would be responding meaningfully to the proposition that the globalization of terror merits comprehensive reconsideration of the

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[275] *See* E.G. Krug, K.E. Powell & L.L. Dahlberg, *Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries*, 27 INT'L J. EPIDEMIOLOGY 214 (1998); *see also* Brendan J. Healey, *Plugging the Bullet Holes in U.S. Gun Law: An Ammunition-Based Proposal*, 32 J. MARSHALL L. REV. 1, 2 (1998) (reviewing other empirical studies). *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997). For an older but still informative source, *see* GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE (1969) (staff report prepared for the National Commission on the Causes and Prevention of Violence).

[276] *See* STATISTICAL ABSTRACT OF THE UNITED STATES 100 (120th ed. 2000) (Table No. 140).

[277] HASHEM DEZHBAKHSH ET AL., PAUL H. RUBIN & JOANNA MEHLHOP SHEPHERD, DOES CAPITAL PUNISHMENT HAVE A DETERRENT EFFECT? NEW EVIDENCE FROM POST-MORATORIUM PANEL DATA 21 (Emory Univ. Econ., Working Paper No. 01-01, 2001), *available at* http://www.ssrn.com.

[278] Daniel D. Polsby & Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 U. COLO. L. REV. 969, 976 (1998).

[279] 10,000 MANIACS, *Gun Shy*, *on* IN MY TRIBE (Elektra/Asylum 1987).

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traditional line between domestic and foreign affairs.[280] That way lies the rebirth of a nation truly fit to lead a world made safe for democracy.[281]

In the meanwhile, we legal scholars can pursue a less ambitious but correlatively more attainable goal. "[A]t any time or place," the law "is an unstable mass in precarious equilibrium."[282] Perfect prediction and prescription lie beyond our mortal reach. In tumultuous times and in peace, we have an affirmatively patriotic duty to favor "conventional thinking and common sense" over "brilliant insights."[283] Instead of treating constitutional scholarship as a sterile exercise in abstract thought, we should write about real rights and real powers as if the Constitution mattered.[284] By contrast, Second Amendment scholarship typifies the worst tendencies of American legal academics "to shut [their] eyes to the plainest facts of our national life and to deal with . . . question[s] of" constitutional interpretation "in an intellectual vacuum."[285] Unless we "temper [our] doctrinaire logic with a little practical wisdom," we risk "convert[ing] the constitutional Bill of Rights into a suicide pact."[286] Airport security before and after September 11 undermines the place of gun ownership in workable schemes for ensuring public safety. The example of air travel therefore represents the triumph of contemporary empiricism over historical exegesis. Every Missourian knows just the retort to deter the theoretical seduction of the law: "Show me."

Every Missourian, that is, except the one who now serves as Attorney General of the United States. The lone civil right that John Ashcroft has rushed to defend in the war on terrorism appears to be the right to keep and bear arms. *United States v. Emerson* would be nothing more than a circuit court curiosity, arguably more forgettable than regrettable, if the putative right of gun ownership were not obstructing the antiterrorism effort. Attorney General Ashcroft's Justice Department has barred the FBI

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280 *See* Peter T. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002). *But cf.* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (refusing to obliterate the traditional constitutional "distinction between what is truly national and what is truly local").

281 It is impossible to predict whether the United States can avoid international violence and whether such avoidance, even if attainable, might plunge the United States into even deeper moral quandaries. *See generally* David A. Westbrook, *Law Through War*, 48 BUFF. L. REV. 299 (2000).

282 GRANT GILMORE, THE AGES OF AMERICAN LAW 110 (1977).

283 Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986).

284 *Cf. generally* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

285 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

286 Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); *cf.* ANDREW M. BICKEL, THE MORALITY OF CONSENT 23 (1975) (urging "good practical wisdom" as the basis for constitutional analysis).

