

# First Amendment Homesickness, Second Amendment Homecoming: Hannah Arendt and 501(c) Militias

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## *Abstract*

In this article we argue that Justice Kennedy, *Citizens United's* critics, and the modern pro-gun movement all share the same homesickness: a longing for the lost promises of the Framers' First Amendment. This ache was anticipated by refugee political philosopher Hannah Arendt, who longed not for her native Germany but for a post-revolutionary America in which true political freedom (for some) was successfully established by the Framers. The pro-gun movement's answer to this homesickness has been a Second Amendment "homecoming," seeking freedom in the personal right to bear arms. However, the outcome of *Defense Distributed v. U.S. Department of State*, a recent case about 3D printable gun codes, illustrates why the gun rights answer is misguided as it entangles the two amendments.

Drawing on Arendt's notion of freedom, as opposed to liberty, this paper argues that a proper response to the current crisis in the jurisprudence of the First and Second Amendments should entail the understanding that: (I) "freedom of speech" should only protect speech-acts that concern public interest; and (II) "the security of a free State" requires adequate access to the infrastructures that make speech possible through an equitable distribution of power.

As this paper concludes, by developing atomic weapons, the government has "constructively taken" the people's "right to keep and bear Arms," and guns are simply not a plausible remedy. Accordingly, this paper suggests a model for how the government may provide a "just compensation" for this "taking" as required by the Fifth Amendment's "taking clause." The model demands that equal to a portion of the defense budget should be diverted annually to publicly fund 501(c) non-profit organizations, modern-day "well-regulated Militias" that distribute freedom across society.

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### *Introduction*

*The same old flights, the same old homecomings,  
dozens of each per day,  
but at last the pigeon gets clear of the pigeon-house . . .  
What is home, but a feeling of homesickness for the flight’s lost moment of  
fluttering terror?*

- Rainer Maria Rilke (For Hannah Arendt)<sup>1</sup>

In 1967, during the midst of the Civil Rights movement, a dissenting Justice of the Supreme Court cites the philosophy work of a newcomer refugee, Hannah Arendt, to defend freedom of speech of the movement.<sup>2</sup> As a refugee from Nazi Germany, Arendt considers America not only as her place of exile, but as her chosen home as well.<sup>3</sup> She writes to her friend that her “American passport” is “the most beautiful book” she knows,<sup>4</sup> and when she gets homesick, it is not for her

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<sup>1</sup> Jocelyn Page, *Lawns of America and Other Poems & On my Mind: The Shared Vision of Collaboration in absentia*, 154 (2015), (Translator/“imitator” Robert Lowell, via Rainer Maria Rilke, dedicates this poem to Hannah Arendt. This paper’s Part (III) starts with other portions of this poem.).

<sup>2</sup> *W. E. B. DuBois Clubs of America v. Clark*, 389 US 309, 314 (1967) (A case involving the constitutionality of a statute that would force “the W. E. B. DuBois Clubs of America to register with the Attorney General as a Communist-front organization.” Justice Douglas, with whom Justice Black concurs, dissents, arguing, “Legislation curbing or penalizing advocacy even of ideas we despise is, I submit, at war with the First Amendment.”).

<sup>3</sup> Frank Mehring, *“All for the sake of Freedom”: Hannah Arendt’s Democratic Dissent, Trauma, and American Citizenship*, 3 J. TRANSNAT’L AM. STUD. (2011), <http://escholarship.org/uc/item/7j88q162> (“Among her fellow intellectual émigrés and exiles such as Adorno, Horkheimer, Marcuse, or Fraenkel, Arendt stands out. She decided not to return to the new democratic Germany with its Grundgesetz fashioned along the lines of the American Constitution. Instead, she insisted on becoming naturalized and used her transnational background as a basis to address democratic gaps from the vantage point of an American citizen.”).

<sup>4</sup> See ALTE AYNAGOGE, HANNAH ARENDT 46 (1997); Christian Volk, *Hannah Arendt and the Law*, 11 INT’L J. CONST. L. 261–265 (2013).

motherland, Germany,<sup>5</sup> but for post-revolutionary America at the time of the Framers.<sup>6</sup> While Arendt strongly criticizes the Framers' ignorance toward slavery as a major source of crises throughout American history, she admires the use of what she considers their true understanding of freedom in designing the Constitution.<sup>7</sup> Because no other revolution could distinguish between liberty and freedom,<sup>8</sup> Arendt believes that the American Revolution was the only successful revolution in modern history.<sup>9</sup> While liberty is only a personal negative against the infringement of the government, freedom is concerned with establishing a foundation for the pursuit of public happiness.<sup>10</sup> The Framers could see this distinction not because they were genius philosophers, but, she argues, because they experienced conditions unique to the New World: diversity of ethno-national identity,<sup>11</sup> socioeconomic equality<sup>12</sup> and

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<sup>5</sup> See *supra* note 3, and accompanying text.

<sup>6</sup> See HANNAH ARENDT, *ON REVOLUTION* (1963) (arguably the whole of "On Revelation" is about Arendt's homesickness for the post-revolutionary America); Dana Villa, *Hannah Arendt: Modernity, Alienation, and Critique*, in *JUDGMENT, IMAGINATION, AND POLITICS: THEMES FROM KANT AND ARENDT* 287-305 (Jennifer Nedelsky ed., 2001); see *supra* note 3 (arguing Arendt's desire and struggle to be recognized as an American citizen, "First, Mehring shows in which ways Arendt identified herself as an American and wished to become recognized as an American citizen. Second, he reconnects Arendt's democratic dissent with her efforts to become recognized as an American citizen.").

<sup>7</sup> See HANNAH ARENDT, *CRISES OF THE REPUBLIC* 90 (1972) (noting, "Tocqueville predicted almost a hundred and fifty years ago that 'the most formidable of all the ills that threaten the future of the Union arises,' not from slavery, whose abolition he foresaw, but 'from the presence of a black population upon its territory.' And the reason he could predict the future of Negroes and Indians for more than a century ahead lies in the simple and frightening fact that these people had never been included in the original consensus universalis of the American republic.").

<sup>8</sup> See ARENDT, *supra* note 6, at 32 ("All these liberties, to which we might add our own claims to be free from want and fear, are of course essentially negative; they are the results of liberation but they are by no means the actual content of freedom, which, as we shall see later, is participation in public affairs, or admission to the public realm.").

<sup>9</sup> See ARENDT, *supra* note 6, at 198-199 ("The great measure of success the American founders could book for themselves, the simple fact that their revolution succeeded where all others were to fail, namely, in founding a new body politic stable enough to survive the onslaught of centuries to come, one is tempted to think, was decided the very moment when the Constitution began to be 'worshipped', even though it had hardly begun to operate.").

<sup>10</sup> *Id.* See also *infra* note 79.

<sup>11</sup> Of course, the white male Framers were not diverse in many respects. But to the extent that they were not bound together by a national identity, they experienced a unique diversity compared to other contemporary revolutionaries. See ARENDT, *supra* note 6, at 94 ("The fact of the matter was, of course, that the kind of *multitude* which the founders of the American republic first represented and then constituted politically, if it existed at all in Europe, certainly ceased to exist as soon as one approached the lower strata of the population.") (emphasis added); HANNAH ARENDT, *HANNAH ARENDT: THE LAST INTERVIEW: AND OTHER CONVERSATIONS* (2013) (Noting the unique condition of America in terms of lacking a national identity, "America is not a nation-state and Europeans have a hell of a time understanding this simple fact, which, after all, they could know theoretically; it is, this country is united neither by heritage, nor by memory, nor by soil, nor by language, nor by origin from the same.").

a collaborative culture.<sup>13</sup> As Arendt writes, “I do not believe in a world, be it a past world or a future, in which [one] could or should ever be comfortably at home.”<sup>14</sup> Thus, her homesickness, as we might call it, was not simple nostalgia for a post-revolutionary America but a practice of philosophical grievance, a yearning for the lost conditions that shaped the democratic ideals of the Constitution. Arendt’s homesickness was specifically a desire to transcend her own diasporic trauma; it is also her desire to recover, in post-war America, the conditions that enabled the Framers to imagine and find a new home founded on freedom.<sup>15</sup>

Arendt believes the ultimate aim of any contemporary revolution should be the constitution of freedom.<sup>16</sup> For this reason, Arendt “worships”<sup>17</sup> the American Constitution as it aims for a system for perpetuating the conditions that made the American Revolution possible in the first place.<sup>18</sup> She contends that the proper understanding of freedom started to fade away after the Constitution’s ratification.<sup>19</sup>

<sup>12</sup> See ARENDT, *supra* note 6, at 166-167 (“What the American Revolution actually did was to bring the new American experience and the new American concept of power out into the open. Like prosperity and equality of condition, this new power concept was older than the Revolution, but unlike the social and economic happiness of the New World—which would have resulted in abundance and affluence under almost any form of government—it would hardly have survived without the foundation of a new body politic, designed explicitly to preserve it; without revolution.”).

<sup>13</sup> *Id.* at 166-167 (“For not only the basic federal principle of uniting separate and independently constituted bodies, but also the name ‘confederation’ in the sense of ‘combination’ or ‘cosociation’ was actually discovered in the earliest times of colonial history, and even the new name of the union to be called the United States of America was suggested by the short-lived New England Confederation to be ‘called by the name of United Colonies of New England.’”); see also *Id.* at 128 (“The very fact that [in the Declaration of Independence] the word ‘happiness’ was chosen in laying claim to a share in public power indicates strongly that there existed in the country, prior to the revolution, such a thing as ‘public happiness’, and that men knew they could not be altogether ‘happy’ if their happiness was located and enjoyed only in private life.”).

<sup>14</sup> HANNAH ARENDT, *THE LIFE OF THE MIND* 158 (1981); See Villa, *supra* note 6, at 287.

<sup>15</sup> See *supra* notes 11-13. Perhaps we can compare Arendt’s homesickness with Thomas Jefferson’s homesickness for politics “when he lets himself go in a mood of playful and sovereign irony and concludes one of his letters to Adams as follows: ‘May we meet there again, in Congress, with our ancient Colleagues, and receive with them the seal of approbation “Well done, good and faithful servants.”’ Or when Jefferson writes, “there had been a time when it ‘was of higher value in my eye than everything in it. ARENDT, *supra* note 6, at 132.

<sup>16</sup> See ARENDT, *supra* note 6, at 142 (“The basic misunderstanding lies in the failure to distinguish between liberation and freedom; there is nothing more futile than rebellion and liberation unless they are followed by the constitution of the newly won freedom.”).

<sup>17</sup> See ARENDT, *supra* note 6, at 198-199 (“The great measure of success the American founders could book for themselves, the simple fact that their revolution succeeded where all others were to fail, namely, in founding a new body politic stable enough to survive the onslaught of centuries to come, one is tempted to think, was decided the very moment when the Constitution began to be ‘worshipped’, even though it had hardly begun to operate.”).

<sup>18</sup> *Id.* at 202.

<sup>19</sup> *Id.* at 139 (Arendt discussing how the correct understanding of freedom started to fade away “almost from the beginning” after the American revolution.).

We contend, following Arendt, that the gravest consequences of misunderstanding “freedom” as the pursuit of individual prosperity rather than the advancement of the public interest<sup>20</sup> have been for jurisprudence of the First Amendment.<sup>21</sup> Faced with 20th-century America’s crises of state repression of civil disobedience,<sup>22</sup> “the Pentagon Paper crisis,”<sup>23</sup> and the “2-party system” monopolization of politics,<sup>24</sup> Arendt argues that only a return to the correct understanding of “freedom of speech” may save the republic.<sup>25</sup> Without a proper grasp of what “freedom” means, she contends that we cannot guarantee free and equal access to the political process.<sup>26</sup> Notably, she observes that the Fourteenth and Fifteenth Amendments on their own were not fully successful in perpetuating the condition of freedom for African Americans.<sup>27</sup> But Arendt focuses much of her critique on the framing of the First Amendment, blaming its lack of explicit language guaranteeing the right to organize for the public interest as a major source of confusion on freedom.<sup>28</sup> She suggests constitutional amendments that incorporate such language may resolve the constitution crisis America is facing.<sup>29</sup> Perhaps we can say Arendt’s homesickness is a desire for a First Amendment homecoming, re-establishing what she sees as its proper objective.

Arendt’s 20th-century observations about the crisis of the First Amendment’s misunderstanding have only become more relevant in the post-*Citizens United*<sup>30</sup> era of “corporate personhood.”<sup>31</sup> Since Arendt’s death in 1975,<sup>32</sup> there has been

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<sup>20</sup> See *infra* note 79.

<sup>21</sup> U.S. CONST. amend. I; See ARENDT, *supra* note 7, *Civil Disobedience*, at 51-102 (discussing why the First Amendment fails to protect “Civil Disobedience.”).

<sup>22</sup> See *supra* note 7, and accompanying text.

<sup>23</sup> *Id.* at 93 (discussing examples of the First Amendment’s failure, such as “the case of an “illegal and immoral war,” the case of an increasingly impatient claim to power by the executive branch of government, the case of chronic deception, coupled with deliberate attacks on the freedoms guaranteed under the First Amendment, whose chief political function has always been to *make chronic deception impossible.*”) (emphasis added). In another chapter of *Crisis in Republic*, Arendt extensively discusses the underlying events in *New York Times Co. v. United States*. 403 U.S. 713 (1971) (a case involving whether the First Amendment protects *New York Times’* unauthorized publication of Pentagon’s confidential documents.); ARENDT, *supra* note 7, *Lying in Politics*, at 1-47.

<sup>24</sup> ARENDT, *supra* note 7, *Civil Disobedience*, at 89 (“Representative government itself is in a crisis today, partly because it has lost, in the course of time, all institutions that permitted the citizens’ actual participation, and partly because it is now gravely affected by the disease from which the party system suffers: bureaucratization and the two parties’ tendency to represent nobody except the party machines.”).

