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Cannibalizing the Constitution: On Terrorism, the Second Amendment, and the Threat to Civil Liberties

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CANNIBALIZING THE CONSTITUTION: ON TERRORISM, THE SECOND AMENDMENT, AND THE THREAT TO CIVIL LIBERTIES

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This article explores the links between internet radicalization, access to weapons, and the current threat from terrorists who have been radicalized online. The prevalence of domestic terrorism, domestic hate groups, and online incitement and radicalization have led to considerable focus on the tension between counterterrorism efforts and the First Amendment. Many scholars recommend rethinking the extent of First Amendment protection, as well as Fourth, Fifth, and Sixth Amendment protections, and some judges appear to be listening. Yet the Second Amendment has avoided this consideration, despite the fact that easy access to weapons is a necessary ingredient for the level of threat posed by online incitement. This article clarifies the way these civil liberties interact to create the threat, suggesting that pro-democracy rights such as protections on speech and privacy should not bear all the burden of compromise for the sake of protection from terrorism.

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INTRODUCTION

At the time of this writing, the nation is still wrapping its collective mind around the attack on the Capitol on January 6, 2021. In March, FBI Director Christopher Wray named the attack domestic terrorism,¹ but the attackers hardly fit stereotypical images of terrorists. This is not only because they are white and our stereotypes suggest terrorists are “others,” but because the individuals who stormed the Capitol are generally unconnected to formal terrorist organizations or even hate groups. They are older, they come from all areas of the country, and a surprising number of them are employed in white-collar jobs.² The lack of connection to hate groups or terrorist organizations suggests these attackers were not formally radicalized or introduced to the type of thorough indoctrination typically seen among terrorists.³ It suggests, terrifyingly, that the process of radicalization may be far easier than we thought.

The shocking frequency of attempted and actual attacks by violent extremists supports this conclusion. In fall of 2020, fourteen men were charged with planning to kidnap Michigan Governor Gretchen Whitmer, in a series of plots the Governor and state prosecutors have described as “domestic terrorism.”⁴ Mere days after news of this plot broke, another man

¹ See Joan E. Greve, *FBI Chief Calls Capitol Attack ‘Domestic Terrorism’ and Defends US Intelligence*, GUARDIAN (Mar. 2, 2021, 12:31 PM), <https://www.theguardian.com/us-news/2021/mar/02/fbi-christopher-wray-capitol-attack-domestic-terrorism> [https://perma.cc/9LNW-XBS3].

² See Robert A. Pape & Kevin Ruby, *The Capitol Rioters Aren’t Like Other Extremists*, ATLANTIC (Feb. 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/> [https://perma.cc/4W6H-GK9X].

³ See discussion *infra* Section I.A.

⁴ David Eggert & Ed White, *Michigan Governor: ‘Domestic Terrorists’ Targeted Her*, ASSOCIATED PRESS (Oct. 9, 2020), <https://apnews.com/article/gretchen-whitmer-vacation-homes-archive-michigan-9eef9d8cf48542a455a7dbfe102a54c9> [https://perma.cc/9LSP-D9CV]; John Flesher & Anna Liz Nichols, *Another Suspect Charged in Alleged Michigan Kidnap Plot*, ASSOCIATED PRESS (Oct. 15, 2020), <https://apnews.com/article/michigan-gretchen->

was arrested for threatening to kidnap and kill the Mayor of Wichita, Kansas.⁵ That man was reportedly acting based on his own beliefs that the Mayor's mask mandate amounted to "tyranny."⁶ In the same week, a neo-Nazi pleaded guilty to federal hate crimes charges in connection to his plot to bomb a synagogue in Colorado,⁷ and twenty-one members of a white supremacist gang in Utah were arrested on drug and firearms charges.⁸

These arrests highlight the threat from white supremacists and right-wing extremists described by the FBI and the Office of the Director of National Intelligence (ODNI),⁹ but they also highlight three less remarked-upon characteristics of the contemporary extremist threat. The first aspect is the way in which the contemporary threat is largely reliant on online connections to recruit and radicalize potential members. Both the state and federal complaints against the defendants in the Whitmer case refer to the online recruitment strategies of the relevant militia,¹⁰ while the Holzer (neo-Nazi) complaint describes the use of online communication to obtain

whitmer-lansing-46e0a8b30dd62d82f2a9845d2f5bea38[<https://perma.cc/S84E-7YJ2>]. While eight members have been charged under state domestic terrorism statutes, six have been charged federally with conspiracy to commit kidnapping. Affidavit in Support of Complaint, *People v. Higgins*, No. 202924FY3 (Mich. Dist. Ct. Oct. 13, 2020), available at https://www.michigan.gov/documents/ag/affidavit_-_public_facing_-_HIGGINS_705198_7.pdf [<https://perma.cc/3RAJ-GQ82>] [hereinafter Michigan Affidavit]; Complaint, *United States v. Fox*, No. 1:20-mj-416 (W.D. Mich. Oct. 6, 2020), <https://www.justice.gov/usao-wdmi/press-release/file/1326161/download> [<https://perma.cc/26CP-ZCTB>] [hereinafter Criminal Complaint].

⁵ Timothy Bella, *Wichita Man Arrested for Allegedly Threatening to Kidnap and Kill Mayor Over City's Mask Mandate*, *Police Say*, WASH. POST (Oct. 19, 2020, 6:55 AM), <https://www.washingtonpost.com/nation/2020/10/19/wichita-mayor-kidnapping-threat-masks-coronavirus/> [<https://perma.cc/N8VP-HRKS>].

⁶ *Id.*

⁷ Colleen Slevin, *Man Described as Neo-Nazi Pleads Guilty in Synagogue Plot*, ASSOCIATED PRESS (Oct. 15, 2020), <https://apnews.com/article/race-and-ethnicity-hate-crimes-colorado-crime-bc3751ea976973c2b3952acba25cd287> [<https://perma.cc/8DK8-7CTL>].

⁸ Scott Neuman, *21 Alleged White Supremacists Indicted in Utah on Federal Drug and Firearms Charges*, NPR (Oct. 16, 2020, 6:11 PM), <https://www.npr.org/2020/10/16/924727639/21-alleged-white-supremacists-indicted-in-utah-on-federal-drug-and-firearms-char> [<https://perma.cc/88PQ-UBPE>].

⁹ Zolan Kanno-Youngs, *F.B.I. Director Warns of Russian Interference and White Supremacist Violence*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/politics/fbi-russia.html> [<https://perma.cc/L7X6-FB8S>]; OFF. OF THE DIR. OF NAT'L INTEL., DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 (2021), <https://int.nyt.com/data/documenttools/biden-administration-domestic-extremist-report-march-2021/ab0bbdf0a8034aea/full.pdf> [<https://perma.cc/Z628-K5RP>] [hereinafter ODNI].

¹⁰ Michigan Affidavit, *supra* note 4, at 1; Criminal Complaint, *supra* note 4, at 4-5.

resources to attack the synagogue.¹¹ A recent threat assessment by New Jersey's Department of Homeland Security highlighted the use of online platforms to radicalize and incite predisposed audiences, and a March 2021 ODNI report suggests the same.¹²

A second important aspect of the current threat is the frantic activity of domestic militias, which are increasing in both in groups and in membership.¹³ The ODNI report specifically points to elevated threats from violent extremists associated with militias and the likely continued growth of those militias.¹⁴ A third, associated aspect of the contemporary extremist threat is its pure political and nationalist strain—extremists appear to genuinely believe that they are combating tyranny.¹⁵ This political and nationalist activity directly confronts core First Amendment, Second Amendment, and Fourth Amendment principles.¹⁶ The increasing presence of online radicalization has led some to call for limitations on internet speech,¹⁷ while others call for new statutes and investigatory authorities in the area of domestic terrorism,¹⁸ and still more call for limitations on Second Amendment rights.¹⁹ Each of these suggestions poses a serious threat to traditional understandings of our constitutional rights and the balance between liberty and security.

¹¹ See Complaint at 4–6, *United States v. Holzer*, No. 1:19-mj-00246 (D. Colo. Nov. 2, 2019), <https://www.justice.gov/opa/press-release/file/1215121/download> [<https://perma.cc/G9VF-NTVF>] [hereinafter *Holzer Complaint*].

¹² N.J. OFF. OF HOMELAND SEC. AND PREPAREDNESS, 2020–2021 SUPPLEMENTAL THREAT ASSESSMENT: THE CONVERGENCE OF COVID-19, NATIONWIDE CIVIL UNREST, AND THE UPCOMING PRESIDENTIAL ELECTION 5 (2020), <https://static1.squarespace.com/static/54d79f88e4b0db3478a04405/t/5f6a57939d312b03d3c67a7f/1600804757127/NJOHSP+2020-2021+Supplemental+Threat+Assessment.pdf> [<https://perma.cc/AU2C-73VN>]; ODNI, *supra* note 9, at 3.

¹³ Patrik Jonsson & Noah Robertson, *With Militias on the Rise, States Boost Vigilance*, CS MONITOR (Oct. 15, 2020), <https://www.csmonitor.com/USA/Politics/2020/1015/With-militias-on-the-rise-states-boost-vigilance> [<https://perma.cc/2GPT-XYW7>].