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and other law enforcement agencies from using records of firearm purchases to determine whether suspected terrorists have acquired guns. Admittedly, federal law does prohibit the recording or transfer of federally mandated gun-check records at "a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof" and specifically forswears the establishment of "any system of registration of firearms, firearms owners, or firearms transactions or dispositions."[287] Federal law likewise directs the Bureau of Alcohol, Tobacco, and Firearms to "destroy all records" of this sort.[288] Though "Congress did not intend to give BATF *carte blanche* with regard to informational requests from federal firearms licensees,"[289] these restrictions fall far short of handcuffing federal law enforcement agents in the fashion that Attorney General Ashcroft has prescribed. The Justice Department's sudden solicitude toward gun owners defies easy justification, for gun owners hold no meaningful interest in maintaining the secrecy of their firearm purchases.[290] Attorney General Ashcroft's refusal to research the gun-purchasing history of suspected terrorists establishes a *de facto* "gun-rights exception to the war on terrorism," a policy evidently "made for narrow political reasons based on a right-to-bear-arms mentality" rather than any "rational basis in public safety."[291] One observer loath to accuse the attorney general "of a soft-spot for alleged terrorists or criminals in general" argues that John Ashcroft laid aside "the war on terrorism" in order to score points in America's ideological clash "between a culture that adamantly supports gun rights and an opposing culture that is equally inflexible in its desire for gun control."[292]

Indeed, it is far from clear that Attorney General Ashcroft's decision to hamstring federal law enforcement shelters a meaningful right to bear arms that is enjoyed generally by noncitizens. In 1998 Congress banned the transfer to and possession of firearms or ammunition by nonimmigrant

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[287] 18 U.S.C. § 926(a) (2000).

[288] *Id.* § 922(t)(2)(C) (2000).

[289] RSM, Inc. v. Buckles, 254 F.3d 61, 69 (4th Cir. 2001).

[290] *See* City of Chicago v. United States Dep't of Treasury, 287 F.3d 628, 636 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 536 (2002); Center to Prevent Handgun Violence v. United States Dep't of Treasury, 781 F. Supp. 20, 23 (D.D.C. 1997); *cf.* United States v. Bidwell, 406 U.S. 311, 316 (1972) (upholding a warrantless search of a gundealer's storeroom under the Gun Control Act).

[291] Fox Butterfield, *Justice Dept. Bars Use of Gun Checks in Terror Inquiry*, N.Y. TIMES, Dec. 6, 2001, at A1, B7 (quoting Larry Todd, police chief of Los Gatos, California).

[292] Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 61-62 (2002).

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aliens.[293] Aliens illegally or unlawfully in the United States had been and still remain barred from acquiring or possessing firearms.[294] Cognizant of the heightened threat to national security since September 11, 2001, the Bureau of Alcohol, Tobacco, and Firearms on February 5, 2002, promulgated new measures enabling "[i]mmediate enhanced enforcement of the general prohibition on nonimmigrant aliens possessing and receiving firearms."[295] The BATF took pains to stress that the 1998 law's exemptions would not be interpreted to allow nonimmigrant aliens, including even diplomats from friendly nations, to bring firearms into the United States for private hunting.[296] The Treasury Department's recognition that guns in the hands of nonimmigrant aliens can threaten national security stands in stark contrast with Justice Department policy under John Ashcroft.

Worst of all, Attorney General Ashcroft and Solicitor General Theodore Olson have reversed the federal government's longstanding position on the meaning of the Second Amendment. In the government's brief in opposition to the petition for certiorari in *Emerson*, the United States explicitly opined that the Second Amendment protects an individual right to bear arms.[297] The Supreme Court's unceremonious denial of the writ leaves it unclear whether the Justices rejected this proposition, whether they agreed with the government that the firearm regulation at issue in *Emerson* was reasonable, or whether they believed that the case failed to present a constitutional issue worthy of review.[298]

Whatever the fate of *Emerson* as positive law, its endorsement of the individual right theory of the Second Amendment and the embrace of that position by the incumbent Justice Department will continue to send tremors through the law. We should expect to see the individual right argument in the arsenal of many litigants, most of them unsavory. Already one criminal defendant has cited the government's *Emerson* brief to

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[293] *See* Omnibus Consolidated & Emergency Supplement Appropriations Act of 1998, Pub. L. No. 105-277, § 121, 112 Stat. 2681, 2681-72 (codified at 18 U.S.C. § 922(d)(5), (g)(5) (2000)).

