

ARTICLES

GUNS AS SMUT: DEFENDING THE HOME-BOUND SECOND AMENDMENT

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In District of Columbia v. Heller, the Supreme Court held that the Second Amendment guarantees a personal, individual right to keep and bear arms. But the Court left lower courts and legislatures adrift on the fundamental question of scope. While the Court stated in dicta that some regulation may survive constitutional scrutiny, it left the precise contours of the right, and even the method by which to determine those contours, for “future evaluation.”

This Article offers a provocative proposal for tackling the issue of Second Amendment scope, one tucked in many dresser drawers across the nation: Treat the Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity under the First Amendment—a robust right in the home, subject to near-plenary restriction by elected government everywhere else.

This Article’s proposal to treat guns like smut is sure to stir controversy. But it is grounded in solid methods of constitutional analysis. The Court in Heller sent unmistakable signals that the First and Second Amendments are cousins and may be subject to similar limitations. As Justice Scalia noted, the First Amendment excludes from its protection certain categories of speech:

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I do not use the word “smut” pejoratively, or as a term of contempt, but rather because it stimulates interest, and because obscenity jurisprudence fairly describes what the resulting doctrinal limits of a home-bound Second Amendment would look like. I could have used the word “obscenity,” but frankly it just isn’t as catchy.

The ideas in this Article are my own and do not necessarily reflect the sentiments of the many individuals who have helped me. Second Amendment scholarship has, to its discredit, become the “.22 caliber Rorschach test” for political ideology. See Erik Luna, *The .22 Caliber Rorschach Test*, 39 *Hous. L. Rev.* 53, 53–54 (2002). I will, therefore, disclose that I am a newcomer to this field. I did not participate in *Heller*, nor in any prior Second Amendment litigation. I remain utterly agnostic as to the empirical question of whether more or fewer guns make people safer. I have not received any monies to prepare this Article on behalf of any group involved in Second Amendment or gun policy. This Article is a piece of advocacy only to the extent that academics frequently offer opinions about what they think is the good society, and occasionally people listen.

“obscenity, libel, and disclosure of state secrets.” The Second Amendment may be “no different,” and almost certainly excludes from its protection certain categories of “bearing” and certain categories of “arms.”

Moreover, the “home-bound” approach to the Second Amendment rationalizes the disparate norms that animate the Court’s privacy jurisprudence. It situates the Second Amendment within tradition and doctrine that accord constitutional weight to a spatial and conceptual distinction between the home and the public sphere. Finally, this proposal has the benefit of simplicity: The Court has already marked boundaries for an individual right to adult obscenity in the home. Those boundaries are surprisingly applicable to the individual right to bear arms, and far easier to administer.

While this proposal will not resolve all issues of Second Amendment scope, its prudential and practical merits deserve serious consideration as part of post-Heller discourse on the Second Amendment.

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INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear

arms for personal protection.¹ But the Court offered legislatures and lower courts little guidance as to the scope of that right.² The Court cautioned that the Second Amendment right is not boundless, but did not specify whether a person may now freely carry a gun into a park, a sports stadium, or a children's petting zoo. Such issues were left for "future evaluation."³

This Article offers a modest proposal, one tucked in the dresser drawer in many bedrooms across the nation. Treat the right⁴ to own a firearm under the Second Amendment the same way we treat the right to view adult obscenity⁵ under the First: a robust right to possess it in the home,⁶ subject to nearly plenary restriction by elected government officials everywhere else.⁷

1. 128 S. Ct. 2783, 2816–17 (2008).

2. *Heller* did not state whether the Second Amendment is a fundamental right for purposes of Fourteenth Amendment due process incorporation against the states. The circuits are currently split on the issue. Compare *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009) (finding incorporation), with *NRA v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, slip op. at 9 (7th Cir. June 2, 2009) (finding no incorporation absent reversal of Supreme Court precedent). This Article assumes that the Second Amendment eventually will be incorporated.

3. *Heller*, 128 S. Ct. at 2821.

4. I mean a "right" in the sense of a norm that is insulated from judgments (typically majoritarian) about what is prudent or wise—similar to the way Justice Scalia uses the term in *Heller*. See *id.* This conception of a right is sometimes referred to as "rights as trumps." See Ronald Dworkin, *Taking Rights Seriously* 365 (1978). I do not speak of a right in the layman's sense as that which the government bestows (for example, laws that permit individuals to carry a concealed or unconcealed weapon). See, e.g., Ohio Rev. Code Ann. § 2923.125 (West 2006). Nor do I mean a right in the sense of a natural right unconnected to positive law. Finally, I refer here to the federal Second Amendment right, not to state constitutional rights to keep and bear arms, which may be more expansive.

5. I am speaking strictly of obscenity depicting adults. Child pornography is not protected, even in the home. *Osborne v. Ohio*, 495 U.S. 103, 108 (1990). Also, when I speak of obscenity, I mean it as a term of art; not, as is commonly understood, as a synonym for graphic representations of adult sex (i.e. pornography), which may or may not be legally obscene. See, e.g., *Farrell v. Burke*, 449 F.3d 470, 486–92 (2d Cir. 2006) (discussing difference between obscenity and pornography); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324–26, 331–34 (7th Cir. 1985) (same).

6. When I use the term "home," I mean a person's permanent dwelling place and habitation. This piece uses home to mean the physical confines of an individual dwelling, recognizing that appurtenant structures or the open land immediately adjacent to the dwelling—the curtilage—present difficult issues. Compare *Beard v. United States*, 158 U.S. 550, 552, 554–55 (1895) (holding self-defense instruction in criminal proceeding in federal territory includes curtilage fifty yards out from dwelling), with *People v. Riddle*, 649 N.W.2d 30, 44 (Mich. 2002) (holding "castle doctrine" applies to all areas of dwelling including basement, garage, porch, or decks, but not entire curtilage), *Commonwealth v. Carlino*, 710 N.E.2d 967, 971 (Mass. 1999) (noting castle doctrine does not include driveway), and *State v. Provoid*, 266 A.2d 307, 311 (N.J. Super. Ct. App. Div. 1970) (determining "castle doctrine" includes curtilage but not public right of way running alongside property).

7. In using this home-bound approach, my thesis is almost diametrically opposite to that of scholars, such as Nelson Lund, who have argued that "government should face a heavy burden when called upon to justify such restrictions [on publicly carrying firearms]."

Provocative? Admittedly.⁸ Nevertheless, *Heller* signaled that the First and Second Amendments are cousins, and may be subject to similar limitations. The majority held that the Second Amendment right to firearms is not restricted to eighteenth century weapons, any more than the First Amendment freedom of speech is restricted to eighteenth century forms of communication.⁹ Conversely, the majority warned that “the [Second Amendment’s] right [to keep and bear arms is] not unlimited, just as the First Amendment’s right of free speech [is] not.”¹⁰ As the majority noted, the First Amendment excludes from its protection categories of expression, such as “obscenity, libel, and disclosure of state secrets.”¹¹ The Second Amendment may be “no different,”¹² and almost certainly excludes from its protection certain kinds of “bearing” and certain categories of “arms.”¹³

This “home-bound” Second Amendment, moreover, rationalizes the disparate norms that animate the Court’s privacy jurisprudence. It situates the Second Amendment within an established doctrine in which con-

which often operate to deprive the people of access to weapons in just those circumstances when they are most needed.” Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 Ga. L. Rev. 1, 73–74 (1996) [hereinafter Lund, Past and Future]; see also Michael P. O’Shea, *The Right to Defensive Arms after District of Columbia v. Heller*, 111 W. Va. L. Rev. 349, 373 (2009) (arguing *Heller* supports proposition that some form of right to publicly carry firearms is required by Second Amendment).

8. Provocative, but not wholly unprecedented. *Heller* itself mentions the First Amendment many times as a source of doctrinal analogies. See *infra* note 162 and accompanying text. Of the gallons of ink spilled over the Second Amendment, a number of scholars have explored First Amendment analogies, primarily “interest balancing” or “time, place, and manner” doctrine. See, e.g., Christopher A. Chrisman, *Mind the Gap: The Missing Standard of Review Under the Second Amendment (and Where to Find It)*, 4 Geo. J.L. & Pub. Pol’y 289, 323–29 (2006) (noting First Amendment content-based analysis is useful for examining gun control regulations); David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 Denv. U. L. Rev. 901, 935 (2008) [hereinafter Kopel, Tenth Circuit] (noting appropriateness of First Amendment time, place, and manner approach); Lund, *Past and Future*, *supra* note 7, at 73–74 (same); Janice Baker, *Comment, The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. Dayton L. Rev. 35, 57–59 (2002) (same).

On a higher level of abstraction, Joseph Blocher has examined the Supreme Court’s use of categories in First and Second Amendment analysis. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375 (2009).

Michael Dorf, in a short essay in the *Syracuse Law Review*, mentioned obscenity as one of a number of doctrinal tools a future court may use. See Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 Syracuse L. Rev. 225, 231 (2008). But Professor Dorf does not explore at length how or why this analogy with obscenity works, its jurisprudential or historical source material, or its correspondence with other aspects of constitutional jurisprudence. In this, I believe, this Article is a first.

9. *Heller*, 128 S. Ct. at 2791.

10. *Id.* at 2799.

11. *Id.* at 2821.

12. *Id.*

13. See *infra* notes 160–164 and accompanying text.

stitutional distinctions turn on a conceptual and spatial division between the home and the public sphere. Finally, this proposal has the benefit of simplicity. The Court has already marked the boundary for a right to adult obscenity at the home. That boundary is surprisingly applicable to the right to bear arms, and far easier to administer.

The Article progresses as follows: Part I tracks *Heller's* litigation history, beginning with the origin of the District's firearm regulation, the concerted effort by Second Amendment advocates to use *Heller* as a test case, the dispositions in the trial and appellate courts, and the ultimate, albeit partial, resolution of the issues in the United States Supreme Court. Part II critiques the *Heller* opinion, with particular focus on its lack of theoretical support for the limitations to the right that it heralds. It then offers a fix: The individual right to keep and bear arms should extend no further than the front porch.¹⁴ Any other regulation by federal, state, or local government should be presumptively constitutional. This Part explains how this rule closely mirrors the Supreme Court's existing First Amendment doctrine, which limits the right to possess obscenity to the home.

Part III offers a multifaceted justification for this approach. First, it demonstrates how a home-bound Second Amendment fits neatly within a doctrinal framework that puts a premium on the privacy of the home. Second, it explores the legal and historical treatment of bearing arms in public, either as a threat to government or for personal defense, and concludes that support for public arms is so hopelessly ambiguous and contingent that the only prudent approach is to defer to local and political branches of government. Third, it demonstrates how this home-bound rule is practical, politically feasible, and preferable to other approaches. The aim of Part III is not to make policy pronouncements on the efficacy of gun promotion or gun control for public safety. Rather, the purpose of Part III is to argue that as a constitutional and prudential matter, those questions (outside the home) are better left to the elected and local branches of government. The Article concludes with an acknowledgment of this approach's limitations and suggests directions for future doctrinal development.

I. *HELLER*, BIRTH OF A DOCTRINE

A. *The Origins of the District of Columbia Handgun Ban*

In 1974, the District of Columbia's homicide rate soared to a record high.¹⁵ The previous decade had already witnessed a startling threefold

14. I use this term metaphorically, reserving the more difficult issue of curtilage for other papers.

15. The rate for murder and nonnegligent manslaughter in that year totaled 38.3 per 100,000 persons. This was the highest rate for the District of Columbia since the Department of Justice began gathering statistics in 1960. The numbers in 1991 would dwarf that rate, topping eighty homicides per 100,000 persons. Bureau of Justice Statistics,

increase in homicides, between 1960 and 1969.¹⁶ 1974 was the deadliest year then on record. Three men were gunned down during the Christmas holiday alone.¹⁷ Citizens felt under siege.¹⁸ One headline suggested that D.C. stood for “Dodge City.”¹⁹ Another story reported that “the increased number of police deaths” resulted “particularly [from] violent crimes involving the use of firearms.”²⁰ The spike of homicides had D.C. residents clamoring for action from their newly minted municipal government.²¹

District leaders responded with a bill that strictly curtailed private possession of handguns and other firearms in the home but did not specifically ban their possession in the District.²² The objectives of the bill were twofold: The first was “to reduce the potential[]” for firearm-related crime and accidents; the second was to “monitor the traffic in firearms” by banning future handgun sales, transfers, and purchases.²³ The hope was to “freez[e] the stock of permissible, registered handguns in the District.”²⁴ Notwithstanding, members of the District of Columbia City Council were pessimistic. The ban would do little good absent a nationwide, or at least a regional, ban on firearms.²⁵ “What we are doing to-

U.S. Dep’t of Justice, State-Level Crime Trends Database, Reported Crime in D.C., at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm> (last visited Aug. 17, 2009) (on file with the *Columbia Law Review*).

16. See Paul Duggan, Crime Data Underscore Limits of D.C. Gun Ban’s Effectiveness, *Wash. Post*, Nov. 13, 2007, at B1.

17. See Jane Rippleteau, Three More Slain; District Total 291, *Wash. Post*, Dec. 26, 1974, at C10.

18. Duggan, *supra* note 16.

19. *Id.*

20. Jerry V. Wilson, Op-Ed., Protecting Our Police, *Wash. Post*, Dec. 20, 1974, at A27.

21. See Duggan, *supra* note 16 (reviewing historical support for passage of handgun ban); see also David Levy, Letter to the Editor, Gun Explosion, *Wash. Post*, Dec. 12, 1974, at A19 (proposing handgun buyback program to reduce number of guns on streets). Prior to 1973, the District of Columbia was governed by Congress with portions of municipal regulation delegated to various bodies. In 1973, Congress passed the Home Rule Act, which created a mayor and council system and significantly increased the District’s ability to manage its own civic affairs. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. Code §§ 1-201.01–1-207.71 (2001)). For a discussion of the broader move towards gun control in the 1960s and 1970s, see Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*, 122 *Harv. L. Rev.* 191, 202–12 (2009).