¹⁴ ODNI, *supra* note 9, at 2.

¹⁵ See Michigan Affidavit, *supra* note 4; Criminal Complaint, *supra* note 4; Holzer Complaint, *supra* note 11; Pape & Ruby, *supra* note 2.

¹⁶ See discussion *infra* Part II.

¹⁷ See *infra* notes 45, 63–64 and accompanying text.

¹⁸ Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [<https://perma.cc/ZS8A-DFVR>]; Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 259 (2017).

¹⁹ See Paolo G. Corso, *Gun Control to Major Tom: An Analysis of Failed Gun Regulations and the Terrorist Watchlist*, 12 U. MASS. L. REV. 376, 405–09 (2017).

This article argues that the current threat of terrorism is created not just by online radicalization and speech, but also, and in combination with, Second Amendment protections. The internet, *in reliance on* the availability of weapons, has drastically changed the level of threat posed by extremists.²⁰ Focus on the importance of Second Amendment protections has encouraged conditions requiring First, Fourth, Fifth, and Sixth Amendment protections to deteriorate. Our Second Amendment rights are, therefore, steadily devouring the rest of our rights.

This article begins with a review of the modern state of terrorism, to give context to both the threats and opportunities for law enforcement that are often ignored by purely legal arguments. It then moves to a description of the First Amendment protection of advocacy of government overthrow, the boundaries of incitement, and the ways in which terrorism and online recruitment are causing scholars and judges to rethink these questions. Next, the article offers a brief overview of these same concerns in the areas of Fourth, Fifth, and Sixth Amendment rights. It then proceeds to the question of Second Amendment rights, in particular the right, claimed by modern militias, to form a militia in preparation for war with a tyrannical government, and the way access to weapons affects the prior questions of rights.

I. THE NEW AGE OF TERRORISM—FASTER, SMALLER THREATS

Recent developments in the nature and strategies of terrorism have led some to argue that we are seeing the beginning of a new wave of terrorism, that of individual, online-inspired terrorists.²¹ These online inspired attackers are self-directed, meaning they act without specific instruction from a representative of a terrorist organization; they tend to use smaller attacks, but are radicalized more quickly, with less effort from terrorist organizations. These differences have obvious repercussions for the imminence and likelihood of attacks in response to varying levels of speech encouraging violence.

²⁰ See discussion *infra* Part III.

²¹ See, e.g., David Rapoport, *The Four Waves of Modern Terror: International Dimensions and Consequences*, in AN INTERNATIONAL HISTORY OF TERRORISM: WESTERN AND NON-WESTERN EXPERIENCES 282–311 (J. M. Hanhimäki & B. Blumenau eds., 2013); Martin J. Gallagher, *The 2016 ‘Lone Wolf’ Tsunami – Is Rapoport’s ‘Religious Wave’ Ending?*, 10 J. STRATEGIC SEC. 60, 62–64 (2017); Jerrold Post, *Terrorism and Right-Wing Extremism: The Changing Face of Terrorism and Political Violence in the 21st Century: The Virtual Community of Hatred*, 65 INT’L J. GRP. PSYCHOTHERAPY 243, 248–52 (2015). See generally JEFFREY SIMON, LONE WOLF TERRORISM: UNDERSTANDING THE GROWING THREAT (2013) (restating Rapoport’s theory of four waves of terrorism and suggesting lone wolf terrorism as a fifth wave).

A. WHAT MAKES TERRORISM (REALLY) DANGEROUS

There is extensive literature on what makes some terrorist organizations more successful in killing people.²² A small attack that scares and injures the public but kills very few people requires an organization or attacker with very different capabilities and structure from “spectacular” attacks that can kill dozens or hundreds of people. And an attack against an unguarded target like a park may require very different capabilities and structure from an attack against soldiers or protected buildings.²³ Scholars have suggested that the lethality of terrorist organizations may be affected by their ideology (that may be more or less permissive or encouraging of indiscriminate violence);²⁴ resources (providing larger weapons, space to train, recruits to utilize in attacks, and experts to help train recruits);²⁵ and organizational structure (which allows for superior training, and education regarding strategy as well as possible targets and weaknesses).²⁶

The difficulty motivating and training individuals to launch successful attacks plays into each of the factors mentioned above.²⁷ Charismatic leaders

²² See, e.g., Victor Asal & R. Karl Rethemeyer, *The Nature of the Beast: Organizational Structures and the Lethality of Terrorist Attacks*, 70 J. POL. 437, 438 (2008); Kim Cragin & Sara A. Daly, *The Dynamic Terrorist Threat: An Assessment of Group Motivations and Capabilities in a Changing World*, RAND CORP. (2004), https://www.rand.org/pubs/monograph_reports/MR1782.html [<https://perma.cc/B79V-BK2H>].

²³ See, e.g., Cragin and Daly, *supra* note 22, at 14–17.

²⁴ Ideology is important for purposes of unifying and mobilizing recruits, and enabling them to step outside of the normal social constraints on killing people. See, e.g., Martha Crenshaw, *The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice*, in ORIGINS OF TERRORISM 7–24 (Walter Reich ed., 1998); Albert Bandura, *Mechanisms of Moral Disengagement*, in ORIGINS OF TERRORISM 161–90 (Walter Reich ed., 1998); SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS 118–34 (1994).

²⁵ David Boyns & James David Ballard, *Developing a Sociological Theory for the Empirical Understanding of Terrorism*, 35 AM. SOCIO. 5, 14 (2004); Asal & Rethemeyer, *supra* note 22, at 439–40, 444–45; MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 140 (2011).

²⁶ Asal & Rethemeyer, *supra* note 22, at 438–41; Cragin & Daly, *supra* note 22, at 26, 37, 42; Brian J. Phillips, *Deadlier in the US? On Lone Wolves, Terrorist Groups, and Attack Lethality*, 29 TERRORISM & POL. VIOLENCE 533, 539 (2017).

²⁷ See Thomas Hegghammer, *Terrorist Recruitment and Radicalization in Saudi Arabia*, 13 MIDDLE E. POL'Y 39, 49–53 (2006) (detailing that though most QAP recruits were top down, even bottom-up recruits to Afghanistan required a process of socialization, including peer pressure, before joining a terrorist group); *The Use of the Internet by Islamic Extremists: Hearing Before the H. Permanent Select Comm. On Intel.*, 109th Cong. 15 (2004) (statement of Bruce Hoffman), https://www.rand.org/content/dam/rand/pubs/testimonies/2006/RAND_CT262-1.pdf [<https://perma.cc/S5HL-TSDR>]; JEROME BJELOPERA, AMERICAN JIHADIST TERRORISM: CONFRONTING A COMPLEX THREAT 13–14 (2013); RANDY BORUM, PSYCHOLOGY OF TERRORISM 57 (2007) (giving a general overview of theories and studies of

may be important in order to attract and retain recruits, as well as to motivate them to violate strongly enforced social norms.²⁸ To facilitate this process, terrorist organizations need strong and safe lines of communication and publicity in order to reach their recruits and potential recruits.²⁹ Recruits are likely to need either to travel to a safe area where they may be trained or to communicate with these specific leaders in order to reach a level where they are willing and able to launch attacks.³⁰

Radicalizing a recruit to be able to engage in violence is difficult, typically requiring up to six years of effort.³¹ The process of radicalization heavily implicates speech rights, as terrorists have traditionally been motivated by a sense of moral outrage in response to abusive government policies.³² But the requirements above have often protected states from terrorism by giving clear areas where they can disrupt training or identify potential recruits.³³ In contrast, the modern terrorist threat is more broadly dispersed than the traditional “most lethal” terrorism discussed above, making disruption more difficult and smaller attacks more likely.³⁴

the process of radicalization). See generally SCOTT GERWEHR & SARA DALY, *AL-QAIDA: TERRORIST SELECTION AND RECRUITMENT* (2006) (outlining the processes and methods of terrorist recruitment), <https://www.rand.org/pubs/reprints/RP1214.html> [<https://perma.cc/VVZ4-6VNW>]; MARC SAGEMAN, *UNDERSTANDING TERROR NETWORKS* (2004) (describing the steps of radicalization and the importance of a long process of building relationships and feelings of personal responsibility).

²⁸ PETER R. NEUMANN & BROOKE ROGERS, *RECRUITMENT AND MOBILISATION FOR ISLAMIST MILITANT MOVEMENTS IN EUROPE* 56–65 (2008); SAGEMAN, *supra* note 27.

²⁹ Cragin & Daly, *supra* note 22, at 37, 42; BRUCE HOFFMAN, *INSIDE TERRORISM* 131–36 (2006).

³⁰ Cragin & Daly, *supra* note 22, at xiii–xiv, 45–50; Asal & Rethemeyer, *supra* note 22, at 446–47; SAGEMAN, *supra* note 25, at 139–41.

