



NOTE

Second Amendment Federalism

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Abstract. In the decade since *District of Columbia v. Heller*, the paradigm-shifting 2008 Supreme Court case affirming the right of individuals to keep handguns in the home for self-defense, lower courts have struggled to reconcile the case's broad conception of the Second Amendment with longstanding restrictions on the keeping and bearing of firearms. A burgeoning literature has urged courts and scholars to approach this tension with an eye toward *Heller's* repeated proclamations that self-defense is the "central component" of the Second Amendment right, suggesting that principles of common law self-defense may offer insight into the scope of the Amendment's protections. Examining self-defense law as a U.S. tradition, this Note contends that the right to self-preservation has evolved significantly from its common law origins, with different states adopting different standards, procedures, and definitions over time. This diversity makes it difficult to extract universal principles of self-defense law for purposes of shaping Second Amendment doctrine.

But even as the law has changed across time and jurisdictions, federal courts have been consistent in allowing states to define the contours of the self-defense right. Therefore, courts today should recognize self-defense law as a site of iterative policy development, and treat laws regulating the instrumentalities of self-defense (for example, firearms) with a degree of deference. This Note argues that this approach, which I term "Second Amendment Federalism," comports with the dictates of *Heller* and provides a roadmap for doctrinal development.

* J.D. Candidate, Stanford Law School, 2021. Many thanks to Hannah Shearer, Eric Ruben, Joseph Blocher, Bernadette Meyler, Barbara Fried, and the students of the autumn 2019 Legal Studies Workshop at Stanford Law School for their insightful feedback. I am also grateful to the team at the *Stanford Law Review* for their meticulous editing—particularly Leslie Bruce, Katherine Cole, Olivia Goldberg, Will Janover, Anthony Kayruz, Diana Li, Samantha Noh, Lauren Shepard, Cameron Silverberg, and Sam Ward-Packard.

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Introduction

In the decade since *District of Columbia v. Heller*, the paradigm-shifting 2008 Supreme Court case affirming the right of individuals to keep handguns in the home for the purpose of self-defense,¹ lower courts have struggled to reconcile the case's broad conception of the Second Amendment with longstanding restrictions on the keeping and bearing of firearms. *Heller* itself provided—without explanation—that the opinion “should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”² This list of regulations, which the Court called “presumptively lawful” and “not . . . exhaustive,”³ has unsurprisingly become the go-to citation for gun-control advocates.⁴

But even those advocates have struggled to articulate a principled understanding of what makes a restriction lawful. One might be tempted to read into the Court's characterization of the presumptively lawful restrictions as “longstanding,”⁵ but this is odd, given that every one of the regulations the Court listed were nineteenth- or twentieth-century inventions.⁶ Some scholars have argued that the Court may have listed the restrictions in order to give lower courts guidance as to the proper standard of scrutiny for future cases⁷—a

1. 554 U.S. 570, 635-36 (2008).

2. *Id.* at 626-27.

3. *Id.* at 627 n.26.

4. See, e.g., *The Supreme Court & the Second Amendment*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/QT34-ZY3S> (archived Jan. 12, 2021) (“In its decision, authored by Justice Antonin Scalia, the Supreme Court was careful to stress the limited nature of its ruling. . . . The Court provided examples of laws it considered ‘presumptively lawful[.]’ . . .”); Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellant & Reversal at 19, *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) (No. 14-16840), 2015 WL 1606313 (“Because California’s waiting-period law is a longstanding commercial regulation . . . the law is ‘presumptively lawful’ under *Heller* . . .” (quoting *Heller*, 554 U.S. at 626 n.26)).

5. *Heller*, 554 U.S. at 626.

6. See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (“[L]egal limits on the possession of firearms by the mentally ill also are of 20th Century vintage . . .”); Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 729-30 (2012) (“[L]aws banning felons from having guns were not enacted until the twentieth century . . .”); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 127 (2015) (noting that the first laws distinguishing between open and concealed carry were passed in Kentucky and Louisiana in 1813).

7. See, e.g., Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1373 (2009).

guideline that *Heller* did not explicitly provide.⁸ Pragmatic readers suggest that the list of permissible restrictions lacks internal coherence altogether and was added simply to secure a fifth vote from Justice Kennedy.⁹ Whatever its origins, the list has earned attention from courts and scholars alike, if only because it offers a semblance of guidance for future cases.

Fixation on this list and other dicta in *Heller* has come at a cost. In trying to extract standards from *Heller*'s limiting language, scholars and advocates have not sufficiently examined the case's macro-level reasoning, including its stunning declaration that self-defense is the "central component" of the Second Amendment right.¹⁰ *Heller*, in other words, does not stand for the proposition that owning a handgun is an end in itself. Rather, it suggests that the Second Amendment protects the right to keep and bear arms *in service of* a separate, more foundational right to self-defense.

Building on an emergent literature that looks to the law of self-defense for guidance on the scope of the Second Amendment right,¹¹ this Note examines how the self-defense right has been construed (and reconstrued) over the course of U.S. legal history. In light of dynamic changes to the law of self-defense over time and across jurisdictions, federal courts have largely deferred to legislative judgments on the scope of the self-defense right, framing it as a matter of criminal (and thus state) law. Given this tradition, courts ought to grant states deference in reviewing laws that regulate the instrumentalities of self-defense (among other things, firearms), just as they would for laws that modify the right itself.

The Note proceeds in three Parts. Part I looks to *Heller*'s repeated declarations that self-defense is the "core" protection of the Second Amendment and examines the significance of those statements. It argues that framing self-defense as the core invites a rigorous Second Amendment analysis that takes into account interest-balancing, empirical analysis, and other modes of reasoning generally assumed to be foreclosed by *Heller*. Part II examines the unique development of self-defense law in the United States, observing that the doctrine has evolved over time and across jurisdictions. It focuses on how

8. See *Heller*, 554 U.S. at 634 (acknowledging the dissent's critique that the opinion "declin[es] to establish a level of scrutiny for evaluating Second Amendment restrictions").

9. See e.g., Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009).

10. *Heller*, 554 U.S. at 599 (emphasis omitted).

11. See generally Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020) (setting forth a theory that common law principles of self-defense may shed light on the limits of the Second Amendment); Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 85 (examining the role of state actors in the construction of self-defense law and suggesting implications for the meaning of self-defense in *Heller*).

courts have reviewed state legislative and executive action that has shaped the substance and procedure of self-defense as a legal right, noting that courts have generally deferred to state-led developments in this area of law even when they deviate from common law tradition. Part III explains how the tradition of self-defense as a state-defined right may provide a basis for a jurisprudential approach that I term “Second Amendment Federalism.” The Part then applies Second Amendment Federalism to three key areas of controversy: restrictions on public carry, bans on dangerous and unusual weapons, and prohibitions on possession by domestic-violence misdemeanants and others with criminal records. A fundamental contention of the Note is that Second Amendment Federalism might ameliorate the frustration that many—including several current Supreme Court Justices—have expressed with the lack of clarity in Second Amendment doctrine.

I. Self-Defense as the Core of the Second Amendment: Theory and Consequences

In parsing *Heller*, lower courts have attempted to give clarity to the scope of the Second Amendment, distinguishing protections at the core of the Second Amendment right from those that might yield to other public-policy concerns. At base, *Heller* held that a Washington, D.C., ordinance prohibiting the possession of handguns in individuals’ homes is unconstitutional.¹² The majority reached that conclusion after identifying the Amendment’s “core lawful purpose of self-defense.”¹³ Since “the American people have considered the handgun to be the quintessential self-defense weapon,” it is constitutionally protected.¹⁴

Heller stopped short, however, of explaining what to make of this newly articulated “core” purpose of the Second Amendment.¹⁵ As Justice Stevens noted in dissent, the majority “[left] for future cases the formidable task of defining the scope of permissible regulations.”¹⁶ Now, with nearly thirteen years of case law available, we are able to see what courts have done. In general,

12. *Heller*, 554 U.S. at 635 (stating that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”).

13. *Id.* at 630.

14. *Id.* at 629.

15. *See id.* at 687 (Breyer, J., dissenting) (“This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law’s constitutionality.”).

16. *Id.* at 679 (Stevens, J., dissenting). Stevens’s frustration is emblematic of the problem with the Court’s list of “presumptively lawful” restrictions. *See supra* notes 4, 6.

courts have applied a consistent framework to Second Amendment challenges but have reached inconsistent outcomes. The purpose of this Part is to return to the basic dictates of *Heller* to determine what its articulation of the Second Amendment’s “core purpose” means for current Second Amendment scholars and practitioners.

This Part proceeds in three Subparts. Subpart A explains the current two-step test that most courts of appeals apply when considering Second Amendment challenges and discusses critiques of that test by four current Justices of the Supreme Court. Subpart B examines how similar two-step approaches have been applied in the context of other constitutional rights. It specifically addresses the Second Amendment’s two closest textual analogs: the First Amendment’s Assembly and Petition Clause and the Fourth Amendment’s Search and Seizure Clause. Subpart C returns to *Heller*’s assertion that self-defense is the core protection of the Second Amendment, drawing on Eric Ruben’s 2020 article *An Unstable Core: Self-Defense and the Second Amendment*—the first major piece of scholarship to propose incorporating principles from self-defense law into Second Amendment doctrine.¹⁷ Subpart C concludes by observing that variances across time and across jurisdictions make it difficult to extract universal principles from self-defense law, complicating attempts to conduct Second Amendment analysis in accordance with such principles.

A. The Two-Step Approach

Rumblings of discontent in Second Amendment law came into sharp focus in April 2020, when the Supreme Court announced (and didn’t announce) its decision in *New York State Rifle & Pistol Ass’n, Inc. v. City of New York (NYSRPA)*.¹⁸ The Court’s first fully briefed Second Amendment case in a decade, *NYSRPA* dealt with a New York City regulation that prohibited the public carry and transport of firearms to anywhere but one of seven firing ranges in the city.¹⁹ The City succeeded before the Second Circuit but, fearing reversal, repealed its regulation shortly after the Supreme Court granted certiorari,²⁰ leading a six-Justice majority to declare the case moot.²¹

Justice Alito, joined by Justices Thomas and Gorsuch, issued a scathing dissent, arguing both that the matter was not moot and that the Second

17. Ruben, *supra* note 11.

18. 140 S. Ct. 1525 (2020) (per curiam).

19. *Id.* at 1527 (Alito, J., dissenting).

20. Adam Liptak, *Fearing Supreme Court Loss, New York Tries to Make Gun Case Vanish*, N.Y. TIMES (May 27, 2019), <https://perma.cc/89VE-2ST2>.

21. *See NYSRPA*, 140 S. Ct. at 1526-27.

Amendment challenge was “not a close question.”²² The dissenters reasoned that the right to use a firearm for self-defense in the home must also include the right to train with that firearm “in order to gain and maintain the skill necessary to use it responsibly.”²³ More crucially, the dissenters noted that the regulation had no analog in history—“neither the City, the courts below, nor any of the many *amici* supporting the City [had] shown that municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice”—and the city’s proffered public-safety justifications were unfounded.²⁴ The dissenters concluded by quipping, “[w]e are told that the [Second Circuit’s] mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.”²⁵

The Second Circuit’s *NYSRPA* opinion was indeed representative of a major trend. After *Heller*, the courts of appeals have almost universally adopted a two-step approach for Second Amendment challenges.²⁶ First, they determine whether the regulation at issue burdens conduct that could fairly be deemed to fall within the Amendment’s protections (that is, conduct that could fairly be characterized as the keeping and bearing of arms). If it does, they apply an interest-balancing test using a standard of scrutiny proportionate to how severely the restriction undercuts the Amendment’s “core” guarantees.²⁷

Despite the near ubiquity of the test, many have criticized it for promoting the sort of “free-standing ‘interest-balancing’ approach” to Second Amendment

22. *Id.* at 1540 (Alito, J., dissenting).

23. *Id.* at 1541.

24. *Id.* at 1541-43.

25. *Id.* at 1544.

26. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (adopting the framework); *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018) (same); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 252-53 (2d Cir. 2015) (same); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 701-03 (7th Cir. 2011) (same); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (same); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) (same); *Georgia Carry, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (same). *But see United States v. Hughley*, 691 F. App’x 278, 279 n.3 (8th Cir. 2017) (per curiam) (“Other courts seem to favor a so-called ‘two-step approach.’ . . . We have not adopted this approach and decline to do so here.” (quoting *Schrader v. Holder*, 704 F.3d 980, 988 (D.C. Cir. 2013))); *United States v. Adams*, 914 F.3d 602, 607, 610 (8th Cir. 2019) (Kelly, J., concurring in the judgment) (urging the Eighth Circuit to adopt the two-step approach).

27. *Chovan*, 735 F.3d at 1136, 1138 (quoting *Ezell I*, 651 F.3d at 703).

decisionmaking that *Heller* explicitly rejected.²⁸ One such detractor is Justice Kavanaugh. As a judge on the D.C. Circuit, he argued that *Heller* demands “an approach based on text, history, and tradition [rather] than . . . an interest-balancing test.”²⁹ Justice Kavanaugh echoed this dissatisfaction in *NYSRPA*, where he concurred in the judgment but wrote separately to endorse the dissent’s analysis of *Heller*.³⁰ Indeed, even long before *NYSRPA*, Second Amendment scholar Joseph Blocher called the majority’s and dissent’s divergent views on interest-balancing “the central disagreement in *Heller*.”³¹

28. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”). It should be noted that Justice Breyer endorsed the interest-balancing approach in his *Heller* dissent, presciently predicting that lower courts would invariably end up applying some form of tiers-of-scrutiny analysis. *See id.* at 689-90 (Breyer, J., dissenting); Rostron, *supra* note 6, at 706-07 (“[The lower courts] have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations . . .”).

29. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

30. *NYSRPA*, 140 S. Ct. at 1527 (Kavanaugh, J., concurring).

31. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009). At the time of this Note’s publication, Justice Barrett is the sole member of the Court who has not participated in a Second Amendment decision at the Supreme Court. Thus, Justice Barrett’s views on the interest-balancing debate remain somewhat unclear, though there is strong reason to believe her views are more in line with Justice Kavanaugh’s than with the courts of appeals’ two-step approach. During her tenure on the Seventh Circuit, she dissented from a decision upholding the constitutionality of a statute prohibiting people convicted of nonviolent felonies from possessing firearms. *Kanter v. Barr*, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, J., dissenting). Her dissent combined interest-balancing with extensive historical analysis. On one hand, she situated her argument in the typical two-step framework, reasoning that “felon dispossession statutes target the whole right, including its core” and that because of their indefinite duration, “the burden [they impose] is severe.” *Id.* at 465. On the other hand, however, her dissent was rooted almost entirely in historical analysis, *see id.* at 454-64, and concluded with Justice Alito’s admonition that the Second Amendment ought not to be treated “as a ‘second-class right,’” *id.* at 469 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). Moreover, the two-step test was well-established in the Seventh Circuit by the time it heard this case, leaving judges with little leeway to deviate from that framework. *See, e.g., Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 892 (7th Cir. 2017); *Ezell I*, 651 F.3d at 701-04 (adopting a mode of analysis that predates the formal two-step approach, but is functionally similar). This dissent has prompted widespread speculation that Justice Barrett’s views on the Second Amendment are highly expansive. *See, e.g.,* Debra Cassens Weiss, *Barrett’s Expansive View of Second Amendment Could Provide Fifth Vote to Strike Down Gun Laws*, ABA J. (Sept. 30, 2020, 1:46 PM CDT), <https://perma.cc/74UV-52TM>; Press Release, Everytown for Gun Safety, Judge Amy Coney Barrett’s Views on the Second Amendment Are Extreme and Dangerous (Oct. 7, 2020), <https://perma.cc/8X5K-K997>; NRA Applauds Nomination of Judge Amy Coney

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But *Heller* did not suggest that interest-balancing had no place in Second Amendment doctrine. Indeed, even the *NYSRPA* dissenters divided the portion of their opinion concerning the Second Amendment into two parts: The first analyzed the statute in light of the Amendment, and the second considered the City's argument that the regulations enhanced public safety.³² *Heller* maintained, after all, that the historical right to bear arms "was not unlimited, just as the First Amendment's right of free speech was not."³³ Moreover, the Court has long turned to interest-balancing to determine the scope of other rights.³⁴ *Heller* simply provided that no enumerated constitutional right's "core protection" may be subject to such analysis—particularly one of a "freestanding" variety that disavows conventional tiers of scrutiny.³⁵ The heart of the dispute in *Heller*, then, was not whether an interest-balancing test might ever be appropriate. Rather, the dispute was about the meaning behind the Second Amendment's core protection.

B. "Core" Protections in Textually Analogous Constitutional Phrases

Heller identified self-defense as the Second Amendment's "central component" and core protection.³⁶ Before discussing the consequences of this declaration, it is useful to consider how the Supreme Court has defined the core of other privileges enumerated in the Bill of Rights. *Heller* pointed to two clauses of the Bill of Rights that, like the Second Amendment, use the phrase "right of the people": the First Amendment's Assembly and Petition Clause and the Fourth Amendment's Search and Seizure Clause.³⁷ In considering these analogous provisions, the Court has identified core concerns that are broader and more value-dependent than the plain text of the Constitution suggests.

Barrett to the Supreme Court, NRA-INST. FOR LEGIS. ACTION (Sept. 26, 2020), <https://perma.cc/CB78-XD6X>.

32. See *NYSRPA*, 140 S. Ct. at 1540-44 (Alito, J., dissenting).

33. *Heller*, 554 U.S. at 595.

34. See *infra* Part I.B.

35. *Heller*, 554 U.S. at 634.

36. *Id.* at 599 (emphasis omitted) ("[S]elf-defense . . . was the *central component* of the right itself."); see also Ruben, *supra* note 11, at 70-73 (discussing possible consequences of the Court's declaration that self-defense is the core protection of the Amendment, emphasizing that the term "lawful self-defense" implies that common law traditions of self-defense are relevant to determining the scope of the Second Amendment right).

37. *Heller*, 554 U.S. at 579. Compare U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed."), with U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), and U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

Cases involving these clauses tend to focus on the extent to which government conduct frustrates the purpose behind the clauses, rather than on whether the conduct falls within the scope of their literal meaning.³⁸ As in the two-step test for Second Amendment cases, the Court applies scrutiny depending on how seriously the clause's purpose is undermined.³⁹

1. First Amendment Assembly and Petition Clause analogs

Of the two textual analogs *Heller* points out, the First Amendment's Assembly and Petition Clause is the most similar to the Second Amendment. It provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"⁴⁰ while the Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed."⁴¹ Both the Assembly and Petition Clause and the Second Amendment center the "right of the people" and prohibit curtailment ("abridgement" in the First Amendment, "infringement" in the Second) of that right by the government. But to determine whether a curtailment has occurred, one first must define the relevant "right of the people." Given the Court's insistence that neither the First nor the Second Amendment is unlimited,⁴² important methodological questions arise as to how one might determine the baseline scope of the right.

38. A related body of scholarship discusses how this mode of constitutional interpretation creates a de facto hierarchy of protection even among rights that, like the Second Amendment's right to bear arms, have been deemed "fundamental." See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1186-99 (1996) (discussing how provisions of the Bill of Rights have been interpreted in light of (and sometimes in contravention of) their original meaning and purpose and how such interpretations have given rise to judicial tolerance for so-called "incidental" burdens on constitutional rights).

39. This is the first piece of legal scholarship to specifically consider recent Petition Clause doctrine as a paradigm for Second Amendment analysis. But given the paucity of guidance for lower courts in *Heller*, scholars have proposed looking to other constitutional doctrines to inform Second Amendment analysis. See, e.g., Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 893-909 (2013) (discussing how Seventh Amendment doctrine may guide the development of Second Amendment doctrine in keeping with *Heller's* mandate for historical analysis); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489, 517-23 (2012) (proposing an "undue burden" test, modeled after the Court's abortion-rights doctrine); Joseph E. Sitzmann, Comment, *High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment*, 86 U. CHI. L. REV. 1990-2013 (2019) (proposing a Second Amendment framework modeled after the Court's treatment of different types of speech under the First Amendment).

40. U.S. CONST. amend. I.

41. *Id.* amend. II.

42. See *supra* note 33 and accompanying text.

A recent Petition Clause case addressed those questions. Though Petition Clause doctrine was long intertwined with other First Amendment doctrines, there was not a distinct methodology for Petition Clause challenges until 2011, three years after *Heller*. In *Borough of Duryea v. Guarnieri*,⁴³ the Supreme Court eschewed its past conflation of Petition Clause analysis with analysis of other provisions of the Amendment, looking instead to the Clause's specific "history and purpose."⁴⁴ The plaintiff, a former chief of police, Charles Guarnieri, brought a § 1983 action alleging that his employer retaliated against him after he filed a union grievance.⁴⁵ Acknowledging that retaliatory conduct raises First Amendment concerns under the Free Speech Clause only when it arises in response to employees speaking out on matters of "public concern," Guarnieri nonetheless argued that the Framers intended the Petition Clause to apply to matters of both public and private significance.⁴⁶

The Supreme Court took Guarnieri's suggestion to revisit the purpose of the Petition Clause. Through historical analysis, the Court concluded that petitions by public servants to their employers are, like speech, constitutionally protected only when they relate to matters of public concern.⁴⁷ The Court relied heavily on the same types of sources it used in *Heller*⁴⁸: commentators on English common law, records from the Framers, nineteenth-century historical practice, and (limited) case law.⁴⁹ With remarkable clarity, the 8-1 Court declared that "[i]nterpretation of the Petition Clause must be *guided by the objectives and aspirations that underlie the right*."⁵⁰ The Court concluded that matters of public interest, as opposed to private disputes, were at the heart of those objectives.

Guarnieri is striking for how transparently it states that the Petition Clause exists to protect a primary right beyond the text of the Constitution. But this was not the first time the Court recognized unwritten but historically

43. 564 U.S. 379 (2011).

44. *Id.* at 388.

45. *Id.* at 383-84.

46. See Brief for Respondent at 25-31, *Guarnieri*, 564 U.S. 379 (No. 09-1476), 2011 WL 175871.

47. *Guarnieri*, 564 U.S. at 389.

48. Compare *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (discussing commentary by William Blackstone), *id.* at 588-90 (discussing drafting notes from James Madison), and *id.* at 602-03 (discussing state Second Amendment analogs from the late eighteenth and early nineteenth centuries), with *Guarnieri*, 564 U.S. at 395 (discussing commentary by William Blackstone), *id.* at 396 (discussing the writings of James Madison), and *id.* at 396-97 (discussing the role of petitions in multiple eighteenth-century state legislative debates).

49. *Guarnieri*, 564 U.S. at 395-98.

50. *Id.* at 388 (emphasis added).

understood limits on the First Amendment. Even in the context of the Petition Clause, past cases have acknowledged that conduct falling within the Clause's literal meaning (insofar as they involve individuals who petition the government for a redress of grievance) may nonetheless fall outside the scope of its protections.⁵¹ And the Free Speech Clause cases cited in *Guarnieri*⁵² weighed public and private interests with a balancing test that resembles intermediate scrutiny.⁵³

Heller's mention of the First Amendment right of assembly is somewhat peculiar, given that the Supreme Court had not heard a case on the Assembly Clause in decades.⁵⁴ Cases about the right to gather in and belong to various groups have generally been litigated under the expressive-association doctrine, a concept arising out of the Free Speech Clause that the Court first described in *NAACP v. Alabama ex rel. Patterson*.⁵⁵ Where the Court has addressed the Assembly Clause, it has largely conflated it (as it does in *Heller*⁵⁶) with the Petition Clause, suggesting that both provisions aim to protect open discourse

51. See *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[B]aseless litigation is not immunized by the First Amendment right to petition.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (noting that petitions “made with reckless disregard of the truth, do not enjoy constitutional protection”).

52. *Guarnieri*, 564 U.S. at 397-99.

53. See *Connick v. Myers*, 461 U.S. 138, 150 (1983) (reasoning that the government's burden in a First Amendment inquiry “varies depending upon the nature of the . . . expression” (with speech on matters of public concern meriting greater consideration) and that effective administration of the balancing test “requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”); see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) (“Under intermediate scrutiny, the Government may employ the means of its choosing ‘so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,’ and does not ‘burden substantially more speech than is necessary to further’ that interest.” (alteration in original) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994))).

54. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 N.W. U. L. REV. 1097, 1104-05 (2016).

55. 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association”); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 486 (2010) (noting that *NAACP* was the first case to recognize a right to association and observing that the right's origins are sometimes mistakenly traced to a later case that distinguished between “expressive” and “intimate” association). For a thorough account on the decline of Assembly Clause litigation, see generally JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

56. *Heller*, 554 U.S. at 579 (referencing “the First Amendment's Assembly-and-Petition Clause”).

around matters of public importance.⁵⁷ Fittingly, therefore, the Court in the first half of the twentieth century adopted a similar interest-balancing approach to Assembly Clause cases, weighing the liberty interests underlying the Clause against state interests in regulating the times, manners, and locations of individuals' exercise of the right.⁵⁸

2. Fourth Amendment Search and Seizure Clause analogs

Other than the Assembly and Petition Clause, the Fourth Amendment's Search and Seizure Clause is the only provision of the Bill of Rights that uses the phrase "the right of the people."⁵⁹ But the textual similarities between it and the Second Amendment end there. Unlike the First and Second Amendments, the Fourth Amendment cannot be interpreted to categorically ban a particular type of government action. By proscribing only "unreasonable" searches and seizures, the text of the Amendment offers a general, value-dependent metric by which to assess constitutionality.⁶⁰ Identifying the Amendment's core protection, therefore, is simple; Fourth Amendment doctrine has drawn on the text of the Amendment to describe the value it serves (freedom from unreasonable governmental intrusion).⁶¹

Of course, even if all interpreters agree that the Amendment's purpose is to ensure that searches and seizures are reasonable, there may still be significant

57. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

58. *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (plurality opinion) (providing that the right to use streets and parks for communications on issues of national importance "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience . . . but it must not, in the guise of regulation, be abridged or denied"); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule The limitation upon individual liberty must have appropriate relation to the safety of the state.").

59. *Compare* U.S. CONST. amend. II ("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."), *with id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

60. *Id.* amend. IV.

61. *See, e.g.*, *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

disputes about how to achieve that purpose. Disagreements over what searches and seizures are “unreasonable” (not to mention what constitutes a “search” or “seizure”) are frequently litigated.⁶² The minutiae of Fourth Amendment doctrine are beyond the scope of this Note, but courts often approach search-and-seizure questions with public- and private-interest-balancing tests comparable to those used in the First Amendment context.⁶³

The similarity between these approaches is noteworthy given the apparent broadness of the Search and Seizure Clause and the narrowness of the Assembly and Petition Clause. But mechanically, it makes sense. Assembly and Petition Clause doctrine simply adds a step that does not appear as explicitly in the Search and Seizure Clause cases—a step in which the Court identifies the “history and purpose” of the clause at hand.⁶⁴ From there, the analysis is the same in both contexts: Courts ask whether the challenged abridgement of petition, assembly, or search-and-seizure rights offends the clause’s purpose and then weigh the infraction against the public interests the abridgement seeks to advance.⁶⁵ In other words, it is not the mere curtailing of one’s freedom to petition the government, assemble peaceably, or avoid unwarranted searches and seizures that violates the Constitution. What matters is whether those constitutional protections were curtailed in a way that undermines “the scope they were understood to have when the people adopted them.”⁶⁶

* * *

62. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’”); Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL’Y 275, 319-20 (2016) (finding that the Supreme Court heard 234 cases involving the Fourth Amendment between its 1967 and 2014 terms, representing approximately 20% of the Court’s nonstatutory criminal-procedure docket).

63. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (“[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (assessing whether parties have a right to privacy by looking first to whether they manifested a subjective expectation of privacy and second to whether that expectation is “one that society is prepared to recognize as ‘reasonable’”).

64. See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387-88 (2011).

65. Compare *id.* at 392 (“The government’s interest in managing its internal affairs requires proper restraints on the invocation of rights by employees”), with *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.”).

