

## COMMENTARY

### HONORABLE HAROLD A. ACKERMAN\*

In listening to the expressions of these scholars, including my colleague, the first thing that struck me was the comment of Professor Levinson in the Yale Law Review. In his judgment this was the worse draft of the amendments in the Bill of Rights and I heartily agree.

I have tried to bring my mind to the problem by examining the question of individual rights versus collective rights. I think Judge Lechtner and several of the other speakers pointed out a paucity prior to 20-30 years ago in really analyzing what this amendment meant. I want to say very clearly that this is my own decision because I want to keep an open mind just in case I receive an *Emerson* case. The sense that I have is that those proponents of individual rights are in the ascension analytically. The fact that Professor Tribe has come around from a footnote to something more, as Professor Malcolm points out, is very significant. There is another aspect to this, which fascinated me, that has not been spoken about at all. I haven't made up my mind about it but I'm sufficiently fascinated to burden you with at this late hour with the fact that several commentators have pointed out that James Madison, one of our luminaries, had a hidden agenda with respect to the Southern States. He had to bring them in line. These commentators have pointed out that, in their judgment, slavery was a very prominent issue for those individuals who met in Philadelphia and subsequently. In order to keep them "in line," this term militia, which meant different things to other people in the South: North Carolina, South Carolina, Virginia, and Georgia, arguably meant that we have to keep the slaves in tow. They feared the absence of any confidence in a standing army to help them out at an appropriate time. Therefore, the ability of the plantation owners to accomplish this objective was transformed into a rather amorphous concept in terms of a militia. I could give you chapter and verse but the time is late and I won't burden you in that regard. I really believe the last remarks of Professor Barnett are very pertinent in hopefully arriving at a rational solution to this entire subject.

If the individualists are right, you can't get away from the language of the Constitution unless you want to amend. If they are right, it seems to me the words of the commentator, Professor Barnett, are very important to absorb and hopefully, through some osmotic process, take to heart. We cannot ignore the tremendous amount of killing that has been going on in this country through the prolific use of handguns by individuals who have acted in a highly irresponsible

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manner. Specifically, I'm thinking of the recent horrific events out in Colorado. It is just one example. On the other hand, it seems to me that if there is some rational basis to resolve this matter in a reasonable way, my hope is that somebody perhaps on both sides bilaterally would loosen up and provide the people with a rational solution short of confiscation to this matter. Thank you very much.