22. Edward D. Jones III, The District of Columbia’s “Firearms Control Regulations Act of 1975”: The Toughest Handgun Control Law in the United States—Or Is It?, 455 *Annals Am. Acad. Pol. & Soc. Sci.* 138, 139–40 (1981) (reviewing provisions of Firearms Control Regulations Act).

23. *Id.* at 142–43.

24. *Id.* at 143; see also Allen Rostron, Incrementalism, Comprehensive Rationality, and the Future of Gun Control, 67 *Md. L. Rev.* 511, 537 (2008) (“The Firearms Control Regulations Act . . . essentially instituted a freeze on handgun ownership and possession in the District of Columbia.”).

25. See Duggan, *supra* note 16 (noting flood of guns coming from Maryland and Virginia and Council’s hope of spurring nationwide ban).

day,” one council member admitted, “will not take one gun out of the hands of one criminal.”²⁶ “But maybe,” said another, “it will save some senseless accident at somebody’s home.”²⁷

The bill passed the Council by a twelve-to-one vote.²⁸ Mayor Walter Washington signed the bill on July 23, 1976.²⁹ Despite congressional maneuvering to undo the legislation without directly confronting the gun control issue, the bill became law.³⁰ This bill, in amended form, was the one challenged three decades later in *Heller*.

B. *Trial Court and Appellate Decision*

Richard Anthony Heller, a mercurial sixty-six year old special officer at the Federal Judicial Center, became the “face behind the landmark case.”³¹ As befits a movement plaintiff, he was not a “tobacco-spitting or camouflage-wearing caricature” but “an everyman with a spotless background.”³² Not that Heller was a stranger to Second Amendment advocacy: He and his friends had planned to challenge the District’s gun regulations for years.³³ But Heller’s plans acquired a particular urgency after he read of a homeowner criminally charged for shooting a burglar with an unlicensed firearm.³⁴ Heller, along with five other D.C. residents,³⁵ sued the District under § 1983,³⁶ alleging that the code provisions barring registration of new handguns, the possession of firearms

26. *Id.* (quoting council member Marion Barry) (internal quotation marks omitted).

27. *Id.* (quoting council member John A. Wilson) (internal quotation marks omitted).

28. Jones, *supra* note 22, at 140. The bill that eventually emerged was the “outgrowth of three more restrictive legislative proposals that had been introduced in 1975.” *Id.* at 141. One of these proposals would have banned all handguns in the District, another would have banned all handguns but would have provided compensation, and a third would have licensed firearm owners and would have imposed mandatory minimum penalties for violations. See *id.* at 141 n.13 (citing No. 1-24, D.C. Council, Period 1 (D.C. 1975), No. 1-42, D.C. Council, Period 1 (D.C. 1975), and No. 1-164, D.C. Council, Period 1 (D.C. 1975)).

29. *Id.* at 140.

30. *Id.* at 141. For a discussion of Congress’s election year efforts to disapprove of the law without triggering a direct vote on the merits of handgun control, as well as early litigation surrounding the law, see *id.* at 140–41.

31. David C. Lipscomb, ‘Regular’ Guy Takes Aim at the Law: Special Police Officer Helps End Gun Ban in the District, *Wash. Times*, July 27, 2008, at M12.

32. *Id.* Robert Levy, the millionaire who backed the litigation, said that the trial team wanted to avoid plaintiffs who were “Loony Toons.” *Id.*

33. *Id.*

34. See *id.*; Elissa Silverman & Allison Klein, Plaintiffs Reflect on Gun Ruling: Residents Explain Reasons for Suit, *Wash. Post*, Mar. 11, 2007, at C1.

35. At trial, five other D.C. residents joined Heller in the litigation, including Shelly Parker, an active community member and resident of crime-plagued Northeast Washington, and Tom Palmer, an openly gay Cato Institute employee who had suffered physical harassment in his youth. See Robert Levy, Commentary, Taking the D.C. Gun Ban to Court, *Wash. Times*, Feb. 28, 2003, at A21; Silverman & Klein, *supra* note 34.

36. 42 U.S.C. § 1983 (2006).

within the home, and the unlicensed carrying of a firearm on one's property violated the Second Amendment.³⁷

Judge Emmet G. Sullivan of the United States District Court for the District of Columbia dismissed the matter on the pleadings. His opinion stitched close to *United States v. Miller*,³⁸ the last definitive statement by the Supreme Court on the Second Amendment. To Sullivan, *Miller* held unequivocally that the Second Amendment is a "collective" right—the Second Amendment, that is, only guarantees the right to firearms for members acting collectively as a state militia.³⁹

Half a century of jurisprudence and three Supreme Court decisions affirmed this collective rights view: The Amendment did not guarantee an individual right to a firearm, nor did the text support such a conclusion.⁴⁰ Judge Sullivan concluded that "[w]hile plaintiffs extol many thought-provoking and historically interesting arguments" for an individual right, the district court could not "overlook sixty-five years" of precedent rejecting such an interpretation.⁴¹

The United States Court of Appeals for the District of Columbia Circuit reversed.⁴² Judge Laurence H. Silberman wrote for the two judge majority. After quickly winnowing the plaintiffs to *Heller* alone,⁴³ the court turned to the Amendment itself. The court began by clarifying that, despite Supreme Court precedent, both the text and the history of the Amendment demonstrated that the right to possess firearms was an individual, as opposed to a collective, right.⁴⁴ The individual right was a cognate to the inherent right to self-defense—a right that included a right to resist "either private lawlessness or the depredations of a tyrannical government."⁴⁵ The court specifically declined to address whether a government could ban the public transportation of guns on foot or in automobiles,⁴⁶ but it suggested that only those regulations that "do not impair the core conduct upon which the [Second Amendment] right was premised" could withstand constitutional scrutiny.⁴⁷ Whether that opened statement included the right to publicly carry guns for self-defense against criminals or tyrannical governments was left unresolved. What

37. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103–04 (D.D.C. 2004), rev'd, 478 F.3d 370 (D.C. Cir. 2007).

38. 307 U.S. 174 (1939).

39. *Parker*, 311 F. Supp. 2d. at 105.

40. *Id.* (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), *Burton v. Sills*, 394 U.S. 812 (1969), and *Miller*, 307 U.S. at 179–82).

41. *Id.* at 109–10.

42. *Parker*, 478 F.3d at 401.

43. The other plaintiffs did not allege sufficient injury to create Article III standing. *Id.* at 373–77.

44. *Id.* at 378–95 (arguing text of Amendment, specifically phrases "the people" and "keep and bear arms," supports individual right interpretation).

45. *Id.* at 395.

46. *Id.* at 400.

47. *Id.* at 399.

was resolved, however, was that a statute that proscribed the in-house, room-to-room transportation of a lawfully registered firearm could not survive, as “it would negate the lawful use upon which the right was premised, i.e., self-defense.”⁴⁸

C. *The Supreme Court Decision*

1. *The Majority Opinion.* — The Supreme Court, in a five-to-four decision, affirmed.⁴⁹ Justice Scalia, writing for the Court, began with a painstaking exegesis of the Amendment’s text⁵⁰—an exercise that occasionally crossed into pedantry. The Second Amendment states: “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.”⁵¹ The Court explained that the Second Amendment was not a secret code, but instead was “written to be understood by the voters” of the founding generation.⁵² The Amendment’s words and phrases must be given their “normal and ordinary meaning,” as opposed to a “technical” meaning.⁵³

Both plaintiffs and defendants, as well as the various amici, deployed an army of linguistic experts and wielded an arsenal of lexicons, vernaculars, and treatises on colonial English usage. Individual rights theories clashed with collective rights theories. Heller advanced that the text unambiguously preserved a personal and individual right to keep and bear arms, “unconnected with service in a militia.”⁵⁴ The District countered that the text of the Amendment “protects only the right to possess and carry a firearm in connection with militia service.”⁵⁵

Justice Scalia delivered the Court’s decision. He pronounced that the Second Amendment preserves an individual right to keep and bear arms, not a collective right. First, one must partition the “operative” from the “prefatory” portion of the Amendment.⁵⁶ The operative section reads “the right of the people to keep and bear Arms, shall not be in-

48. *Id.* at 400. Judge Karen LeCraft Henderson dissented, arguing, inter alia, that the Second Amendment does not apply to the District of Columbia. *Id.* at 409 (Henderson, J., dissenting).

49. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787 (2008). Justice Stevens wrote a dissent in which Justices Souter, Ginsburg, and Breyer joined, and Justice Breyer wrote a separate dissent joined by Justices Stevens, Souter, and Ginsburg. *Id.*

50. See, e.g., *id.* at 2788–89.

51. U.S. Const. amend. II.

52. *Heller*, 128 S. Ct. at 2788 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). It is slightly ironic that the majority’s reliance on such a plain construction of the Amendment’s text required citation to eighteenth and nineteenth century lexicographers and legal theorists, as well as to abstruse research from modern linguistic historians. See, e.g., *id.* at 2805–12.

53. *Id.* at 2788 (quoting *Sprague*, 282 U.S. at 731).

54. *Id.* at 2789.

55. *Id.*

56. *Id.* Nelson Lund apparently first used this prefatory versus operative clause approach. See Siegel, *supra* note 21, at 239 & n.250 (alleging same).

fringed.”⁵⁷ The majority noted that the “right of the people” referred to an individual and personal right, just as the “right of the people” had been construed to be individual and personal in the First Amendment Assembly and Petition Clause and in the Fourth Amendment Search and Seizure Clause.⁵⁸ These texts “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”⁵⁹

Having determined that individuals and not the militia possess the right, the Court turned to the right itself. The right has two textual components: “keep and bear” and “arms.” Marshalling hoary lexicographers, the Court concluded that “arms” meant the same thing in the eighteenth century as it means today: “weapons of offence,” that which a man “takes into his hands, or useth in wrath to . . . strike another.”⁶⁰ Simply because the Second Amendment right is defined by an antique lexicon, however, does not mean that the right is limited to an antique technology. The Second Amendment protects more than the right to bear a musket and black powder, just as the First Amendment protects more than a right to write with a quill and parchment: “[T]he Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁶¹ Any other argument, the Court warned, “border[s] on the frivolous.”⁶²

The Court next defined the phrase to “keep and bear” arms. The majority disaggregated the phrase—the right to “keep and bear” arms meant two distinct rights, not a unitary idiomatic expression. It meant the right “to keep” arms and the right “to bear” them.⁶³ The right “to keep” arms, according to the Court, was simple and straightforward—a right to “have weapons.”⁶⁴ The majority struggled, however, with the plain meaning of “to bear” arms. Plain text dictated that “to bear” meant simply “to carry.”⁶⁵ But the majority stopped short of careening off the textualist precipice: The Second Amendment does not secure an absolute right to carry *any* type of firearm *anywhere* one wishes to carry it. Instead, the majority suggested that “bear,” when used with the term “arms,” means the “carrying” of a firearm “for a particular purpose—con-

57. U.S. Const. amend. II; *Heller*, 128 S. Ct. at 2789–90.

58. *Heller*, 128 S. Ct. at 2790. The majority also noted that the Ninth Amendment use of the term conveyed a personal right. *Id.*

59. *Id.* In contrast, Justice Scalia opined that “the militia,” as used in the prefatory clause, described a specific subset of “the people”—those who were “male, able bodied, and within a certain age range.” *Id.* at 2791. The Justice might have added “white,” as opposed to freedmen or slaves, as he acknowledges later in the opinion. *Id.* at 2802.

60. *Id.* at 2791.

61. *Id.* at 2791–92.

62. *Id.* at 2791.

63. *Id.* at 2797.

64. *Id.* at 2792.

65. *Id.* at 2793 (internal quotation marks omitted).

frontation.”⁶⁶ But the Court did not mean confrontation in the sense of confrontation by or between armed and trained militias,⁶⁷ but rather confrontation for “self preservation”—the “natural right of defense of one’s person or house” and only with such “lawful weapons” as one would possess at home.⁶⁸

Having held that the “operative” portion of the Amendment guarantees an individual right to keep and to bear arms, the Court then contended with the prefatory clause, which states: “A well regulated Militia, being necessary to the security of a free State”⁶⁹ The Court determined that the “well regulated militia” in the prefatory clause was not a militia created by the federal or state government. Such a construction would limit the right to only a subset of individuals, a type of impermissible discrimination that the Second Amendment was designed to prevent.⁷⁰ Instead, “militia” referred to a preexisting set of “all able-bodied men.”⁷¹ Of this set, Congress possessed plenary power to organize all, or any subset, into effective fighting units.⁷² According to the Court, “well-regulated” meant merely “the imposition of proper discipline and training.”⁷³ The phrase “security of a free state” meant only the “security of a free *polity*.”⁷⁴ “State” in this instance did not refer to the various states of the United States.⁷⁵

Now that the Second Amendment had been stripped to its various components, the Court explained how they worked together. The operative clause, an individual right to keep and bear arms, preexisted—and is codified in—the Constitution. That right sounded in nature, the ancient and inalienable right of self-defense or self-preservation.⁷⁶ Self-defense lay at the core of the Second Amendment.⁷⁷

This preexisting right to self-defense contemplates a kind of “citizens’” or “people’s militia,”⁷⁸ of which all able bodied individuals permitted to possess arms are members. This people’s militia is necessary to the security of a free state, because the Framers were conscious of England’s

66. *Id.*

67. Scalia suggests that this interpretation would render the right an absurdity, transforming the Second Amendment into “the right to be a soldier or to wage war.” *Id.* at 2794. The significance of this concession is explored in more detail below. See, e.g., *infra* notes 432–448 and accompanying text.