³¹ ALISON SMITH, *HOW RADICALIZATION TO TERRORISM OCCURS IN THE UNITED STATES: WHAT RESEARCH SPONSORED BY THE NATIONAL INSTITUTE OF JUSTICE TELLS US* 6 (2018), <https://www.ncjrs.gov/pdffiles1/nij/250171.pdf> [<https://perma.cc/97YN-D5BU>]; BORUM, *supra* note 27, at 27 (generally describing the process of radicalization, and detailing the general agreement that “terrorists do not become terrorists over night.”).

³² SAGEMAN, *supra* note 25, at 65–91.

³³ See generally PETER BERGEN AND BRUCE HOFFMAN, *ASSESSING THE TERRORIST THREAT: A REPORT OF THE BIPARTISAN POLICY CENTER’S NATIONAL SECURITY PREPAREDNESS GROUP* (2010) (describing the threat as coming primarily from recruits who travel overseas to train), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/NSPG-Final-Threat-Assessment.pdf> [<https://perma.cc/X4QE-9ZGH>].

³⁴ See, e.g., Ramon Spaaij, *The Enigma of Lone Wolf Terrorism: An Assessment*, 33 *STUD. CONFLICT & TERRORISM* 854, 872 (2010); Brent Smith, Jeff Gruenewald, Paxton Roberts & Kelly R. Dampousse, *The Emergence of Lone Wolf Terrorism: Patterns of Behavior and Implications for Intervention*, in *TERRORISM AND COUNTERTERRORISM TODAY* 104 (Mathieu Deflem ed., 2015); BERGEN & HOFFMAN, *supra* note 33, at 31.

B. MODERN TERRORISM—QUANTITY OVER QUALITY

Sometime around 2010, the goals and structures of (many) terrorist organizations began to change.³⁵ Rather than attempting spectacular or military attacks, terrorist organizations began to encourage individuals to engage in lower level, self-directed attacks.³⁶ These attacks rarely rely on bombs.³⁷ Instead, self-directed attacks tend to use (relatively) low lethality weapons such as guns, knives, and vehicles.³⁸ While these low-level plots may be less lethal individually, they are more difficult to detect and prevent as they can be completed without the communication or travel that might once have alerted authorities.³⁹

Self-directed attackers seem more predisposed to violence than traditional, organizationally-led terrorists.⁴⁰ Scholars have observed that self-directed attackers also seem more likely to be responding to personal grievances and/or alienation by latching onto the terrorist ideology, rather than having to be thoroughly indoctrinated and radicalized by a strong ideology.⁴¹ Some researchers have suggested self-directed terrorists need no

³⁵ See *infra* notes 36–37.

³⁶ JYTTE KLAUSEN, THE ROLE OF SOCIAL NETWORKS IN THE EVOLUTION OF AL QAEDA-INSPIRED VIOLENT EXTREMISM IN THE UNITED STATES, 1990–2015 5–7, 15–16 (2016); Jytte Klausen, *Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq*, 38 *STUD. CONFLICT & TERRORISM* 1–22 (2015); BJELOPERA, *supra* note 27, at 8–9; SAGEMAN, *supra* note 25, at 71, 133–46; Scott Stewart, *Jihadism: The Grassroots Paradox*, STRATFOR (Mar. 18, 2010 8:59 AM), <https://worldview.stratfor.com/article/jihadism-grassroots-paradox> [<https://perma.cc/CJ4R-T3T9>]; MARK S. HAMM & RAMÓN SPAAIJ, THE AGE OF LONE WOLF TERRORISM 35–58 (2017); Glenn E. Robinson, *The Four Waves of Global Jihad, 1979–2017*, 24 *MIDDLE E. POL'Y* 70, 72, 83–84 (2017) (describing the current wave of global jihadist terrorism as the fourth wave, consisting of an online network urging like-minded individuals to small scale, self-directed attacks); SMITH, *supra* note 31, at 6, 17.

³⁷ KLAUSEN, *supra* note 36, at 15; HAMM & SPAAIJ, *supra* note 36, at 35–58; BJELOPERA, *supra* note 27, at 8–9; see also Petter Nesser, *Single Actor Terrorism: Scope, Characteristics and Explanations*, 6 *PERSPS. ON TERRORISM* 61, 64 (2012).

³⁸ KLAUSEN, *supra* note 36, at 15; HAMM & SPAAIJ, *supra* note 36, at 35–58; BJELOPERA, *supra* note 27, at 8–9.

³⁹ Nesser, *supra* note 37, at 64; BJELOPERA, *supra* note 27, at 9–10 (describing the call for smaller scale attacks and noting that these less sophisticated attacks pose problems for law enforcement).

⁴⁰ Studies of traditional terrorists have often contradicted efforts to suggest that traditional, group-focused terrorism is a product of mental illness, abuse, or poor family life. SAGEMAN, *supra* note 25, at 62. But these online-encouraged, self-directed attackers are, so far, understudied, as up until 2010 their appearance among terror attacks was rare. Clark McCauley, Sophia Moskalenko & Benjamin Van Son, *Characteristics of Lone-Wolf Violent Offenders: A Comparison of Assassins and School Attackers*, 7 *PERSPS. ON TERRORISM* 4, 7 (2013).

⁴¹ McCauley, Moskalenko & Van Son, *supra* note 40, at 15–17; Spaaij, *supra* note 34, at 861–62; Nesser, *supra* note 37, at 61–73; CHARLES A. EBY, THE NATION THAT CRIED LONE

formal ideology at all, but rather that an extreme response to personal grievances is all that is required, and a unique, personal ideology may become mixed up in those grievances, in part, as an excuse.⁴² Sudden loss or strain (such as family disruption, or job loss) is hypothesized to make such terrorism more likely by removing an individual's connection to society, reducing the pull of social norms, and thereby reducing the individual's "restraint in reacting to grievance with violence."⁴³

The movement to small-scale, self-directed attacks was a conscious strategy among terror organizations, facilitated by the ability to radicalize individuals over the internet.⁴⁴ It relies on the online community's own knowledge about local vulnerabilities and the attackers' own capabilities, using whatever weapons they have available.⁴⁵ Self-directed terrorists often have a history of firearms use and/or training,⁴⁶ cutting the time needed for training as well as the travel that might be associated with it. The internet has also cut the time of radicalization from an average of five or six years before 2010, to less than two years since 2010.⁴⁷ This type of terrorism is as prevalent and successful as it is, in large part, because the internet makes it possible. Terrorism recruitment has flourished online.⁴⁸ In response, U.S. scholars and judges are rethinking their protective stance towards online speech, as is described in the next Part.

II. EATING AWAY AT THE ANTI-TYRANNICAL BILL OF RIGHTS

It may seem redundant to state that many aspects of the Bill of Rights protect against tyrannical government. But, in the context of the pressure some rights place on others and the typical anti-tyranny language of Second Amendment literature, it is worth briefly restating these fundamental

WOLF: A DATA-DRIVEN ANALYSIS OF INDIVIDUAL TERRORISTS IN THE UNITED STATES SINCE 9/11 at 12-16 (2012), <https://calhoun.nps.edu/handle/10945/6789> [<https://perma.cc/FEN6-JD9R>].

⁴² McCauley, Moskalenko & Van Son, *supra* note 40, at 8; BORUM, *supra* note 27, at 26; Spaaij, *supra* note 34, at 861-62; Eby, *supra* note 41, at 13, 15-16.

⁴³ McCauley, Moskalenko & Van Son, *supra* note 40, at 17.

⁴⁴ KLAUSEN, *supra* note 36, at 3, 33-34.

⁴⁵ BJELOPERA, *supra* note 27, at 8.

⁴⁶ McCauley, Moskalenko & Van Son, *supra* note 40, at 10, 14-15; Noémie Bouhana, Emily Corner, Paul Gill & Bart Schuurman, *Background and Preparatory Behaviours of Right-Wing Extremist Lone Actors: A Comparative Study*, 12 PERSPS. ON TERRORISM 150, 158 (2018).

⁴⁷ SMITH, *supra* note 31, at 6.

⁴⁸ See Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605, 608-13 (2017); J.M. Berger, *Tailored Online Interventions: The Islamic State's Recruitment Strategy*, 8 CTC SENTINEL 19, 19 (2015).

purposes and noting how scholarly and judicial attitudes toward civil liberties have changed.

A. THE FIRST AMENDMENT

An underlying function of the First Amendment is to protect against tyrannical government control of thought and debate.⁴⁹ If people are to control their government, they must be able to make determinations about political questions without the state interfering.⁵⁰ Moreover, this protection must extend even to radical speech, or speech that advocates the overthrow of government, because whether a government is tyrannical and deserving of being overthrown is an inherently political and core political issue.⁵¹ Yet, even given this background, the First Amendment originally was understood to be far less protective than currently employed.⁵² In the early twentieth century the Supreme Court was still willing to accept the notion that Congress could limit speech that posed a real risk of serious harm (whether that harm was a decrease in men willing to sign up to serve in the army, active attempts to overthrow the government, or other criminal activity).⁵³

⁴⁹ See, e.g., GEOFFREY STONE, *PERILOUS TIMES* 7–8 (2004) (discussing the importance of free speech for democracy in order to protect against government officials “manipulat[ing] public discourse in order to preserve their authority.”).