66. See *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

The Second Amendment's textual analogs suggest that a literal approach to the right to keep and bear arms is inappropriate. Instead, courts are tasked with determining the extent to which challenged government action undermines the Amendment's core protection, which, for the post-*Heller* Second Amendment, is the right to self-defense. Practically, however, courts cannot determine whether or how a right is being infringed until they define the scope of that right.⁶⁷ Therefore, as in the Petition Clause and Search and Seizure Clause cases, Second Amendment analysis must consider not only the onerousness of the restriction but also the nature of the self-defense right itself.

C. Self-Defense as the Core of the Second Amendment Right in *Heller*

Heller helps guide the inquiry into the scope of the Second Amendment's protections. Looking again to the history and purpose behind the Second Amendment, the *Heller* Court identified self-defense as "the *central component* of the right itself."⁶⁸ The self-defense core animated *Heller's* holding that handguns in the home are constitutionally protected. But the *case's holding* is different from the *Amendment's core*. This dichotomy is key: It is clear throughout *Heller* that the *holding* of the case (that is, the Court's particular command as applied to the facts) is analytically distinct from the *core* of the Second Amendment (that is, the animating interest that the Amendment seeks to protect). Since the D.C. ordinance under review in *Heller* infringed on the ability of law-abiding citizens to legally possess handguns ("the quintessential self-defense weapon"⁶⁹) in the home ("where the need for defense of self, family, and property is most acute"⁷⁰), the ordinance "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense and [was] hence unconstitutional."⁷¹ Simply put, the ordinance offended not just the text, but also the purpose, of the Second Amendment.⁷²

The case would be far less complicated if the holding didn't implicate both the text and the core of the Amendment. Had the Court accepted an absolutist reading of the text of the Second Amendment, it would be enough to reason simply that the ordinance inhibited citizens' ability to keep and bear arms and

67. Cf. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2161 (2018) ("[J]udicially created doctrinal tests can refine and narrow the scope of constitutional rights even in ways that might seem inconsistent with their plain text.").

68. *Heller*, 554 U.S. at 599.

69. *Id.* at 629.

70. *Id.* at 628.

71. *Id.* at 630.

72. For a more detailed explanation of how *Heller's* analysis recognized self-defense as the "core" of the Second Amendment right, see Ruben, *supra* note 11, at 69-73.

was thus unconstitutional.⁷³ But the Court instead analyzed the ordinance through the lens of its effect on self-defense, assessing the text of the Amendment in accordance with its historical purpose rather than its literal meaning.

Despite *Heller*'s consistent and unambiguous focus on self-defense, few courts look to the law of self-defense in adjudicating Second Amendment cases.⁷⁴ In his 2020 article *An Unstable Core: Self-Defense and the Second Amendment*, Eric Ruben sets forth a theory for courts and scholars that transposes principles from the law of self-defense onto the Second Amendment.⁷⁵ The remainder of this Subpart will emphasize key points from Ruben's article and identify gaps in the framework.

Ruben begins by observing that the *Heller* Court placed self-defense in direct conversation with governing legal frameworks.⁷⁶ The Court repeatedly emphasized, for example, that only *lawful* exercises of self-defense are constitutionally protected.⁷⁷ Relatedly, the Court highlighted that the key interest the *Heller* plaintiffs wished to protect was "being armed and ready for offensive or defensive action in a case of conflict with another person"—a situation that would be deemed either legal or illegal under applicable self-defense law.⁷⁸ Thus, Ruben contends that the "core lawful purpose" of the

73. Interestingly, there are several examples of pre-2008 opinions reaching *Heller*'s conclusion that the Second Amendment protects the individual right to keep and bear arms without reference to a specific self-defense purpose. *See, e.g.,* *United States v. Emerson*, 270 F.3d 203, 216 n.6, 260 (5th Cir. 2001) (finding that the Second Amendment protects an individual right to keep and bear arms, notwithstanding the fact that the challenging party did not allege that he was carrying his firearm for a specific self-defense purpose); *Nordyke v. King*, 364 F.3d 1025, 1026-27 (9th Cir. 2004) (Gould, J., dissenting from denial of rehearing en banc) (arguing that the Second Amendment confers an individual right to keep and bear arms). The existence of such cases suggests that the Court readily could have reached the same conclusion without such extensive discussion of the right to self-defense.

74. *See* Ruben, *supra* note 11, at 73-74 (finding, in a sample of more than 1,000 post-*Heller* Second Amendment decisions, that most courts do not mention self-defense at all or only do so "superficially"); *see also* *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from the denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.")

75. *See* Ruben, *supra* note 11, at 66-68.

76. *Id.* at 70.

77. *See id.*; *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) ("The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))); *id.* at 630 (noting that the D.C. ordinance "makes it impossible for citizens to use [handguns] for the core lawful purpose of self-defense and is hence unconstitutional").

78. Ruben, *supra* note 11, at 70 (quoting *Heller*, 554 U.S. at 584).

Second Amendment is “self-defense as understood by Anglo-American law.”⁷⁹ Ruben’s argument is further buttressed by the Court’s favorable citation to case law providing that “[n]o rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose”⁸⁰ and its assertion that “law-abiding, responsible citizens” are the Amendment’s key beneficiaries.⁸¹

Having established that *Heller* was concerned with self-defense as defined by existing law, Ruben argues that basic principles underlying self-defense law may be transposed to the Second Amendment context.⁸² Looking to notions of necessity, imminence, and proportionality as conditions of lawful self-defense, Ruben argues that the Second Amendment might respect analogous limitations.⁸³ For example, the so-called castle doctrine, which relieves individuals who act in self-defense in their own homes of the duty to retreat, is accepted in all fifty states, suggesting that the right to self-defense is most pronounced in the home.⁸⁴ But where a duty to retreat exists (that is, outside the home), common law calls for a close analysis of reasonable alternatives to lethal force; thus, one can infer that laws that restrict the carry of deadly weapons outside the home might withstand constitutional challenges so long as they allow for the carry of other, less lethal weapons.⁸⁵ In another example, Ruben draws on the common law requirement of proportionality, which provides that the force deployed in self-defense must be roughly equivalent in magnitude to the aggression purported to justify its use.⁸⁶ Looking to Framing-

79. *Id.* (quoting *Heller*, 554 U.S. at 630).

80. *Heller*, 554 U.S. at 612 (quoting *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829)).

81. *Id.* at 635 (holding that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”); see also *id.* at 625 (limiting the scope of a prior Second Amendment decision “to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes” (citing *Miller*, 307 U.S. 174)).

82. Ruben, *supra* note 11, at 90.

83. *Id.* at 87-88, 88 n.176, 98 & n.257.

84. *Id.* at 86.

85. *Id.* at 103.

86. *Id.* at 88-89. Longstanding conceptions of proportionality have come under criticism (and in some jurisdictions have been revised) in recent decades. In some cases, these efforts have been tied to a strong belief in the castle doctrine and the notion that typical understandings of imminence and proportionality should not apply when self-defense occurs in the home. See Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 336-49 (2006) (describing such efforts in Florida and England and linking such efforts to global trends). In other cases, legislatures have adopted broader definitions of what constitutes proportional force, taking into account, for example, the ways in which extreme emotional distress may distort one’s perception of the magnitude of force necessary to thwart an attack. See *id.* at 349-53 (describing such reform efforts in Belgium). A related strand of reform focuses particularly on survivors of domestic violence, with feminist

footnote continued on next page

era case law, Ruben notes that courts have long considered the type of arm used in a confrontation when determining whether an individual's use of force was reasonably necessary to the threat encountered, suggesting that restrictions on disproportionately lethal types of weapons do not offend the Second Amendment's core purpose.⁸⁷

One can see how courts might apply Ruben's theory to the existing two-step test in a manner consistent with the cases interpreting the Assembly and Petition Clause and the Search and Seizure Clause.⁸⁸ A plaintiff challenging the constitutionality of a firearm regulation would show in step one that the regulation inhibits their ability to keep and bear arms, and therefore falls (at least to some degree) within the scope of the Second Amendment. From there, the adjudicating court would proceed to step two, looking to common law traditions to determine how seriously the regulation burdens core self-defense interests and setting the standard of scrutiny accordingly.⁸⁹

Ruben's framework becomes more complicated, however, when viewed in light of the significant ways that U.S. self-defense law deviates from common law and differs among states.⁹⁰ Ruben's theory remains important because it primarily relies on necessity and proportionality—two general principles that have remained a part of self-defense law in every jurisdiction, even as judges and legislatures have defined them in different ways.⁹¹ “Resolving which legal understanding of self-defense should serve as a baseline [for analysis] is a

scholars and advocates leading efforts to revise self-defense law to better protect survivors. *See, e.g.*, Shana Wallace, Comment, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1752-56, 1754 n.25 (2004) (describing how notions of imminence and proportionality have evolved without respect for the experiences of domestic-violence victims, who were specifically forbidden from deploying defensive force against their violent spouses at common law); Suzanne Uniacke, *Proportionality and Self-Defense*, 30 LAW & PHIL. 253, 253-54 (2011) (arguing that decisions related to the justifiability of the use of force in self-defense cases should account not just for the magnitude of force deployed by an aggressor but also for the general seriousness of the provoking harm).

87. Ruben, *supra* note 11, at 78-79, 84 & nn.144-51, 85 & nn.152-53, 89.

88. *See id.* at 76 & nn.86-87, 77 (comparing the two-part test to First Amendment frameworks).

89. *See id.* at 91-92 (applying the two-step methodology to a case involving trigger-lock requirements (citing *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014))).

90. *See id.* at 87 (“[S]elf-defense law is not static through time or between jurisdictions.”).

91. *Id.* at 87-88 (“[C]hange [in U.S. self-defense law] has happened primarily on the margins; the basic requirements of necessity and proportionality are universally accepted, even in stand-your-ground jurisdictions, and have been essentially immune to change.”).

significant second-order question” beyond the scope of Ruben’s article.⁹² This Note addresses that question.

II. Constructing Self-Defense Law

The Supreme Court has never held that self-defense is a constitutional right.⁹³ The task of characterizing the U.S. conception of the self-defense right, therefore, is somewhat bewildering. In a dissent in the 2010 case *McDonald v. City of Chicago*, which incorporated *Heller* against the states, Justice Stevens observed:

[T]he States have always diverged on how exactly to implement [the right to self-defense], so there is wide variety across the Nation in the types and amounts of force that may be used, the necessity of retreat, the rights of aggressors, the availability of the “castle doctrine,” and so forth. . . . Just because there may be a natural or common-law right to some measure of self-defense, it hardly follows that States may not place substantial restrictions on its exercise or that this Court should recognize a constitutional right to the same.⁹⁴

Though the majority rejected Justice Stevens’s ultimate view on the case (as the majority had also done in *Heller*), it made no mention of the difficulty he identified in defining “lawful” self-defense. If the right to lawful self-defense is indeed at the core of the Second Amendment right, then the ways in which legislatures and courts have defined the self-defense right should surely inform the scope of Second Amendment protections.

This Part tracks how courts have viewed the right to self-defense over time and across jurisdictions. It proceeds in two Subparts. Subpart A sets forth the argument that self-defense as a concept requires the existence of some state actor to separate legitimate from illegitimate claims that force was exercised in self-defense. The Subpart rejects the view that self-defense is a natural or preexisting right beyond the scope of state regulation by looking to nineteenth-century case law cited in *Heller*, in which state supreme courts presumed the existence of state regulation in the formulation of self-defense law. Subpart B turns to the federal courts, examining how early-twentieth-century federal courts relied on state judgments about self-defense law to develop a U.S. federal common law of self-defense that differed significantly from English conceptions. The Subpart proceeds to examine how federal

92. *Id.* at 87. Ruben argues that the consequences of jurisdictional variety may be “overstated” for purposes of his argument, given that his conclusions draw mainly from enduring conceptions of necessity and proportionality. *Id.* at 87-88. As I discuss, however, state law differs fairly significantly even with respect to these bedrock principles. See *infra* Part II.A.1.

93. Miller, *supra* note 11, at 85 & n.1.

94. *McDonald v. City of Chicago*, 561 U.S. 742, 888-89 n.32 (2010) (Stevens, J., dissenting).

courts have reviewed challenges to state action affecting the right to self-defense in more recent years, and it notes a tradition of deference to the authority of states to construct their own self-defense law.

A. Self-Defense as a Product of State Law

Self-defense, like other criminal law doctrines, has evolved largely at the state level. The diversity that has emerged among states with respect to how the self-defense right has been interpreted speaks not only to the difficulty of generalizing about the right's ins and outs, but also to the indispensable role that governments have had in determining its outer bounds.

1. State law and the construction of self-defense

The apparent inconsistencies among states in defining the self-defense right produce odd questions for those who rely on self-defense law to understand the scope of *Heller*. As Darrell A.H. Miller has noted, the history of self-defense law is something of a patchwork. What began as grounds for seeking sovereign clemency under English law gradually became a codified excuse for homicide.⁹⁵ Early U.S. case law, according to Miller, maintained the common law's distinction between "justifiable homicide," which was committed at the behest of the sovereign, and "excusable homicide," which would include civilian exercises of self-defense for purposes of self-preservation.⁹⁶ It was not until the nineteenth century that English and American law started to recognize self-defense as its own form of *justifiable*—that is, neither illegal nor publicly condemnable—homicide.⁹⁷

Based on this history, Miller concludes that *Heller's* veneration of self-defense as a preconstitutional right implies, at a minimum, the existence of some sovereign power with authority to distinguish lawful uses of force from unlawful ones.⁹⁸ Implications in *Heller* notwithstanding, "the Supreme Court has never expressly held self-defense to be a constitutional right."⁹⁹ Rather, the question whether to view self-defense as justifiable, excusable, or something else is one that the state decides (and redecides) with some frequency.¹⁰⁰ Any

95. Miller, *supra* note 11, at 89-90.

96. *Id.* at 92-93.

97. *Id.* at 93.

98. *See id.* at 96-97.

99. *Id.* at 85.