68. *Heller*, 128 S. Ct. at 2793, 2817 (internal quotation marks omitted).

69. U.S. Const. amend. II.

70. See *Heller*, 128 S. Ct. at 2798 (observing Stuart kings used sectarian militias to disarm their political and religious opponents).

71. *Id.* at 2800.

72. *Id.* This interpretation of the meaning of “militia” has profound consequences, as I discuss below. See *infra* Part III.

73. *Heller*, 128 S. Ct. at 2800.

74. *Id.* (emphasis added).

75. *Id.*

76. *Id.* at 2801.

77. *Id.* (noting self-defense “was the *central component* of the right itself”).

78. *Id.* at 2802.

history of using sectarian militias and standing armies as tools of government oppression.⁷⁹ Individuals, therefore, possess a personal right to bear arms in their homes. Such a right is necessary because disarmament of some or all of the people would leave individuals at the mercy of tyrannical government or common criminals.

But, according to the Court, such a right is not unlimited. Laws that limit the access of felons, the mentally ill, and children to weapons are presumably legal, as are laws restricting concealed weapons, military grade weapons, commercial sales of weapons, and the bearing of weapons into sensitive places.⁸⁰ How or why these regulations comported with the majority's constitutional methodology, and how lower courts should address other questions of the scope of the Second Amendment, were left for another day.⁸¹

2. *The Dissents.* — Justice Stevens and Justice Breyer wrote separate dissents. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, chiseled at the majority's semantic artifice. The problem, according to Justice Stevens, was one of scope.⁸² In his view, an individual clearly may rely on the Second Amendment to use weapons in an organized militia; the issue was “[w]hether [the Amendment] also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense.”⁸³ Justice Stevens concluded that it does not.

To Justice Stevens, the phrase “[a] well regulated Militia, being necessary to the security of a free State” was not merely prefatory to the right to keep and bear arms.⁸⁴ Instead, the “preface” is hardly prefatory at all. To Justice Stevens, it “sets forth the object of the Amendment and informs the meaning of the remainder of its text.”⁸⁵ That object is simply to protect “a right to possess and use firearms in connection with service in a state-organized militia.”⁸⁶ The majority's construction had turned the preface into “mere surplusage.”⁸⁷

“To keep and bear arms,” argued Justice Stevens, represents not two rights, but a “unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.”⁸⁸ The majority insisted that this construction in effect created a right for only a subset of the populace—those enrolled in a state militia. But Stevens observed that the Court had itself noticeably limited Second Amendment protection to its own “subset” of persons: “law-abiding, responsible citi-

79. *Id.* at 2800–02.

80. *Id.* at 2816–17.

81. *Id.*

82. *Id.* at 2822 (Stevens, J., dissenting).

83. *Id.*

84. *Id.* at 2825.

85. *Id.* at 2826. According to Reva Siegel, this was the way judges had read the “preface” for years. See Siegel, *supra* note 21, at 200–01.

86. *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting).

87. *Id.* at 2826.

88. *Id.* at 2827.

zens.”⁸⁹ Contrary to the majority’s understanding, Justice Stevens understood the phrase “bear arms” to be idiomatic—meaning to bear arms in a military confrontation, not, as the majority suggested, to bear arms for a personal confrontation.⁹⁰

Justice Stevens ended with this note:

The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court’s opinion, I could not possibly conclude that the Framers made such a choice.⁹¹

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, wrote separately.⁹² He agreed with Justice Stevens that “self-defense alone, detached from any militia-related objective, is not the [Second] Amendment’s concern.”⁹³ But Justice Breyer’s primary criticism of the majority was instrumental. The majority, he believed, had left lower courts completely at sea as to the proper approach for the next Second Amendment challenge.⁹⁴ Is strict scrutiny appropriate? Intermediate scrutiny? Rational basis? Something else?⁹⁵ According to Justice Breyer, the majority had incomprehensibly concluded that the District’s regulation would fail under any standard of scrutiny.⁹⁶ But surely the law would survive rational basis review, as a law “which . . . seeks to prevent gun-related accidents, at least bears a ‘rational relationship’ to that ‘legitimate’ life-saving objective.”⁹⁷

Justice Breyer also remarked that the majority had not accepted the strict scrutiny standard urged by Heller’s counsel and several amici.⁹⁸ Strict scrutiny would invalidate a host of otherwise apparently compelling regulations—such as “prohibitions on concealed weapons, forfeiture by

89. *Id.* (internal quotation marks omitted) (quoting majority opinion). This is a subset of individuals found nowhere in the text of the Amendment itself. See *id.* at 2831 (stating “not a word in the constitutional text” supports majority’s assertion of Second Amendment applying to this subset).

90. See *id.* at 2830 (“[T]he single right that [the Second Amendment] does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.”).

91. *Id.* at 2847.

92. *Id.* (Breyer, J., dissenting).

93. *Id.*

94. See *id.* at 2850–51 (“How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment?”).

95. See *id.* at 2851 (“What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?”).

96. *Id.* (“The majority is wrong when it says that the District’s law is unconstitutional ‘[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.’” (quoting *id.* at 2817 (majority opinion))).

97. *Id.*

98. *Id.*

criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales.”⁹⁹ Certainly, the majority did not mean that the right to bear arms extended into the well of the Senate—or into the interior of the courtroom.

Further, even if lower courts construed *Heller* to require a strict scrutiny analysis, it would quickly dissolve into some kind of balancing test. Safety is the quintessential compelling government interest,¹⁰⁰ so all that would remain of strict scrutiny would be to examine whether the regulation was narrowly tailored, or as Justice Breyer rephrased it, “whether the regulation at issue impermissibly burdens [the Second Amendment right] in the course of advancing [public safety].”¹⁰¹ Instead of the majority’s textual obfuscation, Justice Breyer would “simply adopt such an interest-balancing inquiry explicitly.”¹⁰²

The majority eschewed Justice Breyer’s explicit interest balancing approach, but neither would it specify a method of scrutiny—at any level:

The very enumeration of the right takes out of the hands of government [including judges] . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future . . . assessments of its usefulness is no constitutional guarantee at all.¹⁰³

In other words, the very purpose of a constitutional right is to shield it from policy determinations from *all* organs of government. So the right is limited—not by levels of scrutiny, infected as they are by judicial assessments of interests, but by categories.¹⁰⁴ As the majority explained, “[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets. . . . The Second Amendment is no different.”¹⁰⁵ While Justice Scalia did not specifically disclaim *any* scrutiny analysis, he strongly indicated that the Second Amendment, like the First, is an Amendment implemented in the first instance by categories.¹⁰⁶

99. *Id.*

100. *Id.* As Justice Breyer noted, nearly every gun regulation “seek[s] to advance . . . a ‘primary concern of every government—a concern for the safety and indeed the lives of its citizens.’” *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

101. *Id.* at 2852.

102. *Id.* Using an express interest balancing approach, Justice Breyer concluded that the District’s regulation advanced the compelling governmental interest of enhancing public safety, and did not burden the Second Amendment right because the regulation, like “every colonial law” before it, includes a “common-law self-defense exception.” *Id.* at 2853.

103. *Id.* at 2821 (majority opinion).

104. For a fuller discussion of how *Heller* rejects balancing for categories, and the difficulty of maintaining the distinction, see generally Blocher, *supra* note 8, at 379, 382.

105. *Heller*, 128 S. Ct. at 2821.

106. See Blocher, *supra* note 8, at 379 (“The central disagreement in *Heller* was not about strict scrutiny and rational basis review but rather about categoricism and balancing.”).

And, as I will argue, those categories are defined by constitutional values centered on the home.

II. GUNS AND SMUT

Heller purports to adhere to the most disciplined of plain text and original public understanding methodologies. But at crucial moments, it flinches. It cannot stomach the spectacle of the judiciary enforcing a “right” of felons, the mentally ill, or domestic terrorists to keep and carry arsenals of lethal weapons. And so, we are left with a temporizing opinion—one that boldly sallies forth to pronounce the triumph of individual rights under the Second Amendment, but soon breaks into confusion and disarray when pressed on the scope of this new right and finally retreats into a series of muttered exceptions that its earlier reasoning does not support.

Part II.A details how *Heller*’s bold premise collapses under its own weight. It argues that *Heller*’s internal confusion is symptomatic of its inability to fully embrace its natural law self-defense rhetoric. Part II.B then explains how obscenity doctrine, which cabins certain First Amendment liberty interests to the home, serves as an appropriate analogue to the liberty interests in self-defense under the Second Amendment, and can help rescue *Heller* from its own incoherence.

A. *Heller*’s Complaint

Textually, the Second Amendment is a wreck.¹⁰⁷ For decades, individual rights, or “Standard Model,” interpretations and collective rights, or “States’ Rights,” interpretations clashed in its obscurity.¹⁰⁸ A clear victor has now emerged.

107. It appears in at least two versions, different both in capitalization and punctuation, one version submitted to Congress and the other to the states. See generally Ross E. Davies, *Which Is the Constitution?*, 11 *Green Bag* 2d 209 (2008) (discussing different versions and interpretive questions they raise). But leaving that peculiarity aside, the words the two versions share are far from self-defining. Richard Epstein, for one, has stated that “few texts seem as flawed as the Second Amendment.” Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why *Heller* Is (Probably) Wrong on Originalist Grounds*, 59 *Syracuse L. Rev.* 171, 172 (2008); see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637, 644 (1989) (“[T]he Second Amendment is perhaps one of the worst drafted of all [the Constitution’s] provisions.”); Adam Winkler, *Scrutinizing the Second Amendment*, 105 *Mich. L. Rev.* 683, 706 (2007) (noting Amendment’s “confusing wording and grammar”).

108. For a small sample of the individual rights literature, see, e.g., Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876* (1998) [hereinafter *Halbrook, Freedmen*] (discussing right to bear arms in late nineteenth century); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984) (discussing right as individual one); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994) (tracing evolution of right to bear arms, as individual right, in England and United States); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1284 (1992) (discussing how, with model of “refined incorporation,” Second Amendment “right to

Individuals possess a right to keep and bear arms irrespective of their participation in the organized militia.¹⁰⁹ Not even *Heller*'s dissenting Justices seemed to dispute this conclusion.¹¹⁰ The individual rights model, at least in its most general terms, has triumphed. The battle lines are now drawn on the *scope* of the Second Amendment right.¹¹¹

On that front, *Heller* is spare with details. Worse, it is riven through with qualification, ambiguity, and circularity. "Well-regulated" means "nothing more than the imposition of proper discipline and training," and yet "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."¹¹² "Arms" means weapons "in common use,"¹¹³ but only "lawful weapons."¹¹⁴ The right is not limited to just those weapons used in the Revolutionary

keep and bear arms becomes a quintessentially individual right"); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 267–68 (1983) [hereinafter Kates, *Handgun Prohibition*] (discussing how historical, textual, and philosophical underpinnings of Second Amendment demonstrate its intended purpose as protector of individual liberty). The collective rights literature is just as voluminous. For an equally small sample, see, e.g., Carl T. Bogus, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365, 1388 (1993) [hereinafter Bogus, *Race, Riots, and Guns*] (arguing Second Amendment should not be read to allow for private law enforcement and self-defense); Dennis A. Henigan, *Arms, Anarchy, and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991) (similar).

Some scholars have criticized this demarcation between "individual" and "collective" rights interpretations. See, e.g., Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 211–16 (2008) [hereinafter Cornell, *Well-Regulated Militia*] (remarking Second Amendment is not about individual or collective rights of state, but civic rights of individuals); Blocher, *supra* note 8, at 377 n.2 (criticizing these labels); Saul Cornell, *The Ironic Second Amendment*, 1 Alb. Gov't L. Rev. 292, 307 (2008) (criticizing labels). Certainly, post-*Heller* scholarship, including this Article, must work outside the pre-*Heller* framework.

For surveys and comments on the literature, see generally Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi.-Kent L. Rev. 3 (2000); William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 Stan. L. & Pol'y Rev. 671 (2006).

109. *Heller*, 128 S. Ct. at 2821–22.

110. See Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 Ohio St. L.J. 671, 673 (2008) [hereinafter Denning & Reynolds, *Five Takes*] (stating *Heller* court "unanimously interred the old 'collective' right interpretation of the Second Amendment").

111. See, e.g., Blocher, *supra* note 8, at 377 (remarking litigants are already preparing to debate scope of Second Amendment); Stephen G. Calebresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 52–53 (2008) (discussing scope in context of incorporation); Denning & Reynolds, *Five Takes*, *supra* note 110, at 673 ("The locus of disagreement in *Heller* was the *scope* of the individual right."); see also Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 108 (1987) [hereinafter Lund, *Self-Preservation*] ("The exact scope of the individual right is not expressly defined in the Constitution and is not self-evident.").

112. *Heller*, 128 S. Ct. at 2800, 2816.

113. *Id.* at 2815.

114. *Id.* at 2817–18.