⁵⁰ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2362–63, 2366–69 (2000); see also 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, 173 (2012) (citations omitted) (“A liberal democracy requires that its citizens be free to speak their minds, criticize the government, and join forces with like-minded others in those pursuits. The ability to associate and speak with domestic organizations is therefore at the very core of the First Amendment’s democratic purpose It is virtually impossible to imagine meaningful self-government if the state can prohibit speech in coordination with domestic political groups it disfavors.”); STONE, *supra* note 49, at 7–8.

⁵¹ STONE, *supra* note 49, at 5 (“The paradigm violation of the First Amendment is a law forbidding citizens to criticize their government’s policies”); *id.* at 532 (“Insofar as government silences dissent . . . it . . . undermines the very essence of self-government.”); Cole, *supra* note 50, at 173; see also Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 385 (2017) (“[T]he early twentieth-century Supreme Court recognized that advocacy of unlawfulness has social value, even if its decisions did not always reflect that. Without some type of meaningful constitutional scrutiny, government regulation of such expression could realistically suppress or chill what we might recognize as pure expressions of ideology.”).

⁵² See Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg After Charlottesville*, 5 U. PA. J. L. & PUB. AFF. 189, 196–97 (2020).

⁵³ Wilson & Kiper, *supra* note 52, at 197–200.

The more protective, “modern” view of First Amendment protection of dissent is enshrined in *Brandenburg v. Ohio*.⁵⁴ There, the Court expressly stated that the harm that might result from speech “[j]ustif[ying]’ the commission of violent acts” as part of advocacy for criminal syndicalism was inadequately imminent danger to support a prohibition on that speech.⁵⁵ The *Brandenburg* decision moved away from a general calculation of overall risk,⁵⁶ and toward a requirement that speech be *intended* and *likely* to cause *imminent* lawless action—an extremely limiting interpretation.⁵⁷ Some have suggested *Brandenburg*’s imminence requirement is a response to the principle that courts should allow speech whenever there is an opportunity for counterspeech that could remedy the harms of the speech—in other words, that governments can and should rely on *responses* to speech in order to limit its harmful effects, rather than relying on censorship (when the harm is not imminent, so that there is time for responses to occur).⁵⁸

But in recent cases, courts have found incitement regardless of the chronological imminence of the threat. In *People v. Rubin*,⁵⁹ the defendant, at a press conference, held up five hundred dollars and said he would give them to any person who “kills, maims, or seriously injures a member of the American Nazi Party [at a rally to be held five weeks later].”⁶⁰ The California Court of Appeals found that five weeks lead time qualified as “imminent.” The court’s logic seems to fit well with an overall risk based calculation, relying on relative certainty and severity of harm rather than pure speed.⁶¹ *People v. Bohmer* added a consideration of the receptiveness of the audience, which would make harm more likely.⁶²

⁵⁴ JoAnne Sweeney, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 593 (2019); Wilson & Kiper, *supra* note 52, at 202; David S. Han, *Brandenburg and Terrorism in the Digital Age*, 85 BROOK. L. REV. 85, 85 (2019).

⁵⁵ *Brandenburg v. Ohio*, 395 U.S. 445, 447–49 (1969).

⁵⁶ Adopted in *Dennis v. United States*, 341 U.S. 494, 542 (1951).

⁵⁷ This movement was cemented in two following cases: *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886–87 (1982). The Court has not decided another incitement case since.

⁵⁸ See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000); Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1357 (1997).

⁵⁹ *People v. Rubin*, 158 Cal. Rptr. 488 (Ct. App. 1979).

⁶⁰ *Id.* at 488.

⁶¹ *Id.* at 492. The court stated “the imminence of an event is related to its nature. A total eclipse of the sun next year is said to be imminent. An April shower thirty minutes away is not.” *Id.*

⁶² See *People v. Bohmer*, 120 Cal. Rptr. 136, 144–45 (Ct. App. 1975).

In each of these ways—receptiveness of audience, opportunities for counterspeech, and likelihood of harm—the calculation of risk changed in the age of the internet. As an example, in *United States v. White*, the defendant’s online statement that his target (and others) deserved assassination along with his online publication of identifying information about his target was deemed sufficiently “imminent” to qualify as solicitation to murder.⁶³ The Seventh Circuit’s logic was that “a reasonable jury could conclude [the post on the website that tailored to Neo-Nazis] was specifically designed to reach as many white supremacist readers as possible so that *someone* could kill or harm Juror A.”⁶⁴

United States v. White demonstrates the unimportance of immediacy in the face of inevitability. The internet allows for immediate, unfiltered communication,⁶⁵ but at the same time, much of the concerning language to be found on the internet will be “‘heard’ well after [it is] ‘spoken’,” and is sent out to unknown readers who may react in any number of ways.⁶⁶ This lack of imminence and directed speech arguably heightens, rather than lessening the probability of the risk occurring, as it may reach a broader audience, or one better primed to act on the speech.⁶⁷

The connection between internet chat groups and action is clarified in *Sines v. Kessler*,⁶⁸ the civil suit brought by counterprotestors at the Unite the Right rally in Charlottesville, Virginia, where Heather Heyer (a counterprotestor) was killed. Plaintiffs in that suit point to conversations which included incendiary rhetoric on an internet platform hosting many white supremacist groups, including the use of racial slurs, exhortations to violence, and promises of violence.⁶⁹ None of this speech was specifically directed at any victim or particular known listener. But some specific violent tactics mentioned were eventually used at the rally, including the use of

⁶³ *United States v. White*, 610 F.3d 956, 1015 (7th Cir. 2010); *United States v. White*, 698 F.3d 1005, 1016 (7th Cir. 2012).

⁶⁴ *White*, 698 F.3d at 1016.

⁶⁵ Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 8 UCLA J. L. & TECH. 1, 4 (2004); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 706–07 (2009).

⁶⁶ Sweeney, *supra* note 54, at 598 (quoting John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428, 450–51 (2002)); *see also* J. Remy Green, *Digitizing Brandenburg: Common Law Drift Toward a Causal Theory of Imminence*, 69 SYRACUSE L. REV. 351, 360–63, 385 (2019); Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 160 (2011); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 667, 669 (2017).

⁶⁷ *See* Chen, *supra* note 51, at 393; CASS R. SUNSTEIN, REPUBLIC 2.0 69 (2007).

⁶⁸ *Sines v. Kessler*, 324 F. Supp. 3d 765, 773 (W.D. Va. 2018).

⁶⁹ *Id.* at 777.

pepper spray⁷⁰ and running over protestors in crosswalks (a practice which not only killed Heather Heyer, but was repeated at least 104 times at Black Lives Matter protests between May and September of 2020).⁷¹

The knowledge that the internet has become a primary means of terrorist radicalization and recruitment⁷² adds to the awareness that the threat posed by online speech is far more than hypothetical. On this basis, many scholars have begun discussing the need to update the *Brandenburg* standard to be less speech protective,⁷³ while others suggest removing certain online speech platforms entirely.⁷⁴ The nature of internet communications makes this a particularly difficult discussion, however. Even as the internet has added to the dangers of radical speech, it has become an essential part of public dissemination and absorption about news and therefore political knowledge.⁷⁵ The dangers of chilling or infringing on that speech are significant.

B. CRIMINAL PROCEDURE AS ANTI-TYRANNY

Minds reach most often for the First Amendment when considering the broad democratic ideals described above—the formation of public opinion, and the formation of oppositional groups to governmental policies. But in fact, the Fourth Amendment, and all of the criminal justice-related Amendments, have partial roots in these anti-tyrannical ideas.⁷⁶

⁷⁰ *Id.* at 777, 778, 785, 789, 791, 796, 803.

⁷¹ Grace Hauck, *Cars Have Hit Demonstrators 104 Times Since George Floyd Protests Began*, USA TODAY (July 9, 2020), <https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/> [<https://perma.cc/A59U-RJUA>].

⁷² See Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 13–16 (2017); Karen J. Greenberg, *Counter-Radicalization via the Internet*, 668 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 166–67 (2016); see also Paul Gill, Emily Corner, Maura Conway, Amy Thornton, Mia Bloom & John Horgan, *Terrorist Use of the Internet by the Numbers: Quantifying Behaviors, Patterns, and Processes*, 16 CRIMINOLOGY & PUB. POL’Y 99, 107–111 (2017); J.M. Berger, *supra* note 48 at 19; Rahma Sugihartati, Bagong Suyanto & Mun’im Sirry, *The Shift From Consumers to Prosumers: Susceptibility of Young Adults to Radicalization*, 9 SOC. SCIS. 40, 40 (2020).

⁷³ Han, *supra* note 54, at 109; Sweeney, *supra* note 54, at 637; Green, *supra* note 66, at 354, 385; Lidsky, *supra* note 66, at 164.

⁷⁴ Greenberg, *supra* note 72, at 175.

⁷⁵ VanLandingham, *supra* note 72, at 9, 12–13, 22.

⁷⁶ See, e.g., U.S. CONST. amend. V, VI, VIII; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 867–71 (1994) (discussing generally the origins of the Sixth Amendment and the Fourth Amendment); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the New Fifth Amendment and the Old Voluntariness Test*, 65 MICH. L. REV. 59, 78 (1966) (describing the protections against compulsion and torture as protection against tyranny).