[294] *See* 18 U.S.C. § 922(g)(5)(A) (2000).

[295] Implementation of Public Law 105-277, 67 Fed. Reg. 5422, 5422 (Feb. 5, 2002) (amending scattered sections of 27 C.F.R. pt. 178).

[296] *See id.* at 5423.

[297] *See* Brief for the United States in Opposition 19-20 n.3 (filed May 6, 2002), *in* Emerson v. United States, 122 S. Ct. 2362 (2002) (denial of certiorari) (No. 01-8780); *see also* Brief for the United States in Opposition 5 n.2 (filed May 6, 2002), *in* Haney v. United States, 122 S. Ct. 2362 (2000) (No. 01-8272) (endorsing Emerson's holding in favor of an individual right to keep and bear arms).

[298] *See* Emerson v. United States, 122 S. Ct. 2362 (2002), *denying cert. to* 270 F.3d 203 (5th Cir. 2001).

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challenge his indictment under District of Columbia law for carrying a pistol without a license.[299] This defendant was two weeks slower than an even more notorious accused felon: American Talib John Walker Lindh, filing a motion to dismiss charges against him arising from activities in Afghanistan, was probably "the first [criminal defendant] to rely on the Justice Department's newly stated view that an individual has a right to bear arms."[300] And just in time for Independence Day 2002, members of San Francisco's Big Block gang cited the Justice Department's new position in a failed bid to dismiss federal weapons charges.[301] Everyone from street punks to first-order traitors will cite *Emerson* and the government's endorsement of the individual right theory.

Let us therefore turn elsewhere for patriotic inspiration in this time of crisis. Consider the Honorable Robert M. Parker, the Fifth Circuit judge who withheld his approval from that court's Second Amendment mini-treatise in *Emerson*. Received academic wisdom and emerging judicial opinion evidently agree that the Second Amendment guarantees, at least as against the federal government, a limited but irreducibly personal right to keep and bear arms. On this point we have been regaled with mountains of scholarly prose, with "page after page of non-binding dicta."[302] Well, so what? In his special concurrence Judge Parker concluded: "The debate . . . over the nature of the [Second Amendment] right is misplaced. In the final analysis, whether the right to keep and bear arms is individual or collective is of no legal consequence."[303] The only practical consequence of this constitutional debate for the war against terrorism comes through *Emerson*'s unintended impact on the meaning of Article I's Militia Clauses. To insist otherwise — to persist in advocating a personal right of gun ownership as a privilege of militia membership without acknowledging the breathtaking power that this posture would confer upon Congress — is to drain constitutional interpretation of all vitality. Rendered irrelevant to contemporary security concerns, Second Amendment jurisprudence has become "Shape without form, shade without colour / Paralysed force, gesture without motion":

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[299] *See* Neely Tucker & Arthur Santana, *D.C. Handgun Ban Challenged in Court*, WASH. POST, May 30, 2002, at A1.

[300] Katharine Q. Seelye, *Lindh Wants Charge Dropped Using Justice Dept. Argument*, N.Y. TIMES, May 16, 2002, at A23.

[301] *See* Bob Egelko, *Judge Questions Ashcroft's Gun Stand*, S.F. CHRON., July 4, 2002, at A24.

[302] United States v. Emerson, 270 F.3d 203, 273-74 (5th Cir. 2001) (Parker, J., specially concurring), *cert. denied*, 122 S. Ct. 2362 (2002).

[303] *Id.* at 273.

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This is the way the law ends
This is the way the law ends
This is the way the law ends
Not with a whimper but a bang.[304]

[304] *Cf.* T.S. ELIOT, *The Hollow Men*, *in* COLLECTED POEMS 1909-1962, at 77, 82 (1963).

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