Era,¹¹⁵ and the right is protected as a check on military despotism.¹¹⁶ Yet the right likely does not extend to the very weapons effective to accomplish that purpose, such as machine guns and artillery.¹¹⁷ “Militia” means the state and national militias, such as the National Guard¹¹⁸—except when used in the Second Amendment, where it means the “citizens’” or “people’s militia.”¹¹⁹ To “bear” arms simply means “to carry.”¹²⁰ It also means to carry for confrontation.¹²¹ It also means to carry (for confrontation) in a war, except when used in the Second Amendment, when it doesn’t.¹²²

Finally, and most explosively, the Second Amendment preserves a right to keep and bear arms for “self-defense,” but—outside the narrow facts of *Heller* itself—does not specify against whom, when, or where.¹²³ Freighted with these questions, the opinion disintegrates into tautology: A person of legal age has a constitutional right to take a lawful firearm anywhere it is lawful do so, as long as it is for a lawful purpose.¹²⁴

115. *Id.* at 2817.

116. *Id.* at 2802.

117. See *id.* at 2815–17 (acknowledging “M-16s and the like” effective against modern military forces may be proscribed). This is not to mention more exotic weapons like tactical nuclear ordnance and nerve gas. If the point of the Second Amendment is truly to guarantee an *effective*, as opposed to symbolic, safeguard of liberty against our own government, no weapon would be taken off the table. The test would simply be to assume the worst: The “doomsday” scenario has come to pass; legal and political restraints are gone and the entire issue is now a military one. See *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (referring to Second Amendment as “doomsday provision” when all other norm-enforcing mechanisms are gone). What military hardware would prevent a motivated national army, bent on subjugating its own people and armed with nuclear, chemical, and biological weapons, from acting? The fact that the Court explicitly rejected this type of analysis suggests an attenuated role for the antityranny aspect of future Second Amendment doctrine.

118. See *Heller*, 128 S. Ct. at 2799–800 (stating Second Amendment militia refers to both Article I “organized” militia as well as militia made up of all able bodied men).

119. *Id.* at 2802.

120. *Id.* at 2793 (internal quotation marks omitted).

121. *Id.*

122. *Id.* at 2793–94.

123. “Given the presumption that most citizens are law abiding,” Justice Stevens warned, “and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home . . . the District’s policy choice [to restrict handguns in the home and elsewhere] may well be just the first of an unknown number of dominoes to be knocked off the table.” *Id.* at 2846 (Stevens, J., dissenting). In its defense, the Court likely felt that it had bitten off quite enough by adopting the individual rights model. Detailing its outer boundaries would have only invited further dissent, and a potential plurality decision. Cf. Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit I* (U.C. Davis Legal Studies Research Paper Series, Research Paper No. 164, 2009), available at <http://ssrn.com/abstract=1347186> (on file with the *Columbia Law Review*) (speculating opinion was tailored to get Justice Kennedy’s vote).

124. *Heller*, 128 S. Ct. at 2817–18 (describing such limits). Judge J. Harvie Wilkinson trenchantly criticizes the majority’s desire to “recognize a right to bear arms without having

Heller's internal inconstancy is a symptom of an acute interpretive ailment: *Heller* recognizes a penumbral right to self-defense in the Second Amendment, but cannot decide if this right obtains any place such defense is necessary, and against any threat, public or private.¹²⁵ And if not, why not?

Part of the problem is *Heller's* imprecision on what it means by “self-defense.” The right to self-defense proposed in *Heller* could mean two related things. It could mean a right to publicly defend oneself against government threats—the strong “right to revolution” or “insurrectionist” model.¹²⁶ It could also mean a right to publicly defend oneself against private threats—“true man” theories.¹²⁷

Heller alludes to these two concepts as the preconstitutional source of the Second Amendment, but makes very little effort to distinguish them. This is a mistake. Both aspects of self-defense must be understood in philosophical and historical context in order to have any analytical value.

Unfortunately, *Heller* swallows natural law self-defense reasoning whole, without adequately parsing the political and historical provenance of that concept and without digesting its legal and practical limitations.

to deal with any of the more unpleasant consequences of such a right.” J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 273 (2009).

125. As more than one commentator notes, the phrase “self-defense” does not appear in the Second Amendment, even though some state constitutions used the term or its close equivalents. “If clear and unambiguous language from state constitutions was available to the drafters of the Second Amendment to demonstrate that the right to keep and bear arms was intended to guarantee . . . firearms for self-defense purposes, why doesn’t the Second Amendment use that language to state this principle ‘unequivocally?’” Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically Correct Originalism, and Other Second Amendment Musings* 26 (U.C. Davis Legal Studies Research Paper Series, Research Paper No. 170, 2009), available at <http://ssrn.com/abstract=1390330> (on file with the *Columbia Law Review*). One response is that the original understanding was of the right to “self-defense” notwithstanding the text. But as Brownstein also observes, that only creates a “dissonance between text and alleged original understanding” that undermines the value of reducing the Constitution to writing in the first place. *Id.* at 23.

126. See discussion *infra* Part III.B.

127. See discussion *infra* Part III.B.5. One could argue that the Amendment only preserves a *means* of self-defense, and not the right to self-defense itself. This interpretation, however, seems highly problematic. First, it is countered by the numerous references to self-defense in *Heller*. E.g., *Heller*, 128 S. Ct. at 2801, 2803, 2805. Second, the interpretation is difficult to reconcile with the majority’s decision to strike down the D.C. trigger lock requirement, even though that provision said nothing about the ability to keep actual arms. See David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 Ohio St. L.J. 641, 644 (2009) [hereinafter Williams, *Death to Tyrants*] (noting trigger lock requirement “immobilized” guns, making it “impossible to use a handgun in the home for self-defense”). Third, just as the right to possess adult obscenity means a right to view it, so too a right to possess a firearm must mean a corresponding right to *use* it. See *id.* (discussing how restrictions on gun use, if upheld, would render Second Amendment meaningless). Eventually, the Court will have to reckon with its apparent constitutionalization of self-defense doctrine.

Consequently, the opinion ends up tempering its inflammatory self-defense rhetoric with this bromide:

[N]othing in our opinion should 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.¹²⁸

That's not a rule of decision. That's ipse dixit, "in search of a theory."¹²⁹ The home-bound Second Amendment is a tonic, but not a cure, for *Heller's* flux.

No one can deny that the raw Second Amendment right to arms for self-defense will be implemented through some type of doctrine—categories, levels of scrutiny, tests of one form or another.¹³⁰ Courts will distill that doctrine from judgments about the structure, text, history, and purpose of the Second Amendment, as well as from extratextual concerns such as federalism, separation of powers, and institutional competence. This Article proposes that when those factors are boiled down into functional doctrine, the scope of the Second Amendment right to keep and bear arms for self-defense, like the scope of the First Amendment right to possess and use obscenity, should be limited to the home.¹³¹

Part II.B briefly discusses the Supreme Court's obscenity doctrine, with particular emphasis on *Stanley v. Georgia*, which first held that indi-

128. *Heller*, 128 S. Ct. at 2816–17.

129. Larson, *supra* note 123, at 1. Larson notes that this section of *Heller* has an "ad hoc, patchy quality" designed, perhaps, to garner a majority. *Id.* Nelson Lund is particularly troubled by this apparently unprincipled set of carve outs. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. Rev.* 1343, 1357–58 (2009) [hereinafter Lund, *Originalist Jurisprudence*] (challenging originalist support for this "casual and sweeping dictum"); see also Siegel, *supra* note 21, at 198 (raising host of questions about legitimacy of these exceptions); Wilkinson, *supra* note 124, at 273 (noting exceptions indicate Court wants "to have its cake and eat it, too"). Of course, this lack of rationale has not prevented lower courts from mechanically citing this section, often with little else, to justify upholding a range of current regulations. See, e.g., *United States v. Holbrook*, 613 F. Supp. 2d 745, 776 (W.D. Va. 2009) (dismissing post-conviction challenge to felon-in-possession conviction); *Richardson v. United States*, No. 3:08-1146, 2009 WL 819485, at *3 (M.D. Tenn. Mar. 27, 2009) (same); *United States v. Willaman*, Civil Action No. 08-283 Erie, 2009 WL 578556, at *3–*4 (W.D. Pa. Mar. 5, 2009) (upholding conviction for possession of unregistered machinegun).

130. See Winkler, *supra* note 107, at 685 ("No right is absolute, and the extent to which legislation can permissibly burden a right is largely determined by the doctrinal rules, tests, and other devices the Court adopts to 'implement' the right.").

131. At least one court has located the "core" concern of the Second Amendment as protection of the home. In *Nordyke v. King*, a panel of the Ninth Circuit concluded that the Second Amendment is incorporated by the Fourteenth Amendment to the states. 563 F.3d 439, 457 (9th Cir. 2009). The court, however, upheld the local ordinance regulating gun shows on the ground that the law "does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it." *Id.* at 460 (emphasis added).

viduals possess a First Amendment right to have obscenity at home.¹³² This Part will further explain how the home-bound rule for obscenity translates fairly neatly into a home-bound rule for the right to keep and bear arms. It also discusses how the Supreme Court in *Heller* has already laid the conceptual and rhetorical groundwork for such a rule. Part II.B concludes by recognizing the hostility this proposal may generate, and introduces, notwithstanding, the varied reasons for its adoption as explored in Part III.

B. *The Obscenity Fix*

1. *Obscenity and the Home*. — Obscenity doctrine, a mature jurisprudence now forty years old, provides a useful analogue with which to explore the limits of *Heller*'s holding. The Supreme Court's doctrine concerning obscenity and the home can be summarized fairly succinctly: The First Amendment protects a near-absolute right for an adult to possess in the home obscene materials depicting adults.¹³³ Once beyond the doorstep, however, obscene material loses its First Amendment protection. It can be regulated even to the point of complete prohibition or prior restraint.¹³⁴ Put simply, obscene speech outside the home is no longer "speech," at least as the First Amendment uses the term.¹³⁵

*Stanley v. Georgia*¹³⁶ is the signal case on First Amendment protection of obscenity in the home. Robert Eli Stanley was a reputed bookmaker living near Atlanta, Georgia. While executing a search warrant in Stanley's home, the police found three reels of eight-millimeter film in a desk drawer in Stanley's upstairs bedroom. The officers viewed the film with a projector found on the premises.¹³⁷ The authorities deemed the film obscene and arrested Stanley for possession of obscene matter in

132. 394 U.S. 557, 557 (1969).

133. Unless otherwise noted, whenever I use the term "obscenity" in this piece, I refer solely to obscenity that depicts only adults. See *supra* note 5.

134. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 44–46 (1961) (upholding regulation requiring prior submission of film to municipal authority before it may be shown).

135. In this regard, I use certain aspects of the approach championed by Fred Schauer, well aware that his approach has been criticized. Compare Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 *Geo. L.J.* 899, 903, 910–14, 921–22 (1979) (noting some definition of "speech" is necessary in any method of First Amendment interpretation and because obscenity is more like action than communication, it does not fall within scope of term "speech"), with Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as an Act and Idea*, 86 *Mich. L. Rev.* 1564, 1589–96 (1988) (criticizing Schauer's approach for, among other things, obscuring value judgments implicit in Schauer's argument).

136. 394 U.S. 557.

137. *Id.* at 558.

violation of Georgia's criminal code.¹³⁸ A jury tried and convicted him for this crime.¹³⁹

The Supreme Court unanimously overturned the conviction. Justice Thurgood Marshall wrote for the Court: "[T]he mere *private possession* of obscene matter cannot constitutionally be made a crime."¹⁴⁰ But the Court faced a conceptual problem. For two decades it had maintained that obscene material was not protected by the First Amendment.¹⁴¹ If obscenity was not "speech" for purposes of the First Amendment, how could the First Amendment protect it in the home? The majority concluded that its earlier decisions had dealt with obscenity in *public*. In the privacy of one's home, the great danger of government intrusion overwhelmed whatever need a society may have to protect its citizens from obscene materials.¹⁴²

As the Court stated: "[Stanley] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."¹⁴³ The Court continued: Georgia's "mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."¹⁴⁴ Justice Marshall finished with an appeal to first principles: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at . . . giving government the power to control men's minds."¹⁴⁵

138. The Code criminalized the knowing possession of obscene material, defined as material that, when "considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. § 26-6301 (1968); see also *Stanley*, 394 U.S. at 558 n.1 (citing same).

139. *Stanley*, 394 U.S. at 558–59.

140. *Id.* at 559 (emphasis added). *Stanley* did not contest whether the film was actually obscene; and for purposes of the opinion, Justice Marshall assumed that under any of the developing obscenity standards it would be obscene. *Id.* at 559 n.2.

141. See *Roth v. United States*, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press."); see also *Smith v. California*, 361 U.S. 147, 152 (1959) (reaffirming holding of *Roth*).

142. *Stanley*, 394 U.S. at 565. *Stanley* is thus an example of how "the boundaries of . . . categorical exclusions may be a result of balancing." Blocher, *supra* note 8, at 388. *Stanley* is a categorical inclusion (obscenity is First Amendment speech in the home) made as a result of balancing (individual liberty of thought at home outweighs government interests in protecting citizens from obscenity).

143. *Stanley*, 394 U.S. at 565.

144. *Id.*

145. *Id.* Justice Stewart, joined by Justices Brennan and White, concurred in the result. For them, Georgia had violated *Stanley's* rights, not because of the films' content, but because they were seized in excess of the probable cause necessary to issue the search warrant. *Id.* at 569–70 (Stewart, J., concurring). In other words, the concurrence saw this

Despite scholarly criticism,¹⁴⁶ the lower courts have maintained the strict domestic perimeter of obscenity doctrine throughout nearly forty years of subsequent litigation.¹⁴⁷ While the Court permits regulation of pornographic and obscene material in a host of other venues,¹⁴⁸ it has, as recently as the 2007 Term, reaffirmed the central tenet of *Stanley*—government cannot forbid the possession of adult obscenity in the home.¹⁴⁹

2. *Obscenity Doctrine Applied to the Second Amendment.* — Application of obscenity doctrine to the right to keep and bear arms for self-defense is elegantly, perhaps beguilingly, simple. Essentially, the Second Amendment right to keep and bear arms, like the First Amendment right to obscene materials, is a right that ends at the doorstep.