<sup>25</sup> *Id.* at 101 (suggesting a new constitutional amendment to correct the First Amendment).

<sup>26</sup> See generally ARENDT, *supra* note 7.

<sup>27</sup> *Id.* at 90.

<sup>28</sup> *Id.* at 101 (arguing, we should “admit publicly that the First Amendment neither in language nor in spirit covers the right of association as it is actually practiced in this country—this precious privilege whose exercise has in fact been (as Tocqueville noted) ‘incorporated with the manners and customs of the [American] people’ for centuries.”).

<sup>29</sup> *Id.*

<sup>30</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>31</sup> See Amanda D. Johnson, *Originalism and Citizens United: The Struggle of Corporate*

substantial development in the First Amendment's jurisprudence of the right to organize,<sup>33</sup> especially in form of corporations.<sup>34</sup> However, this development did not include the second half of Arendt's theory: the right to organize should be for the pursuit of public interest not personal profit.<sup>35</sup> For-profit corporations have been using the First Amendment as a powerful deregulatory tool, protecting them against all types of commercial and election laws.<sup>36</sup> The accelerated accommodation of corporate wealth gave for-profit corporations substantial control over policy, motivated by the maximization of profit not the public interest.<sup>37</sup> In this way,

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*Personhood*, 7 RUTGERS BUS. L.J. 187 (2010) ("Corporate personhood is the concept that the federal Constitution provides for equal identity between corporations and persons. Since the nineteenth century, our highest court has debated the legitimacy of corporate personhood.").

<sup>32</sup> See William L. McBride, *What Is the Value of Thinking?*, 92 YALE L.J. 396, 397 (1982).

<sup>33</sup> See *Boy Scouts of America v. Dale* 530 U.S. 640 (2000) (holding a LGBTQ individual has an "association" right to join a publicly funded organization); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1494 (2001) (discussing the "new" Supreme Court' "approach to expressive associations."); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 989 (2011) (discussing *Boy Scouts of America v. Dale* (2000) as a modern turn in "the Court's modern association jurisprudence"); Randall P. Bezanson et. al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 24 (2012) ("Freedom of expressive association under the First Amendment is relatively new, with roots in Supreme Court doctrine tracing back only about a half century. Further, First Amendment expressive association principles are swiftly developing and expanding in a pattern begun only over the last decade or so."); 16A AM. JUR. 2d CONSTITUTIONAL LAW § 579 (a legal encyclopedia entry about the jurisprudence of the First Amendment's "implicit" freedom of association).

<sup>34</sup> See Yvette Ann Walker, *More Than Human: Modern Expansion of Corporate Personhood Rights in Hobby Lobby*, 24 S. CAL. REV. L. & SOC. JUST. 297 (2015) (discussing how the current jurisprudence of the First Amendment protects "corporations" more than humans).

<sup>35</sup> See *supra* note 20 and accompanying text; see also Part (I) of this paper for extensive discussion of Arendt's theory of freedom of speech.

<sup>36</sup> See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016) ("Commercial interests are increasingly laying claim, often successfully, to First Amendment protections. Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine—and one with great implications for modern governance."); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, New Republic (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (arguing how the First Amendment has implicitly become "the right to evade regulation" for corporations).

<sup>37</sup> See Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*. PERSPECTIVES ON POLITICS, 12, 564-581(2014) ("Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence. The results provide substantial support for theories of Economic-Elite Domination and for theories of Biased Pluralism, but not for theories of Majoritarian Electoral Democracy or Majoritarian Pluralism."); Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, OHIO N.U. L. REV. 261, 339 (2015) ("The

Arendt's homesickness dovetails with Justice Kennedy's feelings toward the current status of the military-industrial complex: "sick."<sup>38</sup>

Speaking at Harvard Law School, Justice Kennedy bemoans lobbying by for-profit corporations to prolong prison sentences in California,<sup>39</sup> stating "we've got to do something about it."<sup>40</sup> Yet needless to say, for-profit corporate lobbying is protected as "freedom of speech" under *Citizens United*, through reasoning that Justice Kennedy himself penned.<sup>41</sup> When a Harvard Law 1L student asks Justice Kennedy if he has changed his opinion about *Citizens United*,<sup>42</sup> Justice Kennedy says, "yes! Certainly, in my view, what happens with money in politics is not good."<sup>43</sup> But he admits that he does not have a satisfactory answer for what constitutional

predominance of laissez-faire ideology during both the early twentieth and early twenty-first centuries also generated persistent and overt attacks on democratic processes and government.").

<sup>38</sup> Supreme Court Associate Justice Anthony Kennedy visits HLS, HARVARD LAW SCHOOL 25:00-26:00 (2015), <https://www.youtube.com/watch?v=ZHBMPnA5n0Q>.

<sup>39</sup> *Id.*

<sup>40</sup> Justice Kennedy mentions the California Correctional Peace Officer Association (CCPOA) as an example of a powerful anti-criminal reform group in California. *Id.* Surely, to maximize the profits of its members, CCPOA has played a significant role in advancing pro-incarceration policies. See Sagar Jethani, *Union of the Snake: How California's Prison Guards Subvert Democracy*, MIC (May, 14 2013) <http://mic.com/articles/41531/union-of-the-snake-how-california-s-prison-guards-subvert-democracy>. However, for-profit prison corporations such as Corrections Corporation of America (CCA) play a substantial role to influence the political process in order to maximize their pro-incarceration profits. See especially Karyl Kicenski, *CASHING IN ON CRIME: THE DRIVE TO PRIVATIZE CALIFORNIA STATE PRISONS* (2014). In fact, CCPOA has inadvertently contributed to the competitiveness of for profit business corporations. *Id.*; ELIZABETH LINER, *INDUSTRY ANALYSIS: THE SOURCES OF PROFIT FOR SAN DIEGO'S PRIVATIZED PRISONS* RADY SCHOOL (2013), <http://rady.ucsd.edu/rbj/2013/winter/privatized-prisons>; See also Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 79 (2016) ("The prison industry is an archetypal example of an established industry preventing public-spirited reform because of the incentives of existing stakeholders."); Hadar Aviram, *The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity*, 11 HASTINGS RACE & POVERTY L.J. 111, 114 (2014) (discussing "developments in prison privatization and shows how the private prison industry has adjusted to the financial crisis by amending its contracts with state governments and by opening up a new market."); Saki Knafo, *For-Profit Prisons Are Big Winners Of California's Overcrowding Crisis*, THE HUFFINGTON POST, October 25, 2013, [http://www.huffingtonpost.com/2013/10/25/california-private-prison\\_n\\_4157641.html](http://www.huffingtonpost.com/2013/10/25/california-private-prison_n_4157641.html) ("California is now CCA's second-biggest customer, providing \$214 million to the company last year, according to HuffPost's analysis of the company's finances. The [sic] status surpassed only by the federal government, which paid CCA \$752 million last year [2012].").

<sup>41</sup> Michael S. Kang, *The Campaign Finance Debate After Citizens United*, 27 GA. ST. U. L. REV. 1147, 1152 (2011) (noting, "The practical obstacles to lobbying regulation, though, appear as daunting as those for campaign finance reform. The First Amendment offers a textual basis for protection of the right to petition government that is at least as strong as that for campaign spending on elections.").

<sup>42</sup> See *supra* note 38, at 57:20-59:59.

<sup>43</sup> *Id.*

reasoning may be used to overturn *Citizens United*.<sup>44</sup> In other words, Justice Kennedy is “sick” about the outcomes of *Citizens United*, but he sees a constitutional deadlock in the way of overturning it.<sup>45</sup>

Do we need a constitutional amendment, as Arendt suggests, providing a homecoming for this First Amendment homesickness?<sup>46</sup> As an alternative, we suggest that this homesickness can be salvaged through the homecoming<sup>47</sup> of the Second Amendment<sup>48</sup>. In the last decade, there has been a “conservative”<sup>49</sup> movement to revive the Second Amendment’s protection of “Arms,” interpreted as handguns<sup>50</sup>—a movement that many anti-gun advocates find “sick.”<sup>51</sup> But the gun rights movement is another misguided effort to provide a homecoming for the First Amendment’s homesickness.<sup>52</sup> In fact, advances in gun technology have forced gun rights advocates to turn to the First Amendment.<sup>53</sup> In a recent Texas case, the court accepted that the plaintiffs’ 3D printable gun “code” files are “speech” for the purposes of the First Amendment.<sup>54</sup> This case provides a rare window to rethink the intersection of the First Amendment and the Second Amendment, as Defense

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<sup>44</sup> *Id.*

<sup>45</sup> As the First Amendment was the primary base of *Citizens United*’s reasoning.

<sup>46</sup> *Citizens United*’s crisis is effectively a crisis in the First Amendment since the First Amendment is the primary basis for the reasoning of *Citizens United*. 558 U.S. 310, 311 (2010).

<sup>47</sup> Dan M. Peterson, Stephen P. Halbrook, *A Revolution in Second Amendment Law*, DEL. LAWYER, Winter 2011/2012, at 12 (“It is no exaggeration to say that in the past four years Second Amendment jurisprudence has been radically transformed. In all of our constitutional history, no provision of the Bill of Rights has undergone such a rapid and profound revolution in its interpretation.”).

<sup>48</sup> “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>49</sup> See Erwin Chemerinsky, *The Heller Decision: Conservative Activism and Its Aftermath*, CATO UNBOUND (July 25, 2008), <http://goo.gl/vuXbTY> (Professor Chemerinsky arguing the pro-gun legal movement is a “conservative” activism); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 393 (2009) (quoting Professor Chemerinsky to highlight the liberal critique of the “conservative activism” approach toward the Second Amendment).

<sup>50</sup> See *supra* note 38.

<sup>51</sup> See e.g., Joe Page, *This is how sick the anti-gun lobby can be*, NEWS RADIO 1190 KEX (April, 13, 2016), <http://1190kex.iheart.com/onair/the-joe-pags-show-10/this-is-how-sick-the-antigun-14602224/> (noting the sickness of an ad by a pro-gun organization, “A new ad from a prominent gun control group features the main character from Alice in Wonderland shooting herself in the face with a handgun.”); Judah Robinson, *Fox News’ Geraldo Rivera: We Are A ‘Gun Sick’ Nation*, HUFFINGTON POST (2015), <http://goo.gl/Nuxl7F> (“The mass murder at Umpqua again reveals we are a gun sick nation.”); Amanda Marcotte, *4 Pro-Gun Arguments We’re Sick of Hearing*, ROLLING STONE, 2015, <http://goo.gl/bm5b85> (rebuking four typical pro-gun arguments as “sick”).

<sup>52</sup> See *infra* Part (II) for extensive discussion of the modern pro-gun movement.

<sup>53</sup> *Defense Distributed v. U.S. Department of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015). See Part (II) for extensive discussion of this case.

<sup>54</sup> *Id.*



Distributed's theory of the case would be incomplete without either of the Amendments:

To defend the human and civil right to keep and bear arms as guaranteed by the United States Constitution and affirmed by the United States Supreme Court; to collaboratively produce, publish, and distribute to the public without charge information and knowledge related to the digital manufacture of arms.<sup>55</sup>

At the end, the court rules that the state has a "national security" interest in censoring speech on the internet.<sup>56</sup> Astoundingly, the "security" that the Second Amendment reasons for, the right to have "Arms," has been used to justify the censorship of the plaintiffs' "code" under the First Amendment's jurisprudence.<sup>57</sup>

However, a careful analysis of the Second Amendment's anti-totalitarian history and language provide guidance for what freedom means, in the exact same way that Arendt wishes the First Amendment would provide.<sup>58</sup> Therefore, a reconciliation of the Second Amendment with Arendt's theory of freedom may provide us with the homecoming for the First Amendment that Arendt, Justice Kennedy, gun advocates and anti-gun advocates all share.

In Part (I), we employ Arendt's theory of freedom to demonstrate why the First Amendment should only protect speech that is for the pursuit of the public interest. In Part (II), we elucidate why the history and anti-totalitarian spirit of the Second Amendment conform to Arendt's theory of freedom. In particular, we argue that the Second Amendment's Arms is a "code" for an adequate infrastructure or technology for enabling and protecting a Militia's right to organize, but the federal government's possession of atomic and other weapons of mass destruction makes it virtually impossible for that Militia to plausibly challenge the force of the federal government with firearms. This power imbalance leads to an unequal capacity to appear as a political subject in the public sphere. As a result, we argue that the federal government has "taken" people's right to bear arms and should pay just compensation as long as it holds its weapon of mass destruction. Similarly, in Part (III), we argue the Second Amendment's "Militia" should be construed as "a tax exempt right to organize for the public interest," analogous to the modern 501(c) regime. This

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<sup>55</sup> See *supra* note 114.

<sup>56</sup> See *infra* note 156; see also Part (II) for extensive discussion of this case.

<sup>57</sup> *Id.*; see also ARENDT *supra* note 11:

National security is a new word in the American vocabulary, and this, I think, you should know. National security is really, if I may already interpret a bit, a translation of "raison d'état." And "raison d'état," this whole notion of reason of state, never played any role in this country. This is a new import. National security now covers everything, and it covers, as you may know from the interrogation of Mr. Ehrlichman, all kinds of crimes. For instance, the president has a perfect right . . . the king can do no wrong; that is, he is like a monarch in a republic. He's above the law, and his justification is always that whatever he does, he does for the sake of national security.

<sup>58</sup> See *supra* note 28.

interpretation provides not only a strong constitutional justification for 501(c) nonprofits but a path to reform the current complexities that the IRS is facing. In Part (V), we propose a model of just compensation for "taking" Arms that could substantially revive the right to Militia embedded in the Second Amendment. The proposal involves an auto-calculating formula based on the defense budget that would give all citizens a voucher of equivalent value to donate to the 501(c) of their choice annually.