100. *See id.* at 97 ("Identifying as accurately as possible the common law history of self-defense only serves to focus the discussion. It does not thereby transform the common law into a found thing, unconstructed, pre-political, neutral, and natural. If this article has attempted to prove anything, it is that our law of self-defense is not natural or neutral; it is a choice." (footnote omitted)); *see also* Janine Young Kim, *The Rhetoric of* footnote continued on next page

discussion of the self-defense right as it relates to the Second Amendment is necessarily shaped, to some degree, by government actors.¹⁰¹

In the U.S. tradition, those rights-shaping government actors are states. As Justice Stevens described in his *McDonald* dissent, perhaps the most striking feature of U.S. self-defense law is its diversity.¹⁰² States are roughly evenly split on whether there exists a duty to retreat outside the home.¹⁰³ They also offer wildly different guidance on the conditions under which a person may lawfully use deadly force. There is a general consensus, for example, that the right is at its height in the home (under the castle doctrine), but states are divided as to whether this means a person may use deadly force in one's home against a person who does not pose an imminent threat to human life or safety.¹⁰⁴ States also generally agree that threats of violence must be present to justify the use of deadly force outside one's home but disagree on which crimes are sufficiently violent to prompt such a response.¹⁰⁵ For example, a small number of jurisdictions allow for the use of deadly force to thwart the commission of any felony.¹⁰⁶ And regardless of statutory distinctions, the idiosyncrasies of a case—from a defendant's physical capabilities¹⁰⁷ to the quality of lighting in the area where a confrontation occurs¹⁰⁸—invariably affect its outcome.

Self-Defense, 13 BERKELEY J. CRIM. L. 261, 294-98 (2008) (situating self-defense law in the context of social-contract theory and arguing that the law esteems defenders “whose reasons and actions [for using lethal force] are congruent to those that justify the criminal law”).

101. See Miller, *supra* note 11, at 86 (“[S]elf-defense, as well as its close relative, defense of others, has been far from inalienable, individual, or innate. Instead it has been heavily conditioned and constructed by the state.”).

102. See *supra* note 94 and accompanying text.

103. See *Self Defense and “Stand Your Ground,”* NAT’L CONF. ST. LEGISLATURES (May 26, 2020), <https://perma.cc/H7TK-6ZKZ>.

104. Compare 720 ILL. COMP. STAT. 5/7-2(a)(2) (2021) (permitting the use of deadly force in the home where a person “reasonably believe that such force is necessary to prevent the commission of a felony in the dwelling”), and N.H. REV. STAT. ANN. § 627:4(II)(d) (2021) (authorizing the use of deadly force where necessary to prevent an intruder from committing a felony within one’s home), with DEL. CODE ANN. tit. 11, § 466(c) (2021) (authorizing the use of deadly force only when necessary to prevent death, serious physical injury, or forceful dispossession of a person’s dwelling), and N.J. STAT. ANN. § 2C:3-4(b)(2) (West 2021) (authorizing the use of deadly force within one’s home only where it is necessary to protect against death or serious bodily injury).

105. Compare ALASKA STAT. § 11.81.335(a)(3)-(7) (2021) (authorizing deadly force when an actor believes it is necessary to prevent kidnapping, sexual assault, sexual abuse, or robbery), with 18 PA. CONS. STAT. § 505(b)(2) (2021) (authorizing deadly force when an actor believes it necessary to prevent kidnapping and sexual assault, but not robbery).

106. See, e.g., S.D. CODIFIED LAWS § 22-16-35 (2021); WASH. REV. CODE § 9A.16.050(1) (2021).

107. See *State v. Ventre*, 811 A.2d 1178, 1183 (R.I. 2002).

108. See *Commonwealth v. Iacoviello*, 58 N.E.3d 1032, 1035, 1041 (Mass. App. Ct. 2016).

2. Countering natural-law theory in *Heller*

At first glance, the contention that self-defense in the U.S. is shaped primarily by positive state law appears to be in tension with *Heller*. In interpreting the meaning of the term “bear arms,” the *Heller* Court concluded that early U.S. law recognized the right to keep and carry firearms without regard to one’s service in a militia, countering the District of Columbia’s contention that the Militia Clause of the Second Amendment cabins the right to that context.¹⁰⁹ The Court instead insisted that state courts endorsed the view that the right to bear arms is “a recognition of the *natural right* of defense ‘of one’s person or house.’”¹¹⁰

This is a significant assertion. If *Heller* was concerned with self-defense solely as a “natural right” predating the Constitution, the role of positive law in shaping that right is unclear.¹¹¹ But if we concede that government has some role in shaping the right, it would follow that states have latitude to define it.¹¹² To determine the that role government was understood to possess in shaping the right to self-defense (and in regulating the use of arms for that purpose), I consider three state supreme court cases that *Heller* cited to support the theory that the Second Amendment protects an individual right to bear

109. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State . . .”); *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (concluding that the term “bear arms” was unambiguously used [in the Framing era] to refer to the carrying of weapons outside of an organized militia”).

110. *Heller*, 554 U.S. at 585 (emphasis added) (quoting 2 COLLECTED WORKS OF JAMES WILSON 1142 & n.x (Kermit L. Hall & Mark David Hall eds., 2007)) (citing PA. CONST. of 1790, art. IX, § 21).

111. See David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 250 (2008) (“*Heller’s* natural law explication of the inherent right of armed self-defense teaches another very relevant lesson. The right of self-defense is not culturally contingent, and it does not depend on national law. The right of self-defense is a universal, fundamental, natural and inherent human right.” (emphasis omitted)).

112. It should be noted that merely labeling a right “natural” does not make it entirely untouchable. Jud Campbell has argued that the drafters of the Constitution differentiated between natural and positive rights merely to the extent that natural rights may be exercised whether or not government exists. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 268 (2017). But basic social-contract theory provides that some natural rights may be circumscribed by government. See *id.* at 276 (“[E]ven though the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace.”).

arms: Alabama's *State v. Reid*,¹¹³ Missouri's *State v. Shultz*,¹¹⁴ and Kentucky's *Bliss v. Commonwealth*.¹¹⁵

In general, *Heller* was correct that these cases recognized the existence of a self-defense right, but they hardly regarded that right as “natural.” All three state cases addressed state constitutional provisions that (unlike the Second Amendment) explicitly protected the right to bear arms *in defense of* oneself or the state.¹¹⁶ Moreover, the fact that the right to defend both oneself and one's state are codified in the state constitutional provisions at issue in these cases suggests a dialogic relationship between individual and government. The cases confirm this dynamic.

a. *State v. Reid*

In *Reid*, an 1840 Alabama Supreme Court case upholding a state law that banned open carry, the interaction between the substance of the self-defense right and state conceptions of that right is evident.¹¹⁷ Noting a state constitutional guarantee that “[e]very citizen has the right to bear arms in defence of himself and the State,” the court reasoned that the constitution “neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne.”¹¹⁸ More specifically, the court explained that by limiting lawful exercises of force to those in defense of oneself or the state, the Alabama Constitution reserved for the legislature the right to regulate in the interest of public safety up until such

113. *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Heller*, 554 U.S. at 585 n.9.

114. *State v. Shultz*, 25 Mo. 128, 155 (1857); *Heller*, 554 U.S. at 585 n.9.

115. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91-92 (1822), *superseded by constitutional amendment*, KY. CONST. of 1850, art. XIII, § 25; *Heller*, 554 U.S. at 585 n.9.

116. ALA. CONST. of 1819, art. I, § 23 (“Every citizen has a right to bear arms in defence of himself and the State.”); MO. CONST. of 1820, art. XIII, § 3 (“[The people’s] right to bear arms in defence of themselves and of the State cannot be questioned.”); KY. CONST. of 1799, art. X, § 23 (“[T]he rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.”).

117. It is no coincidence that two of the three cases discussed in this section (*Reid* and *Bliss*) concern concealed carry. Concealed carry was perhaps the key firearms-related controversy of the nineteenth century. Indeed, the startling volume of concealed-carry challenges led Jonathan Meltzer to posit that the strict originalist analysis of *Heller* and *McDonald* supports the conclusion that *open* public carry is permitted under the Second Amendment, while *concealed* public carry is not. See Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1490 (2014); see also David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126 (“In the nineteenth century, concealed carry was often considered outside the scope of the right to bear arms.”).

118. *Reid*, 1 Ala. at 616 (quoting ALA. CONST. of 1819, art. I, § 23).

regulation “amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence.”¹¹⁹

Two observations arise from *Reid*, one relating to what the court said and another to what the court did not say. The *Reid* court acknowledged, as *Heller* implied, that there exists a right to self-defense that the legislature cannot violate. Of equal importance, however, is the fact that the *Reid* court did not conceive of that right as preexisting; it came from the text of the Alabama Constitution.¹²⁰ To the extent that the court implicitly characterized self-defense as a natural right that might exist independent of the state constitution, it also suggested that the state would violate that right only if it were to render self-defense fundamentally impracticable.¹²¹ Put otherwise, even if one reads *Reid* to endorse a natural right to self-defense, that natural right would, under the court’s reasoning, be coextensive with the right enshrined in the state constitution.

b. *State v. Shoultz*

In *Shoultz*, an 1857 case upholding a defendant’s murder conviction despite his self-defense plea, the Missouri Supreme Court demonstrated similar deference to state-defined conceptions of self-defense.¹²² In the case, the defendant challenged the trial judge’s failure to instruct the jury that the Missouri Constitution prohibited jurors from drawing adverse inferences against individuals who happened to be bearing arms at the time of an alleged murder.¹²³ While the court accepted both the defendant’s interpretation of the right to bear arms and his conception of how it limited the proper inferences a jury may draw, it nonetheless rejected his appeal.¹²⁴ It reasoned that the right to bear arms “is known to every jury man in our State, but nevertheless the right to bear does not sanction an unlawful use of arms.”¹²⁵

119. *Id.*

120. *Id.* at 614-15 (discussing *Reid*’s claim that a state concealed-carry law is “repugnant to the constitution of this State,” which is itself “said to be for the most part, in affirmance of the common law”).

121. *Id.* at 622 (“We will not undertake to say, that if in any case, it should appear to be indispensable to the right of defence that arms should be carried concealed about the person, the act [banning concealed carry] should be so construed, as to operate a prohibition in such case. But in the present case, no such necessity seems to have existed; and we cannot well conceive of its existence under any supposable circumstances.”).

122. *State v. Shoultz*, 25 Mo. 128, 156 (1857).

123. *Id.* at 154-55.

124. *Id.* at 155.

125. *Id.*

By acknowledging a broadly understood right to bear arms, *Shoultz* came slightly closer than *Reid* to recognizing a natural right to self-defense. But this acknowledgment in no way foreclosed the state from legitimately defining the scope of self-defense. Ultimately, *Shoultz*'s appeal failed for the same reason *Reid*'s did. The court recognized the right to keep and bear arms for only one purpose—self-defense—and the factfinder was instructed to evaluate purported violations of that right only to the extent that they undermined that purpose.¹²⁶ Against a background presumption that the right existed to protect self-defense, both the *Shoultz* and *Reid* courts held that substantive state law defined the contours of self-defense.

c. *Bliss v. Commonwealth*

The outlier to the general rule that nineteenth-century cases upheld the ability of states to regulate firearms is *Bliss*, an 1822 Kentucky Supreme Court decision invalidating a state concealed-carry ban for violating a state constitutional amendment providing that “the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.”¹²⁷ The *Bliss* court rejected not only the state’s argument that the law was a legitimate exercise of police powers but also the notion that the availability of alternative means of self-defense allowed for restrictions on concealed carry.¹²⁸ The court’s reasoning was based on a strict interpretation of Kentucky’s state constitution.¹²⁹ Because the relevant provision set forth no limits on the right to bear arms, the court deemed “any restraint on the right” unconstitutional.¹³⁰ This conclusion is in direct conflict with *Heller*, which explicitly rejected the notion that the Second Amendment right is unlimited; thus, the reasoning in *Bliss* is inconsequential for federal constitutional jurisprudence.

126. *Id.* (“[T]he right to bear does not sanction an unlawful use of arms. The right is to bear arms in defense of ourselves.”).

127. KY. CONST. of 1799, art. X, § 23; *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 93-94 (1822), *superseded by constitutional amendment*, KY. CONST. of 1850, art. XIII, § 25.

128. *Bliss*, 12 Ky. (2 Litt.) at 91-92 (“But to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form—it is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”).

129. *See id.* at 91-92 (“[I]t is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”).

130. *Id.* at 92.

Nonetheless, the case is frequently cited in contemporary case law and scholarship for its apparent acknowledgment of a natural, preexisting right to public carry.¹³¹ In particular, the *Bliss* court asserted that “[t]he right [to bear arms] existed at the adoption of the constitution.”¹³² But this is more a statement of fact than a pronouncement of natural law. The right to concealed carry did indeed exist at the 1799 ratification of the Kentucky Constitution, at least in the sense that it was not banned by the legislature until 1813.¹³³ But concealed carry was relatively rare until around the time the ban was enacted, its newfound popularity arguably linked to increased state regulation of dueling.¹³⁴ Kentucky politicians recognized the rise of concealed carry as a serious problem in the period after *Bliss* was decided.¹³⁵

Nineteenth-century records from the Kentucky House of Representatives indicate that lawmakers felt the *Bliss* court erred because it strayed too far from the common law meaning of the right to bear arms, which extended only to arms-bearing practices “appropriate to individual contest in private broils.”¹³⁶ In other words, the *Bliss* court’s atypical interpretation relied not on a superior understanding of natural rights relative to contemporaneous courts in other states, but rather, in the legislative committee’s view, on a “literal” interpretation of the state constitution that neglected the provision’s “probable intention.”¹³⁷ The legislature’s frustration culminated in an 1849 constitutional amendment explicitly allowing the state to “pass laws to prevent persons from carrying concealed arms,” which was ratified without debate.¹³⁸

Despite other courts’ heavy reliance on *Bliss*’s alleged characterization of a preexisting right to bear arms, no binding decision in a Kentucky court has ever cited *Bliss* in any firearm-related context.¹³⁹ When *Bliss* is cited in

131. See *District of Columbia v. Heller*, 554 U.S. 570, 585 & n.9 (2008); see also *Young v. Hawaii*, 896 F.3d 1044, 1055 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019), *argued*, No. 12-17808 (9th Cir. Sept. 24, 2020); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1359-60 (2009) (arguing that the *Bliss* court “assumed (just as Justice Scalia does) that the constitutional provision at issue codified a preexisting right”).

132. *Bliss*, 12 Ky. (2 Litt.) at 92.

133. See KY. CONST. of 1799, art. X, § 23; Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 REG. KY. HIST. SOC’Y 370, 370 (1993).