Stanley has clearly drawn the First Amendment line on obscenity around the home: An individual has no right to produce obscene materials for distribution outside the home, or to solicit obscene materials for receipt inside the home.¹⁵⁰ A person has no right to open a store that sells obscene materials.¹⁵¹ A person has no right to transport obscene

case not as a First Amendment case, depending on the content of the materials themselves, but as a Fourth Amendment search and seizure case. *Id.* at 571–72. Although scholars and courts occasionally have characterized the *Stanley* case as really about unlawful searches and seizures, the predominant view is that *Stanley* truly is a First Amendment case. See, e.g., *United States v. Williams*, 128 S. Ct. 1830, 1835 (2008) (reiterating obscenity is not protected by First Amendment); *Osborne v. Ohio*, 495 U.S. 103, 108 n.3 (1990) (stating decision in *Stanley* was “firmly grounded in the First Amendment” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986))). But see *United States v. Reidel*, 402 U.S. 351, 356 (1971) (“The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes . . . do not depend on whether the materials are obscene or whether obscenity is constitutionally protected.”).

146. See, e.g., Catharine MacKinnon, *Only Words* 9, 36 (1993) (referring to pornography as “sexual abuse” and arguing harms in production may outweigh any countervailing liberty interest); James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. Rev. L. & Soc. Change 865, 884 (2007) (suggesting some obscenity should be permitted in public to allow democratic debate).

147. The one circumstance in which governments can breach the domestic perimeter of the Court’s obscenity doctrine is where a child’s safety and welfare are at stake. Government may criminalize the possession of pornographic materials featuring actual children even when such materials are possessed within the confines of the home. See *Osborne*, 495 U.S. at 109–10 (holding state may constitutionally criminalize possession of child pornography in home to destroy “a market for the exploitative use of children”). But cf. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248–51 (2003) (stating *Osborne* holding does not apply to depictions of “virtual” children or youthful adults pretending to be children).

148. See *infra* notes 150–159 and accompanying text.

149. See *Williams*, 128 S. Ct. at 1836 (reiterating that government “may not criminalize the mere possession of obscene material involving adults”).

150. See John Nowak & Ronald Rotunda, *Constitutional Law* § 16.61, at 1393–94 (7th ed. 2004) (“Though the private possession of obscene materials in the home is protected activity, virtually any process that leads to such possession may be declared illegal.”). For many of these citations, I am indebted to 1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 14 (2008).

151. See *United States v. Orito*, 413 U.S. 139, 141 (1973) (stating right to view obscenity in home does not extend to “a correlative right to . . . distribute it”); see also

materials in a car, a bus, or an airplane.¹⁵² A person has no right to possess obscene materials in a car,¹⁵³ at work,¹⁵⁴ in a public park,¹⁵⁵ or in a school.¹⁵⁶ Furthermore, the government may prevent felons,¹⁵⁷ the mentally infirm,¹⁵⁸ and minors¹⁵⁹ from obtaining obscenity. In each of these instances, elected officials can regulate obscenity so as to protect the health and welfare of the populace. And so it should be with firearms.

An individual should possess a right to maintain a firearm for protection of the person, the occupants of the home, and the person's property within the home. But an individual should not possess a Second Amendment "right"—in the sense of an entitlement shielded from popular legislative encroachment¹⁶⁰—to "keep and bear arms" in public spaces. Federal, state, and local officials should have nearly unfettered discretion to decide when, whether, and what kind of firearms to allow in automobiles, schools, municipal buildings, public theatres, parks, playgrounds, and courthouses. And, just as government may keep obscene materials out of the hands of minors, felons, the insane, and the incompetent, the government should have authority to do the same with firearms, based on sound legislative judgments, and without fear of pro-

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973) (holding right to view obscene materials does not include right to view them in public theater).

152. See *Orito*, 413 U.S. at 141 (declaring right to view obscenity in home does not extend to "a correlative right to . . . transport it"); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (finding no right to use mails to distribute obscenity).

153. See *United States v. Cangiano*, 491 F.2d 906, 911–14 (2d Cir. 1974) (affirming *Roth* and finding no violation of First Amendment rights for seizure of obscene materials stored in automobile).

154. See *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Fla. 1989) (holding police department liable for officer's harassment of female officer with obscene language and pornographic material); *Barbetta v. Chemlawn Service Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (finding evidence of sexually graphic material in workplace sufficient to establish prima facie case of discrimination).

155. Cf. *United States v. Mather*, 902 F. Supp. 560, 562, 565 (E.D. Pa. 1995) (stating "[I]t seems clear that masturbation in a public park is obscene under . . . the standard in *Miller v. California*," and upholding conviction of two men for disorderly conduct).

156. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (holding student may be disciplined for lewd and indecent behavior at school); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001) (stating school may proscribe obscene expression).

157. See *Farrell v. Burke*, 449 F.3d 470, 476–77 (2d Cir. 2006) (upholding special condition of parole that parolee not possess pornographic material).

158. See *In re R.P.*, No. A-06-1045, 2007 WL 1532327, at *8–*10 (Neb. Ct. App. May 29, 2007) (affirming mental commitment order in which mentally ill individual failed in complying with outpatient restrictions against viewing pornography).

159. See *Ginsberg v. New York*, 390 U.S. 629, 635–37 (1968) (finding no First Amendment violation in statute prohibiting distribution of obscenity to minors); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 126–27 (4th Cir. 1989) (holding regulation prohibiting booksellers from allowing minors to peruse "harmful" material not constitutionally vague).

160. See *supra* note 4.

tracted and costly Second Amendment litigation. In short, most of the restrictions that can constitutionally regulate the who and where of obscenity could apply equally to firearms.

The *Heller* Court signaled some receptiveness to this analysis; it repeatedly referred to the First Amendment as an important interpretive analogue for the Second.¹⁶¹ Justice Scalia's opinion refers to the First Amendment to support the Court's conclusion that the Second Amendment is a personal and individual right and that it is a right that encompasses modern technology.¹⁶² More importantly, the majority states that the Second Amendment right is not subject to common law case-by-case interest balancing, but, like the First Amendment, the Second Amendment right is not limitless.¹⁶³ Finally, *Heller* displays hallmarks of a nascent jurisprudential compromise centered on the home, just as debates over the scope of protection for obscenity were resolved by reference to the home. The majority opinion is particularly aggrieved by a handgun "prohibition [that] extends . . . to *the home*, where the need for defense of self, family and property is most acute."¹⁶⁴ According to the Court, such a regulation would be unconstitutional under *any* standard of scrutiny.¹⁶⁵ If the Second Amendment right means anything, then, it means that the government has no business telling a man he cannot have a gun to protect his home.

But *Heller* also suggests that the home not only *defines*, but *confines* the Second Amendment right, in much the same way as it does the First Amendment right to obscenity.¹⁶⁶ This interpretation may appear ten-

161. See, e.g., Blocher, *supra* note 8, at 375–76 (arguing First and Second Amendments are analogous and Court must identify "core values" of Second Amendment to prevent it from becoming as murky as First).

162. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791–92 (2008) ("Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.")

163. *Id.* at 2817–18 (reciting but not analyzing limits).

164. *Id.* at 2817 (emphasis added); see also *Nordyke v. King*, 563 F.3d 439, 458 (9th Cir. 2009) (quoting same).

165. See *Heller*, 128 S. Ct. at 2817–18.

166. My proposal to use obscenity doctrine as a model for the scope of the Second Amendment right diverges from other scholars who have looked to the First Amendment as a resource, but have stopped short of using the category-based approach of First Amendment obscenity doctrine. These other commentators have variously predicted (or urged) a time, place, and manner approach or an "undue burden," "strict scrutiny," or "intermediate scrutiny" approach. Compare Chrisman, *supra* note 8, at 324–28 (proposing time, place, and manner test), and Kopel, Tenth Circuit, *supra* note 8, at 936 (same), with *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny to Second Amendment challenge), O'Shea, *supra* note 7, at 355–57 (exploring use of intermediate scrutiny), and Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 *Urb. Law.* 1, 82 (2009) (discussing undue burden analysis). Eugene Volokh, however, has rejected any unitary test. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An*

dentious. More than a decade ago, Elaine Scarry announced in the *Pennsylvania Law Review* that “the [S]econd [A]mendment is a very great amendment, and coming to know it through criminals . . . seems the equivalent of our coming to know the [F]irst [A]mendment only through pornography.”¹⁶⁷ That observation resonates today. The *Heller* majority recognizes that the Framers of the Bill of Rights regarded an armed populace with approbation, as a positive good, something to be encouraged.¹⁶⁸ By contrast, the Court views obscenity as a necessary, but distasteful, byproduct of free speech.¹⁶⁹

Undoubtedly, Second Amendment fundamentalists will recoil at a right to guns tempered with the same doctrinal tools as the right to obscenity. They will argue that scrutinizing gun rights through the unsavory lens of obscenity invites courts to drape naked policy preferences with a shift of legal respectability.¹⁷⁰ They will charge that nothing in American law or tradition supports treating firearms with, if not contempt, at least the same embarrassed toleration that surrounds smut. I am sensitive to these principled objections. Ultimately, however, I find them unpersuasive. As I explain in Part III below, the home-bound approach has three advantages over more expansive Second Amendment theories. First, it coheres with a privacy doctrine that centers on the home.¹⁷¹ Second, it is textually and historically supportable—although neither textually nor his-

Analytical Framework and a Research Agenda, 56 *UCLA L. Rev.* 1443, 1446 (2009) [hereinafter Volokh, Implementing the Right] (proposing category and scrutiny framework instead of unitary approach). The problem with each of these proposals is that the *Heller* majority strongly disapproved of any test that would lead to judicial balancing of “interests,” see *Heller*, 128 S. Ct. at 2821, even though it appears inevitable that some balancing will take place. See Blocher, *supra* note 8, at 388 (arguing doctrinal categories themselves are result of balancing).

167. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 *U. Pa. L. Rev.* 1257, 1268 (1991).

168. Indeed, as *Heller* noted, a number of states actually required that their citizens possess firearms to aid in the common defense. *Heller*, 128 S. Ct. at 2802–03. Even this historical data, however, is equivocal. In the nineteenth century, the *New York Times*, for instance, published op-eds decrying the “pernicious practice of brandishing pistols or pointing guns, whether loaded or unloaded.” Editorial, *Shooting in Sport*, *N.Y. Times*, May 22, 1881, at 6. In another piece, the author stated that “[u]nhappily, (concerning that this is a world full of violence and brutality,) too many men think that self-defense chiefly consists in carrying arms and ammunition.” Editorial, *Manly Self-Defense*, *N.Y. Times*, July 19, 1882, at 4.

169. See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”).

170. Of course, some commentators believe that the *Heller* majority has already done this—albeit with a drapery of “law office” history. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *New Republic*, Aug. 27, 2008, at 32, 35 [hereinafter Posner, *Defense of Looseness*] (“The range of historical references in the [*Heller*] majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs.”).

171. See *infra* notes 177–183 and accompanying text.

torically incontestable—and, more importantly, it respects the different institutional capacities of judges and legislatures.¹⁷² Third, it is politically palatable.¹⁷³ These attributes make it a suitable way to at least partially resolve our great American gun debate.¹⁷⁴

III. TREATING GUNS AS SMUT: THREE REASONS FOR THE HOME-BOUND SECOND AMENDMENT

The reasons for a home-bound approach to the Second Amendment, one mirrored on obscenity doctrine, are multifaceted and compelling. What follows is an assay of the doctrinal, textual, historical, jurisprudential, and political support for a home-bound Second Amendment.

Part III.A will discuss the doctrinal support for this approach. Both the First and Second Amendments reverberate with the notes of personal liberty, but it is a liberty that must give way to public need and conflicting constitutional values outside the home. This Part will explain how a home-bound Second Amendment, based on obscenity doctrine, locates the Second Amendment within an existing individual rights architecture where individual liberty is at its apex in the home. This Part also demonstrates how the home already mediates constitutional categories in other areas of the Bill of Rights. “Speech” under the First Amendment or an “unreasonable search” under the Fourth Amendment is given constitutional meaning often by reference to whether the search or the speech occurs in the home. The Second Amendment, like the First, Third, and Fourth Amendments, is an individual rights provision implemented through categories that often depend on a spatial and conceptual distinction between the home and elsewhere.

Part III.B will survey the textual and historical support for the home-bound Second Amendment. *Heller* states that the core purpose of the Second Amendment is to protect the use of arms for self-defense.¹⁷⁵ But one man’s self-defense is another man’s lawlessness.¹⁷⁶ This Part will discuss how the home mediates between self-defense and lawlessness—both as it applies to self-defense against government, the right to revolution or insurrectionist theory, and as it applies to self-defense against ordinary criminals, the true man or stand your ground theory. It will conclude that in both cases, self-defense in the home, and only in the home, is the

172. See *infra* Part III.

173. See *infra* notes 460–483 and accompanying text.

174. See Don B. Kates, Introduction, *in* *The Great American Gun Debate* 3, 3 (Don B. Kates & Gary Kleck eds., 1997).

175. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008) (“[T]he District’s [regulation] . . . makes it impossible for citizens to use [arms] for the core lawful purpose of self-defense and is hence unconstitutional.”).