### *I. Politics as the Freedom of Speech in Groups For Public Interest*

*The word 'people' retained for them (the Founding Fathers) the meaning of manyness, of the endless variety of a multitude whose majesty resided in its very plurality. Opposition to public opinion, namely to the potential unanimity of all, was therefore one of the many things upon which the men of the American Revolution were in complete agreement; they knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the very moment an exchange became superfluous because all equals happened to be of the same opinion.<sup>59</sup>*

- Justice Douglas, quoting Hannah Arendt, *W. E. B. DuBois Clubs of America* (dissenting 1967)

Justice Douglas dedicates two full footnote paragraphs<sup>60</sup> to quote Arendt's theory of the American Revolution only four years after she published her work "On Revolution."<sup>61</sup> Perhaps only in America can the intellectual work of a newcomer refugee, within a short time, influence the country's highest court – a fact that only supports Arendt's faith in the American Revolution.<sup>62</sup> For Arendt, politics means freedom of speech-action<sup>63</sup> in groups<sup>64</sup> for the purposes of public interest.<sup>65</sup>

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<sup>59</sup> *W. E. B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 314 (1967) (Douglas, J. dissenting) (internal citations omitted).

<sup>60</sup> *Id.* at 314 ft. nt. 1, 2.

<sup>61</sup> See ARENDT, *supra* note 6.

<sup>62</sup> See ARENDT, *supra* note 9.

<sup>63</sup> See ARENDT, *supra* note 7, at 95 (quoting Tocqueville to emphasis the plurality of "language" for the purposes of politics, "From that moment, they are no longer isolated men but a power seen from afar, whose actions serve for an example and whose language is listened to.") (internal citation omitted) For Arendt action, conduct and speech are all synonymous as long as they are meaningful for a group. *Id.* She believes conduct of civil disobedience groups deserves the same protections as speech. *Id.*

<sup>64</sup> *Id.* (echoing Tocqueville to admire group acting in America as the correct mean of politics, "As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world,' or have found some fault they wish to correct, 'they look out for mutual assistance, and as soon as they have found one another out, they combine.'").

<sup>65</sup> *Id.* 119 ("The point is that the Americans knew that public freedom consisted in having a share in public business, and that the activities connected with this business by no means constituted a burden but gave those who discharged them in public a feeling of happiness they could acquire nowhere else.").

Arendt's admiration of the American Revolution is for the fact that Framers, immediately after the American Revolution, engaged in designing a method to find a framework for politics.<sup>66</sup> A pre-condition for politics is liberty, or a protection against intrusion into the home or private sphere.<sup>67</sup> But after "liberation," a revolution must establish freedom, which in modern times is only possible through a constitution.<sup>68</sup> Arendt believes all other revolutions, including the French Revolution, were futile because they were not "followed by the constitution of the newly won freedom."<sup>69</sup> She admires John Adams when he writes that "a constitution is a standard, a pillar, and a bond when it is understood, approved and beloved. But without this intelligence and attachment, it might as well be a kite or balloon, flying in the air."<sup>70</sup>

Another pre-condition of freedom is the plurality of opinions.<sup>71</sup> As a constitution is a contract, it requires the plurality of mutual promises as the principle of consent.<sup>72</sup> Accordingly, a constitution can only successfully maintain its legitimacy and perpetuate freedom over time if it provides a framework for the presence of a plurality of opinions in the public sphere.<sup>73</sup> Without the constitutional protection of plurality of opinions, including the minority opinions, the constitution will lose its legitimacy, which requires the voluntary consent of all.<sup>74</sup> The Framers well understood that freedom of speech requires "voluntary associations" to ensure plurality of "consent and the right to dissent."<sup>75</sup> Arendt sees grassroots organizations associated with the American civil rights movements of the 1960s as examples of these "voluntary associations,"<sup>76</sup> which "are too important, not merely in numbers, but in quality of opinion, to be safely disregarded."<sup>77</sup> She asks why the American legal system does not protect the movement's right to organize under the First Amendment when, in fact, civil disobedience is deeply rooted in American history.<sup>78</sup>

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<sup>66</sup> See *supra* notes 9 and 8.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See also ARENDT, *supra* note 6 at 142-143.

<sup>69</sup> *Id.* at 142.

<sup>70</sup> See ARENDT, *supra* note 6 at 146.

<sup>71</sup> See ARENDT, *supra* note 7, at 94.

<sup>72</sup> See ARENDT, *supra* note 7, at 95.

<sup>73</sup> See ARENDT, *supra* note 6 at 200-204.

<sup>74</sup> See ARENDT, *supra* note 7, at 88 ("Consent as it is implied in the right to dissent—the spirit of American law and the quintessence of American government—spells out and articulates the tacit consent given in exchange for the community's tacit welcome of new arrivals, of the inner immigration through which it constantly renews itself."); see also *Id.* at 95.

<sup>75</sup> *Id.*

<sup>76</sup> ARENDT, *supra* note 7, at 96 ("It is my contention that civil disobedients are nothing but the latest form of voluntary association, and that they are thus quite in tune with the oldest traditions of the country. What "could better describe them than Tocqueville's words "The citizens who form the minority associate in order, first, to show their numerical strength and so to diminish the moral power of the majority?"").

<sup>77</sup> *Id.* at 76 ("the point, at any rate, is that we are dealing here with organized minorities that are too important, not merely in numbers, but in quality of opinion, to be safely disregarded.").

<sup>78</sup> See ARENDT, *supra* note 7, *Civil Disobedience*, at 51-102; see also *Id.* at 83 ("although the phenomenon of civil disobedience is today a world-wide phenomenon and even though it has attracted the interest of jurisprudence and political science only recently in the United

Arendt's explanation is that a two-pronged historical confusion about the word "freedom" led to this misunderstanding.<sup>79</sup> First, the *plurality* pre-condition of freedom has been forgotten; implied in freedom of speech is a right to organize as groups.<sup>80</sup> Second, freedom should only protect speech-acts that are in the pursuit of the public interest, which for Arendt was the original meaning of the "pursuit of happiness" in the declaration of independence.<sup>81</sup>

Therefore, for Arendt, since for-profit speech is not concerned with the protection of plurality, the freedom of speech cannot survive a reading that grants the same protections to all speech.<sup>82</sup> For-profit speech would eventually lead to monopolization of speech by one totalitarian party who could profit the most and exclude others from the public sphere,<sup>83</sup> because it would mean that to avoid

States, it still is primarily American in origin and substance; that no other country, and no other language, has even a word for it, and that the American republic is the only government having at least a chance to cope with it—not, perhaps, in accordance with the statutes, but in accordance with the spirit of its laws.”).

<sup>79</sup> *Id.* at 94 (arguing freedom should not be reduced to the right to vote, “it is precisely these voting rights, universal suffrage in free elections, as a sufficient basis for a democracy and for the claim of public freedom, that have come under attack.”); see also ARENDT, *supra* note 6 at 128 (“In the eighteenth-century setting, the term [freedom], as we have seen, was familiar enough, and, without the qualifying adjective, each of the successive generations was free to understand by it what it pleased. But this danger of confusing public happiness and private welfare was present even then.”).

<sup>80</sup> *Id.* at 84 (“A contract [such as the Constitution] presupposes a plurality of at least two, and every association established and acting according to the principle of consent, based on mutual promise, presupposes a plurality that does not dis- solve but is shaped into the form of a union-*e pluribus unum*.”).

<sup>81</sup> See ARENDT, *supra* note 6 at 127 (“This freedom they called later, when they had come to taste it, ‘public happiness’, and it consisted in the citizen’s right of access to the public realm, in his share in public power—to be ‘a participator in the government of affairs’ in Jefferson’s telling phrase—as distinct from the generally recognized rights of subjects to be protected by the government in the pursuit of private happiness even against public power, that is, distinct from rights which only tyrannical power would abolish.”).

<sup>82</sup> See ARENDT, *supra* note 7, at 174-176 (explaining why a self-centered approach to freedom would result in violence and destruction of politics, “Self-interest is interested in the self, and the self dies or moves out or sells [one’s] house; because of its changing condition, that is, ultimately because of the human condition of mortality, the self qua self cannot reckon in terms of long-range interest, i.e. the interest of a world that survives its inhabitants.”).

<sup>83</sup> See ARENDT, *supra* note 88 at 164-167:

The reason why this development, which seems inevitable in a commercial society, became a deep source of uneasiness and eventually constituted the chief problem of the new science of economics was not even relativity as such, but rather the fact that *homo faber*, whose whole activity is determined by the constant use of yardsticks, measurements, rules, and standards, could not bear the loss of "absolute" standards or yardsticks. For money, which obviously serves as the common denominator for the variety of things so that they can be exchanged for each other, by no means possesses the independent and objective existence, transcending all uses and surviving all manipulation, that the yardstick or any other measurement possesses with regard to the things it is supposed to measure and to the men who

contradictions, eventually all regulations of commerce, including taxation, should be prohibited.<sup>84</sup> At its base, any commercial transaction is speech since the “price” of an object is a meaningful form of communication for the participants within the “market.”<sup>85</sup> So taxation, for example, would be an infringement on the “value” that market participants try to communicate to each other.<sup>86</sup> But a prohibition of taxation would eventually lead to one party accumulating all wealth and excluding “losers” from the “market.”<sup>87</sup> Without an active attempt to represent the plurality of opinions in politics, dissenting minorities slowly disappear from the political arena.<sup>88</sup> Precisely because for Arendt, in the marketplace of *goods* there is no room for dissent, because the price of an object cannot possibly represent all opinions about its value, the unlimited protection of all speech in the marketplace of *ideas*, regardless of origin or intent, is incommensurable with the perpetuation of freedom.<sup>89</sup>

For Arendt, the fact that the plurality aspect of freedom had been lost was the reason the Supreme Court could not see<sup>90</sup> the “conduct” of the civil disobedience

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handle them.

<sup>84</sup> See *Id.* at 155 (“The only way out of the dilemma of meaninglessness in all strictly utilitarian philosophy is to turn away from the objective world of use things and fall back upon the subjectivity of use itself. Only in a strictly anthropocentric world, where the user, that is, man himself, becomes the ultimate end which puts a stop to the unending chain of ends and means, can utility as such acquire the dignity of meaningfulness.”); see also Shanor, *supra* note 36 (arguing the logic of *commerce speech* “would constitutionalize ordinary contract law and the filing of tax returns.”); see e.g., *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403 (D.C. Cir. 2012) (plaintiffs arguing that the First Amendment protects them against tax regulations since they the right to inform the public about their untaxed price); *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (“The dearth of Takings Clause authority is not surprising, for application of the Takings Clause here bristles with conceptual difficulties. If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?”).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See ARENDT, *supra* note 88 at 255 (“What distinguishes this development at the beginning of the modern age from similar occurrences in the past is that expropriation and wealth accumulation did not simply result in new property or lead to a new redistribution of wealth, but were fed back into the process to generate further expropriations, greater productivity, and more appropriation.”).

<sup>88</sup> See HANNAH ARENDT, *THE HUMAN CONDITION* (1958) at 221-222. (“the attempt to do away with this plurality is always tantamount to the abolition of the public realm itself. The most obvious salvation from the dangers of plurality is mon-archy, or one-man-rule, in its many varieties, from outright tyranny of one against all to benevolent despotism and to those forms of democracy in which the many form a collective body so that the people ‘is many in one’ and constitute themselves as a ‘monarch.’”); see generally Sheldon S. Wolin, *Hannah Arendt: Democracy and The Political*, No. 60 SALMAGUNDI 3-19 (1983).

<sup>89</sup> *Id.* at 44 (“The crux of the argument is that this amounts to the assertion that society must be conceived as a single subject. This, however, is precisely what cannot be conceived. If we tried, we would be attempting to abstract from the essential fact that social activity is the result of the intentions of several individuals.”).

<sup>90</sup> See ARENDT, *supra* note 7, at 82-83.

groups in the 1960s as speech<sup>91</sup> and thus why the Supreme Court could not see the value of civil disobedience in regards to politics.<sup>92</sup> However, since Arendt's passing in 1975,<sup>93</sup> the jurisprudence of the First Amendment has been expanded substantially.<sup>94</sup> The Court is now more willing to recognize "conduct" as speech,<sup>95</sup> and it puts a substantially higher value on the speech of associations, especially for-profit corporations.<sup>96</sup> Indeed, the recent rapid expansion of the First Amendment's protection has led some legal scholars to warn about the danger of too much speech protection.<sup>97</sup> However, the root of these critiques is that the Court could not establish a coherent theory on what kind of speech deserves First Amendment protection.<sup>98</sup> This is the constitutional deadlock<sup>99</sup> that Justice Kennedy blames for why he does not know how to overturn *Citizens United's* holding:

Remember the government of the United States stood in front of our court and said that it was lawful and necessary of an act to ban a book that was written about Hillary Clinton. They said it would apply to a book written about Hillary Clinton in the prohibited period of three months before the election—that can't be right. And I wasn't surprised that the New York *Times* was incensed that their little monopoly to affect our thinking was being taken away. I was surprised, Dean, at how virulent of their attitude was. Because the last time I looked, the New York Times was a corporation and this meant that the Sierra Club, the Chamber of Commerce in a small town couldn't take out an ad. It seemed to me that there was a tremendous speech problem here. The result is not happy.<sup>100</sup>

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<sup>91</sup> See *supra* note 63.

<sup>92</sup> See *supra* notes 76-81.

<sup>93</sup> See *supra* note 32.

<sup>94</sup> See *supra* notes 33-34.