134. Ireland, *supra* note 133, at 370-72.

135. *Id.* at 373 (noting the Kentucky state legislature’s finding that the *Bliss* court was “too literal in its interpretation of the constitution”).

136. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF KENTUCKY 74 (Frankfort, Ky., A.G. Hodges ed., 1837).

137. *Id.* at 73.

138. KY. CONST. of 1850, art. XIII, § 25; Ireland, *supra* note 133, at 374.

139. Only one Kentucky opinion of any kind—a concurrence in *Posey v. Commonwealth*—has cited the decision in such a context. See 185 S.W.3d 170, 183-205 (Ky. 2006) (Scott, J., *footnote continued on next page*)

Kentucky, it is almost always with reference to its then-groundbreaking dictum describing the Kentucky Supreme Court's power to invalidate legislation it deems unconstitutional.¹⁴⁰ Such is the irony of the case's recent renaissance: When *Heller* framed the Second Amendment as codifying a natural right, *Bliss's* fleeting reference to preconstitutional rights gave it obvious appeal as persuasive authority. Yet its precedential value lies not in its affirmation of natural law, but rather in its meticulous interpretation of written constitutional provisions.

* * *

Taken together, the nineteenth-century cases relied upon in *Heller* demonstrate a historical trend. The right to keep and bear arms was understood (and, in the case of state constitutions, explicitly drawn) in conjunction with—and in service of—a more fundamental right to self-defense. The cases affirmed the right of states to pass many types of regulations on firearms, so long as the regulation did not seriously inhibit the exercise of the right to self-defense—a right that was itself given meaning through state law.

B. Federal Courts and Self-Defense Law

Given that the Second Amendment's self-defense "core" is inextricably tied to state law, it is useful to examine how federal courts have examined challenges to such laws in other contexts. It is axiomatic that federalism grants states considerable discretion to shape their own criminal law.¹⁴¹ This is consequential because even the simplest conception of self-defense—the proportional exercise of lethal force in response to a reasonable fear of imminent death or serious bodily injury—relies, like so much of criminal law, on difficult line-drawing exercises.¹⁴² Jury verdicts and common law give meaning to vague standards like "proportionality" and "reasonableness," but so does statutory law. As social conditions evolve, self-defense law evolves, too—

concurring in part and dissenting in part). Even there, the analysis was historical; it made no reference to a natural right. *See id.* at 188-89, 196, 200-01.

140. *See, e.g.,* *Gaines v. O'Connell*, 204 S.W.2d 425, 427 (Ky. 1947); *Bd. of Penitentiary Comm'rs v. Spencer*, 166 S.W. 1017, 1019 (Ky. 1914); *Commonwealth v. Ill. Cent. R.R. Co.*, 170 S.W. 171, 175 (Ky. 1914).

141. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

142. *See* Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1596 (2013) ("The typical formulation of self-defense allows the defendant to use deadly force upon reasonable fear of imminent death, serious bodily injury, or a violent felony. An archetypal case of self-defense would involve one using proportional force to ward off a sudden unprovoked attack with a weapon." (footnote omitted)).

sometimes to expand the right and other times to limit it.¹⁴³ Like self-defense law as a whole, state self-defense law frequently codifies existing norms and prejudices,¹⁴⁴ but unlike the purely historical sources of law upon which *Heller* and other originalist decisions rely, state self-defense law is capable of adapting in response to societal change.¹⁴⁵ And regardless of their substance, state-level changes to self-defense law have long been reviewed deferentially by federal courts.¹⁴⁶ It follows, therefore, that state policy affecting the instrumentalities with which self-defense is actualized (including firearms) ought to enjoy similar deference.

Two cases from the late nineteenth and early twentieth centuries highlight the power of state actors to alter common law conceptions of self-defense and the willingness of courts to accept such alterations. The first is *Beard v. United States* in 1895.¹⁴⁷ The case concerned Beard, a man who had gotten into a property dispute with decedent Will Jones and his two brothers, one of whom threatened Beard's life and came to his property brandishing a gun.¹⁴⁸ Jones and his brothers refused to leave the property and a fight broke out, prompting Beard to strike Jones on the head.¹⁴⁹ Beard claimed that as Jones approached him, he feared for his life due to Jones's earlier threat.¹⁵⁰ During the encounter, which took place a short distance outside of Beard's

143. See, e.g., *infra* notes 169-73 (discussing developments in self-defense law over the last century).

144. See generally CAROLINE E. LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* (2017) (providing a historical account of the development of self-defense law in the United States as a tool of white supremacy); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (noting that widely held racist stereotypes inform determinations about what fears are "reasonable"); Jane Campbell Moriarty, "While Dangers Gather": *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 28-30 (2005) (discussing legislative efforts to revise self-defense laws to provide a defense for victims of domestic violence who kill their abusers and the shortcomings of such reforms); Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites Are Far More Likely to Be Ruled "Justifiable,"* MARSHALL PROJECT (Aug. 14, 2017, 5:30 AM), <https://perma.cc/MZ7B-HTAL> (presenting empirical research regarding racial disparities in the success rates of self-defense pleas and other affirmative defenses to homicide).

145. See Wallace, *supra* note 86, at 1752-56 (discussing the failure of self-defense law to protect survivors of domestic violence at common law); *infra* note 265 and accompanying text (discussing legislative efforts to revise state self-defense law to better protect survivors of domestic violence).

146. See *infra* notes 169-78 and accompanying text.

147. 158 U.S. 550 (1895).

148. *Id.* at 550-52.

149. *Id.* at 552-53.

150. *Id.*

property, Beard made no attempt to retreat.¹⁵¹ The trial judge instructed the jury that if Beard had the ability to retreat safely and did not attempt to do so, he could not plead self-defense.¹⁵² Beard was convicted.¹⁵³

The Supreme Court reversed, finding that Beard “was entitled to stand his ground” and that the trial court was wrong to instruct the jury that Beard had a duty to retreat.¹⁵⁴ In reaching this conclusion, the Court acknowledged that U.S. courts have largely bucked ancient common law tradition with respect to the duty to retreat.¹⁵⁵ According to the Court, the duty to retreat “has been greatly modified in this country, and has with us a much narrower application than formerly.”¹⁵⁶ The *Beard* Court cited the work of contemporaneous commentators, who surveyed the law of the states at the time and found a trend away from the duty to retreat.¹⁵⁷

The Court extended *Beard* in 1921 in *Brown v. United States*.¹⁵⁸ *Brown* involved a lethal act of violence that the defendant claimed he committed in self-defense.¹⁵⁹ Defendant Brown alleged that decedent Hermes, who had attacked and threatened Brown in the past, lunged at him with a knife.¹⁶⁰ Brown responded by running across the room (about twenty to twenty-five feet) to grab his coat, pulling a pistol out of its pocket, and shooting Hermes four times.¹⁶¹ The defendant was convicted at trial, following the judge’s instruction “that the party assaulted is always under the obligation to retreat, so long as retreat is open to him.”¹⁶²

The Supreme Court again reversed, reiterating that U.S. law has come to disfavor the duty to retreat.¹⁶³ As in *Beard*, the Court in *Brown* was remarkably blunt about its aberration from the common law, with Justice Holmes writing,

151. *See id.*

152. *Id.* at 556-58.

153. *Id.* at 551.

154. *Id.* at 564.

155. *Id.* at 561.

156. *Id.* (quoting *Runyan v. State*, 57 Ind. 80, 84 (1877)).

157. *See Runyan*, 57 Ind. at 83-84 (“A man may repel force by force in the defence of his person, habitation[,] or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if, in a conflict between them, he happen to kill, such killing is justifiable.” (quoting a contemporaneous criminal law treatise)).

158. 256 U.S. 335 (1921).

159. *Id.* at 341-42.

160. *Id.* at 342.

161. *Id.*

162. *Id.* at 341-42.

163. *Id.* at 343-44.

“[t]he law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature.”¹⁶⁴ To justify this departure from tradition, the Court primarily cited its own precedent (including *Beard*) as well as state court precedent from Texas,¹⁶⁵ concluding, “in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”¹⁶⁶

Beard's and *Brown*'s rejection of the duty to retreat marks a major deviation from common law tradition, but it would be a mistake to conclude from these cases that the duty is no longer relevant in the United States. As a pure doctrinal matter, the dissolution of federal common law has rendered these cases nonbinding.¹⁶⁷ To the extent the cases remain persuasive authority, they are more notable for their willingness to discard longstanding traditions in favor of uniquely U.S. developments than they are for their substantive propositions.¹⁶⁸ The Court's recognition that state practices may supersede even well-established common law dictates demonstrates how powerful positive legal developments can be in the evolution of self-defense, and how deferential federal courts are to such developments.

The Court's attitude is all the more striking given just how recent the abandonment of the duty to retreat was at the time *Brown* and *Beard* were decided. States generally did not begin abandoning the retreat requirement until the late 1800s.¹⁶⁹ In more recent years, this debate has been revived with

164. *Id.* at 343.

165. *See id.* at 343-44.

166. *Id.* at 343.

167. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”); David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 325 (2000) (“The Self-Defense Cases, like any other Supreme Court interpretations of the common law, remain available as persuasive, if not necessarily binding, precedents for any court which must consider common law self-defense issues.”).

168. Ruben alludes to this difficulty with respect to “stand your ground.” *See* Ruben, *supra* note 11, at 86-88; *see also* *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring in the judgment) (commending a self-defense claimant who “stood her ground” during a public confrontation).

169. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 243 (2008) (noting that the duty to retreat was generally not called into question until the nineteenth century). It should be noted that the movement to end the duty to retreat remains highly controversial; indeed, a majority of current stand-your-ground laws were passed in the twenty-first century. *See* Cynthia V. Ward, “Stand Your Ground” and Self-Defense, 42 AM. J. CRIM. L. 89, 108 (2015).

the advent of so-called stand-your-ground laws.¹⁷⁰ These laws abolish the duty to retreat outside the home, thereby defining self-defense to encompass a large number of public, lethal uses of force.¹⁷¹ Twenty-eight states have adopted stand-your-ground legislation, creating vast and highly controversial discrepancies in self-defense law across the states.¹⁷² Federal courts have left these discrepancies in place. In the century since *Brown*, the Court has treated objections to substantive self-defense law as matters of state criminal law, unfit for federal review and unbound by common law rules of either English or U.S. extraction.¹⁷³

Procedural challenges to state self-defense law have similarly been denied on federalism grounds. The most prominent such challenge arose in the 1987 Supreme Court case *Martin v. Ohio*, in which a homicide defendant argued that an Ohio law placing the burden of proof on her to show that her conduct constituted self-defense (as opposed to on the prosecutor to disprove her assertion) violated due process.¹⁷⁴ The Court sided with the state, noting that self-defense falls within the province of criminal—and thus state—law and is therefore subject to judicial review only where it offends fundamental notions of ordered liberty.¹⁷⁵ Fundamental rights of that magnitude might be implicated, the Court noted, if the jury had been instructed to ignore the defendant’s self-defense claim altogether or if she had been denied the opportunity to plead self-defense in the first place.¹⁷⁶ But placing the burden of proof on defendants who plead self-defense neither eliminated the right nor violated common law understandings of the right’s scope (even though Ohio was one of only two states with this sort of burden-shifting scheme at the time the case was decided).¹⁷⁷ Ohio was thus permitted to adopt a procedure that

170. I use the term “stand your ground” to refer broadly to laws that abolish the duty to retreat, though it is worth noting that stand-your-ground laws differ significantly from state to state. Controversially, some states have passed legislation altering the circumstances under which defendants may claim self-defense, allowing individuals to “stand their ground” and use lethal force in some circumstances where only property, not life, is threatened. See Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIA. L. REV. 827, 829-33 (2013).

171. Ward, *supra* note 169, at 94-107 (discussing the origins of stand your ground, its normative basis, and how it differs from traditional self-defense law).

172. “Stand Your Ground,” GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/5EMV-FLUU> (archived Jan. 13, 2021). Additionally, eight states have abolished the duty to retreat in public via court decision. *Id.*

173. See, e.g., *Hart v. Virginia*, 298 U.S. 34, 34-35 (1936) (per curiam) (dismissing for lack of jurisdiction a Fourteenth Amendment challenge to Virginia’s homicide statute).

174. 480 U.S. 228, 230-31 (1987).

175. *Id.* at 232-33 (citing *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

176. *Id.* at 233.

177. *Id.* at 235-36.

rendered the self-defense right significantly less accessible than in other states, highlighting the power of individual states to set the parameters for the self-defense right.¹⁷⁸

III. Applying Second Amendment Federalism

The diversity of state policies surrounding self-defense, combined with federal courts' willingness to embrace such policies in characterizing the self-defense right, suggests that the right itself goes hand in hand with state regulation. Because self-defense is the core protection of the Second Amendment, this conclusion has significant implications for the right to keep and bear arms. Drawing on the frameworks the Court has adopted in the First and Fourth Amendment contexts, courts should consider how seriously a regulation burdens the right to self-defense as understood under principles of federalism. A familiar two-step framework guides this process: First, ask whether the right to self-defense is burdened; then, ask how severe that burden is.

The critical aspect of this approach, and what differentiates it from current applications of the two-part test, is that it seeks to define the scope of the right to self-defense *before* assessing the severity of the burden. In effect, the approach adds a "step 1.5" to the two-part test: Before asking about the severity of the burden on the right to self-defense, courts inquire about the scope of the right *independent of the challenged state action*. The approach turns on recognizing U.S. self-defense law's inextricable links to federalist tradition; hence, I label the approach "Second Amendment Federalism."