The Fourth Amendment's prohibition on general warrants is a direct response to the use of such warrants "to enforce libel laws and suppress dissent in England."⁷⁷ English licensing and copyright laws were used to heavily influence the political materials generally available to readers.⁷⁸ Criticism of the king in particular was prosecuted as seditious libel, not only subject to general warrants in order to search for any and all relevant material but also subject to interrogation in the Star Chamber.⁷⁹ The Star Chamber was infamous not only for the brutality of the interrogation therein,⁸⁰ but also its secrecy,⁸¹ and its failure to require that the King show cause for detainees' detention.⁸² This history of political suppression looms large in American foundations of due process, the Fifth Amendment right against self-incrimination (in part as response to the coercive interrogations famously conducted in the Star Chamber), the right to a public trial, and the prohibition on the suspension of habeas corpus.⁸³ These connections are recognized in Supreme Court doctrine as well.⁸⁴

Again, the internet has fundamentally changed the nature of these protections. First, the internet and big data have overwhelmingly changed the type of information governments can gather on citizens, and therefore its

⁷⁷ Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. NAT'L SEC. L. & POL'Y 247, 250 (2016); see also Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 63, 69, 78 (1996) (arguing that the threat to political speech is one reason general warrants were prohibited when writs of assistance were allowed).

⁷⁸ Price, *supra* note 77, at 251.

⁷⁹ *Id.*

⁸⁰ Price cites William Prynne, a prominent Puritan, as among the better known instances of excessive punishment for seditious libel. *Id.* Prynne was convicted twice of publishing libelous works against the state and the king. As a part of his punishment, his ears were cut off in the pillories at Westminster and Cheapside and his forehead was branded with an S.L., for "Seditious Libeller." See generally Emory Washburn, *The Court of Star Chamber*, 12 AM. L. REV. 727, 747-48 (1877).

⁸¹ Thomas S. Schattenfield, *The Right to a Public Trial*, 7 CASE W. RES. L. REV. 78, 80 (1955).

⁸² Jared Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1190 (2007).

⁸³ *Id.*; "[I]t is through the agency of public trials that the freedoms most evident to the average individual, those of speech, press, religion and assembly, are enforced." Schattenfield, *supra* note 81, at 78. Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807 at 807-809 (2002) (describing the Supreme Court's use of the Star Chamber as a foil, against which the importance of civil liberties are educed)

⁸⁴ Riebli, *supra* note 83, at 828. "Some of those who came to these shores were Puritans who had known the hated oath ex officio used both by Star Chamber and the High Commission. They had known the great rebellion of Lilburn, Cartwright and others against those instruments of oppression." *Id.* (quoting *Ullman v. United States*, 350 U.S. 422, 446 (1956)).

opportunities to prosecute dissenters.⁸⁵ The use of the internet is increasingly a necessity, rather than a choice, and the Third Party doctrine arguably opens the door wide to general surveillance by government.⁸⁶ Nearly all conversations that might once have been conducted in private, over (normally) unrecorded phone lines, or on burnable or shreddable paper, are now conducted on stored data in the form of e-mail, chat, or social media.⁸⁷ This exponentially increases the ability of government to gather data, records, and substantive conversations from individuals.⁸⁸

The same online characteristics that complicate the incitement calculus (*described supra* Section II.A.) create a heightened desire to analyze all available internet data.⁸⁹ Indeed, the interest in preventing terrorist attacks has led to government pressure not only on current Fourth Amendment doctrine, but on technological advancement that might make surveillance impossible, such as total encryption, or the automatic deletion of messages.⁹⁰ Not only does the government want the ability to search existing material, the government also wants the ability to prevent individuals from deleting or encrypting that material (as individuals might once have burned letters in order to prevent their being read).⁹¹

⁸⁵ Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089–1102 (2002); Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 473, 494 (1999); Chris J. Chasin, *The Revolution Will Be Tweeted, but the Tweets Will Be Subpoenaed: Reimagining Fourth Amendment Privacy to Protect Associational Anonymity*, 2014 U. ILL. J. L. TECH. & POL'Y 1, 9–10 (2014).

⁸⁶ See generally Price, *supra* note 77 (describing the steady creep of the third party doctrine to threaten Fourth Amendment privacy rights in the digital age); Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 553, 558 (2017).

⁸⁷ Nicole Friess, *When Rummaging Goes Digital: Fourth Amendment Particularity and Stored E-Mail Surveillance*, 90 NEB. L. REV. 971, 972 (2012).

⁸⁸ See generally Price, *supra* note 77; Donohue, *supra* note 86, at 535.

⁸⁹ Solove, *supra* note 85, at 1084.

⁹⁰ See Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 FORDHAM L. REV. 203, 209 (2018); STAFF OF H. JUD. COMM. & H. ENERGY & COM. COMM., 114TH CONG., ENCRYPTION WORKING GROUP YEAR-END REP. (2016), <https://publicintelligence.net/us-houseencryptionworkinggroup-2016/> [<https://perma.cc/8AUS-K5XT>]; STAFF OF H. HOMELAND SEC. COMM. MAJORITY, 114TH CONG., GOING DARK, GOING FORWARD: A PRIMER ON THE ENCRYPTION DEBATE (2016), https://irp.fas.org/congress/2016_rpt/hsc-encrypt.pdf [<https://perma.cc/2WHT-JBXP>]; Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks on Encryption at the United States Naval Academy (Oct. 10, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-encryption-united-states-naval> [<https://perma.cc/K6HQ-8FSR>] (“Encrypted communications that cannot be intercepted and locked devices that cannot be opened are law-free zones that permit criminals and terrorists to operate without detection.”).

⁹¹ Sacharoff, *supra* note 90, at 206–10 (describing law enforcement frustration with encryption).

But as the government's abilities to oversee online communications increase, so does the risk of chilling speech.⁹² The government's interest in the online activities of political activists has already arisen as a topic of concern.⁹³ And while scholars disagree as to whether the increased oversight is positive or negative, they agree that court doctrine currently allows surveillance to be more possible and prevalent, and privacy is rapidly decreasing.⁹⁴

III. THE WITCHES BREW—THE INTERNET, ALGORITHMS, PREDISPOSITION, AND GUNS

It is true that the internet has changed the risks that are posed by radical speech, and the reasons for that are outlined below. But if this threat gives reason to infringe on the rights and liberties that are foundational to our government, we should respond in a manner that best protects democratic self-determination. The internet is not the only changing factor in this calculus, and our civil liberties might be better protected with a fuller view of the danger. Section III.B. outlines the important role of weapons to our new state of threat.

A. MAKING IT EASY—THE ESSENTIAL DIFFERENCES OF INTERNET SPEECH

Scholars and government officials suggesting we should modify First Amendment protections in light of modern terrorism and the internet have focused on recruitment and radicalization.⁹⁵ There are obvious reasons for this. Successful terrorist groups traditionally have required a steady stream of recruits, and a process of radicalization that relies heavily on political speech.⁹⁶ Perhaps more specifically, the internet has changed the dynamic of terrorist speech and recruitment, particularly regarding the immediacy of the threat and opportunities to respond to it.

⁹² Solove, *supra* note 85, at 1084–85.

⁹³ Michael German & Sara Robinson, *Wrong Priorities on Fighting Terrorism*, BRENNAN CTR. FOR JUST. 2 (Oct. 31, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf [<https://perma.cc/BLD4-PFQM>].

⁹⁴ See, e.g., Price, *supra* note 77; Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SEC. J. 53, 96–111 (2017); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 10-13 (2006) (arguing that civil liberties, including rights against surveillance, are constitutionally limited in the face of serious threat).

⁹⁵ Rachel E. VanLandingham, *Words We Fear: Burning Tweets & the Politics of Incitement*, 85 BROOK. L. REV. 37, 38, 40 (2019).

⁹⁶ See *supra* notes 28 and 45 and accompanying text.

Consider, first, the audience that can be reached via chatrooms and social media. Even before the threat of terrorism reached general consciousness in American society, commentators warned that the “virtually unlimited” reach of the internet posed a threat in the form of encouragement to commit terrorism.⁹⁷ Classic First Amendment doctrine is based on the use of leaflets⁹⁸ and speeches as part of protests or political meetings.⁹⁹ This inherently limits the reach of the speech.¹⁰⁰ Had the *Brandenburg* speech been televised nationally on the most highly watched news programs of 1969, it *might* have been seen (once) by some 50 million viewers.¹⁰¹ In contrast, studies suggest that any of the top ten websites may be viewed between 80 and 200 million times.¹⁰²

Perhaps more importantly, the 50 million viewers that would have seen the *Brandenburg* speech in this hypothetical scenario would be a cross section of the American public, not likely to be primed for a response to incendiary material.¹⁰³ Books, leaflets, and even the choice to view a particular news program require some effort or luck for the message of the materials to reach someone who will be convinced by it. In contrast, social media communications infamously produce a “bubble” or “rabbit hole” effect.¹⁰⁴ On the internet, algorithms attract and then pigeonhole likeminded

⁹⁷ Bruce Braun, Dane Drobny & Douglas C. Gessner, *WWW.Commercial_Terrorism.Com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. LEGIS. 159, 159 (2000).