176. Georg Buchner said something similar: “Where self-defense ends murder begins.” Georg Buchner, *Danton’s Death* act 1, sc. 4, *in* *Georg Buchner: Collected Plays and Prose* 1, 21 (Carl Richard Mueller trans., Hill and Wang 1963).

sole area in which historians and common law scholars can arrive at some historical consensus. Self-defense outside the home is so historically contested that the prudent approach is for the Court to leave these areas to political and local organs of government.

Finally, Part III.C explains how a home-bound Second Amendment is politically palatable, reflecting the broadest consensus of what American citizens think about the right to bear arms and respecting local variations in gun culture and policy. While this Part admits that a home-bound interpretation does not resolve every conflict surrounding the right to bear arms, its simplicity and defensibility—and, most importantly, its respect for democratic deliberation—warrant its use as a foundation for future Second Amendment rights discourse.

A. *Doctrinal Coherence, or There's No Place Like Home*

“The home occupies a special place in the pantheon of constitutional rights.”¹⁷⁷ Sometimes the home’s constitutional preeminence is express. The Third Amendment, for example, states that “[n]o soldier shall, in time of peace be quartered in any *house*, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹⁷⁸ The Fourth Amendment states that “[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁷⁹ Other times, courts have inferred the home’s constitutional primacy from the structure and context of the document itself. For example, the Constitution does not allow governments to interfere with decisions about with whom to have consensual sexual contact,¹⁸⁰ whether and when to have a family,¹⁸¹ or

177. *United States v. Craighead*, 539 F.3d 1073, 1077 (9th Cir. 2008) (addressing whether interrogation by police in individual’s home can be considered “custodial” for purposes of Fifth Amendment); see also *United States v. Orito*, 413 U.S. 139, 142 (1973) (“The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education.”).

178. U.S. Const. amend. III (emphasis added). Akhil Reed Amar has noted that after Reconstruction, “the Third Amendment . . . now bridges together a *home-centric* Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain.” Akhil Reed Amar, *The Bill of Rights* 267 (1998) [hereinafter *Amar, Bill of Rights*].

179. U.S. Const. amend. IV (emphasis added).

180. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down law criminalizing consensual sodomy between adults). Note however, that this right only applies to nonremunerative sexual contact between unrelated adults; prostitution and incest can still be outlawed. See *United States v. Palfrey*, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (holding *Lawrence* does not invalidate laws criminalizing prostitution); *State v. Freeman*, 801 N.E.2d 906, 910 (Ohio Ct. App. 2003) (holding *Lawrence* does not invalidate laws related to incest).

181. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down, under right of privacy, statute criminalizing distribution of contraception to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding state cannot criminalize use of contraception between married adults).

how to educate one's children.¹⁸² In *Griswold v. Connecticut*, Justice Douglas famously—and according to some, infamously—derived these rights from the “emanations” and “penumbras” of enumerated rights in the Constitution.¹⁸³

This privilege of the home works a kind of alchemy with the Constitution. Things of no constitutional value outside the home glister with constitutional meaning within it. A warrantless search that occurs outside the home is reasonable, but one that occurs within the home typically is not.¹⁸⁴ Sodomy is still a “crime against nature” when it takes place in public,¹⁸⁵ but not when it occurs at home.¹⁸⁶ Obscenity is not First Amendment speech until it is located inside a house.¹⁸⁷ The result is a Constitution that continues to “manifest[] a special concern with the protection of the home.”¹⁸⁸ It is a concern located not in an individual line of constitutional text, but in “the Bill of Rights as a whole.”¹⁸⁹ Situating the Second Amendment right securely in the home, therefore, complements a long and durable line of cases and reaffirms “our tradition [that] the State is not omnipresent in the home.”¹⁹⁰

Text, history, tradition, and political morality are the reagents for this alchemy. For centuries, Anglo-American society has used the home as a conceptual pivot to decide what should or should not come under governmental sway. In other words, the boundaries of the home help determine that which falls inside the social compact and that which falls outside of it.

182. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (prohibiting state from requiring students to attend only public schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding state cannot proscribe teaching of German to students).

183. 381 U.S. at 484.

184. See *Holmes v. Kucynda*, 321 F.3d 1069, 1078 (11th Cir. 2003) (“A warrantless entry into a suspect’s home is presumed to be an unreasonable violation of the Fourth Amendment.”).

185. See *Singson v. Commonwealth*, 621 S.E.2d 682, 687–88 (Va. Ct. App. 2005) (upholding conviction for solicitation of sodomy because “[*Lawrence*] le[ft] undisturbed the states’ authority to prohibit sexual conduct that occurs in a public—rather than private—arena,” and “[t]hus, to the extent that [state law] prohibits individuals from engaging in public acts of sodomy, the statute survives constitutional scrutiny under the Due Process Clause”); see also *Bowers v. Hardwick*, 478 U.S. 186, 212–13 (1986) (Blackmun, J., dissenting) (“Intimate behavior may be punished when it takes place in public.”); *State v. Thomas*, 891 So. 2d 1233, 1236 (La. 2005) (upholding conviction for solicitation of “unnatural oral copulation” because “*Lawrence* specifically states the [C]ourt’s decision does not disturb state statutes prohibiting public sexual conduct or prostitution”).

186. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers* and prohibiting criminalization of private sexual conduct between adults).

187. See *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

188. *Dorf*, *supra* note 8, at 232.

189. *Id.* (understanding Second Amendment as aimed at securing hearth and home “places *Heller* squarely in line with *Stanley*, *Griswold*, and *Lawrence*”).

190. *Lawrence*, 539 U.S. at 562.

By tradition, a man at home answered to no one but himself. At home the man was Leviathan.¹⁹¹ His home was his castle.¹⁹² This is more than a simple metaphor of security; within the home a man partook of some part of that “sole and despotic dominion” that God had given to Adam “over every living thing that moveth upon the earth.”¹⁹³ The proprietary interest in the home was the center and totem of a man’s physical autonomy,¹⁹⁴ just as speech in the home became the center and totem of a man’s mental autonomy.¹⁹⁵ And “[i]f a person’s autonomy is compromised by [an] intrusion, then the defender has a right to expel the intruder and restore the integrity of his domain.”¹⁹⁶

Blackstone considered this right to possess and protect one’s home—the “right of habitation”¹⁹⁷—to be antediluvian, intertwined with the natural right to self-protection.¹⁹⁸ Incursions into the home were a grievous affront to this natural “right of habitation.”¹⁹⁹ A man could lawfully kill a home invader because, within the home, the man was a proxy sovereign.²⁰⁰ Later, courts extended this protection to a man’s mental as well as his physical life.²⁰¹

191. See Jeannie Suk, *Is Privacy a Woman?*, 97 *Geo. L.J.* 485, 491 (2009) (“The rhetorical power of the home as castle lies in its comparison of the ordinary man to the king.”); see also Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 *Harv. J.L. & Gender* 237, 242–43 (2008) [hereinafter Suk, *True Woman*] (discussing conceptual analogies between individual defending his home and sovereign’s right to wage war in defense of country).

192. I discuss the “castle doctrine” in self-defense and the Second Amendment implications in particular below. See *infra* Part III.B.5.

193. 2 William Blackstone, *Commentaries* *2–*3 (internal quotation marks omitted) (quoting Genesis 1:28).

194. See George P. Fletcher, *Rethinking Criminal Law* § 10.5.3 (2000) (describing self-defense as right to restore personal autonomy).

195. See *Stanley v. Georgia*, 394 U.S. 557, 565–66 (1969) (stating “desirability of controlling a person’s private thoughts” is not permissible premise for legislation that extends into the home).

196. Fletcher, *supra* note 194, § 10.5.3. Fletcher goes on to note that this idea of autonomy is retained in Anglo-American law in the “castle” doctrine. *Id.*; see also Suk, *True Woman*, *supra* note 191, at 274 (discussing castle doctrine).

197. 4 Blackstone, *supra* note 193, at *223–*224; see also Suk, *True Woman*, *supra* note 191, at 241 (citing same).

198. “In the case of habitations in particular,” he wrote, “even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds . . . had nests, and the beasts . . . had caverns, the invasion of which they esteemed a very flagrant injustice.” 2 Blackstone, *supra* note 193, at *4.

199. 4 *id.* at *223 (“[T]he law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity . . .”); see also Suk, *True Woman*, *supra* note 191, at 241 (citing same).

200. See Suk, *True Woman*, *supra* note 191, at 241–42 (“A person in his home could with impunity use deadly force and kill [a] burglar. This was as justifiable an act as executing a man on the king’s command.”).

201. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

The Constitution protects obscenity at home because the home is where human freedom reaches its apogee.²⁰² As Smolla says, “[t]he individual self-fulfillment that comes from speech is bonded to man’s capacity to think, imagine, and create. Men and women cannot realize their full potential as human beings unless they are free to express themselves without restraint.”²⁰³ The protection at home is especially necessary because “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”²⁰⁴

Conversely, obscenity loses constitutional protection outside the home because, once public, free expression as a way to advance human autonomy must be harmonized with other constitutional values—including facilitation of democratic deliberation. Outside the home, the touchstone of First Amendment speech is not only whether the speech advances individual identity and liberty,²⁰⁵ but also how the speech contributes to democratic discourse.²⁰⁶ As the Court has noted, freedom of speech is guaranteed in public because it “assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²⁰⁷

Obscenity does none of these things. Obscene utterances serve “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁰⁸ Instead, obscenity is akin to libel or “fighting words,” words that “by their very utter-

202. As Warren and Brandeis wrote, “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890). That right is lost “only when the author himself communicates his production [of thought] to the public.” *Id.* at 199.

203. Smolla, *supra* note 150, § 2:25.

204. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

205. An exhibitionist might argue, for example, that prohibitions on public sexual acts inhibit those autonomy values. See *Singson v. Commonwealth*, 621 S.E.2d 682, 687–89 (Va. Ct. App. 2005) (rejecting defendant’s argument for fundamental liberty interest in public sex).

206. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (“[T]he First Amendment embodies more than a commitment to free expression . . . it has a *structural* role to play in securing and fostering our republican system of self-government.”).

207. *Roth v. United States*, 354 U.S. 476, 484 (1957).

208. *Id.* at 485 (emphasis omitted) (internal quotation marks omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). David Strauss has argued that these types of utterances fail the “persuasion principle” at the core of the First Amendment. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 334–35, 354–360 (1991) [hereinafter Strauss, *Persuasion*] (arguing speech that induces action through process that rational person would value is protected, while speech that misdirects or aborts rational process—like lies or fighting words or obscenity—fails First Amendment function).

ance inflict injury or tend to incite an immediate breach of the peace.”²⁰⁹ In fact, Blackstone lumped low or no-value speech and the public carrying of firearms in the very same category in his *Commentaries*: Libel and “challenges to fight” fall just behind riot, unlawful hunting, and “riding or going armed, with dangerous or unusual weapons” as offenses to the public peace.²¹⁰

Second Amendment terms, like their First Amendment cousins, undergo a categorical shift when invoked in the public, rather than the private, realm. The First Amendment protects obscenity as “speech” at home, because it advances human dignity and liberty. But outside the home it does not, because dignity and liberty must surrender to public purpose. With the Second Amendment, to “keep and bear” arms means to keep and bear them in the home for individual security and liberty. In public, however, to “keep and bear” arms means to keep and bear them in the service of the common defense and welfare. Outside the home, the social compact confers to the government a monopoly on legitimate violence.²¹¹

Like the right to obscenity, the right to self-preservation, once public, must be tempered by other constitutional values, including the preservation and maintenance of the social compact and democratic norms.²¹² Public display—not to mention use—of weaponry frustrates these equally important constitutional values in two ways. First, a gun is a token that the social compact is out of joint. It is a sign that the bearer

209. *Chaplinsky*, 315 U.S. at 572; see also Strauss, *Persuasion*, supra note 208, at 346 n.35 (arguing sexually oriented speech is justifiably regulated, perhaps, because it “is peculiarly likely to make a manipulative, nonrational appeal that cannot be resisted by answering speech”).

210. 4 Blackstone, supra note 193, at *149–*150 (emphasis omitted).

211. See Max Weber, *Politics as a Vocation*, in Max Weber’s Complete Writings on Academic and Political Vocations 155, 156 (John Dreijmanis ed., Gordon C. Wells trans., Algora 2008) (coining phrase translated as “monopoly of legitimate force”). An individual does not partake of the “despotic dominion” over property or his person in public, because some of that dominion has been surrendered to the public weal: “[T]he king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.” Suk, *True Woman*, supra note 191, at 241 (quoting 1 Matthew Hale, *The History of the Pleas of the Crown* 480 (Thomas Dogherty ed., London, E. Rider 1800) (1678)); see also *Commonwealth v. Drum*, 58 Pa. 9, 22 (1868) (remarking while liberty to go wherever one pleases is worthless if one must flee from attacker, such liberty must give way to society’s interest in protecting life in case of deadly self-defense). This does not mean that the government, through affirmative lawmaking by state legislatures, state common law, or state constitutional law, cannot share its authority over legitimate public violence with individuals, if the government decides that human liberty in public is more important. Compare *Drum*, 58 Pa. at 22, with *State v. Bartlett*, 71 S.W. 148, 152 (Mo. 1902) (holding human life cannot trump interest in human liberty, and if man does not have physical ability to vindicate his human liberty, then human weaponry can give him such ability). My argument is that as a federal constitutional matter, it is improbable that the Second Amendment requires this devolution.