Consider, for example, a statute that prohibits individuals from bringing firearms to a public school. Such a law would unquestionably implicate the Second Amendment because it literally prohibits a person from bearing arms. But suppose that seventeen states had passed laws or adopted judicial rules requiring that individuals who mount claims of self-defense for acts of violence committed on school grounds meet a higher standard of necessity than individuals who commit acts of violence in less sensitive areas. The

178. Federal courts' deference to state legislative judgments regarding self-defense law has only intensified since passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). *See, e.g.,* Middleton v. McNeil, 541 U.S. 433, 435-38 (2004) (per curiam) (holding, in a federal habeas case, that a state appellate court did not unreasonably apply federal law by deciding that the jury instruction's single incorrect statement of the "imperfect self-defense" standard did not render the instruction reasonably likely to have misled the jury); Pinkney v. Sec'y, 876 F.3d 1290, 1295-98 (11th Cir. 2017) (deferring to a state court's determination that an attorney's failure to object to an erroneous self-defense-related jury instruction did not constitute unconstitutional ineffective assistance of counsel).

existence of such laws would suggest that the statute prohibiting firearms on campus does not undermine core Second Amendment interests as much as it might in other contexts, given that the law merely regulates the instrumentalities of self-defense in a context where self-defense generally is subject to more vigorous regulation. Therefore, something like intermediate scrutiny may be appropriate.

This Part proceeds in three Subparts, each of which examine different types of Second Amendment challenges. Subpart A addresses restrictions on public carry, Subpart B addresses bans on dangerous and unusual weapons, and Subpart C addresses prohibitions on the possession of firearms by domestic-violence misdemeanants and other people with criminal records. Each Subpart begins by describing sample cases that addressed the issue and have applied the existing two-step test, and concludes by proposing a way to incorporate Second Amendment Federalism into the analysis.

A. Restrictions on Public Carry

In applying Second Amendment Federalism to restrictions on the public carry of firearms, *Wrenn v. District of Columbia*¹⁷⁹ is instructive. This D.C. Circuit case dealt with a post-*Heller* ordinance requiring individuals who carry firearms in public to obtain licenses, which are available only to those who demonstrate a “special need for self-protection distinguishable from the general community.”¹⁸⁰ The D.C. Circuit separated the core protection of the Second Amendment from the particular holding of *Heller*, framing the core as “individual self-defense”¹⁸¹ and the holding as protecting “a law-abiding citizen’s right to carry common firearms for self-defense beyond the home.”¹⁸² From there, the court looked to the same sources as *Heller* (English common law, Founding-era commentary, and nineteenth-century case law) to conclude that the Second Amendment confers a right to carry firearms publicly for the purpose of individual self-defense.¹⁸³ Rejecting D.C.’s comparison of the law to various historical firearm regulations, and noting that *Heller* flatly invalidated any “complete prohibition[s]” on the exercise of core Second Amendment rights, the court voided the ordinance without applying interest-balancing or tiers-of-scrutiny analysis.¹⁸⁴

179. 864 F.3d 650 (D.C. Cir. 2017).

180. *Id.* at 655 (quoting D.C. CODE § 7-2509.11(1)(A), *invalidated by Wrenn*, 864 F.3d 650).

181. *Id.* at 657 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

182. *Id.*

183. *Id.* at 658.

184. *Id.* at 661-65 (alteration in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)); *see also id.* at 659-61 (declining to engage with D.C.’s attempt to compare its
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Wrenn is the only public-carry case that recognizes self-defense as the core protection of the Second Amendment, but it did not discuss the law of self-defense in detail. Early on, the *Wrenn* majority cited *Heller*'s proclamation that the right to self-defense was "most acute" in the home and reasoned that this suggested that the right still exists in some other, less "acute" form outside the home.¹⁸⁵ "After all," the court reasoned, "the Amendment's 'core lawful purpose' is self-defense and the need for that might arise beyond as well as within the home."¹⁸⁶

The *Wrenn* majority's reasoning was questionable for two reasons. First, it characterized the D.C. licensing scheme as a "complete prohibition[...]" comparable to that which the Supreme Court had invalidated in *Heller*, despite the fact that this ordinance allowed qualified residents to carry firearms publicly.¹⁸⁷ The court noted that the ordinance in *Heller* also allowed for some limited exceptions to the blanket prohibition but was nonetheless deemed a "total ban" because it prohibited most ordinary, law-abiding citizens from possessing handguns.¹⁸⁸ This comparison is factually dubious.¹⁸⁹ Second, the majority in *Wrenn* did not acknowledge the consequences of the declaration from *Heller* that it quoted. If the right to self-defense is *most* acute in the home, then it follows that the right is *less* acute outside the home.¹⁹⁰ It follows, therefore, that regulations of conduct occurring outside the home are less likely to pose a substantial burden on Second Amendment rights. At a minimum, this suggests that the government's interests, which have long prompted governments to regulate public carry, ought to carry some weight.

ordinance to a medieval English statute, reasoning that the dictates of *Heller* allow courts to "sidestep" such historical debate).

185. *Id.* at 657 (quoting *Heller*, 554 U.S. at 628).

186. *Id.* (citation omitted) (quoting *Heller*, 554 U.S. at 630).

187. *Id.* at 665 (quoting *Heller*, 554 U.S. at 629); *id.* at 655-56 (describing the procedure for securing a license to carry under D.C.'s ordinance).

188. *Id.* at 665.

189. *Heller* fleetingly referred to "minor exceptions [to the ban] . . . none of which [are] relevant here," 554 U.S. at 575 n.1, but proceeded to invalidate the challenged ordinances for failing to include "an exception for self-defense," *id.* at 630. In contrast, the code provision at issue in *Wrenn* meticulously explained how to secure a public-carry license by showing a heightened need for self-defense. See *Wrenn*, 864 F.3d at 655-56. For example, D.C. required that applicants claiming they needed their weapons for self-defense to show "a 'special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life.'" *Id.* at 655 (quoting D.C. CODE § 7-2509.11(1)(A), *invalidated by Wrenn*, 864 F.3d 650).

190. See *Wrenn*, 864 F.3d at 669 (Henderson, J., dissenting).

As discussed above,¹⁹¹ state interests have long enjoyed substantial deference in federal courts, which allow states to regulate self-defense heavily.¹⁹² With respect to the law at issue in *Wrenn*, the District of Columbia—far from promulgating a total ban—merely established a regulatory scheme with the goal of ensuring that only those with cognizable self-defense claims could carry firearms in public. Such a scheme not only comports with the standards of necessity and proportionality that the Court in *Brown* and *Beard* recognized as essential to lawful self-defense,¹⁹³ but it is also consistent with the balance of powers as affirmed in *Martin v. Ohio*, allowing subnational governments to define the conditions and procedures under which the right to self-defense may be exercised.

The burden those conditions and procedures place on the exercise of the self-defense right must be taken seriously. But so too must the government's interest in public safety, which is substantial. Only 2.8% of all firearm homicides are justified on self-defense or other grounds, meaning that unlawful lethal confrontations involving firearms are around 35 times more common than lawful ones.¹⁹⁴ Fewer than 1% of violent confrontations outside the home result in the defensive use of a firearm; it is around 52 times more likely for people in such situations to undertake other means of self-protection.¹⁹⁵ From a public-policy standpoint, the rarity of defensive gun use is good news, given that the use of a firearm in self-defense has no effect on the likelihood of injury to the person acting in self-defense in a violent confrontation.¹⁹⁶ There is also some evidence that regulations on public carry reduce gun violence generally and enhance public safety.¹⁹⁷ Legislatures are

191. *Supra* Part II.B.

192. *See supra* notes 94-108 and accompanying text; *see also, e.g.*, *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (holding that “[t]he State [of Ohio] did not exceed its authority” by shifting the burden of proof to homicide defendants who claim self-defense).

193. *See supra* notes 82-87 and accompanying text (describing how these principles may transpose onto Second Amendment doctrine).

194. VIOLENCE POL’Y CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY DATA 1, 10 tbl.2 (2018), <https://perma.cc/EW6W-2UNR>.

195. David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007-2011*, 79 PREVENTIVE MED. 22, 23 & tbl.1 (2015).

196. *Id.* at 24.

197. *See* Michael Siegel, Ziming Xuan, Craig S. Ross, Sandro Galea, Bindu Kalesan, Eric Flegler & Kristin A. Goss, *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923, 1929 (2017) (“The trend toward increasingly permissive concealed-carry laws is inconsistent with public opinion, which tends to oppose the carrying of guns in public. Our findings suggest that these laws may also be inconsistent with the promotion of public safety.” (footnote omitted)).

certainly under no obligation to accept the evidence in support of regulating public carry (which, after all, is not a model of consistency),¹⁹⁸ and they are not required to pass laws like the one under review in *Wrenn*. But their authority to legislate in this area is consistent with the longstanding traditions of self-defense law.

Critics may argue that self-defense law does not support restrictions on public carry because its limits have to do with the *actual* use of lethal force, as opposed to the mere *capacity* to unleash such force.¹⁹⁹ Since there is always the possibility—however remote—that the need for force might arise in any setting, one might contend that it is inappropriate to justify public-carry laws based on prospective appraisals of the likelihood that conditions for lawful self-defense will materialize. But courts recognize public safety as a compelling government interest, and balancing perceived infringements on personal freedom against legitimate policy initiatives is the hallmark of constitutional interest-balancing.²⁰⁰ *Heller* even clarified, “we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”²⁰¹ Thus, the right to keep and bear arms need not extend to every conceivable scenario where the need for self-defense could arise. Expanding the Second Amendment right in this way would effectively render it unlimited, contravening *Heller’s* repeated assertions that it is not.²⁰²

198. *Id.* at 1923 (“Unfortunately, the existing literature on the impact of concealed carry laws is inconsistent.”).

199. See Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537, 551-56 (2013) (arguing that *Heller* and *McDonald* implicitly recognized a need for self-defense outside the home as well as inside it).

200. See, e.g., *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 659-60, 677 (1989) (concluding, in a Fourth Amendment case involving drug testing of U.S. Customs Service agents, that “the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees”).

201. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); cf. Pratt, *supra* note 199, at 574-84 (suggesting a method for incorporating First Amendment-style analysis into Second Amendment doctrine).

202. For example, people with mental illnesses, people who have been convicted of felonies, people who set foot in sensitive areas, and anyone else subject to one of *Heller’s* longstanding, presumptively lawful regulations may well find themselves in a situation where the need for self-defense arises. Despite this possibility, *Heller* upholds the ability of legislatures to limit their access to firearms. 554 U.S. at 626-27, 627 n.26. Moreover, should a person exercise legitimate self-defense while violating public-carry laws, she might use evidence of an actual or reasonably anticipated imminent threat as an affirmative defense to the charge of violating the public-carry laws. Such a procedural structure would mirror how many jurisdictions—as well as most common

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B. Bans on Dangerous and Unusual Weapons

Second Amendment Federalism may also be applied to another common type of Second Amendment restriction: those concerning dangerous or unusual weapons.

In *Kolbe v. Hogan* in 2016, a three-judge panel of the Fourth Circuit remanded to the district court to apply strict scrutiny when evaluating the constitutionality of Maryland's Firearm Safety Act (FSA), a statute passed in the aftermath of the Sandy Hook tragedy that banned semiautomatic rifles and large-capacity magazines (LCMs).²⁰³ Broad in scope, the FSA prohibited virtually all Marylanders from possessing these weapons, except for active and retired law-enforcement officers, licensed dealers, and those who already owned such items at the time the Act was passed.²⁰⁴ The panel applied the two-step approach, observing at step one that the Second Amendment's core protection is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" and that "[a]ny prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment."²⁰⁵ Even so, the panel acknowledged that the first step was complicated by *Heller's* preservation of "the historical tradition of prohibiting the carrying of dangerous and unusual weapons."²⁰⁶ The panel thus turned its attention to whether the sorts of devices banned in the FSA "are commonly possessed by law-abiding citizens for lawful purposes."²⁰⁷ Citing statistical evidence about the popularity of assault rifles and LCMs, the panel concluded that they fit this description.²⁰⁸

The standard for determining what makes some weapons "dangerous and unusual" and others "commonly possessed . . . for lawful purposes" is a matter of dispute.²⁰⁹ Assuming the *Kolbe* panel's answer to this threshold question is

law commentators—conceive of self-defense. See *supra* notes 174-78 (discussing *Martin v. Ohio* and other cases that impose procedural hurdles and heightened burdens of proof on defendants who plead self-defense); see also Ruben, *supra* note 11, at 83 (concluding that self-defense traditionally sanctions only a narrow range of conduct).

203. 813 F.3d 160, 168 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017); *id.* at 194 (King, J., dissenting in part and concurring in the judgment).

204. *Id.* at 169-70 (majority opinion).

205. *Id.* at 172 (quoting *Heller*, 554 U.S. at 635).

206. *Id.* at 173 (emphasis omitted) (quoting *United States v. Marzzarella*, 614 F.3d 85, 90 (3d Cir. 2010)); see also *Heller*, 554 U.S. at 627.

207. *Kolbe*, 813 F.3d at 173.

208. *Id.* at 174-75.

209. *Id.* at 173 (emphasis omitted) (quoting *Marzzarella*, 614 F.3d at 90). The conjunctive "and" in "dangerous and unusual" is a particular source of controversy. All weapons are at least somewhat dangerous, but it is unclear what makes a weapon unusual. Compare *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032-33 (2016) (Alito, J., concurring in the judgment) (arguing that the sale of approximately 200,000 stun guns to private citizens

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correct, the inquiry for the second step of the test is clear: To what extent does Maryland's ban on assault rifles and LCMs offend the Second Amendment's core purpose of preserving the right to self-defense? The panel observed that the categorical nature of the ban would necessarily prohibit private citizens from using the banned weapons in the home, where the right is most acute.²¹⁰ Moreover, the panel recognized "legitimate reasons" why some citizens might prefer the extreme destructive capacities of assault weapons and LCMs when it comes to exercising lawful self-defense.²¹¹ But the mechanics of how the proscribed weapons might be used in exercise of the self-defense right were ancillary to the panel's ultimate conclusion. What mattered more was that the challenged statute inhibited the ability of law-abiding citizens who, "for whatever reason," wished to use the banned weapons to protect themselves in their homes.²¹² Emphasizing that locational element, the panel remanded to the district court, ordering it to rehear the case and apply strict scrutiny.²¹³

Underlying the panel's analysis was an assumption that LCMs do indeed help people exercise their right to self-defense.²¹⁴ The fact that the FSA prohibited the possession of assault weapons and LCMs altogether, whether in public or in the home, undoubtedly makes compliance with the law more burdensome. But that burden is constitutionally significant only if we accept

renders them sufficiently popular to warrant Second Amendment protection, regardless of how common they are relative to other types of firearms), and *Maloney v. Singas*, 351 F. Supp. 3d 222, 237-38 (E.D.N.Y. 2018) (finding that nunchakus are "in common use," and thus protected by the Second Amendment, by virtue of the fact that "at least 64,890 nunchakus have been sold over the past 23 years to private citizens"), with *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (concluding that machine guns are "unusual" in part because only 175,977 legal machine guns exist in the United States), and *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (noting that large-capacity magazines might be "unusual" because only 9% of U.S. firearm owners possess them, while dismissing the unusualness inquiry as "circular" because many weapons are unusual only because they are illegal).