⁹⁸ *Schenck v. United States*, 249 U.S. 47, 49 (1919); *Abrams v. United States*, 250 U.S. 616, 617 (1919).

⁹⁹ *Dennis v. United States*, 341 U.S. 494, 516 (1951) (upholding conviction for the “teaching and advocacy of” overthrowing the government); *Whitney v. California*, 274 U.S. 357, 359–60 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

¹⁰⁰ *Abrams* involved the use of all of 5000 leaflets, 250 U.S. at 618, while *Brandenburg* involved a speech before a few dozen men. 395 U.S. at 445–46.

¹⁰¹ In 1969, the population of the United States was approximately 200 million. *Place Explorer: United States*, DATA COMMONS, <https://datacommons.org/place/country/USA?topic=Demographics> [<https://perma.cc/8A4W-NDK2>]. Approximately 25% of the population watched the nightly news. John Robinson, *The Audience for National TV News Programs*, 35 PUB. OP. Q. 403, 403–05 (1971).

¹⁰² *Facebook’s Algorithm: A Major Threat to Public Health*, AVAAZ.ORG (Aug. 19, 2020), https://secure.avaaz.org/campaign/en/facebook_threat_health/ [<https://perma.cc/P5BD-HF6H>].

¹⁰³ Robinson, *supra* note 101, at 403–05.

¹⁰⁴ Derek O’Callaghan, Derek Greene, Maura Conway, Joe Carthy & Pádraig Cunningham, *Down the (White) Rabbit Hole: The Extreme Right and Online Recommender Systems*, 33 SOC. SCI. COMP. REV. 459, 467–74 (2015) (describing the online mechanisms that create rabbit holes); Mark S. Kende, *Social Media, the First Amendment, and Democratic Dysfunction in the Trump Era*, 68 DRAKE L. REV. 273, 282–83 (2020).

viewers into echo chambers of self-encouragement, meaning the individuals watching radicalizing material are also precisely the individuals most likely to respond to such material.¹⁰⁵ Considering the profile of the “new” terrorist described above the sensitivity of readers and risk posed by rabbit holes become even more apparent.¹⁰⁶

Because rabbit holes both attract vulnerable viewers and encourage those viewers to continue viewing websites representing *similar* political views (and similar or increasing levels of extremism), they also foreclose opportunities for counterspeech, thereby hamstringing the non-oppressive responses relied upon in First Amendment doctrine. While organizations such as Google, CAIR, and the United Nations have tried to create counter-radicalization programs online (displaying links to material offering counter-narratives in response to suggestive search terms), these programs rely on a user to choose to explore them.¹⁰⁷ In contrast, because online communities of hate are comprised of individuals who have already chosen to view material propagated by the organization, and are interested in using their own resources to support its cause, online extremists need only sit back and wait for algorithms to bring the most predisposed readers to their doorstep.¹⁰⁸ Moreover, the use of bots to amplify ads and messaging wildly increases the fishing lines out in the world to catch such predisposed individuals and reel them in to activation.¹⁰⁹

The difference between broadcast media and the internet is further apparent in the element of editing, which undermines the power of expert terrorist recruiters. Recruitment is a delicate process that requires expertise and effort.¹¹⁰ Editing by the news media interferes with the direct transmission of recruitment and incendiary materials.¹¹¹ The internet allows

¹⁰⁵ Greenberg, *supra* note 72, at 166–67; O’Callaghan, Greene, Conway, Carthy & Cunningham, *supra* note 104, at 460, 474 (describing the purpose of algorithms as reaching receptive audiences); Kende, *supra* note 104, at 282–84.

¹⁰⁶ Lidsky, *supra* note 66, at 149–50; Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1575 (2007); Janet Morahan-Martin & Phyllis Schumacher, *Loneliness and Social Uses of the Internet*, 19 COMPUTS. HUM. BEHAV. 659, 660 (2003).

¹⁰⁷ Greenberg, *supra* note 72, at 170–71.

¹⁰⁸ Lydsy, *supra* note 66, at 49 (“the individual who conducts an Internet search for ‘white supremacy’ will often be searching for confirmation of his own prejudices and may be seeking support for his own violent plans or projects.”); Sweeney, *supra* note 54, at 602.

¹⁰⁹ Greenberg, *supra* note 72, at 170–71.

¹¹⁰ Tim Stevens, *Regulating the “Dark Web”: How a Two-Fold Approach Can Tackle Peer-to-Peer Radicalisation*, 154 RUSI J. 28, 28 (2009); Kurt Braddock, *WEAPONIZED WORDS: THE STRATEGIC ROLE OF PERSUASION IN VIOLENT RADICALIZATION AND COUNTER-RADICALIZATION* 20–22 (2020).

¹¹¹ Stevens, *supra* note 110, at 28.

expert recruiters complete control over content and editing, facilitating their efforts to produce the most convincing calls to violence. News editing interferes with this activity (for instance, the *Brandenburg* speech was broadcast only in parts). Each of these factors adds to the other to make successful incitement far more likely online than via television or print media, supporting the argument that the danger from internet communications is so great that immediacy itself is not necessary.¹¹² But why are the individuals recruited in this fashion actually successful in achieving their violent ends? This issue is less well addressed—the immediate availability of predisposed and pretrained potential terrorists.

B. THE SECOND AMENDMENT

While First and Fourth Amendment doctrines have bent in the face of the threat of terrorism (and scholars suggest they may bend still further) the Second Amendment's strength has only increased in recent years since incorporation of the right to bear arms was only accomplished in 2008, in *District of Columbia v. Heller*.¹¹³ In *Heller*, the Court determined (5–4) that the Second Amendment enshrined an individual right to self-defense (applied against the federal government), although it could be regulated in accordance with long-standing prohibitions on the ownership and carrying of firearms.¹¹⁴ Two years later the ruling was extended to apply against the states in *McDonald v. City of Chicago*.¹¹⁵

McDonald came down in 2010, nine years after the September 11th, 2001, terrorist attacks on the United States and well into the arguments over limitations on the First and Fourth Amendments.¹¹⁶ Yet, amazingly, terrorism is almost completely ignored in this opinion.¹¹⁷ Additionally, in direct contrast to the First and Fourth Amendments, the Second Amendment is rarely analyzed in relation to the terrorist threat, by courts or legal scholars.¹¹⁸

¹¹² Green, *supra* note 66, at 353–54, 380–82; *see also supra* notes 64–70 and accompanying text.

¹¹³ 554 U.S. 570 (2008).

¹¹⁴ *Id.* at 626–27.

¹¹⁵ 561 U.S. 742, 791 (2010).

¹¹⁶ *See, e.g.,* Margulies, *supra* note 65 (already addressing civil liberties concerns relating to terrorism and the internet in 2004).

¹¹⁷ White supremacist terrorism in the form of the Ku Klux Klan and other such organizations is mentioned in Justice Thomas' concurrence as a justification for expanding gun ownership—for Black victims to defend themselves. *McDonald*, 561 U.S. at 809–10.

¹¹⁸ A search of court opinions on Westlaw shows sixty-three cases that reference *Heller* and terrorism (terrorism, terrorist, terror), out of the over 1,100 Second Amendment cases in the lower courts. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1434 (2018)

Of the cases that do address terrorism and the Second Amendment, in most the reference to terrorism comes up in an entirely separate section from the question of the Second Amendment claim. Few cases reference terrorism as a reason to protect the Second Amendment as an individual right: for instance, discussing the use of weapons for self-defense against white supremacists.¹¹⁹ Importantly, none reference terrorism as a reason to modify Second Amendment protections, as is discussed in First Amendment cases.

The connection between the terrorist threat and guns received some attention in relation to efforts to limit access to guns for those on the terrorism watchlist, but this proposal was eventually dropped.¹²⁰ Yet, the terrorist watchlist is not entirely ignored in gun sales—whether an individual is on the watchlist is part of the FBI’s National Instant Criminal Background Check System (NICS).¹²¹ If the individual is on the watchlist, gun sales may be held up to three days while the FBI searches for some other reason to disallow the sale (merely being on the watchlist is not sufficient reason, and this was the failed proposal from 2016).¹²² However, in 2015, 223 of 244 gun transactions involving individuals on the terrorist watchlist were allowed to proceed.¹²³ The popular press and policy institutes have occasionally focused on the issue, in the wake of mass shootings,¹²⁴ but no proposals to strengthen limitations on availability of firearms have succeeded thus far.

(examining success rates in Second Amendment cases and finding over 1,000 such cases; in this analysis the words “terrorism” and “terrorist” do not appear even once).

¹¹⁹ *Heller* discusses the prior ruling *United States v. Cruikshank*, 92 U.S. 542 (1876), “vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms.” 554 U.S. at 617. *Heller* also discusses the Second Amendment as a right to defend against tyranny, but ignores the implication of a war of terrorism. *McDonald* more directly addresses the history of *Cruikshank*. 561 U.S. at 752–53. *Duncan v. Becerra* devotes a significant portion of its opinion to Second Amendment rights as a defense against white supremacist terrorism and hate crimes. 970 F.3d 1133, 1166–70 (2020).