212. Cornell, *Well-Regulated Militia*, supra note 108, at 15 (“[O]nce men left the state of nature and entered civil society, they renounced the untrammelled right of self-defense.”).

perceives either that his neighbor is a threat and that the social compact is unable to protect him,²¹³ or that the social compact itself is corrupt and unwilling to protect him.²¹⁴ The very purpose of the social compact, of which the American Constitution is an exemplar,²¹⁵ is to relieve individuals of the necessity for self-protection.²¹⁶ Second, the presence of a gun in public has the effect of chilling or distorting the essential channels of a

213. This vulnerability is true both empirically and legally. The police cannot be everywhere, and there is no violation of due process if the police fail to protect any one person. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding nothing in Due Process Clause requires government to protect against threats by private actors). The failure of police to be omnipresent, however, is not a reason to presume that the compact has dissolved, or that the state of nature must be recognized as prevailing anytime the police are absent. See *Zelig v. County of Los Angeles*, 45 P.3d 1171, 1197 (Cal. 2002) (holding children of woman shot by ex-husband in courthouse could not state claim against county, even though prohibitions on carrying firearms in courthouse "curtailed her ability to arm herself in self-defense").

214. As explained by the English Chief Justice in *Sir John Knight's Case*, (1686) 87 Eng. Rep. 75 (K.B.), the crime of going about with weapons to the terror of the public is "a great offense at the common law" because it treats the sovereign "as if [he] were *not able or willing* to protect his subjects." *Id.* at 76 (emphasis added). Although the American Constitution replaces the hereditary sovereign with a state and federal one, the same concept applies.

Second Amendment defenders cite *Sir John Knight* for the proposition that English common law recognized a right to carry weapons in public, because Sir John Knight was acquitted of violating the 1328 Statute of Northampton, a statute that stated that no person was permitted to go "armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." Statute of Northampton, 2 Edw. 3, c. 3 (1328); see also David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 Alb. L. Rev. 305, 317 & n.59 (2005) (making argument that case permits public armament).

This interpretation is problematic for three reasons. First, the case was apparently tried to a jury, see Malcolm, *supra* note 108, at 104–05, so the legal significance of such a "jury nullification" of the statute, if that in fact occurred, is questionable. A second, overlooked problem is that the Chief Justice states that the crime would exist at common law *even in the absence of a statute* because of its offense to the sole authority of the sovereign to protect his people through a monopoly on legitimate violence. See *Sir John Knight*, 87 Eng. Rep. at 76 ("It is likewise a great offence at the *common law*, as if the King were not able or willing to protect his subjects . . ."). The final problem is that Sir John Knight took his guns into a church. *Id.* *Heller* itself preserves in dicta prohibitions on carrying arms into "sensitive places" which, one would presume, include churches. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008); see Utah Code Ann. § 76-10-530 (2008) (prohibiting firearms in house of worship).

215. See Stephen G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1524 n.149 (1994) (referring to Constitution as "social contract").

216. See Jean Jacques Rousseau, *The Social Contract and Discourses* 14 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) ("[I]f the individuals retained certain rights, as there would be no common superior to decide between them and the public . . . the state of nature would thus continue, and the association would necessarily become inoperative or tyrannical."); see also U.S. Const. pmb. (noting purpose of Constitution is to "insure domestic Tranquility" and "provide for the common defence").

democracy—public deliberation and interchange.²¹⁷ Valueless opinions enjoy an inflated currency if accompanied by threats of violence.²¹⁸ Even if everyone is equally armed, everyone is deterred from free-flowing democratic deliberation if each person risks violence from a particularly sensitive fellow citizen who might take offense.²¹⁹ Finally, unlike possessing a gun at home for self-defense, the right to keep and bear arms in public—like the right to free speech—is designed to advance some common good, such as protecting the citizenry, securing a free state, defending against invasion, or suppressing insurrection. These goals are stymied when individuals claim a right to publicly carry firearms, without democratic guarantees that they are wielded wisely, or in favor of the public good. A right to freely brandish firearms frustrates one of the very purposes of a constitution, which is “to make politics possible.”²²⁰

B. *Textual and Historical Arguments, or (Outside the Home) the Tie Goes to Democracy*²²¹

The home is a fault line that runs deep within the text, context, and history of the Second Amendment, the Constitution, and the common

217. General Douglas MacArthur reportedly scoffed: “Whoever said the pen is mightier than the sword obviously never encountered automatic weapons.” Edmund C. Hughes, *Chuckles* 42 (2004); see also *infra* note 429 and accompanying text (discussing nineteenth century newspaper editorial lamenting prevalence of gun as settling all disputed questions in Arkansas).

218. This point is nicely illustrated by a scene from a film, in which a tow truck operator, Simon (played by Danny Glover), helps rescue a stranded driver (Kevin Kline) from a street thug named Rocstar (Shaun Baker):

Rocstar: [Y]ou asking me [to tow the car away] as a sign of respect, or are you asking because I got the gun?

Simon: Man, the world ain’t supposed to work like this. . . . I’m supposed to be able to do my job without having to ask you if I can. That dude is supposed to be able to wait with his car without you ripping him. Everything’s supposed to be different than it is.

Rocstar: So what’s your answer?

Simon: You don’t have that gun, we ain’t having this conversation.

Rocstar: That’s what I thought man. No gun, no respect. That’s why I always got the gun.

Grand Canyon (20th Century Fox 1991); see also Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, 24 *Crime & Just.* 105, 146–48 (1998) (noting reports by inner city youths that they respect peers who bear arms, even for criminal purposes, more than peers who earn college degrees).

219. See Winkler, *supra* note 107, at 704 (“Whereas robust protection of free speech . . . serves democracy, if everyone had access to howitzers and machine guns, representative democracy would likely be harder, not easier, to achieve.”). Robert Heinlein wrote: “[A]n armed society is a polite society.” Robert A. Heinlein, *Beyond this Horizon* 228 (Baen Books 2002) (1942). Maybe polite, but not necessarily political.

220. Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 *Quinnipiac L. Rev.* 579, 592 (2008).

221. See Wilkinson, *supra* note 124, at 267 (“When a constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes.”). But

law itself. But, like a geographic fault, it shifts, it meanders, it turns back on itself, and it terminates in conceptual dead ends and blind alleys. And so, the text and history of the Second Amendment and self-defense lend support for, but alone cannot dictate, a limit at the home.

But while the text and history are not definitive, there are better and worse interpretations of the record, and there are zones of greater and less agreement as to textual and historical scope.²²² In that regard, the home-bound Amendment is strongest. One may divine a threshold consensus that the home is the object of Second Amendment protection. In contrast, the history of the Second Amendment and its text betrays a marked ambivalence and occasional hostility towards the public bearing of arms. So, rather than providing certitude, the text, history, and context of the public bearing of arms only exacerbate constitutional tensions between personal security and public security, between the tyranny of despots and the tyranny of the mob.²²³

The solution to this indeterminacy is the democratic process. Because the text and history equivocate respecting the public display and use of firearms, far more than in regard to private home possession, the most prudent approach is for courts to defer to the political branches.²²⁴

Part III.B parses *Heller's* self-defense justification for the Second Amendment, first as it applies to self-defense against government—the right to revolution or insurrectionist strain of self-defense—and then as it applies to true man or stand your ground theories of self-defense. This Part explains the fallacy of particularly virile strains of self-defense theory that argue the Second Amendment indubitably guarantees a right to in-

cf. *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”).

222. Cf. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 866 (1986) (noting in determining legislative intent, only conclusions with “relative degrees of certainty” are possible).

223. See generally, Mark Tushnet, *Heller and the New Originalism*, 69 Ohio St. L.J. 609, 623 (2008) (“[T]he grammar, syntax, and common use of the Second Amendment’s terms support competing identifications of the Amendment’s original public meaning.”). Tushnet notes that “original public meaning” methodology is supposed to take the policy preferences out of judging, but in the case of the Second Amendment, the area is so confused that resort to public meaning originalism promises far more certitude than it can deliver. *Id.* at 610–11 (“[N]ew originalism fails in its effort to provide a rock-solid, unchanging Constitution at the point where judgment is exercised.”).

224. Kurt Lash for instance, has stated that “the proper stance . . . in the face of historical ambiguity . . . is one of humility. If the original meaning of the text remains obscured, then courts lack authority to use the text to interfere with the political process.” Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 Harv. J.L. & Pub. Pol’y 467, 472 (2008); see also Wilkinson, *supra* note 124, at 259 (“Society is a defined balance between individual and community. . . . [W]hen [rights] are not enumerated, or only ambiguously so, the balance is set by democracy.”); cf. Posner, *Defense of Looseness*, *supra* note 170, at 34 (“The proper time . . . to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests, as abortion advocates, like gun advocates, did and do.”).

surrection. These models suppose that individuals have a right not only to keep and bear arms for self-defense, but also to carry arms as an open challenge to law enforcement officials (who may become tyrannical), and perhaps to carry weapons in groups (including volunteer “militias”) for superior self-defense. This Part will also demonstrate that public self-defense against private threats, true man or stand your ground theories of self-defense, fare no better as a matter of history, and offer far less in the nature of definitive pronouncements than should be required for the constitutionalization of a right to self-defense outside the home.

Part III.B.1 offers an overview of these right to revolution or insurrectionist strains of self-defense and *Heller*’s fickleness in adopting such theories. Next, Part III.B.2 explains how, textually, these insurrectionist interpretations are strongly countered by other sections of the Constitution and by the text of the Second Amendment itself. It simultaneously demonstrates how the concept of the home shifts textual categories, just as it does with the First Amendment—so, for example, the Second Amendment “militia” inside the home becomes the Article I and II “militia” outside the home.

Part III.B.3 then explores the historical indicators for a home-bound Second Amendment. This Part faults insurrectionist theories, and the *Heller* opinion in particular, for inadequately acknowledging the highly contested historical roots of the insurrectionist model. These theories have not engaged with the reality of sectarian and agrarian strife in the English common law history, Shays’s Rebellion as a formative event in American constitutional history, or—most damning—the reality of America’s own Civil War and Reconstruction.

Part III.B.4 explains that the primary failing of insurrectionist theories is not their lack of historical or textual fidelity but, more fundamentally, that they ask courts to render essentially meaningless judgments about the legality, as opposed to political acceptability, of violent government dissolution.

Finally, Part III.B.5 discusses the historical arguments for the right to self-defense as a right to stand your ground in the face of private criminal threats, as opposed to government threats. This Part concludes that the right is only untrammelled as a matter of history *in the home*. Public self-defense against criminals, like public self-defense against government, is so historically contingent and unsettled that the only prudent approach is to constitutionalize it only in the one area of general consensus: the home.

1. *Heller and the Charms of Insurrection*. — Prior to *Heller*, self-defense against the government—the right to revolution or the insurrectionist model of the Second Amendment—was dismissed as the cant of conspir-

acy theorists and fringe groups.²²⁵ Today it is the law—in some unresolved sense.

This Part proposes a partial resolution: Individuals should possess a right to keep a weapon suitable for home defense that incidentally may be wielded against government, once all other forms of nonviolent restraint have failed. Conversely, individuals possess no Second Amendment right to carry their weapons outside the home to challenge law enforcement, nor do they possess a Second Amendment right to use such weapons in self-defense against government agents. To supporters of a vigorous right to insurrection, this will appear to be a shell of what the Framers intended or the people understood. But, as I argue below, this interpretation best assembles the jagged pieces of text, history, and jurisprudence concerning the right to insurrection, while still leaving the beating heart of insurrectionism—natural law—in place. In other words, this Article posits that the right to insurrection is not dead, just comatose.

Insurrectionist theory is not standardized: It varies by degree and analytical rigor.²²⁶ Weak insurrectionists conceive of an extremely limited insurrectionist right. This right means only a legally enforceable right to possess a *means* to resist tyrannical government; it says nothing about a legal right to deploy those means or the military efficacy of those means.²²⁷ Strong insurrectionists push a vigorous right, where the

225. The term “insurrectionist theory” appears to have been coined by Dennis A. Henigan. Henigan, *supra* note 108, at 110. I use the term “insurrectionist” primarily for convenience and because it is more euphonious than “right to revolution.” In so doing, I believe that most in the insurrectionist camp are well-meaning, love their country, and truly believe that a right to insurrection is what the Constitution preserves. I do not question the insurrectionists’ motives, only their analysis and their conclusions.

226. For example, Glenn Reynolds has signaled a belief that the Second Amendment contains a right to insurrection. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *Tenn. L. Rev.* 461, 471 (1995). Reynolds, however, is apparently unsure whether the right extends to tools effective to wage such an insurrection. See Glenn Harlan Reynolds & Brannon P. Denning, *The Year of the Gun: Second Amendment Rights and the Supreme Court*, 86 *Tex. L. Rev.* See Also 22, 22–23 (2008), available at <http://www.texasrev.com/seealso/volume-86/issue-1/the-year-of-the-gun.html> (on file with the *Columbia Law Review*) [hereinafter Reynolds & Denning, *Year of the Gun*] (contrasting ease of finding individual rights to “ordinary weapons” in Second Amendment with more difficult question of rights to bazookas or nuclear weapons); see also Wayne LaPierre, *Guns, Crime & Freedom* 7 (1994) (“[T]he people have the right . . . to take whatever measures necessary, including force, to abolish oppressive government.”).