210. *Kolbe*, 813 F.3d at 179.

211. *Id.* at 181.

212. *Id.*

213. *Id.* at 184; see also *id.* at 168 ("In our view, Maryland law implicates the core protection of the Second Amendment—the right of law-abiding[,] responsible citizens to use arms in defense of hearth and home' . . ." (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008))); *id.* at 172 ("Any prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment.").

214. See *id.* at 181 ("A semi-automatic rifle may not be 'the quintessential self-defense weapon,' as *Heller* described the handgun; nonetheless, as we explained previously, AR-15s and the like are commonly possessed by law-abiding citizens for self-defense and other lawful purposes and are protected under the Second Amendment." (citation omitted) (quoting *Heller*, 554 U.S. at 629)).

that assault weapons and LCMs are, like handguns, tools for self-defense.²¹⁵ In other words, it cannot be said that the proscription of certain items impedes the right to self-defense if the relationship between the items and the right is never identified.

The *Kolbe* panel's brief and ultimately dismissive investigation into that relationship is troubling. In a single paragraph, the panel cited to conclusory statements in the briefs describing long guns as more accurate than handguns, as well as concerns that the stresses of a home invasion may make it more difficult to frequently reload weapons (a concern for firearms with lower-capacity magazines).²¹⁶ There is reason to doubt that the weapons banned under the FSA are commonly used for self-defense, let alone that they would be more effective than handguns in effectuating that purpose.²¹⁷ But even if the FSA does prevent some people from defending themselves in the precise manner they choose, this would matter only if one's right to in-home self-defense encompasses a subsidiary right to act in self-defense in whatever manner one chooses. Otherwise, the availability of handguns would be sufficient to protect the Amendment's core purpose.²¹⁸

215. *Cf. Heller*, 554 U.S. at 629 (affording handguns Second Amendment protection because “the American people have considered the handgun to be the quintessential self-defense weapon”).

216. *Kolbe*, 813 F.3d at 181.

217. See MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 241730, FIREARM VIOLENCE, 1993-2011, at 12 (2013), <https://perma.cc/8LYD-AXJ7> (finding that between 2007 and 2011, only 1% of victims in all nonfatal violent victimizations used a firearm of any kind in self-defense); Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 497 (1992) (“If high powered semiautomatic weapons are necessary for self defense, then it is difficult to explain why the police do not regularly carry those weapons or even fully automatic ones.”); Declaration of Professor Daniel W. Webster in Support of Defendant Xavier Becerra's Opposition to Plaintiffs' Motion for Preliminary Injunction at 10, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17-cv-01017), ECF No. 15 (“I know of no data indicating that victims of violent crime tend to need more than 10 rounds of ammunition . . . or that persons equipped with assault weapons or LCMs were more effective in protecting themselves than were crime victims who used other types of firearms.”).

218. Several courts have made the complementary observation that restrictions on non-handgun firearms may be constitutional specifically because handguns remain constitutionally protected under *Heller*. See, e.g., *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015) (“Unlike the District of Columbia's ban on handguns, Highland Park's ordinance [banning semiautomatic assault weapons] leaves residents with many self-defense options.”); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 259 (2d Cir. 2015) (“The scope of the legislative restriction and the availability of alternatives factor into our analysis of the ‘degree to which the challenged law burdens the right.’” (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010))).

The en banc Fourth Circuit reversed the *Kolbe* panel, concluding that semiautomatic weapons and LCMs are not constitutionally protected²¹⁹ and that even if they were, the FSA would survive intermediate scrutiny.²²⁰ The Fourth Circuit acknowledged that the former conclusion could be justified via the district court’s “sound analysis,”²²¹ which looked to expert testimony from law-enforcement officers who “could not identify a single instance in which an assault weapon or more than ten rounds of ammunition were used or were necessary to ward off an attacker.”²²² Assuming this testimony is true, it provides a powerful counterweight to arguments about individual liberty. If the weapons regulated by the FSA are not used for self-defense, it is difficult to see why the FSA would seriously undermine a person’s Second Amendment rights.

But this argument reveals little about why intermediate scrutiny is the appropriate standard. It would be tautological to say that a ban on certain types of weapons does not undermine self-defense rights simply because there are few actual cases where such weapons have been used for self-defense. One can accept that semiautomatics and LCMs are seldom used for lawful self-defense while at the same time at least imagining a situation in which they *could* be used for lawful self-defense. The empirical fact that such situations are rare does not address the threshold doctrinal question of how proscriptions on semiautomatics and LCMs interact with self-defense law.

Second Amendment Federalism helps define that relationship. That individuals are more at liberty to use lethal force in their homes as opposed to outside of them is scarcely debated, but the extent of that liberty is a matter of dispute.²²³ States maintain vastly different standards regarding individuals’ obligation to minimize force when exercising lethal self-defense, both inside and outside the home.²²⁴ In interpreting those standards, state courts and juries consistently find occasion to consider the type of weapon used in an act of alleged self-defense.²²⁵ When courts answer the most basic question—whether

219. See *Kolbe v. Hogan*, 849 F.3d 114, 135-37 (4th Cir. 2017) (en banc) (holding that semiautomatics and LCMs are not constitutionally protected).

220. *Id.* at 138-41 (holding, in the alternative, that the FSA survives intermediate scrutiny).

221. *Id.* at 135.

222. *Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 790 (D. Md. 2014), *aff’d en banc sub nom. Kolbe v. Hogan*, 849 F.3d 114.

223. See *supra* notes 103-08 and accompanying text.

224. See *supra* notes 103-08 and accompanying text.

225. See *State v. Mincey*, 687 P.2d 1180, 1189-90 (Ariz. 1984) (en banc) (upholding the admission of evidence that a defendant wanted “to adapt a semi-automatic weapon to make it shoot faster,” introduced for the purpose of undermining his self-defense claim); Glenn E. Meyer, Alicia S. Baños, Tiffany Gerondale, Christine Kiriazes, Claire M. Lakin & Amanda C. Rinker, *Juries, Gender, and Assault Weapons*, 39 J. APPLIED SOC.

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a defendant's use of force was excessive—they often take note of the lethality of the weapon used.²²⁶ In other instances, trial courts issue jury instructions allowing factfinders to draw inferences about a defendant's criminal intent based on the type of weapon they used in an encounter (assuming, for example, that defendants who use especially destructive weapons likely did not intend to minimize force).²²⁷ At the evidentiary stage, courts sometimes admit expert testimony about the sophisticated nature of a weapon in order to assess the likelihood that the weapon would be used in a manner consistent with lawful self-defense.²²⁸ In short, there is a strong tradition among states that casts suspicion not just on individuals who claim self-defense in cases where excessive force was used, but also on individuals who exert deadly force with unusually destructive weapons.

This tradition is buoyed by *Heller's* oft-repeated admonishments that the Second Amendment right is “not unlimited,”²²⁹ applies “only to certain types of weapons,”²³⁰ and does not protect the privilege “to keep and carry any weapon whatsoever in any manner whatsoever.”²³¹ With respect to the statute at issue in *Kolbe*,²³² one may conclude that because state law routinely disfavors the use of highly destructive weapons for self-defense, a ban on semiautomatic weapons and LCMs does not seriously undermine self-defense interests. It is true that some states—especially in recent years—have loosened their

PSYCH. 945, 946-48, 953 (2009) (noting that juries tend to draw adverse inferences based on the appearance or aesthetics of the gun used by self-defense claimants).

226. *See, e.g.,* *People v. Williams*, No. C039442, 2003 WL 21153464, at *6 (Cal. Ct. App. May 20, 2003) (noting, as one factor in a holistic evaluation of whether a defendant's use of force was reasonable in light of the circumstances, that the defendant “had many less lethal options other than to shoot [the victim] at close range”); MASS. SUP. JUD. CT., MODEL JURY INSTRUCTIONS ON HOMICIDE 32 (2018), <https://perma.cc/L9L3-HESM> (instructing jurors deciding on a self-defense plea to consider, among other things, “the characteristics of any weapons used”). *But see* *Blackwell v. State*, 257 So. 2d 855, 855-56 (Miss. 1972) (reversing a murder conviction where the jury instruction informed the jurors that malice is implied by law in a homicide case by virtue of the “nature and character of the weapon used”).
227. *See, e.g.,* *People v. Roberson*, No. 251358, 2004 WL 2601271, at *2-3 (Mich. Ct. App. Nov. 16, 2004) (per curiam) (upholding such an instruction).
228. *See, e.g.,* *State v. Fish*, No. 1 CA-CR 06-0675, 2009 WL 1879479, at *7-8 (Ariz. Ct. App. June 30, 2009) (finding no error in a trial court's decision to admit expert testimony on “the powerful and expensive nature of the handgun and ammunition Defendant used to kill the Victim” for the purpose of undermining a defendant's self-defense claim).
229. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).
230. *Id.* at 623.
231. *Id.* at 626.
232. *Kolbe v. Hogan*, 849 F.3d 114, 120-23 (4th Cir. 2017) (en banc).

restrictions on excessive force and the duty to retreat.²³³ But these developments are testaments to, not refutations of, the tendency of self-defense law to evolve and diversify among states.²³⁴ At most, the existence of a wide range of state policies governing the use of destructive weapons in cases of self-defense suggests that laws that ban such weapons only cursorily undermine core self-defense interests. Hence, Second Amendment challenges to those laws would warrant some lesser degree of scrutiny than a challenge to a *Heller*-style ban on commonly held weapons.

C. Prohibitions on Possession by Domestic-Violence Misdemeanants and Others with Criminal Records

Second Amendment Federalism can also help give clarity to *Heller*'s most bewildering dictum, which preserves "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."²³⁵ Ironically, the (arguably) least controversial gun-control law²³⁶—and one of

233. See Ward, *supra* note 169, at 108 ("Since 2005, when the Florida legislature replaced the state's Retreat rule with a Stand Your Ground statute, about half the states have followed suit.").

234. The interaction between state laws curtailing the duty to retreat and common law tradition came into focus in *State v. Jones*, in which the Supreme Court of South Carolina upheld a defendant's invocation of an affirmative defense asserting immunity from prosecution for murder under the newly enacted Protection of Persons and Property Act. See 786 S.E.2d 132, 134 (S.C. 2016) (citing 2006 S.C. Acts 2908 (codified at S.C. CODE ANN. § 16-11-410 to -450 (2021))). The case concerned a woman who was prosecuted for stabbing her cohabitating boyfriend. *Id.* at 134. She had argued that her conduct was legal notwithstanding her decision not to retreat, citing a provision of the 2006 Act that "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground." *Id.* at 139 (quoting S.C. CODE ANN. § 16-11-440(C) (2015)). Finding for the defendant, the court reasoned that "[t]he Legislature explicitly codified the Castle Doctrine when it promulgated the Act and extended its protection, when applicable, to include an occupied vehicle and a person's place of business." *Id.* at 136. The crux of the analysis dealt purely with statutory interpretation. *Id.* at 137-140. While the court briefly argued that its reasoning was in line with pre-Act common law, *id.* at 140, that observation was not essential to its decision. Interestingly, the court spent more time expounding on the general policy rationales of stand your ground—which, it noted, have been adopted by "the majority of jurisdictions"—than in grappling with the doctrine's congruence with common law. *Id.* at 140-41.

235. *Heller*, 554 U.S. at 626-27.

236. Part of the relative lack of controversy surrounding the Gun Control Act is attributable to the fact that the gun lobby was far weaker in 1968 than today. The National Rifle Association, for example, worked alongside the federal government to develop the Act. See Ron Elving, *The NRA Wasn't Always Against Gun Restrictions*, NPR
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the only federal statutes regulating firearms²³⁷—is perhaps the most sweeping. The Gun Control Act of 1968²³⁸ prohibits firearm possession by, as well as sales or disposals to, people convicted of felonies, people who are “unlawful user[s] of or addicted to any controlled substance,” and people who lack citizenship or immigrant visas.²³⁹ The Act was amended in 1997 to also bar individuals convicted of domestic-violence misdemeanors from possessing firearms (as well as to prohibit sales or disposals to this class of individuals).²⁴⁰ “Prohibited person” bans like the ones in the Act enjoy widespread public support.²⁴¹ Critics of the law tend to come from the political left, including gun-control advocates who argue that the federal law as currently constituted

(Oct. 10, 2017, 5:00 AM EST), <https://perma.cc/MCN9-KMHU>; Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://perma.cc/BB2H-QR8F> (quoting NRA Executive Vice President Franklin Orth’s general support for the Gun Control Act, including Orth’s reasoning that while some provisions of the Act “appear unduly restrictive and unjustified in their application to law-abiding citizens, the measure as a whole appears to be one that the sportsmen of America can live with”). As discussed later in this Subpart, the law has faced challenges in court more recently, but its substantive provisions enjoy widespread support among the public. See Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RSCH. CTR.: FACT TANK (Oct. 16, 2019), <https://perma.cc/MFA8-6NZC> (reporting that 91% of respondents favored preventing people with mental illnesses from purchasing guns and 88% supported background checks for private gun sales and gun shows); 18 U.S.C. § 922(d)(4) (barring sales of firearms or ammunition to people who “ha[ve] been adjudicated as a mental defective or ha[ve] been committed to any mental institution”); *id.* § 922(t) (setting forth a background-check system for firearm sales).