¹²⁰ Corso, *supra* note 19, at 379.

¹²¹ Letter from Diana Maurer, Dir., Homeland Sec. and Just. Issues to Senator Dianne Feinstein (Mar. 7, 2016), https://www.feinstein.senate.gov/public/_cache/files/f/5/f53c4195-430d-4d8d-acde-1ec53e97d0fa/8B0B32645FB7DD74C275F4E0A9B06F96.gao-nics-watchlist-2016-update.pdf [<https://perma.cc/3HDX-R5QQ>]; Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

¹²² Maurer, *supra* note 121; Benjamin Bahney, *How U.S. Gun Laws Allow Mass Shooters to Slip Through*, RAND BLOG (Nov. 15, 2018), <https://www.rand.org/blog/2018/11/how-us-gun-laws-allow-mass-shooters-to-slip-through.html> [<https://perma.cc/9JS7-LYLX>].

¹²³ Maurer, *supra* note 121, at 2.

¹²⁴ John Cassidy, *Gun Laws and Terrorism: An American Nightmare*, NEW YORKER (June 13, 2016) <https://www.newyorker.com/news/john-cassidy/gun-laws-and-terrorism-an-american-nightmare> [<https://perma.cc/8FLE-BCES>]; Bahney, *supra* note 122; Corso, *supra* note 19, at 379.

The absence of a discussion about terrorism in arguments about Second Amendment rights is only more striking in the context of an apparent belief among gun rights advocates that the Constitution enshrines a right to individual insurgency against the United States Government.¹²⁵ The extreme end of the gun rights movement includes the notion that gun registration requirements impede political dissent, and that “unrestricted access to guns of every kind is an essential element of freedom.”¹²⁶ Of course, if one is to defend against tyranny and fight off the United States government, one must have access to bombs and surface-to-air missiles, let alone automatic firearms.¹²⁷ This logic has propelled, protected, and legitimated the militia movement, and it has done so even as rights protecting peaceful dissent have been compromised in the face of the threat of terrorism.

Insurrection is intimately linked to terrorism. While scholars may argue about whether all insurrectionists are terrorists,¹²⁸ terrorism has often been used as a tactic of insurrectionists.¹²⁹ When we imagine a war of broadly dispersed insurgent citizens’ militias against a tyrannical United States government, what most of us imagine is a war of terrorism. Yet, even while arguably blessing the rights of individuals to take up arms against the government in this manner, *United States v. Heller* never addresses the threat of terrorism nor the question of whether the Constitution is a suicide pact, as is addressed in First, Fourth, and Fifth Amendment discussions.¹³⁰

¹²⁵ See generally JOSHUA HORWITZ & CASEY ANDERSON, GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA (2009) (describing the possibility of anti-tyrannical insurgency as a primary motivation in Second Amendment advocacy).

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 14, 17, 68.

¹²⁸ Depending on the targets of their violence and its purposes. See, e.g., John Mueller & Mark Stewart, *Conflating Terrorism and Insurgency*, LAWFARE (Feb. 28, 2016, 10:05 AM) <https://www.lawfareblog.com/conflating-terrorism-and-insurgency> [https://perma.cc/A362-FBR8]; HOFFMAN, *supra* note 29, at 1–65 (describing arguments over the definitions of terrorism, and the use of terrorism as a response to empire); THOMAS HEGGHAMMER, JIHAD IN SAUDI ARABIA: VIOLENCE AND PAN-ISLAMISM SINCE 1979 5–6 (2010); Ariel Merari, *Terrorism as a Strategy of Insurgency*, 5 TERRORISM & POL. VIOLENCE 213, 213 (1993).

¹²⁹ Hegghammer, *supra* note 128; Merari, *supra* note 128.

¹³⁰ The phrase “the Constitution is not a suicide pact” was first written by Justice Robert Jackson, dissenting in *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949), as a warning that civil liberties must be tempered with “practical reason” because, if they were protected too rigidly, the government would be destroyed (in this case, an extremist, pro-Nazi speaker had incited a riot). The phrase became popular in the wake of the terror attacks of 2001 as a way of framing the ongoing debates regarding the needs of national security and First, Fourth, and Fifth Amendment limitations. See, e.g., POSNER, *supra* note 94; David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003).

This extreme view of the Second Amendment does not only increase the threat of terrorism by arguably protecting terrorism itself, it also contributes to the threat of terrorism in the same ways the internet has—by making terrorism more likely and more easily accomplished.

C. THE FINAL INGREDIENT—GUNS, THE SECOND AMENDMENT,
AND THE STATE OF THE THREAT

Terrorism is hard. Causing large amounts of death is not easy to achieve, and in fact, more than half of terror attacks result in no fatalities.¹³¹ Making bombs, evading security, and choosing appropriate targets requires complicated skills and analysis.¹³² Theorists have suggested that this is the reason that terrorist recruits rarely reflect the types of social or economic hardships that many instinctively believe would make individuals more susceptible to a terrorist ideology.¹³³ Instead, these theorists argue, the recruitment pool is more widely reflective of society because terrorist organizations are particularly interested in recruits who will bring valuable skills to the organization, such as engineering, medical, and legal skills, as well as the required levels of strategic thinking.¹³⁴ As the FBI has noted, terrorist organizations have specifically recognized these opportunities, and have focused extra recruitment efforts on people with firearms expertise, for instance, recruiting among law enforcement and the military.¹³⁵

In traditional, group-oriented terrorism, aspiring terrorists might be rejected from training camps because they lack the abilities the organization

¹³¹ Gary LaFree & Laura Dugan, *Global Terrorism and the Deadliest Groups Since 2001*, in PEACE AND CONFLICT 2016 69 (David Backer, Paul Huth & Ravinder Bhavnani eds., 2016).

¹³² Efraim Benmelech & Claude Berrebi, *Human Capital and the Productivity of Suicide Bombers*, 21 J. ECON. PERSPECTIVES 223, 224–25 (2007); Ethan Bueno De Mesquita, *The Quality of Terror*, 49 AM. J. POL. SCI. 515, 515 (2005).

¹³³ De Mesquita, *supra* note 132 at 515.

¹³⁴ De Mesquita, *supra* note 132 at 51; Benmelech & Berrebi *supra* note 132 at 223–25, 234–36; *see also* Michele Zanini & Sean Edwards, *The Networking of Terror in the Information Age*, in NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY 32, 37 (John Arquilla & David Ronfeldt eds., 2001) (discussing the specific recruitment of individuals with computer skills in order to facilitate more internet recruitment and communication).

¹³⁵ FBI COUNTERTERRORISM DIV., *supra* note 108, at 3. *See also* Daniel Koehler, *A Threat from Within? Exploring the Link Between the Extreme Right and the Military*, ICCT POL'Y BRIEF (Sept. 2019), <https://icct.nl/app/uploads/2019/09/ICCT-Koehler-A-Threat-from-Within-Exploring-the-Link-between-the-Extreme-Right-and-the-Military.pdf> [<https://perma.cc/RUM8-CX8Q>].

desires.¹³⁶ The inadequacies of aspiring terrorists are exemplified by the plots that never materialized, such as Jose Padilla's plot to create material for a dirty bomb by placing uranium "in a bucket . . . and swinging it around [his] head as fast as possible for 45 minutes,"¹³⁷ or the failures of Richard Reid and Omar Farouk Abdulmutallab whose sweat apparently rendered their bombs unusable.¹³⁸ James Cromitie, who after agreeing to an undercover informant's cajoling to bomb a synagogue in the Bronx, New York, was incapable of plugging the bomb in to make it operable, and forgot to set the timer on one bomb when setting it in front of the synagogue.¹³⁹ The need for training, and the likelihood that aspiring terrorists would fail, has made it possible for the United States to use less invasive methods to protect itself—disrupting efforts to travel overseas, or heightening surveillance of people who engage in such travel.¹⁴⁰

But modern terrorists have managed to avoid this complication by strategically choosing quantity over quality of attacks.¹⁴¹ By focusing on activating predisposed loners, terrorist organizations have increased the speed of the process, while decreasing the opportunities to interfere before

¹³⁶ Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 192 (2013); Thomas Hegghammer, *The Recruiter's Dilemma: Signaling and Rebel Recruitment Tactics*, 50 J. PEACE RES. 3, 13 (2013) ("A common misperception about extremist groups is that they enlist any willing person they can put their hands on. In reality, recruiting is very dangerous. The recruiter can be captured when approaching strangers, and the whole organization will suffer if the latest recruit turns out to be an informant. Groups must therefore be careful and selective in their admissions procedures.").

¹³⁷ S. REP. NO. 113-288, at 226 (2014) (internal quotations omitted).