<sup>95</sup> See Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423 (2014) (elucidating the expansiveness of the modern jurisprudence of expressive speech, or conduct, as protected by the First Amendment); see e.g. *Texas v. Johnson*, 491 U.S. 397 (1989) (holding Johnson's burning of the flag was expressive conduct protected by the First Amendment).

<sup>96</sup> See *supra* notes 33-34.

<sup>97</sup> See *supra* note 36; see also Kyle Langvardt, *The Doctrinal Toll of "Information As Speech"*, 47 LOY. U. CHI. L.J. 761, 761 (2016) (noting, "It is simple to diagnose the problem that has set the First Amendment on course for a tech bubble."); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015) (discussing how the lack of theorization to justify "private economic power" under the First Amendment's jurisprudence).

<sup>98</sup> See e.g., Shanor, *supra* note 36 at 172 (noting, "A key question in First Amendment jurisprudence and theory has been whether, and if so on what grounds, paternalism of thought is distinguishable from other forms of paternalism."); see also Langvardt, *supra* note 96 at 764 ("The underlying error behind the overextension of First Amendment coverage is clear in theory: the courts have too often assumed that the Free Speech Clause extends blindly to speech, communication, or information, per se—an ontological approach—rather than to a set of constitutionally significant social contexts.").

<sup>99</sup> See *supra* notes 38-45.

<sup>100</sup> *Supra* note 38, at 57:20-59:59.

Arendt's theory of freedom offers a solid rule for drawing the line between protected speech and unprotected speech: only speech that relates to public interest, not personal profit, deserves protection.<sup>101</sup> Under this approach, the answer to Justice Kennedy's dilemma<sup>102</sup> would be, yes, only the speech of the Sierra Club and other nonprofits shall be protected. If for-profit corporations such as the *New York Times* are primarily concerned about the public interest, and want the unlimited protection guaranteed by the First Amendment, they can always re-structure as a non-profit corporation. In fact, in recent years, there has been a non-for-profit journalism movement positing itself against the corruptibility of corporate media.<sup>103</sup> Possibly a harder question under this approach is whether all current 501(c) nonprofits<sup>104</sup> should qualify as public-interest organizations, especially since many of them have commercial purposes.<sup>105</sup>

Arendt's notion of "public interest" includes a group's interest in economic welfare since adequate economic conditions are essential for appearing in public space.<sup>106</sup> However, she sees danger in reducing equality to economic status as opposed to viewing it more broadly as a pre-condition for access to politics.<sup>107</sup> For

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<sup>101</sup> See *supra* notes 63-65.

<sup>102</sup> *Supra* note 38, at 57:20-59:59.

<sup>103</sup> See Joel Kramer & Jon Sawyer, *A Donor Collaborative to Support Not-for-Profit Public Affairs Journalism*, DUKE CONFERENCE ON NONPROFIT MEDIA (May 2009) <http://www2.sanford.duke.edu/nonprofitmedia/documents/dwckramersawyerfinal.pdf> (With the business model of for-profit journalism rapidly and sharply deteriorating, many not-for-profit enterprises have been started in recent years to do public-affairs journalism, some with a local focus and some national/international."); Núria Almiron-Roig, *From Financialization to Low and Non-profit*, 9 tripleC 39-61 (2011) (discussing business models of the emerging nonprofit media); Charles Lewis, *The Nonprofit Road*, Columbia Journalism Review (2007) [http://www.cjr.org/feature/the\\_nonprofit\\_road.php](http://www.cjr.org/feature/the_nonprofit_road.php) ("And for serious reporters and editors looking for trustworthy places to work, these new and future nonprofit institutions could be ways to rejuvenate and sustain the soul of journalism.").

<sup>104</sup> Section 501(c) of IRS regulations tax-exempts nonprofits as authorized under 26 U.S.C.A. § 501.

<sup>105</sup> See *e.g.*, section 501(c)5 tax-exemptions for "labor agricultural or horticultural organizations."

<sup>106</sup> See ARENDT, *supra* note 88 at 32 ("To be free meant both not to be subject to the necessity of life or to the command of another *and* not to be in command oneself. It meant neither to rule nor to be ruled."); see *e.g.*, ARENDT, *supra* note 7, at 73 ("There is, for example, the well-known over-researched fact that children in slum schools do not learn. Among the more obvious causes is the fact that many such children arrive at school without having had breakfast and are desperately hungry. There are a number of 'deeper' causes for their failure to learn, and it is very uncertain that breakfast would help. What is not at all uncertain is that even a class of geniuses could not be taught if they happened to be hungry."); see especially Steven Klein, *"Fit to Enter the World": Hannah Arendt on Politics, Economics, and the Welfare State*, 108 AM POLIT SCI REV AMERICAN POLITICAL SCIENCE REVIEW 856-869 (2014) (arguing, "Arendt's thought to articulate new possibilities for relating democratic agency and the welfare state, possibilities neglected by currently dominant deliberative and radical democratic approaches.").

<sup>107</sup> See ARENDT, *supra* note 88 at 135 ("The easier that life has become in a consumers' or laborers' society, the more difficult it will be to remain aware of the urges of necessity by

Arendt, equality means equal access to adequate infrastructure for speech<sup>108</sup> and can only be sustained if all citizens actively speak about matters of public interest.<sup>109</sup> Appearing in public space—the practice of politics—requires the right to organize as well as the right to vote, as voting only represents the view of the majority, not all plural opinions.<sup>110</sup> Nowhere is the danger of the lack of full plural participation in politics more apparent than the history of the Second Amendment.<sup>111</sup>

## *II: Arms as “Code”*

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which it is driven, even when pain and effort, the outward manifestations of necessity, are hardly noticeable at all. The danger is that such a society, dazzled by the abundance of its growing fertility and caught in the smooth functioning of a never-ending process, would no longer be able to recognize its own futility.”); *see also* Klein, *supra* note 106 (noting, “For Arendt, the danger is not the invasion of politics by economics, but rather the loss of the worldly, mediating institutions that allow economic matters to appear as objects of public concern. Reconstructing her account of these mediating institutions, I show that Arendt’s analysis opens up novel insights into the relationship between democratic action and welfare institutions, drawing attention to how such institutions transform material necessity into shared objects of attachment, judgment, and action.”).

<sup>108</sup> *See* ARENDT, *supra* note 88 at 215 (“The equality attending the public realm is necessarily an equality of unequals who stand in need of being ‘equalized’ in certain respects and for specific purposes.”); *see especially* Judith Butler, *Rethinking Vulnerability and Resistance*, Lecture, Madrid (2014) <https://goo.gl/pAQEa7>:

The material conditions for speech and assembly are part of what we are speaking and assembling about. We have to assume the infrastructural goods for which we are fighting, but if the infrastructural conditions for politics are themselves decimated, so too are the assemblies that depend upon them. At such a point, the condition of the political is one of the goods for which political assembly takes place —this might be the double meaning of “the infrastructural” under conditions in which public goods are increasingly dismantled by privatization, neo-liberalism, accelerating forms of economic inequality, and the anti-democratic tactics of authoritarian rule.

<sup>109</sup> *See* ARENDT, *supra* note 88 at 210-220. This may explain the problem with the CCPOA that Justice Kennedy mentions. *See supra* note 40. CCPOA engages in pursuing economic interests well-beyond adequacy, while prisoners do not enjoy the same access to speech as CCPOA. *Id.* As Arendt in her analysis of the labor movement notes:

The labor movement, equivocal in its content and aims from the beginning, lost this representation and hence its political role at once wherever the working class became an integral part of society, a social and economic power of its own as in the most developed economies of the Western world, or where it “succeeded” in transforming the whole population into a labor society as in Russia and as may happen elsewhere even under non-totalitarian conditions. Under circumstances where even the exchange market is being abolished, the withering of the public realm, so conspicuous throughout the modern age, may well find its consummation.

<sup>110</sup> *See* ARENDT, *supra* note 7.

<sup>111</sup> *See* Part (II) of this paper.



*A monarchy cannot be well-regulated unless the powers of the monarch are limited by law.*<sup>112</sup>

- Algernon Sidney, Discourses Concerning Government (1698)

In May 2013, a video was released of a person shooting a gun that was fully produced on a 3D printer.<sup>113</sup> Several days later, a 501(c)(3) non-profit organization<sup>114</sup> called Defense Distributed released the 3D printable “code” for the gun on the internet.<sup>115</sup> In a short time, the “code” was downloaded over 100,000 times before the United States Department of State asked Defense Distributed to remove the files.<sup>116</sup> This series of events is the basis of *Defense Distributed v. United States Department of State*,<sup>117</sup> the latest development in the gun rights movement. In fact, Alan Gura, the mastermind behind *Defense Distributed*,<sup>118</sup> is the same attorney who successfully argued two landmark Second Amendment cases before the United States Supreme Court that constitute the culmination of the pro-gun movement:<sup>119</sup> *District of Columbia v. Heller*<sup>120</sup> and *McDonald v. Chicago*.<sup>121</sup> In *Defense Distributed* Gura argues, among other things, that the Department of State violated both Defense Distributed’s First Amendment right of “freedom of speech” and their Second Amendment right to “keep and bear Arms,”<sup>122</sup> but the main emphasis of

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<sup>112</sup> ALGERNON SIDNEY, 1 DISCOURSES CONCERNING GOVERNMENT 414 (1698) (emphasis added).

<sup>113</sup> See Gert Van Vugt, *The Killer Idea: How Some Gunslinging Anarchists Held Freedom of Speech at Gunpoint*, INFORMATION TECHNOLOGY AND LAW SERIES 3D PRINTING 117-118 (2015).

<sup>114</sup> See About Defense Distributed, DEFENSE DISTRIBUTED, <https://defdist.org/about/>.

<sup>115</sup> See *supra* note 113.

<sup>116</sup> *Id.*; *Defense Distributed*, 121 F. Supp. 3d 680 (W.D. Tex. 2015) (After receiving the Department of State’s request, Defense Distributed immediately removed the online files. Consequently, Defense Distributed moved for preliminary injunction to re-upload the files with the court’s permission); See *also infra* note 117 for discussion of the statute that based the Department of State’s request.

<sup>117</sup> *Defense Distributed*, 121 F. Supp. 3d 680 (The legal authority for the Department of State’s action is a cold-war-era statute that requires the permission of the federal government for any “defense related technology” before being “exported” to a foreign party. The Statute gives the government full discretion to decide what would be a “defense related technology.” Here, the Department of State contends online 3D printable gun files are “defense related technology,” and availing them on the internet would constitute as “exporting.”); Arms Export Control Act, § 38(a)(2), 22 U.S.C.A. § 2778(a)(2); 22 C.F.R. § 120.1(a).

<sup>118</sup> *Defense Distributed*, 121 F. Supp. 3d 680 (W.D. Tex. 2015) (Alan Gura is the lead counsel for Defense Distributed).

<sup>119</sup> See generally DAMON ROOT, OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT, IN OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT 192-193 (2014).

<sup>120</sup> 554 U.S. 570 (2008) (holding for the first time that the Second Amendment prohibits the federal government to violate the right of “individuals” to have modern handguns).

<sup>121</sup> 561 U.S. 742, 130 (2010) (holding *Heller*’s “right to keep and bear arms is fully applicable to the States by virtue of Fourteenth Amendment.”).

<sup>122</sup> *Defense Distributed*, 121 F. Supp. 3d 680 (W.D. Tex. 2015).

Defense Distributed's brief and the district court's analysis is on the First Amendment.<sup>123</sup> Indeed, it is very easy for the court to dismiss the plaintiffs' Second Amendment claim when the technology at issue, a printable "code" file, is so different from the Arms technology that the Framers had.<sup>124</sup>

The fact that Defense Distributed has to bring a First Amendment claim to defend its Second Amendment claim suggests the Second Amendment's *Hellerian* homecoming is more of an answer to the First Amendment's homesickness than anything else. As the founder of Defense Distributed, Cody Wilson explains that Defense Distributed is a political project with the goal of establishing a "cyber utopia,"<sup>125</sup> which will dismantle "the reactionary, control-oriented state."<sup>126</sup> Wilson rejects the notion that the goal of Defense Distributed is about "personal armament."<sup>127</sup> Rather, it is "the liberation of information. It's about living in a world where you just download the file for the thing you want to make in this life."<sup>128</sup> What Wilson describes as "liberation of information" sounds like a pure First Amendment concern.<sup>129</sup> Some scholars even suggest Defense Distributed would

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<sup>123</sup> *Id.* (docket filings); Brief of Plaintiffs in Support of Motion for Preliminary Injunction, *Defense Distributed v. U.S. Department of State*, No. 15-CV-372-RP, Document 7 (Filed May 11, 2015) (the First Amendment portion of the brief is about ten pages whereas the Second Amendment portion is only about three pages); Order Denying Preliminary Injunction, *Defense Distributed v. U.S. Department of State*, No. 15-CV-372-RP, Document 43 (Filed Aug. 4, 2015) (the court's merit analysis of the First Amendment claim is about seven pages whereas the the Second Amendment's merit analysis is only about three pages); *see generally* *Defense Distributed*, 121 F. Supp. 3d at 699 (The court enjoys a much broader discretion in applying the Second Amendment since there are not many precedents governing the Second Amendment, "the appropriate level of [Second Amendment] scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.") (internal citations omitted).

<sup>124</sup> *Defense Distributed*, 121 F. Supp. 3d at 699 ("While the founding fathers did not have access to such technology, . . . Plaintiffs suggest, at the origins of the United States, blacksmithing and forging would have provided citizens with the ability to create their own firearms, and thus bolster their ability to 'keep and bear arms.' While Plaintiffs' logic is appealing, Plaintiffs do not cite any authority for this proposition, nor has the Court located any.").

<sup>125</sup> *Cody Wilson: 'The real utopia is right now'*, BBC NEWS, (March 12, 2014) <http://www.bbc.com/news/technology-26551434>.