237. There are two other significant pieces of federal firearms legislation in addition to the Gun Control Act of 1968: the National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-5872), which imposes tax and registration requirements, and the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended in scattered sections of 22 U.S.C.), which empowers the President to regulate the import and export of arms. See 22 U.S.C. § 2751; 27 C.F.R. § 447.21 (2020) (interpreting portions of the Act to apply to civilian firearms); see also BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUST., PUB. 5300.4, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 73-77, 95-97 (rev. 2014), <https://perma.cc/JB6L-RSNV>.
238. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).
239. 18 U.S.C. § 922(d)(1), (3), (5), (g)(1), (3), (5).
240. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b)(1)(C), (b)(2)(C), 110 Stat. 3009, 3009–372 (codified at 18 U.S.C. § 922(d)(9), (g)(9)).
241. See, e.g., Colleen L. Barry, Emma E. McGinty, Jon S. Vernick & Daniel W. Webster, Perspective, *After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1078 tbl.1 (2013) (indicating that 73.7% of Americans support prohibiting firearm possession for ten years for people convicted of domestic-violence-related crimes, and 74.8% support a ten-year prohibition on possession by people convicted of two or more drug- or alcohol-related crimes within a three-year period).

contains too many loopholes,²⁴² as well as criminal-justice reformers who express concern that the law’s highly punitive sentencing scheme incarcerates men of color at astronomical rates.²⁴³

Individuals convicted of domestic-violence misdemeanors have frequently challenged the constitutionality of the federal “prohibited persons” ban. The Seventh, First, and Ninth Circuits have all considered challenges to the ban on possession by domestic-violence misdemeanants, which is codified at 18 U.S.C. § 922(g)(9), and have concluded that it satisfies intermediate scrutiny.²⁴⁴ But uniformity in outcome has not meant uniformity in analysis. The courts that have considered Second Amendment challenges to the statute have reached their decisions as to the level of scrutiny in inconsistent ways.

In 2010, the Seventh Circuit was the first to hear a challenge to § 922(g)(9), in *United States v. Skoien*. Applying an early iteration of the two-step approach, the court acknowledged that the statute was a “categorical disqualification[]” and thus required some level of scrutiny under the Second Amendment.²⁴⁵ At the same time, the court declined to “parse . . . passages of *Heller* as if they contain[] an answer to the question whether § 922(g)(9) is valid” and used the dictum on “longstanding prohibitions” to conclude that the opinion preserved

242. See, e.g., Melanie Kalmanson, Note, *The Second Amendment Burden: Arming Courts with a Workable Standard for Reviewing Gun Safety Legislation*, 44 FLA. ST. U. L. REV. 347, 362-63, 379-82 (2016) (noting that the law’s “default proceed” scheme allows individuals to proceed with purchasing a firearm if their background check takes more than three days to process for any reason and that the law exempts unlicensed sellers—who facilitate approximately 40% of U.S. gun sales—from its background-check requirements); Nick Butto, Note, *The Front and Back Ends of Domestic Violence Murder: An Exploration of the Avenues for Change and an Introduction of the Domestic Violence-Murder Doctrine*, 107 GEO. L.J. 457, 464-65 (2019) (describing the “boyfriend loophole,” a gap in federal law that restricts individuals convicted of intimate-partner violence from possessing firearms but defines “intimate partner” to exclude nonmarried, non-coparenting, non-cohabiting partners).

243. The statute as currently written imposes a maximum of ten years of imprisonment for individuals found guilty of illegally possessing a firearm, with a minimum of fifteen years if the individual has been convicted of three or more violent felonies and/or serious drug offenses. 18 U.S.C. § 924(a)(2), (e)(1). James Forman Jr. argues that lawmakers have fixated on gun violence to the detriment of communities of color:

Prohibiting gun possession . . . while failing to curb the vibrant national gun market or to address crime’s root causes, has led to the worst of all possible worlds. Guns—and gun violence—saturate our inner cities, while the people who go to prison for possessing guns are overwhelmingly black and brown.

JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 77 (2017).

244. See *United States v. Skoien*, 614 F.3d 638, 639, 641-42, 645 (7th Cir. 2010) (en banc); *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

245. *Skoien*, 614 F.3d at 639, 641-42.

at least “some categorical limits.”²⁴⁶ Such limits cannot be analyzed under rational basis; indeed, the United States conceded that “some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential, and . . . § 922(g)(9) is valid only if substantially related to an important governmental objective.”²⁴⁷ Nonetheless, the court averred, “we need not get more deeply into the ‘levels of scrutiny’ quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.”²⁴⁸ With that, the court upheld the statute.²⁴⁹

By the time the First Circuit considered the statute in *United States v. Booker* the following year, the courts of appeals had begun to coalesce around the two-step test.²⁵⁰ In light of the expanded use of the two-step framework, one would expect less reticence in applying it than the Seventh Circuit showed in *Skoien*. Yet the First Circuit’s analysis was remarkably similar to that in *Skoien*, which it cited extensively. Observing that domestic-violence misdemeanants fall outside the explicit scope of *Heller*’s “longstanding” restrictions, the court acknowledged that the categorical nature of § 922(g)(9) placed it within the Second Amendment’s ambit.²⁵¹ Even so, compelling empirical evidence regarding the prevalence of domestic violence, the frequency of recidivism among abusers, and the link between firearms and intimate-partner homicide led the court to conclude that “it is plain that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence.”²⁵² The court thus upheld the statute, concluding that it had satisfied intermediate scrutiny.²⁵³

The Seventh Circuit’s and First Circuit’s analyses resembled that of other courts grappling with step two of the two-prong test. By jumping into the policy rationales behind § 922(g)(9), the courts applied intermediate scrutiny before explaining why intermediate scrutiny was appropriate. In considering a challenge to § 922(g)(9) in 2013, the Ninth Circuit in *United States v. Chovan* conducted a more detailed two-step analysis, citing to multiple circuits that

246. *Id.* at 639-40 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

247. *Id.* at 641.

248. *Id.* at 642.

249. *Id.* at 642, 645.

250. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (adopting the framework); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) (same).

251. *United States v. Booker*, 644 F.3d 12, 22-26 (1st Cir. 2011) (quoting *Heller*, 554 U.S. at 626).

252. *Id.* at 25-26.

253. *Id.* at 26.

had heard challenges to the statute.²⁵⁴ The result at step one was a definitive declaration: “[B]y prohibiting domestic violence misdemeanants from possessing firearms, § 922(g)(9) burdens rights protected by the Second Amendment.”²⁵⁵ The court reached this conclusion by refuting the government’s assertion that bans on possession by domestic-violence misdemeanants were “longstanding” restrictions, marking a less equivocal analysis on step one than either *Skoien* or *Booker* had offered.²⁵⁶ At step two, however, the court contended that § 922(g)(9) did not undermine the *core* protection of the Second Amendment, which was the “right of *law-abiding, responsible* citizens to use arms in defense of hearth and home.”²⁵⁷ Therefore, while the burden imposed on Second Amendment rights by § 922(g)(9) was indeed “quite substantial,” the actors it regulated were not subject to its core protection.²⁵⁸

Chovan appropriately described the constitutional dilemma posed by bans on firearm possession by domestic-violence misdemeanants. Their policy justifications are compelling, but their broad scope makes them legally suspect. *Heller*’s fleeting suggestion that the Second Amendment extends only to “law-abiding” citizens promises a quick way to discard the problem by limiting the scope of the right.²⁵⁹ But doing so would further require one to accept *Heller*’s fiction that restricting gun rights only to those who are generally “law-abiding”—a practice that, at least at the federal level, came into existence no earlier than 1938—is in fact a longstanding tradition dating back to the days of ratification.²⁶⁰ Courts might choose to do just that rather than call into question common-sense public-safety laws.

Nonetheless, Second Amendment Federalism helps to offer analytical clarity and consistency to § 922(g)(9) challenges. True, individuals convicted of domestic violence (or any other crime) do not categorically surrender their

254. See *United States v. Chovan*, 735 F.3d 1127, 1134-36 (9th Cir. 2013) (summarizing other circuits’ approaches to such challenges and adopting the two-step approach).

255. *Id.* at 1137.

256. *Id.*

257. *Id.* at 1138 (emphasis added) (quoting *Heller*, 554 U.S. at 635).

258. *Id.*

259. *Heller*, 554 U.S. at 635.

260. General interest in restricting access to firearms by individuals convicted of violent crimes dates back to a 1926 model statute, which sought to build momentum around a nascent movement for gun control in the United States. See C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 700-01 (2009). By the time the Federal Firearms Act was passed in 1938, only eleven U.S. jurisdictions had adopted the model restriction, which barred firearm possession by individuals convicted of “crime[s] of violence.” *Id.* at 705. The Federal Firearms Act adopted this same language, and it was not until 1968 that it was amended to prohibit firearm possession by any person convicted of a felony. *Id.* at 698-99.

right to self-defense in circumstances where the use of force would otherwise be justified.²⁶¹ But neither does a person surrender the self-defense right when he or she enters a public space or uses a destructive weapon. The dispositive question is not whether there could conceivably be a situation in which the use of lethal force by a domestic-violence misdemeanor would be justified, but whether the law of self-defense tolerates limits on how such individuals may exercise the right.

Historically, the purpose of self-defense has been to prevent violent crime—indeed, some early common law commentators suggested that individuals have an affirmative obligation to intervene (in some cases lethally) to prevent such occurrences.²⁶² Today, this attitude might manifest in state law principles limiting the ability of individuals who escalate violent encounters to raise claims of self-defense.²⁶³ Inversely, we might also look to state rules liberalizing self-defense against individuals with histories of violence; many states, for example, allow defendants asserting self-defense to present evidence of a victim’s past violent conduct to buttress claims that their use of lethal force was reasonably necessary.²⁶⁴ One area where evidence of past violent conduct has proven especially relevant is in self-defense cases where survivors of domestic violence kill their abusive partners, a circumstance for which many states have adopted revised procedures that allow juries to take into account cyclical patterns of violence.²⁶⁵ Taken together, these state laws demonstrate a

261. Ruben, *supra* note 11, at 75 (“Ex-felons and the mentally ill maintain their self-defense rights, but, according to the list, lose their Second Amendment rights.”).

262. See Miller, *supra* note 11, at 92 (“It is not only every person’s right, but it is his legal duty, to prevent a felony, even if he has to go to the extreme of taking the life of the person attempting to commit it.’ . . . [T]heories of self-defense and defense of others merged with a duty to enforce the law against actual or attempted felons.” (quoting W.M. L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 137 (St. Paul, Minn., West Publ’g Co. 1894))).

263. See, e.g., *State v. Broussard*, 768 S.E.2d 367, 369-70 (N.C. Ct. App. 2015) (“A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force.”); *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1992) (per curiam) (noting that a defendant “cannot raise a legitimate self-defense claim when he went out of his way to look for trouble”).

264. See, e.g., *State v. Jenewicz*, 940 A.2d 269, 278-79 (N.J. 2008) (explaining that, in self-defense cases, evidence of a victim’s violent tendencies may be used to support an inference that the victim was the first aggressor and to establish a defendant’s belief that self-defense was necessary); *Workman v. Commonwealth*, 636 S.E.2d 368, 377 (Va. 2006) (same); see also FED. R. EVID. 404(a)(2).

265. See, e.g., ARK. CODE ANN. § 5-2-607(a)(3) (2021) (permitting persons to use lethal force against someone “imminently about to victimize the person . . . from the continuation of a pattern of domestic abuse”); KY. REV. STAT. ANN. § 503.050(3) (West 2021) (providing that “[a]ny evidence presented by the defendant [pleading self-defense] to establish the existence of a prior act or acts of domestic violence and abuse . . . by the person against whom the defendant is charged with employing physical force shall be admissible under this section”). See generally Moriarty, *supra* note 144, at 20-32
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trend in which states adopt separate procedures surrounding claims of self-defense by individuals convicted of violent crimes such as domestic violence. It stands to reason that efforts to limit this population's access to the instrumentalities of self-defense are subject to something less than strict scrutiny.

How, precisely, to characterize that level of scrutiny is a matter of debate. As the cases examining § 922(g)(9) suggest, there is strong evidence linking positive public-health outcomes to bans on possession for domestic-violence misdemeanants—strong enough, one may argue, to withstand all but the highest levels of scrutiny. Even so, few can dispute that prohibited-person legislation severely impedes individual liberties, making it reasonable to require that these bans be justified by some highly persuasive government interest. For example, the Second Amendment Federalism case for banning possession by people convicted of nonviolent offenses or undocumented individuals is quite weak; such individuals do not fall outside the obvious bounds of self-defense law, so the rationale for prohibiting them from exercising the self-defense right is wanting.²⁶⁶ Second Amendment Federalism encourages judges and advocates to look past assumptions about who and what the Second Amendment protects, focusing instead on what interests the Amendment seeks to guard and what costs society is and is not willing to tolerate in order to serve those interests.

Conclusion

There is little doubt that the Supreme Court will hear a Second Amendment case in the near future. Regardless of when another case comes before the Court, the Justices' interest in clarifying the doctrine is clear.

Any such inquiry into the Second Amendment's scope must respect individual self-defense as its core protection. The Court's approach to

(describing how self-defense law has failed survivors of domestic violence and discussing revisions to various penal codes that have attempted to rectify this problem); Suk, *supra* note 169 (surveying changes to self-defense law in domestic-violence cases through a feminist jurisprudential lens).

266. See *Kanter v. Barr*, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, J., dissenting). In this case, the Seventh Circuit affirmed the constitutionality of 18 U.S.C. § 922(g)(1) (the felony dispossession statute) as applied to people convicted of nonviolent crimes. *Id.* at 438-40 (majority opinion). Then-Judge Barrett dissented, reasoning that the statute (and its state law equivalent) was not "tailored to serve the governments' undeniably compelling interest in protecting the public from gun violence." *Id.* at 451 (Barrett, J., dissenting). Central to this conclusion was the observation that "[n]either felons nor the mentally ill are categorically excluded from our national community" but "[t]hat does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess" *Id.* at 453.

analogous constitutional protections in the First and Fourth Amendments, as well as the internal logic of *Heller*, demands such a reading. But the Second Amendment's broad protection is, as *Heller* reminds us, subject to appropriate limitations. In defining those limits, Second Amendment Federalism offers insight into the elements of lawful self-defense and the broad authority that states retain in setting the rules and procedures around it. Given the limited scope of the Second Amendment's core protection, it follows that states must be empowered to regulate the instrumentalities with which the right is exercised. Second Amendment Federalism respects *Heller's* originalist reasoning without sacrificing its limiting dictum. More importantly, it helps strike the essential balance at the heart of the gun-control debate, respecting both individual liberty and common-sense public-safety laws.