¹³⁸ Ian Sample, *Cargo Plane Bomb Plot: What Is PETN?*, GUARDIAN (Nov. 1, 2010), <http://www.theguardian.com/world/2010/nov/01/cargo-bomb-plot-petn-explosive> [<https://perma.cc/XG8E-Q7X7>]; Nicole Hensley, *Underwear Bomb Aboard 2009 Flight Failed Because it was Sullied by Suicide Bomber*, N.Y. DAILY NEWS (July 25, 2014), <http://www.nydailynews.com/news/national/underwear-bomb-aboard-2009-flight-failed-soiled-article-1.1880193> [<https://perma.cc/6JSH-H7HH>]; Francesca Laguardia, *Imagining the Unimaginable: Torture and the Criminal Law*, 46 COLUM. HUM. RTS. L. REV. 48, 67–68 (2015).

¹³⁹ Laguardia, *supra* note 138, at 195.

¹⁴⁰ See, e.g., *Annual Threat Assessment of the U.S. Intelligence Community: Hearing Before the H. Permanent Select Comm. on Intel.*, 111th Cong. 35 (2010) (statement of Dennis C. Blair, Director of National Intelligence) ("It is clear . . . that a sophisticated, organized threat from radicalized individuals and groups in the United States comparable to traditional homegrown threats in other countries has not emerged. Indeed, the elements most conducive to the development of an entrenched terrorist presence—leadership, a secure operating environment, trained operatives, and a well-developed support base—have been lacking to date in the United States or, where they have been nascent, have been interrupted by law enforcement authorities.").

¹⁴¹ See *supra* notes 35 & 36 and accompanying text.

attacks are realized.¹⁴² These attacks rely primarily on firearms, and they are successful, in the United States. As one scholar noted,

“[T]errorist attacks involving firearms are less lethal than non-gun attacks in [other countries] . . . but more lethal than non-gun attacks in the United States. Perhaps this result is driven by the availability of high-capacity firearms in the United States, or the firearms skills of the typical American compared with the skills of those in other countries.”¹⁴³

Where impulsiveness and a “loner” mentality might have interfered with willingness to train or work to develop necessary strategic skills in traditional terrorist groups, generalized knowledge about and access to firearms erases this hurdle in the United States. The ability to avoid having to train recruits further reduces the need for recruits to travel, and thereby cuts off opportunities to detect threats.¹⁴⁴ Lax gun laws, loose registration policies, and large numbers of gun purchases prevent the government from using gun purchases as a warning system.

In sum, this modern terrorism strategy works *because* weapons and people experienced in those weapons are so readily available in the United States. While the internet would still work as a platform for recruitment and radicalization with or without guns, the availability of predisposed individuals with ready access to guns and the knowledge of how to use those guns is what makes those attacks likely, easier to inspire without detection, and more lethal. In 2010, it was reasonable to think that there was little possibility of a sustained terror threat without training from a terrorist organization¹⁴⁵ Were training still a necessary ingredient of successful terrorist attacks, law enforcement could continue to disrupt and arrest

¹⁴² See *supra* note 46 and accompanying text.

¹⁴³ Phillips, *supra* note 26, at 545.

¹⁴⁴ Risa Brooks, *Muslim “Homegrown” Terrorism in the United States: How Serious is the Threat?*, 36 INT’L SEC. 7, 34 (2011); BERGEN & HOFFMAN, *supra* note 33, at 24–26.

¹⁴⁵ Peter Bergen on *Homegrown Terrorism in the U.S.*, C-SPAN (Mar. 19, 2017), <https://www.c-span.org/video/?425585-5/washington-journal-peter-bergen-discusses-homegrown-terrorism> [<https://perma.cc/BD8S-S8PL>]; *Reassessing the Evolving Al-Qaeda Threat to the Homeland: Hearing Before the Subcomm. on Intel., Info. Sharing, & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 5–15 (2009) (emphasizing the importance of training, quoting Peter Bergen as saying “it is going to a training camp that really makes a difference. I mean, it is one thing to be radicalized over the Internet. Anybody can watch a beheading video, and that does not really get you anywhere in terms of becoming a serious terrorist,” and providing examples of Americans who have gone for training). See also *Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the Sen. Comm. on Homeland Sec. & Governmental Affs.*, 111th Cong. 167 (2009) (statement of Mike Leiter, Director, National Counter Terrorism Center) (“The handful of homegrown extremists who have sought to strike within the Homeland since 9/11 have lacked the necessary tradecraft and capability to conduct or facilitate sophisticated attacks.”).

aspiring terrorists when they travelled or engaged in training activities,¹⁴⁶ or lean on the confidence that a successful terrorist attack takes more skill than most aspiring terrorists can acquire.¹⁴⁷ But the preexisting access and knowledge of guns, combined with modern strategies of low level attacks have made this travel and training unnecessary.

This threat then feeds back into the analysis of risk performed by judges and scholars in the face of websites directed at predisposed individuals. The cases *U.S. v. White* and *U.S. v. Sines* are examples of instances where incendiary speech is not only more likely to reach a party who is susceptible to incitement, but also that at least some susceptible individual who has come to that chatroom has the means and training necessary to act on that incitement, before he can be detected and incapacitated. This threat, in turn, makes judges and scholars more hesitant to protect speech, and more likely to narrow First Amendment protection. Yet while the debate rages over the need to reduce speech rights in response to the threat of terrorism, the Second Amendment right to build an arsenal is ignored—even while that arsenal’s availability eradicates those areas where law enforcement would normally intercept and prevent terror activity.

CONCLUSION

There is no doubt that the internet has fundamentally altered the strategy, and therefore threat, of terrorists, both individuals and organizations. The internet has made it easier to recruit, organizations can avoid financial costs, can use fewer recruiters or even bots, and can avoid the need for a safe space to train recruits. These physical and financial savings then cut into the options law enforcement once had to detect and disrupt terror plots, or to weaken organizations.

But the final erasure of opportunities to disrupt lethal terror attacks is the pre-training of potential recruits and ready availability of weapons. Once, law enforcement could limit its observation of potential terrorists to those with the most likelihood of launching *successful* attacks (i.e., those who had undergone extensive radicalization and training, often travelling to a training camp). Now, the prevalence of Americans with easy access to guns, combined with internet recruitment and a willingness to rely on low level attacks, has stolen that enforcement opportunity.

Similarly, while courts might once have relied on counterspeech, small audiences, and the rarity of individuals who could launch the types of attacks

¹⁴⁶ See, e.g., Brooks, *supra* note 144, at 35.

¹⁴⁷ See e.g. Leiter, *supra* note 145 (pointing to the lack of skill as a reason to be less concerned about homegrown terrorists that do not have connections to terrorist organizations).

terrorist organizations were urging, the combination of the reach of the internet, the use of algorithms, and the prevalence of people who are trained or can train themselves in guns have combined to erase those opportunities. Options to implement less restrictive impositions on speech are quickly disappearing in the face of well-armed extremists, ready and waiting to be activated.

It is the combination of training, rabbit holes, and weapons that makes the threat of domestic terrorism as large as it is today, which has resulted in a push for increased government surveillance and decreased speech protections.¹⁴⁸ However, this increased government surveillance runs a strong likelihood of chilling pure political speech.¹⁴⁹ Government restrictions on speech are likely to be employed unequally, particularly against politically disfavored groups.¹⁵⁰ New statutes criminalizing terrorism suffer the same problem.¹⁵¹ What's more, attempts to cut down the threat by suspending chat rooms or surveilling speech may well push extremists further into the dark recesses of the internet, where they have better protections against counterspeech and detection.¹⁵²

Scholars and courts have stepped away from an absolutist framework of speech protections in the face of this threat¹⁵³—a threat that is largely a product of Second Amendment protections. Fourth, Fifth, and Sixth Amendment protections similarly yield to the need to protect against terror attacks. Increasing limits on firearms purchases, registration requirements, and other low-level restrictions on gun ownership might provide law enforcement with the ability to identify and act on terror threats without threatening the First Amendment and the democratic functions it performs. To ignore the possibility that the Second Amendment, too, should bend to these threats, while simultaneously engaging in discussions of how the First,

¹⁴⁸ Solove, *supra* note 85, at 1096–98.

¹⁴⁹ Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1651–52 (1999).

¹⁵⁰ *See supra* notes 87–89.

¹⁵¹ Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1398–1402 (2019); Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 212, 228–41 (2019); German & Robinson, *supra* note 93, at 2; Harsha Panduranga & Faiza Patel, “Domestic Terrorism” Bills Create More Problems Than They Solve, JUST SEC. (Aug. 28, 2019), <https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve> [<https://perma.cc/U9KZ-2G9S>].

¹⁵² Greenberg, *supra* note 72, at 169; Joseph Cox, *ISIS Now Has a Propaganda Site on the Dark Web*, VICE (Nov. 16, 2015), <https://www.vice.com/en/article/d7yzy7/isis-now-has-a-propaganda-site-on-the-dark-web> [<https://perma.cc/HTC2-H5RP>].

¹⁵³ *See supra* notes 54–69 and accompanying text.

Fourth, Fifth, and Sixth Amendments must bend, is philosophically inconsistent, as well as blatantly disrespectful of the anti-tyrannical purposes of Constitutional criminal procedure.

As it stands, the Second Amendment is sheltered from these considerations, while it actively undermines the protection of the other Amendments. It is a cannibal, eating our civil liberties from the inside.