<sup>126</sup> *See supra* note 113, at 122-123.

<sup>127</sup> *Id.* at 123.

<sup>128</sup> *Id.*

<sup>129</sup> *See generally* Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 316 (2003) (noting, "First Amendment doctrine also presumes the existence of a storehouse of public knowledge. For example, the free-wheeling public debate on matters of public moment praised in the First Amendment cases assumes such a cache of information."); *see also* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004) (arguing, the First Amendment should provide "protection to the 'essential processes' of communication necessary to facilitate an informed public discussion of important societal matters-would justify the recognition of a more uniform, but limited, First Amendment right to gather many different types of information of public concern.").

harm the interests of the gun lobby, because of the threat 3D printing poses to the profits of gun manufacturers.<sup>130</sup> As one commentator observes, “The NRA, which is pretty rabid about any form of gun control, is silent on this issue largely because it is funded by gun manufacturers who really don’t want people printing copies of their product rather than buying one.”<sup>131</sup>

Unsurprisingly, as someone who is troubled by a constitutional homesickness, Wilson, like Arendt<sup>132</sup> and Justice Kennedy themselves,<sup>133</sup> is deeply invested in the issue of human dignity and its relationship to production:<sup>134</sup>

Defense distributed as a project I think is about the preservation of *human dignity* in a world of accelerating inhumanity. It’s about collapsing the distinction between digital information and material goods. And ultimately, it may be about that origin salvific promise of the free internet.<sup>135</sup>

It’s not only Wilson who approaches the Second Amendment as a homecoming for his underlying homesickness for an Arendtian notion of freedom. Many analyses reveal that the pro-gun movement, in general, is about a frustration that the pro-gun supporters feel as they are faced with the oppression of their economic dignity and identity.<sup>136</sup> Thus it comes as no surprise when some pro-gun scholars connect gun

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<sup>130</sup> See e.g., Freiberg, W. Christopher, *Big Man with a 3D-Printed Gun: One Possible Solution to the Public Safety Problems Presented by Manufacturing Non-Metal Firearms with 3D Printers*, SSRN (November 5, 2014) <http://ssrn.com/abstract=2519611> (arguing, “traditional opponents of gun control laws such as the NRA could actually favor laws banning 3D-printed firearms because of the threat these weapons pose to the profits of gun manufacturers.”); Josh Sager, *3-D-printed guns could doom the NRA*, SALON (May 30 2013), <http://goo.gl/bD2hHZ>; J.D. Tuccille, *3D Guns May Sideline the NRA, But Not Because It’s Funded by Gun Makers*, REASON.COM (Nov. 19, 2013), <http://goo.gl/ZH1BkU>.

<sup>131</sup> See Tuccille *supra* note 130.

<sup>132</sup> See generally Jeffrey C. Isaac, *A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights*, 90 THE AMERICAN POLITICAL SCIENCE REVIEW 61–73, 61–73 (1996); John Helis, *Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights*, 1 JOURNAL OF POLITICS AND LAW JPL (2008).

<sup>133</sup> See generally Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015) (discussing the importance of *dignity* in Justice Kennedy’s thinking)

<sup>134</sup> See generally Jake P. Greear, *Decentralized Production and Affective Economies: Theorizing the Ecological Implications of Localism*, 7.1 ENVIRONMENTAL HUMANITIES 7.1 107–127 (2015).

<sup>135</sup> See *supra* note 113, at (emphasis added) 115–116.

<sup>136</sup> For example, Blocher contends that “the Great American Gun Debate is not just about the Constitution, nor rights, nor even just guns. It is, in large part, a cultural debate - even a culture war - about identity and values.” Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 815 (2014) However, precisely because the “Gun Debate” is about “culture” and “identity” it *is* about the Constitution - the First Amendment. See Jack M. Balkin, *Cultural Democracy and the First Amendment*, NW. U. L. REV. (forthcoming 2016); see also Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing A Better Gun Debate*, 55 EMORY L.J. 569, 607 (2006) (noting, “The refusal of moderate commentators, politicians, and citizens to

rights and LGBTQ rights, and decry their liberal counterparts' inability to see this similarity.<sup>137</sup>

Furthermore, although the pro-gun movement is perceived to be a conservative movement, there are a few liberal and progressive voices in support of *Defense Distributed*.<sup>138</sup> For example, among *Defense Distributed's* amici is a brief by the Electronic Frontier Foundation (EFF), a nonprofit organization with the mission of "defending civil liberties in the digital world" that has no previous history defending gun rights.<sup>139</sup> We want to ask what is missing in the First Amendment that has led to this unexpected coalescing around the Second Amendment?

The recent desperation for a Second Amendment homecoming indicates the First Amendment's failure, in practice, to protect the political voices and identities of America's marginalized and disenfranchised.<sup>140</sup> But the holding of *Citizens United* in abstract is that censorship of information based on a speaker's identity is unconstitutional.<sup>141</sup> It seems the Second Amendment's homecoming constitutes an attempt to establish that which the First Amendment has promised but not delivered. But can the pro-gun approach to the Second Amendment really provide a palliative that relieves the First Amendment's homesickness? To answer this, the holding of *Defense Distributed* can be illustrative.

The district court concedes that *Defense Distributed's* printable "code" files are "speech" for the purpose of the First Amendment.<sup>142</sup> However, the court justifies the censorship in the compelling interest of "national security," as established in *Holder v. Humanitarian Law Project*.<sup>143</sup> Here, the government's interest in national security entails preventing enemy foreigners from accessing "defense articles."<sup>144</sup> As

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address what social meanings gun laws should express creates a vacuum that zealots are quick to fill with ridicule and recrimination."); Heidi Nast, *The Machine-Phallus: Psychoanalyzing the Geopolitical Economy of Masculinity and Race*, 35.8 PSYCHOANALYTIC INQUIRY 766-785 (2015) (a psychoanalytic take on the role of the gun as phallus, standing in for the vanished machines of deindustrialized America).

<sup>137</sup> See e.g., Marc Greendorfer, *And the Ban Played On: The 'Public Safety' Threat to Individual Rights*, SSRN (April 18, 2014) <http://ssrn.com/abstract=2426704> ("If public safety concerns are allowed to undermine constitutional protections of individual rights, the damage will extend to all rights, especially those dear to liberal constituencies (such as abortion and gay rights), and not just Second Amendment rights.").

<sup>138</sup> See *supra* note 49.

<sup>139</sup> See *Defense Distributed v. U. S. Department of State*, 2015 WL 9289397 (C.A.5); About EFF, ELECTRONIC FRONTIER FOUNDATION (2007), <https://www.eff.org/about>.

<sup>140</sup> See *supra* notes 113-114.

<sup>141</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>142</sup> *Defense Distributed*, 121 F. Supp. 3d at 692 (Citing *Universal City Studios, Inc. v. Corley* as a seminal case in which "the court made clear the fact that computer code is written in a language largely unintelligible to people was not dispositive, noting Sanskrit was similarly unintelligible to many, but a work written in that language would nonetheless be speech.); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir.2001).

<sup>143</sup> *Defense Distributed*, 121 F. Supp. 3d at 692. ("The Court has little trouble finding there is a substantial governmental interest in regulating the dissemination of military information."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 (2010) (holding government's interest in national security "is an urgent objective of the highest order.").

<sup>144</sup> See *supra* note 117.

some commentators observe, following the Roberts Court's generous deference to "national security," the court will inevitably give great deference to the government's means for protecting this security as well.<sup>145</sup>

Considering the "clear and present danger"<sup>146</sup> arguably present in current world affairs, including America's own ongoing wars,<sup>147</sup> it might be understandable why courts develop such strict attitudes toward national security.<sup>148</sup> For example, taking *Defense Distributed's* claim<sup>149</sup> to its extreme, American citizens should be allowed to upload the printable "code" files of an atomic bomb to the internet.<sup>150</sup> However,

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<sup>145</sup> See especially David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 148 (2012) ("In *Humanitarian Law Project*, however, the Court's scrutiny was, in actuality, neither strict nor fatal, nor even "demanding." Instead, the Court engaged in only the most deferential review, and upheld the law in the absence of any argument, much less evidentiary showing, that prohibiting plaintiffs' speech was necessary or narrowly tailored to further a compelling interest."); Erwin Chemerinsky, *Not A Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011) (discussing, "the Roberts Court's dismal record of protecting free speech in cases involving challenges to the institutional authority of the government when it is regulating the speech of its employees, its students, and its prisoners, and when it is claiming national security justifications."); Rosa Brooks, *The Trickle-Down War*, 32 YALE L. & POL'Y REV. 583, 596 (2014) (discussing how government has a substantial advantage in "national security" cases); Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1685 (2015) ("Judge Richard Posner, for example, contends that speech that supports terrorism does not warrant constitutional protection because such messages do not comport with Western democratic values. In contrast, this Article argues that it is precisely that type of abominable messages that are the paradigm example of political speech warranting constitutional protection as long as they fall short of establishing high likelihood of harm."); Sheerin N.S. Haubenreich, *SOMETIMES YOU HAVE TO GO BACKWARDS TO GO FORWARDS: JUDICIAL REVIEW AND THE NEW NATIONAL SECURITY EXCEPTION*, 8 CONN. PUB. INT. L.J. 1 (2008) ("National security concerns have historically provided a strong basis for non-justiciable Executive Branch action; however, post 9/11, such actions have grown to encompass a greater number of American citizens' civil liberties.").

<sup>146</sup> See generally Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982) ("The test that has received the most attention from Justices and scholars is the so-called 'clear and present danger' test, originated by Justice Holmes in his opinion for the Court in *Schenck v. United States*. This first incarnation of the test provided that speech may be regulated if 'the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.'"); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>147</sup> See generally Abigail M. Pierce, *#tweeting for Terrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support Statute*, 24 WM. & MARY BILL RTS. J. 251, 276 (2015) ("the War on Terror has created new challenges to the First Amendment. The fear from September 11, 2001, is still very much alive. With this seemingly never-ending battle against terrorists, new fears and challenges arise almost daily. In an era of constant war, terrorism has indeed shaken our foundation.").

<sup>148</sup> See *supra* note 145.

<sup>149</sup> *Defense Distributed*, 121 F. Supp. 3d at 692 (Plaintiffs argue they have a First Amendment right to unrestrictedly upload files on the internet).

<sup>150</sup> In many respects *Defense Distributed* is just a newer version of *United States v.*

the late Justice Scalia, writing for the majority opinion in *Heller* rejects the originalist claim that “only those arms in existence in the 18th century are protected by the Second Amendment”<sup>151</sup> and offers the definition of Arms as “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>152</sup> By this definition, it is hard to argue why a 3D printable “code” file of an atomic bomb does not constitute as “bearable arms.” After all, a computer “code” file is among the most “carry-able” items that one can imagine.<sup>153</sup> But “worlds collide” if an atomic bomb becomes universally accessible.<sup>154</sup> Nevertheless, the problem with the district court analysis in *Defense Distributed* is not the recognition of “national security” as the government interest, but the court’s conclusory treatment of the rest of the case after this recognition.

Following the Roberts Court’s deferential attitude toward “national security,”<sup>155</sup> the *Defense Distributed* court ruled for the government without any serious scrutiny of the government’s means chosen.<sup>156</sup> For example, instead of asking *Defense Distributed* to delete its files altogether, the Department of State could ask *Defense*

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*Progressive*, 467 F. Supp. 990, 991 (W.D. Wis. 1979); Ian M. Dumain, *No Secret, No Defense: United States v. Progressive*, 26 Cardozo L. Rev. 1323, 1333 (2005) (Discussing *United States v. Progressive* extensively, noting “the First Amendment does not protect publication of scientific information about atomic weapons. So the question becomes, not Shall we keep the secrets of atomic energy? – that is impossible; but rather, will the control of atomic information in the United States delay other nations enough to warrant the resulting impairment of our own research and international comity?”).

<sup>151</sup> *Heller*, 554 US 570, 582 (2008) (Justice Scalia, writing for majority, arguing “Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

<sup>152</sup> *Heller*, 554 U.S. 570, 582.

<sup>153</sup> *Heller*, 554 U.S. 570, 584 (“at the time of the founding, as now, to “bear” meant to “carry.”).

<sup>154</sup> See Tristan Volpe, *3-D Printing the Bomb? The Nuclear Nonproliferation Challenge*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, (Nov 4, 2014)

<http://carnegieendowment.org/2015/11/04/3-d-printing-bomb-nuclear-nonproliferation-challenge/ilcn> (“A revolution in manufacturing is underway that may enable the most sensitive pieces of a nuclear weapons program to be transferred and produced around the globe. In the Additive Manufacturing (AM) process, 3-D printing machines build objects of virtually any shape from digital build files—the essential data telling printers how to construct an object—by laying down successive layers of material.”); Fleschner McMullen, *Worlds Collide When 3d Printers Reach the Public: Modeling A Digital Gun Control Law After the Digital Millennium Copyright Act*, 2014 MICH. ST. L. REV. 187, 190 (2014) (discussing the danger of 3D printer technology for copy right laws).

<sup>155</sup> See *supra* notes 143 and 145.

<sup>156</sup> *Defense Distributed*, 121 F. Supp. 3d at 695 (the “intermediate scrutiny” of the government “means chosen” would pass since “a prohibition on Internet posting does not impose an insurmountable burden on Plaintiffs’ domestic communications.”).

Distributed to “geoblock” – to restrict its website to foreigners.<sup>157</sup> Is total censorship really the best way to regulate online “gun” files? The court fails to ask this question. This “national security” deferential approach to the First Amendment raises concerns about further curtailments of the freedom of speech. In the era of networked communication and ongoing wars, all American “speech” is easily accessible to foreigners, including enemies.<sup>158</sup> For example, a blog post on how to petition the United Nations for funds may pose a national security risk since a U.S. enemy could earn additional money from that petition and use it against the U.S.<sup>159</sup> Similarly, a blog post about a healthy recipe may pose a “national security” risk since it could help a U.S. enemy fighter by boosting her “brain power.”<sup>160</sup> Given ongoing conditions of insecurity, only a rigorous “means chosen” analysis could provide a meaningful protection of speech. Otherwise, under a deferential approach to “means chosen,” all it takes for the government to oppress undesirable speech would be to tag “national security” as the government’s interest for censoring that speech.<sup>161</sup> This is a trend that is already happening in the Roberts Court era,<sup>162</sup> raising the question of why pro-gun enthusiasts employ the Second Amendment homecoming to defend their First Amendment rights.<sup>163</sup>

The text and spirit of the Second Amendment undermines any notion that “security” should be monopolized by one party, including the federal government.<sup>164</sup> The Second Amendment aims to achieve a well-regulated equilibrium in which no totalitarian power can justify the oppression of others in name of security.<sup>165</sup> The

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<sup>157</sup> See Tal Kra-Oz, *Geoblocking and the Legality of Circumvention*, SSRN 1 (Nov. 15, 2014), <http://ssrn.com/abstract=2548026> (defining Geoblocking as “the limiting of access to digital content based on the user’s geographical location.”); Michelle Edelman, *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should Be Illegal*, 15 VA. SPORTS & ENT. L.J. 110, 112 (2015) (advocating for illegalization of the circumvention of Geoblocks).

<sup>158</sup> See *supra* note 145.

<sup>159</sup> This was in fact similar to one of the activities the censorship of which the court found constitutional in Humanitarian Law Project, 561 US 1, 37 (“plaintiffs propose to teach PKK members how to petition various representative bodies such as the United Nations for relief. The Government acts within First Amendment strictures in banning this proposed speech”).

<sup>160</sup> See e.g., Brain-Boosting Dinner Recipes, EatingWell, [http://www.eatingwell.com/recipes\\_menus/recipe\\_slideshows/brain\\_boosting\\_dinner\\_recipes](http://www.eatingwell.com/recipes_menus/recipe_slideshows/brain_boosting_dinner_recipes).

<sup>161</sup> See *supra* note 145.

<sup>162</sup> *Id.*

<sup>163</sup> See *supra* note 113, at 122-123.

<sup>164</sup> See Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 673-74 (2000) (“The ability to raise a standing army, reserved to the federal government by the Constitution, was considered a grave threat to popular liberty, justified only by its necessity for defense against foreign aggressors. The right to bear arms, subsequently enshrined in the Bill of Rights, was intended to check potential abuses by a tyrannical government armed with such a standing army.”); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1277-78 (1991) (“If the amendments as a group are ‘distributive’ in their general character, the second amendment is so specifically. The repeated call for the decentering of military power at the ratification conventions was, in its overt phrasing, consciously poised against the centrist habits of the Constitutional Assembly.”).

<sup>165</sup> See *Heller*, 554 U.S. 570, 598 (Justice Scalia, writing for majority, arguing “That history

Second Amendment is one of many constitutional examples of balancing power through its distribution.<sup>166</sup> As John Adams writes, “power must be opposed to power, force to force, strength to strength, interest to interest, as well as reason to reason, eloquence to eloquence, and passion to passion.”<sup>167</sup> The Second Amendment aims to balance the military power of the government with the people’s Militia, and the government’s Arms power with that of the people.<sup>168</sup> And, indeed, as Justice Scalia argues in *Heller*, the Second Amendment does not only aim to balance the power of the people against the government, but also the power of a “community” against other communities.<sup>169</sup> James Madison approves this view when he notes, “it is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part, to save ‘the rights of individuals, or of the minority . . . from interested combinations of the majority.’”<sup>170</sup>

The Framers well understood that a balance of power is not achieved only through the “limitation and negation of power,” but rather by the “distribution of power.”<sup>171</sup> The balance of Arms power against Arms power could securitize a “free state,” or as Justice Scalia would say, a “free community.”<sup>172</sup> By replacing the prospect of “I will use violence” with “I can use violence, but I will not since you have equal power and it will be self-destructive,”<sup>173</sup> the Framers disagreed with Algernon Sidney’s notion that “[a] monarchy cannot be well-regulated unless the powers of the monarch are limited by law.”<sup>174</sup> Instead, the Framers believed that a monarchy cannot be well-regulated unless the power of the monarch is balanced by the distribution of power.<sup>175</sup> As Arendt explains:

For power can of course be destroyed by violence; this is what happens in tyrannies, where the violence of one destroys the power of the many, and which therefore, according to Montesquieu, are destroyed from within: they perish because they

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showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”); see also Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 665 (2001) (“‘anti-totalitarian’ axiom has appropriately been called a “transcendental doctrine”).

<sup>166</sup> See *supra* note 164.

<sup>167</sup> See *supra* note 6, at 152.

<sup>168</sup> See McIntosh *supra* note 164 (“This divergence of the two conceptions of Second Amendment symmetry has profound consequences for our understanding of the American system of checks and balances and, moreover, for the American democratic experiment.”).

<sup>169</sup> *Heller*, 554 US 570, 580 (Justice Scalia, writing for majority, arguing the word “state” in the text of the Second Amendment means “community”).

<sup>170</sup> See *supra* note 6, at 150.

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* note 169.

<sup>173</sup> See *supra* note 6, at 150-151 (“political freedom did not reside in the I-will but in the I-can, and that therefore the political realm must be construed and constituted in a way in which power and freedom would be combined”).

<sup>174</sup> See *supra* note 112.

<sup>175</sup> See *supra* note 6, at 150-151.



engender impotence instead of power. But power, contrary to what we are inclined to think, cannot be checked, at least not reliably, by laws, for the so-called power of the ruler which is checked in constitutional, limited, lawful government is in fact not power but violence, it is the multiplied strength of the one who has monopolized the power of the many.<sup>176</sup>

Accordingly, the anti-totalitarian ambition of the Second Amendment was only possible in the 18th-century because the federal government, people, communities and states all enjoyed access to the equal technology of Arms.<sup>177</sup> However, that has not been the case for quite some time, as the federal army has asymmetrically amassed ever more technologically advanced forms of “Arms.”<sup>178</sup> When the President of the United States can destroy everyone and everything on earth with “Gold Codes” of atomic weapons, this power imbalance is at its most extreme.<sup>179</sup>

“Code” could be a key word to connect the lost meaning of “Arms” in the Second Amendment with the reality of today’s Arms technology. In the text of the Second Amendment, Arms is a “code” for equal possession of a technology that guarantees access to free speech. Only when everyone has such equal technology, can everyone choose to speak rather than resort to violence.<sup>180</sup> In other words, Arms were “pre-existing” properties that enabled the Framers to speak freely instead of using violence, and the Second Amendment was supposed to perpetuate that pre-existing condition of the freedom of speech.<sup>181</sup>

Arendt warns that reducing equality to mere economic outcomes makes equality unsustainable,<sup>182</sup> but also that freedom is not possible when politics is reduced to the attainment of legal rights without providing those very economic pre-conditions on which it depends.<sup>183</sup> The historical development of the Second Amendment is a case in point of how this phenomenon worked in practice. By excluding African Americans from formal political subjectivity, the Framers inadvertently triggered the

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<sup>176</sup> *See supra* note 6, at 151.

<sup>177</sup> *See supra* note 164.

<sup>178</sup> *Id.*

<sup>179</sup> *See Weapons of Mass Destruction (WMD), GLOBAL SECURITY*, <http://www.globalsecurity.org/wmd/systems/nuclear-football.htm>; *see especially* Scarry *supra* note 164 (“President Nixon stated during the Watergate crisis, ‘I can go into my office and pick up the telephone and in 25 minutes 70 million people will be dead.’ This announcement should probably not count heavily against Nixon or any other individual President. Justice Davis once wrote that this nation ‘has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.’”).

<sup>180</sup> *See supra* note 173.

<sup>181</sup> *Heller*, 554 US 570, 592 (“it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”); *see supra* note 6, at 179-180 (“We have difficulties today in perceiving the great potency of this principle because the intimate connection of property and freedom is for us no longer a matter of course. To the eighteenth century, as to the seventeenth before it and the nineteenth after it, the function of laws was not primarily to guarantee liberties but to protect property; it was property, and not the law as such, that guaranteed freedom.”).

<sup>182</sup> *See* notes 107 and 108.

<sup>183</sup> *Id.*

very disequilibrium the Second Amendment was designed to forestall, and that led directly to the Civil War and the birth of a powerful federal army.<sup>184</sup> The Union Army used the newly freed slaves as soldiers, which disturbed the militia-Military power equilibrium that the Framers envisioned.<sup>185</sup> The newly freed slaves become additional “arms” of the federal government, but as a Civil War historian observes:

Yet blacks were also objects; in order to defeat the white South, the white North needed black men. Lincoln was their emancipator, their savior, when he spoke as the cautious, prudent political leader and when he eloquently spoke of the magnificent contribution that black soldiers made to the Union.<sup>186</sup>

The mainstream abolitionist movement, which in its earlier stages had proposed the deportation of the slaves, did not foresee that without providing equalizing material conditions for the new black citizens, they could not exercise their political rights.<sup>187</sup> For the Framers, equal access to Arms also meant equal access to a technology used to protect the property they were more or less enjoying equally.<sup>188</sup> During the Reconstruction era the meaning of the Second Amendment changed as African American communities armed themselves for defense against white vigilantes.<sup>189</sup> But reducing “Arms” to the use of guns alone was not a sustainable solution<sup>190</sup>; the disparity in the land ownership at the time of the Civil War is still among the root causes of racial inequality in America.<sup>191</sup> By the end of the Civil War and

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<sup>184</sup> See especially Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 *RUTGERS L.J.* 405, 423 (2013) (“the Constitution created in 1787 gave enormous protection to slavery and made it impossible to end slavery within the existing constitutional structure.”) see also *supra* note 9.

<sup>185</sup> See John T. Hubbell, *Abraham Lincoln and the Recruitment of Black Soldiers*, 2 *PAPERS OF THE ABRAHAM LINCOLN ASSOCIATION* 6-21 (1980).

<sup>186</sup> *Id.* at 21.

<sup>187</sup> See *supra* note 7, at 90 (“It was the tragedy of the abolitionist movement, which in its earlier stages had also proposed deportation and colonization (to Liberia), that it could appeal only to individual conscience, and neither to the law of the land nor to the opinion of the country.”).

<sup>188</sup> See *supra* note 12; see also JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 37677 (Charles Francis Adams ed., 1969) (1856) (John Adam noting, “The balance of power in a society, accompanies the balance of property in land. The only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make the division of the land into small quantities, so that the multitude may be possessed of landed estates.”); Shelby D. Green, *Imagining A Right to Housing, Lying in the Interstices*, 19 *GEO. J. ON POVERTY L. & POLY* 393, 443 (2012).

<sup>189</sup> See generally Adam Winkler, *THE SECRET HISTORY OF GUNS*, 10727825.308 *ATLANTIC MONTHLY* 80-87 (2011).

<sup>190</sup> *Id.*

<sup>191</sup> See Vernelia R. Randall, *For Whites Only - A Long History of Affirmative Action*, 2003, <http://academic.udayton.edu/race/04needs/affirm22.htm> (noting, “White Americans were also given a head start with the help of the U.S. Army. The 1830 Indian Removal Act, for example, forcibly relocated Cherokee, Creeks and other eastern Indians to west of the Mississippi River to make room for white settlers. The 1862 Homestead Act followed suit,

Reconstruction eras, the Second Amendment had lost its anti-totalitarian function and was effectively been reduced to a right to hunting and individual self-defense.<sup>192</sup>

Arms is “code,” a right to pre-existing property that enables citizens to access the political sphere equally. In other words, Arms are the adequate infrastructure that all citizens need to be at an equilibrium which would remove the possibility of violent domination and enable the possibility of dissenting voices to organize and represent themselves in politics.<sup>193</sup> The latest development of that “code” now entails the “Gold Codes” of the atomic bombs, a property that is only in the possession of the federal government. Defense Distributed, all pro-gun judges and the whole gun movement combined, with all their handguns and rifles, could never defeat the United States Army.<sup>194</sup> To launch its advanced weapons and drones, the federal government does not even need many human resources or obedient soldiers.<sup>195</sup> The modern American defense system runs predominantly on codes and computers.<sup>196</sup> This is why the Second Amendment’s pro-gun homecoming is a misguided answer to the First Amendment’s homesickness. By developing advanced weapons, the federal government has “constructively taken” the people’s right “to keep and bear Arms.” Consequently, we argue that the federal government has broken the Constitution’s promise of a “free community” collectively responsible for ensuring

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giving away millions of acres of what had been Indian Territory west of the Mississippi. Ultimately, 270 million acres, or 10% of the total land area of the United States, was converted to private hands, overwhelmingly white, under Homestead Act provisions.”); *see also* Edith Y. Wu, *Reparations to African-Americans: The Only Remedy for the U.S. Government’s Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 Conn. Pub. Int. L.J. 403 (2004) (discussing failure of “the 13th, 14th, and 15th Amendments” to bring inequality in America).

<sup>192</sup> *See* McIntosh *supra* note 164 (“The symmetry presupposed by the Second Amendment as a political right and the symmetry underlying the Second Amendment as a civil right were highly similar until approximately the Civil War.”); *see also* Akhil Reed Amar, *Second Thoughts*, *Law & Contemp. Probs.*, Spring 2002, at 103, 109-10 (“The imperial Redcoats at the Founding were villains, but the boys in blue who had won under Grant and Sherman were heroes-- at least in the eyes of Reconstruction Republicans. Thus, when this great generation took its turn rewriting the Constitution, it significantly recast the right to weapons.”).

<sup>193</sup> *See supra* note 173.

<sup>194</sup> *See generally* note 175; *see also supra* note 6 at 175 (“The truth is that even prior to the horror of nuclear warfare, wars had become politically, though not yet biologically, a matter of life and death. And this means that under conditions of modern warfare, that is since the First World War, all governments have lived on borrowed time.”); *see also supra* note 164.

<sup>195</sup> *See* Scarry *supra* note 164 at 1266:

This second species of consent appears to depend on the technical attributes of the guns themselves: because they must be carried onto the field by persons, the leaders must address the population and persuade them to carry those guns. With nuclear weapons, this requirement disappears: because there is no longer any need for the population to carry the arms, there ceases to be the need to elicit the population’s consent, either at the opening of war or throughout its duration. Thus, the ordinary features of argument and citizenry are no longer needed or available.

<sup>196</sup> *Id.*

free speech, i.e., the right to form a “Militia”<sup>197</sup> And the best we can hope for is “a just compensation” based on “the taking clause.”<sup>198</sup>

### *III: MILITIA AS “501(C)”*

*Back in the dovecote, there’s another bird, by all odds the most beautiful,  
one that never flew out, and can know nothing of gentleness . . .  
Still, only by suffering the rat-race in the arena  
can the heart learn to beat.*<sup>199</sup>

- Rainer Maria Rilke (For Hannah Arendt)

What would Militia mean then while considering Arms as adequate infrastructure enabling the possibility of the right to organize? Perhaps the Second Amendment’s Militia is one of the most mystical and archaic parts of the Constitution. As Michael J. Golden notes, “The term ‘militia’ is polarizing, misunderstood, misapplied, and generally difficult for modern Americans to digest.”<sup>200</sup> But understanding Arms in a more general and accurate sense would provide an opportunity to reinvigorate the constitutional functionary role of Militia. This could be a Second Amendment homecoming that, unlike the misguided pro-gun homecoming, may actually mediate the constitutional crisis of freedom that we face today.<sup>201</sup> Considering Arms as a pre-condition for Militia,<sup>202</sup> Militia can be defined as the right to organize and to form a voluntary association for the purpose of public interest.<sup>203</sup>

Unlike the First Amendment, the Second Amendment explicitly defines its goal: “the security of a free state.”<sup>204</sup> This goal is clearly concerned with the interest of the community rather than personal security.<sup>205</sup> For this reason, as much as the original

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<sup>197</sup> See *supra* note 7, at 93; see also Part (III) of this paper for an extended discussion of “Militias.” (“There exist a great number of circumstances that may cause a promise to be broken, the most important one in our context being the general circumstance of change. And violation of the inherent mutuality of promises can also be caused by many factors, the only relevant one in our context being the failure of the established authorities to keep to the original conditions.”); see also Scarry *supra* note 164.

<sup>198</sup> U.S. CONST. amend. V; see Part (IV) of this paper for an extended discussion of “taking clause.”

<sup>199</sup> See *supra* note 1.

<sup>200</sup> Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 WM & MARY BILL RTS J 1021 (2013).

<sup>201</sup> See *supra* note 42.

<sup>202</sup> See *supra* note 181; see also Part (II) of this section for extensive discussion of Arms.

<sup>203</sup> See *supra* note 200.

<sup>204</sup> “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>205</sup> See *Heller*, 554 US 570, 580 (holding “the security of a free state” means the security of a free “community”); see *supra* note 200, at 1064 (“Militia history reveals that militias operated most effectively when they could tailor their activities to the unique needs of their respective

meaning of “Militia” has been obscured since the time of the Framers, there has never been an understanding that a Militia represents anything other than the local community interest. In our modern era, as much as for-profit corporations could manipulate the ambiguous language of the First Amendment to expand their rights, they have never dared to suggest that a Militia could include for-profit corporations as well.<sup>206</sup> The security of a “free” state does not depend on for-profit corporations, but on organized citizens who can voice their plural opinions for the matters of public interest.<sup>207</sup>

On the other hand, reducing “Militia” to organizations that involve “firearms,” as opposed to the infrastructure subtending speech, is both historically inaccurate and an unsustainable position for the anti-totalitarian purpose of the Second Amendment. It is historically inaccurate since there are many historical examples of Militia that did not involve “firearms.”<sup>208</sup> As Golden observes, “Historically, militia simply refers to a broad-based civic duty to protect one's fellow citizens from internal and external dangers and is not limited to activities involving firearms.”<sup>209</sup> Also, limiting the meaning of Militia is inadequate since firearm-related activities are only one of the areas that a totalitarian party might monopolize, while other areas such as health and food are similarly susceptible to “internal and external dangers.”<sup>210</sup>

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communities and the internal and external threats they faced.”); Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 *Buff. L. Rev.* 321, 321 (1992) (defining the right to Militia as the right to engage in “grassroots activity”).

<sup>206</sup> See *supra* note 36.

<sup>207</sup> See *supra* note 88.

<sup>208</sup> See *supra* note 200, at 1043 (For example, “Militias” used to manage events of infectious diseases.”).

<sup>209</sup> See *supra* note 200.

<sup>210</sup> See *supra* note 200; see e.g., Scheherazade S. Rehman, *National Security Challenges and the Global Financial Crisis*, 7 *FIU L. REV.* 119, 147 (2011) (discussing the relationship between financial crisis and security, noting “right-wing extremism is being fueled by the current financial and ensuing economic crisis and has resulted in a resurgence of radicalization and recruitment.”); Robert W. Seifert, *Home Sick: How Medical Debt Undermines Housing Security*, 51 *ST. LOUIS U. L.J.* 325, 342 (2007) (discussing the relationship between medical debt and security); Robert S. Lawrence et. al., *Poverty, Food Security, and the Right to Health*, 15 *GEO. J. ON POVERTY L. & POL’Y* 583, 591 (2008) (discussing the importance of food security as “as determined by nutritional adequacy, food safety and quality, and cultural acceptability along with the stability of the food supply and access as determined by environmental sustainability and social sustainability.”); Mariano-Florentino Cuellar, *“Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953*, 76 *U. CHI. L. REV.* 587 (2009) (describing how in 1931, the executive branch took responsibility for security broadly defined as “education, drug regulation, protection of the food supply, civil defense preparedness, supplying employees to war-related industries, facilitating the relocation of Japanese-Americans, antiprostitution enforcement, and biological weapons research.”); Ekundayo B. George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government Be Held Liable for Not Attaining This Goal?*, 27 *WM. & MARY ENVTL. L. & POL’Y REV.* 651 (2003) (discussing the relationship between “environmental protection” and security); Arthur Rizer, *The National Security Threat of Energy Dependence: A Call for A Nuclear Renaissance*, 2 *HARV. NAT’L SEC. J.* 193, 196 (2011) (discussing the relationship

In other words, “the security of a free state” requires a mechanism against any kind of monopolization of power which could endanger the freedom of people.<sup>211</sup> And a Militia is supposed to play that role when other official avenues fail:<sup>212</sup> when the official avenue for the protection of the national defense,<sup>213</sup> health, or food security is inadequate.<sup>214</sup> In this way, the notion of Militia is similar to the contemporary 501(c) regime.<sup>215</sup> In his recent study of the root of 501(c) laws, Chaffee notes that 501(c) laws were created to provide a collaborative mechanism for fulfilling goals that government cannot or ought not achieve on its own.<sup>216</sup>

Understanding 501(c) organizations as Militia is particularly helpful since it could resolve the current 501(c) regulatory crisis. Currently, the IRS cannot fully enforce 501(c) regulations, through which the enabling statute aims to limit the “political” activities of 501(c) organizations including “campaign intervention” and “lobbying.”<sup>217</sup> However, First Amendment challengers keep questioning 501(c) regulations by essentially arguing 501(c) regulations involve viewpoint discrimination.<sup>218</sup> Therefore, the government has a hard time distinguishing between a desired tax-

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between “energy dependency” and security).

<sup>211</sup> See *supra* note 7 at 86:

There was, second, the Hobbesian variety, according to which every individual concludes an agreement with the strictly secular authorities to insure his safety, for the protection of which he relinquishes all rights and powers. I shall call this the vertical version of the social contract. It is, of course, inconsistent with the American understanding of government, because it claims for the government a monopoly of power for the benefit of all subjects, who themselves have neither rights nor powers as long as their physical safety is guaranteed; the American republic, in contrast, rests on the power of the people—the old Roman *potestas in populo*— and power granted to the authorities is delegated power, which can be revoked.

<sup>212</sup> See *supra* note 200.

<sup>213</sup> See *supra* note 7, at 95 (“This happened in 1861, about thirty years after Tocqueville wrote these words, and it could happen again; the challenge of the Massachusetts legislature to the foreign policy of the administration is a clear warning.”).

<sup>214</sup> See *supra* note 210.

<sup>215</sup> 26 U.S.C.A. § 501 (providing tax-exemption for a list of non-profit organizations).

<sup>216</sup> Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*. 49 UC DAVIS L. REV (Forthcoming 2016) (“Collaboration theory suggests that charitable tax exempt nonprofit corporations are collaborations among the state governments, federal government, and individuals to promote the public good.”).

<sup>217</sup> See especially Donald B. Tobin, *The Internal Revenue Service and A Crisis of Confidence: A New Regulatory Approach for A New Era*, 16 Fla. Tax Rev. 429 (2014) (“The current structure regulating the political activity of tax-exempt organizations is unworkable, and the recent crisis resulting from the IRS’s use of partisan criteria to determine what applications for exempt status should come under further inquiry highlights the breakdown in the current regulatory regime.”)

<sup>218</sup> See *Freedom Path, Inc. v. Lerner*, No. 3:14-CV-1537-D, 2015 WL 770254, at 9 (N.D. Tex. Feb. 24, 2015) (Freedom Path alleging the IRS’ “viewpoint-based targeting of Freedom Path’s application for tax-exempt status for heightened scrutiny violated its constitutional rights”); *Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015) (alleging “the IRS maintains an ‘Israel Special Policy’ with respect to the Section 501(c)(3) applications of organizations

exempt “non-political activity” vs. undesired “political activity.”<sup>219</sup> Here, we again face with the same constitutional deadlock that frustrates Justice Kennedy’s attempts to respond to the “sickness” that money causes in politics.<sup>220</sup> The Second Amendment may guide us to answer the current 501(c) tax crisis.

Although the 501(c) tax-exempt challengers primarily rely on the First Amendment,<sup>221</sup> the Second Amendment could be a stronger constitutional challenge for expanding 501(c) tax exemption rights. The First Amendment challenges of 501(c) tax regulations are primarily based on discrimination between how the government treats different organizations.<sup>222</sup> Congress could remove all these challenges by dismantling 501(c) benefits altogether, which would make discrimination based challenges obsolete. Considering this vulnerability at the hands of Congressional leaders, it is, in fact, the Second Amendment that could provide a stronger case for maintaining 501(c) regulations.

Understanding 501(c) organizations as modern “Militias” would provide a constitutional justification for 501(c) tax exemption. An historicized reading of the Second Amendment would suggest that “Arms” are properties that citizens may donate to “Militias”<sup>223</sup> and that the government cannot confiscate a Militia’s

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whose stance on Israel differs from that of the Obama administration, and that such applications are subject to additional review procedures not otherwise applicable.”); Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RES. L. REV. 757, 783-84 (2012) (arguing 501(c) limitations on ‘lobbying’ are not content-neutral since “If legislative activity promotes social welfare, it is therefore charitable and charities are not and should not be limited in the amount of charitable activity in which they can engage. And finally, a public charity lobbying to further the interests of its constituents just seems charitable, particularly if the legislative activity furthers the charitable mission of the organization.”); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1316 (2007) (“opponents of the ban argue that 501(c)(3) organizations have a First Amendment right to intervene in a political campaign on behalf of a candidate, and that the Internal Revenue Code provision prohibiting intervention is a violation of that right.”); Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian’s Knot*, 34 VA. TAX REV. 1, 19 (2014) (“the fact of a prohibition perennially raises concerns under the First Amendment, particularly in the context of political activity by churches.”).

<sup>219</sup> See Ellen P. Aprill, *Why the Irs Should Want to Develop Rules Regarding Charities and Politics*, 62 Case W. Res. L. Rev. 643, 675 (2012) noting (“The IRS itself recognizes that the campaign intervention prohibition carries with it important First Amendment considerations. The report on the 2004 PACI, for example, stated that one of the challenges to enforcement and education was that “[t]he activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression.”); Political Activities Compliance Initiative Final Report, IRS, 1 (Feb. 24, 2006) [http://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.gov/pub/irs-tege/final_paci_report.pdf); see also Colinvaux *supra* note 218 (“One of the principal solutions advanced by commentators and the Service is focus on the definition of political activity. The lack of uniformity of a tax-law definition across the Code increases confusion for taxpayers, policymakers, and for the Service.”).

<sup>220</sup> See *supra* note 38.

<sup>221</sup> See *supra* notes 218 and 219.

<sup>222</sup> See *supra* note 218.

<sup>223</sup> See *supra* note 210, at 1033 (“It was not enough for militia members simply to show up

properties in the name of taxation.<sup>224</sup> The right of the people to organize for freedom as a “Militia” would have been meaningless if the government could regulate Militias with taxation mechanisms. Perhaps this implicit tax exemption right in the Second Amendment is the most significant right that the Second Amendment adds onto the First Amendment’s implicit freedom of association.<sup>225</sup> As Militias, all 501(c) organizations should have a right to tax exemption as long as they work toward a cause that promotes “the security of a free State.”<sup>226</sup>

It is here that the study of 501(c) regulations may help us to provide a practical rule for distinguishing between Arendtian public interest,<sup>227</sup> or what constitutes “the security of a free State”, and a for-profit cause. Removing all the “content-based” add-ons from 501(c) regulation, we face a clear content-neutral rule on what constitutes a nonprofit:

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. “[N]et earnings’ mean[s] here pure profits—that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital that he provides, whether or not that person exercises some control over the organization. It should be noted that a nonprofit organization is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus. It is only the distribution of the profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.”<sup>228</sup>

This content-neutral rule, based on restraint on distribution of income, could be the answer on how 501(c) tax-exemption should be regulated to both conform to: (I) the Second Amendment’s implicit tax exemption right;<sup>229</sup> and (II) the First Amendment’s content-neutrality requirement.<sup>230</sup> This definition also conforms to the archetypical notion of Militia as a firearm-based organization<sup>231</sup> since Militias

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for service, as one called to participate in the standing army, nor could they expect the government to provide them with arms (as some early colonial militias did, when no standing army existed); when called, militia members were expected to be prepared with the arms and supplies they needed to be effective.”); *see also id.* at 1027 (“colonies assessed special taxes to provide arms for the poor”).

<sup>224</sup> *Id.* (discussing tax-exemptions that Militias used to receive).

<sup>225</sup> *See supra* note 33.

<sup>226</sup> *See supra* note 210.

<sup>227</sup> *See supra* note 106.

<sup>228</sup> Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835 (1980) (analyzing what defines a nonprofit organization); *see supra* note 216 at 12 (quoting Hansmann’s theory of nonprofit).

<sup>229</sup> *See supra* notes 223 and 224.

<sup>230</sup> *See supra* note 218.

<sup>231</sup> *See supra* note 210.



would not distribute earnings to their members and compensation was limited to a reasonable level.<sup>232</sup> Thus, to provide a proper homecoming for the Second Amendment's Militia, we can simply define Militia as "a tax exempt right to organize for the public interest."

#### *IV: A JUST COMPENSATION MODEL FOR ARMS' LOST MOMENT*

*Every intelligent mind would rejoice in the establishment of an institution, under whose auspices the youth and vigor of the Constitution would be renewed with each successive generation, and which would appear to secure the great principles of freedom and happiness against the injuries of time and events.*<sup>233</sup>

-Henry Knox, the Secretary for the Department of War, 1786

The Takings Clause of the Fifth Amendment commands, "nor shall private property be taken for public use without just compensation."<sup>234</sup> The Supreme Court has held that "private property" does not only constitute "physical property," but also intangible properties such a private person's rights and benefits.<sup>235</sup> Madison approves of this understanding of "property" when he writes "as a man is said to have a right to his property, he may be equally said to have a property in his rights."<sup>236</sup> Similarly, the Supreme Court has held that a "taking" does not only constitute an

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<sup>232</sup> See *supra* note 210, at 1058 ("even those purportedly obligated to militia duty frequently were not required to fulfill it themselves: states with some form of mandatory duty had provisions allowing called militia members to pay compensation or find replacements rather than serve. Financial substitution for personal performance was perfectly acceptable.").

<sup>233</sup> CYNTHIA ANN WATSON, *U.S. MILITARY SERVICE: A REFERENCE HANDBOOK*, 182 (2007).

<sup>234</sup> U.S. CONST. amend. V.

<sup>235</sup> See *Penn Central Transport v. New York City*, 438 US 104, 124 (1978) (finding "trade secrets" as a property subjected to the Fifth Amendment); See especially Kaimipono David Wenger, *Slavery As A Takings Clause Violation*, 53 Am. U. L. Rev. 191, 192 (2003) (arguing slavery is a violation of the taking clause); See also Terry Hart, *Copyright and the Takings Clause*, COPYHYPE (Dec. 10, 2012), <http://www.copenhype.com/2012/12/copyright-and-the-takings-clause/> (arguing "taking clause" includes patents); but see Kenneth J. Sanney, *Balancing the Friction: How A Constitutional Challenge to Copyright Law Could Realign the Takings Clause of the Fifth Amendment*, 15 COLUM. SCI. & TECH. L. REV. 323 (2014) ("With the shift in the focus of the American economy from an agrarian economy to a manufacturing economy to a technology economy, there has been a corresponding shift in the socioeconomic importance of differing types of property from real property to personal property to digital property. Unfortunately, the legal response to this shift has unwisely tipped the balance of property rights in favor of society and away from the individual.").

<sup>236</sup> Haydn J. Richards, Jr., *Redefining the Second Amendment: The Antebellum Right to Keep and Bear Arms and Its Present Legacy*, 91 KY. L.J. 311 (2003).

actual taking of legal title to property, but also any government action that constructively impairs a private owner's "access" to their property.<sup>237</sup>

Considering, as discussed in the Part (II), that the federal government's development of atomic weapons constructively impaired people's access to their "Arms," the question remains as to how the government should justly compensate for such a "constructive taking." The "just compensation" entails the fair economic value of what the owner has lost, but not what the taker has gained.<sup>238</sup> How can we put an economic value on the ownership of a technology that would make all people effectively equal to each other and equal to the force of the state?<sup>239</sup> The "just compensation" of a taken property should enable the owner to purchase a similar property,<sup>240</sup> but in this case due to strong multilateral restrictions, no amount of money would enable people to purchase a nuclear weapon.<sup>241</sup> Therefore we need to find the best available alternative to compensate for the lost value of "Arms."

It is our suggestion that a "just compensation" for "Arms" could be an ongoing annual voucher, based on diverting a certain percentage the defense budget, that all people: (I) would receive equally; and (II) donate to the 501(c) organization of their choice.<sup>242</sup> The implementation of this compensation program would be close to just compensation for "Arms" in our time. First, this program would enhance people's ability to form or support the Militias of our time, i.e. 501(c) organizations. Also, this program would serve the power balancing goal of the Second Amendment by mediating the gap between the federal Army's resources and people's Militias.<sup>243</sup> Similarly, this program would serve the power balancing goal of the Second Amendment by mediating the gap in access to political speech between groups supported by economic elites and those representing other communities.<sup>244</sup>

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<sup>237</sup> See *Penn Central Transport*, 438 US 104, 124 (1978) (finding a "taking" when the government action's has impaired the value of a private owner's "trade secrets.")  
*Nollan v. Cal. Coastal Comm.*, 483 U.S. 825 (1987) (finding "taking" when a government's project limited the owners' access to beachfront from their property); Ashley Mas, *Eninent Domain Law and "Just" Compensation for Diminution of Access*, 36 CARDOZO L REV 369 (2014) (discussing the right to access as subjected to the taking clause).

<sup>238</sup> See *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).

<sup>239</sup> See *supra* Part (II) for discussion of "Arms."

<sup>240</sup> *United States v. Miller*, 317 U.S. 369, 375 (1943) (holding "just compensation" means fair market value).

<sup>241</sup> Transactions involving nuclear materials is a serious crime in the U.S. 18 U.S. Code § 831.

<sup>242</sup> It is beyond the scope of this paper to discuss what percentage of the defense budget should be dedicated to this program however it is worth noting that the total amount of lobbying spending in 2015 is only a small fraction of total defense spending in 2015. See Lobbying Database, OPENSECRETS (2016), <https://www.opensecrets.org/lobby> (showing total U.S. lobbying spending in 2015 was \$3.22 Billion); *but see* Military Spending in the United States, NATIONAL PRIORITIES PROJECT, <https://www.nationalpriorities.org/campaigns/military-spending-united-states/> (2016) ("In fiscal year 2015, military spending is projected to account for 54 percent of all federal discretionary spending, a total of \$598.5 billion.").

<sup>243</sup> See *Supra* Part (II) of this paper for discussion of balancing goal of the Second Amendment; *see also* Military Spending in the United States *supra* not 242.

<sup>244</sup> See *supra* note 37. A major problem with the problem that Justice Kennedy identifies, about pro-incarceration lobbying, is that anti-incarceration communities do not have equal

Also, this paper's suggested program could resolve a major problem of the current lobbying and campaign finance crisis.<sup>245</sup> As Gerken and Tausanovitch note, the current problem with money in politics is not just corruption but the privatization of an important public function: providing policy analysis and contextualized information for politicians and legislators.<sup>246</sup> For this reason, politicians heavily rely on lobbyists, not just for campaign contributions, but because politicians vitally need the information that lobbyists provide to them in order to perform their daily policymaking duties.<sup>247</sup> In contrast, many European countries publicly fund 501(c)-like think-tanks in order to provide information and analysis for their politicians.<sup>248</sup> Gerken and Tausanovitch suggest that we should "level-up" people's ability to participate in politics through public financing rather than leveling down the wealthy community's participation in politics through contribution limits.<sup>249</sup> This paper's "just compensation" suggestion would provide a constitutional mechanism for this public funding solution.

Moreover, this paper's suggested program could also resolve the funding crisis that 501(c) organizations are currently facing. Currently, nonprofits are sandwiched between two coercive funding forces. On one hand, government agencies try to regulate 501(c) organizations indirectly by imposing conditions on government-sponsored grants that are available for nonprofits.<sup>250</sup> On the other hand, for-profit corporations use conditional funding and donations as a mechanism to influence

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resources to fight (lobby) back. *See supra* note 40.

<sup>245</sup> *See* Heather K. Gerken, *Alex Tausanovitch, A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 *ELECTION L.J.* 75 (2014).

<sup>246</sup> *Id.* at 76 ("Private actors provide most of the funding for campaigns, and they subsidize much of the information-gathering process for legislatures. Private actors, in short, are carrying out a public function even if they have not been deputized to do so.").

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 78 ("in many [European countries] also rely heavily on government-funded think tanks. Even more interestingly for our purposes, a number of these government-funded think tanks (Germany and the Netherlands are the leaders on this front) are explicitly tied to the political parties and provide both substantive and political advice to party members. One scholar has termed the government-funded, party-affiliated think tanks "the dominant model in Europe.").

<sup>249</sup> *Id.* at 76 ("the paper proposes a 'leveling-up' approach to lobbying, one that uses public funds to reduce legislators' susceptibility to the disproportionate influence of private monies. This 'public finance' analog for lobbying satisfies existing constitutional constraints while mitigating some of the inequities in our current system.").

<sup>250</sup> *See e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (holding the "requirement that organizations receiving funding under the Act have a policy expressly opposing prostitution, by compelling as a condition of federal funding the affirmation of a belief that by its nature could not be confined within the scope of the Government program, violated First Amendment free speech protections."); *see also* Max J. Andrucki, and Elder S. Glen, *Locating the state in queer space: GLBT non-profit organizations in Vermont, USA*, 8 *Social & Cultural Geography* 89 (2007) (demonstrating because of regulatory coercion fears certain queer groups fear registration as 501(c)3 nonprofits, despite the tax advantages).

nonprofits.<sup>251</sup> A condition-free public funding system, as employed in this paper's suggested program, would help nonprofits secure resources without jeopardizing their independence. In this way, the elimination of the fiscal precarity and geographical unevenness of voluntary sector service provision will ensure the fulfilment of the material pre-conditions for equitable access to the discursive space of politics. But first, we need a comprehensive public conversation that moves beyond gun rights arguments to consider what "just compensation" could be for the true value Arms. We hope this paper's suggestion will contribute to initiating this conversation.

### *Conclusion*

*The chief fallacy is to believe that Truth is a result which comes at the end of a thought-process. Truth, on the contrary, is always the beginning of thought; thinking is always result-less.*<sup>252</sup>

- Hannah Arendt

The interpretation of Militia as "501(c)" and Arms as a "code" for adequate infrastructure of speech offers a threshold, where the Second Amendment's homecoming and the First Amendment's homesickness may safely meet.<sup>253</sup> However, a knowledge that we can never return to the exact same conditions of home as we left it is implied in homesickness.<sup>254</sup> The development of an atomic weapon and other weapons of mass destruction make it impossible for citizens to be technologically equal to the federal government, a condition that the Framers enjoyed.<sup>255</sup> This article's "taking" proposal provides a way to move on from this constitutional deadlock.<sup>256</sup> Notably, adoption of this proposal would make it possible for the Supreme Court to apply the Arendt-inspired not-for-profit theory of

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<sup>251</sup> See especially, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (2007) (a collection of essays about the influence of for-profit corporation over non-profits); Gray GC, *Victoria Bishop Kendzia, Organizational Self-Censorship: Corporate Sponsorship, Nonprofit Funding, and the Educational Experience*, 46(2) CANADIAN REVIEW OF SOCIOLOGY/REVUE 161 (May 2009) ("By examining self-censorship, we reveal that nonprofit organizations may instead redefine their own goals in order to appeal to private sector funders.").

<sup>252</sup> HANNAH ARENDT, BETWEEN FRIENDS: THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY, 1949-1975, 24 (1995).

<sup>253</sup> See Part (II) and Part (III) of this paper.

<sup>254</sup> John Hughes, *Memory and Home*, THE NEW CRITIC (2006), <http://www.ias.uwa.edu.au/new-critic/three/memoryandhome> ("What we feel homesick for, that is, is not a place itself, but the unrecoverable moment of leaving that place, and the fact that it is never the same place to which we return. Nostalgia, then, has little to do with homesickness for a place; it's neither a longing for a lost place or a lost time, but is, rather, a homelessness in time. And the more one travels, as the exiled Russian poet Joseph Brodsky once wrote, the more complex one's sense of nostalgia becomes.").

<sup>255</sup> See *supra* notes 11-13 and 164.

<sup>256</sup> See Part (IV) of this paper.

the First Amendment without the need to overturn precedents such as *Citizens United*.<sup>257</sup> The Court can simply argue that the new support system for non-profit corporations implies a paradigm shift in the concept of corporation, and any contracting precedent is based on the old paradigm of corporation.

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<sup>257</sup> See Part (I) of this paper.