227. My typology is influenced by David Williams, who defines a Second Amendment right to revolution as: “(1) the constitutional right to own arms to make a revolution and (2) the implicit constitutional acknowledgement of the legitimacy of revolution against a tyrannical government.” David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 *Cornell L. Rev.* 879, 886 n.13 (1996) [hereinafter Williams, *Conjuring*]; see also Thomas B. McAfee, *Constitutional Limits on Regulating Private Militia Groups*, 58 *Mont. L. Rev.* 45, 56–57 (1997) (stating one of Second Amendment’s purposes includes use of weapons to facilitate insurrection, but not right to conduct such insurrection or possess heavy weaponry necessary for its success). Narrow arguments that turn on means of insurrection inevitably devolve into questions about what arms may be “kept.” Attempting to limit the right to only those arms

Second Amendment preserves not only a legally enforceable right to keep firearms at home, but a legally enforceable right to bear them outside and even, perhaps, a legally enforceable right to bear those arms against one's own government.²²⁸ Even among these insurrectionists, however, opinions diverge as to when arms may be restricted, under what

that can be carried or "borne" may be a partial solution, *id.* at 57, as it keeps out helicopters and howitzers, but it also leaves in landmines, hand grenades, shoulder-fired missiles, anthrax, suitcase nuclear munitions, and a host of other arms that are easily "borne" and also extremely effective for thwarting a standing army.

228. See, e.g., Halbrook, *Freedmen*, *supra* note 108, at 43 (discussing individual right to possess latest firearms as defense against illegitimate government); Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. Det. Mercy L. Rev. 943, 949–50 (1999) [hereinafter Halbrook, *Right of Workers*] (discussing common law right to use deadly force against law enforcement using excessive, deadly force); David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 Md. L. Rev. 438, 521 (1997) ("The right to revolution lies at the heart of the Second Amendment's guarantee of the right to keep and bear arms."). Earlier in the same article, Kopel and Little go further, arguing:

If there is ever a Second Amendment revolution in this country, it will be because a very large fraction of the American population becomes so convinced that the federal government is taking away the traditional rights of Americans . . . and because tens of millions of Americans are willing to take up arms, and like the revolutionary minority of 1776, submit themselves to the immense perils of rebellion against the most powerful military in the history of the world. . . . [I]f the federal government one day became so oppressive that a third of the population would risk their lives and fortunes to fight against it, the rebellion would be precisely the act for which the Second Amendment was written.

Id. at 483–84 n.237; see also David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1454 n.358 [hereinafter Kopel, *Nineteenth Century*] (stating right of self-defense against individual criminal extends to threats by many criminals operating as standing army).

Timothy McVeigh's well-documented belief in the "tyranny" of the federal government motivated his bombing of the Oklahoma City federal building, killing 168 people. He is the strong insurrectionist's enfant terrible. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 386–87 (1998) [hereinafter Bogus, *Hidden History*] (recounting adoption of insurrectionist rhetoric by McVeigh before and after bombing); David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 Okla. City U. L. Rev. 247, 285–89 (1996) (attempting to distance Second Amendment insurrectionist theory from McVeigh); cf. Williams, *Conjuring*, *supra* note 227, at 880 (cataloging various anti-government "milita" or "patriot" movements).

circumstances, where, and why.²²⁹ The insurrectionist right has yet to develop a coherent theory.²³⁰

Heller flirts with insurrectionism, but does not identify the caliber of insurrectionism to which it yields. It hints that the source of the Second Amendment right is self-preservation, even from despotic governments. It toys with the idea that the Framers understood the Second Amendment “to be an individual right protecting against both public and private violence.”²³¹ But elsewhere, the majority cools to the right to revolution. It acknowledges that the Amendment does not preserve the right to bear *any* kind of arm in *any* confrontation.²³² It does not preserve a “right to . . . wage war.”²³³ Instead, one only may “bear[] arms for a lawful purpose.”²³⁴ Indeed, David Williams has criticized *Heller* for escorting the right to revolution onto the constitutional dance floor, only

229. Cf. David B. Kopel, *Guns, Gangs, and Preschools*, 1 *Barry L. Rev.* 63, 86 (2000) (criticizing laws prohibiting minors from possessing and carrying firearms for self-defense). Compare Halbrook, *Freedmen*, *supra* note 108, at 43 (discussing right of individuals to possess latest firearms of all kinds as defense against illegitimate governments), and Kopel, *Nineteenth Century*, *supra* note 228, at 1531–36 (arguing bans on machine guns are unconstitutional because of suitability for use in militia, as are bans on public carrying of firearms), with Kates, *Handgun Prohibition*, *supra* note 108, at 261 (arguing Second Amendment does not protect fully automatic weapons or flamethrowers), and Reynolds & Denning, *Year of the Gun*, *supra* note 226, at 22–23 (contrasting ease of finding individual right to “ordinary firearms” as opposed to bazookas or nuclear weapons). As David Williams has extensively catalogued, those scholars who believe in a right to insurrection have nuanced positions as to when such a right can be exercised. The Oklahoma City bombing only sharpened the necessity for scholars to explain what they mean by a right to insurrection. See Williams, *Conjuring*, *supra* note 227, at 912–21 (comparing scholarly views on right to revolution and demonstrating difficulty of articulating its extent).

230. To his credit, Williams attempts to provide content to this elastic phrase. First, he disaggregates “natural law” theories of a right to revolution from “organic” or “positivist” theories. See David C. Williams, *The Constitutional Right to “Conservative” Revolution*, 32 *Harv. C.R.-C.L. L. Rev.* 413, 420–22 (1997) [hereinafter Williams, *Conservative Revolution*]. He proposes that there might be a scenario in which the Constitution preserves a right to revolution when the purpose is to restore the constitutional order from government usurpers. *Id.* at 428 (“When government itself seeks to subvert the Constitution, then the government . . . actually becomes its opponent.”). The problem, however, is that this idea of a “conservative revolution” may be a null set, as Williams seems to admit. See *id.* at 438–39 (noting conceptual limits of “conservative revolution” may make real world application impossible); cf. *infra* notes 316–327 and accompanying text (noting southern secessionists and Klansmen argued that theirs was “conservative,” meaning constitution-restoring, revolution).

231. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798–99 (2008). Carl Bogus has lamented that “[i]nsurrectionism has metastasized from gun rights literature, to political and legal literature, to courts, and now to the Supreme Court,” but he also notes that the use of insurrectionist justifications for the Second Amendment have been haphazard, “attached to the end of arguments almost as cabooses are attached to the end of trains.” Carl T. Bogus, *Heller and Insurrectionism*, 59 *Syracuse L. Rev.* 253, 264–65 (2008) [hereinafter Bogus, *Heller and Insurrectionism*].

232. See *Heller*, 128 S. Ct. at 2799.

233. *Id.* at 2794.

234. *Id.* at 2813.

to unceremoniously dump it for its more attractive (and easy) companion—the right to individual self-defense.²³⁵

But the Court's coyness is not a virtue. Clarity in this area is essential. Mayors need to know if they can still forbid armed demonstrations; antiterrorism agents need guidance on permissible interdiction; police need to know whether suspects held at gunpoint have a right to arm themselves and respond in kind;²³⁶ citizens need to have confidence in the statutory lines their legislatures have drawn.

This Part will focus primarily on addressing strong insurrectionist theories. By strong insurrectionist theories, I refer to theories of insurrection that propose that the Second Amendment—at a minimum—guarantees a judicially cognizable right to carry a firearm in public because of its deterrent effect on government.²³⁷ This theory presents the

235. Williams, *Death to Tyrants*, *supra* note 127, at 651. One way of addressing Williams's criticism is that the Court has unreflectively merged insurrectionist theories with self-defense theories. In other words, the right to resist a tyrant is simply one manifestation of a general right to self-defense. The problem is not that the Court is elevating one over the other; the problem is that the Court does not clearly distinguish between them. See Kopel, *Nineteenth Century*, *supra* note 228, at 1454 n.358 ("The Framers . . . saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.").

236. A full discussion of the use of arms to deter or resist arrest is beyond the scope of this Article. I surmise, however, that if weapons can be worn openly to resist tyranny by state or national governments, then by logical extension insurrectionist theories must protect a right to arms to inhibit tyranny in the form of individual police officers acting outside the scope of their authority. While there is a common law tradition of a right to resist arrest, and to even use deadly force if attacked with deadly force, the law on that issue—like all of the law relating to self-defense—is fragmented, contradictory, and has been abrogated by statute in several circumstances. See 4 Wharton's *Criminal Law* § 569 (15th ed. 1996) (detailing complicated and conflicting principles of self-defense law). Suffice it to say that I believe, as did the Kentucky Court of Appeals in 1889, that a right to bear a firearm outdoors in order to resist arrest is not a constitutional guarantee. See *Ogles v. Commonwealth*, 11 S.W. 816, 818 (Ky. 1889) (finding no right to bear arms in order to threaten law enforcement officers attempting to effect arrest); see also *Posey v. Commonwealth*, 185 S.W.3d 170, 202 (Ky. 2006) (Scott, J., dissenting) ("*Ogles* recognized that a constitutional right may not be exercised to threaten, impede, or injure others in an unlawful manner; when it interferes with the lawful rights of others, it has no constitutional protection."); Darrell A.H. Miller, "F*ck tha Police": Retail Rebellion and the Second Amendment (Sept. 17, 2009) (unpublished manuscript, on file with the *Columbia Law Review*).

237. This is the minimum quantum of what I would call a strong insurrectionist theory. Higher levels of insurrectionism would include a Second Amendment right to resist government with these arms. Justice Story, no less, proposed that the bearing of arms in public, "in a military form, for the express purpose of overawing or intimidating the public" was a form of treason, "although no actual blow has been struck, or engagement has taken place." Joseph Story, *Charge of Mr. Justice Story on the Law of Treason Delivered to the Grand Jury of the Circuit Court of the United States 7* (Providence, H.H. Brown 1842); see also Cornell, *Well-Regulated Militia*, *supra* note 108, at 158–60 (discussing Story's participation in Dorr Rebellion adjudication).

outer limit of what the Amendment can mean, and no interpretation of its scope can begin without first treating this issue.

2. *Textual Arguments.* — The Second Amendment right to keep and bear arms cannot be interpreted in a vacuum. The Second Amendment is qualified both by its own text and by other textual provisions.²³⁸ These textual qualifications support a doctrinal limit of the Second Amendment right to the physical boundaries of the home.

The first qualification is the preceding amendment. The Second Amendment cannot be understood without reference to the right “peaceably to assemble” in the First Amendment. They are foils. And, according to English common law tradition, a right to bear arms and a right to peacefully assemble were often incompatible.

Blackstone noted as much, stating that the right to petition the government is protected but restricted, “lest, under the pretence of petitioning, the subject be guilty of any riot or tumult.”²³⁹ Blackstone’s *Commentaries* cite, apparently without reservation, laws where the public carrying of a weapon could breach the peace.²⁴⁰ Among the “Offenses of the Public Peace,” Blackstone lists the appearance in any enclosed area, or on any highway or common, by day or night, with face blacked and with offensive weapons.²⁴¹ The violation was not “of the damage thereby done to private property.”²⁴² Instead, it was a public offense because it caused “the terror of his majesty’s subjects.”²⁴³ Similarly, Blackstone identified the Statute of Northampton,²⁴⁴ which stated that “[t]he offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the

238. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999) (exploring holistic interpretive approach to Constitution); see also *Parker v. District of Columbia*, 478 F.3d 370, 382 (D.C. Cir. 2007) (reading “the people” in Second Amendment and other parts of Constitution intratextually).

239. 1 Blackstone, *supra* note 193, at *143.

240. Blackstone was one of the Framers’ common references during deliberations on the Constitution. See Gary L. McDowell, *High Crimes & Misdemeanors: Recovering the Intent of the Founders*, 67 Geo. Wash. L. Rev. 626, 640 (1999) (“[T]he most dominant source of authority on the common law for those who wrote and ratified the Constitution was Sir William Blackstone and his justly celebrated *Commentaries on the Laws of England* . . .”).

241. 4 Blackstone, *supra* note 193, at *143–*144.

242. *Id.* at *144.

243. *Id.*

244. Statute of Northampton, 2 Edw. 3, c. 3 (1328).

land.”²⁴⁵ This ancient restriction originated as far back as Solon of Athens.²⁴⁶

William Hawkins, an eighteenth century legal scholar much relied upon by the Framers,²⁴⁷ expressly drew the distinction at the home:

[A]n assembly of a man’s friends for the defence of his person against those who threaten to beat him, if he go to . . . a market, [etc.] is unlawful. . . . Yet an assembly of a man’s friends in his own house, for the defence of the possession thereof . . . is indulged by law²⁴⁸

Hawkins also warned of the threat created when “great numbers”²⁴⁹ of people “complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly.”²⁵⁰ In eighteenth century common law tradition, therefore, the right to assemble in public did not include a right to assemble armed.

Second, the right of the people’s militia to muster with arms is qualified by the other uses of the term “militia” in the Constitution. The Second Amendment militia, even if understood as a preconstitutional people’s militia, must be well-regulated.²⁵¹ The *Heller* opinion suggests that “well-regulated” means merely “the imposition of proper discipline and training.”²⁵² But that terminology itself can be fairly capacious. The imposition of proper discipline assumes someone with authority to im-

245. 4 Blackstone, *supra* note 193, at *149 (emphasis omitted). One ought to note here that Blackstone does not say with the *intent* to terrify, although this is a gloss that other commentators have put on the underlying statute. See, e.g., David I. Caplan & Sue Wimmershoff-Caplan, Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century, 73 UMKC L. Rev. 1073, 1113–14 (2005) (citing authorities for proposition that terrorizing of public, and not mere public bearing of weapons, was required); Kopel, Nineteenth Century, *supra* note 228, at 1386 n.96 (discussing terror as key component of statute). Another way to read this gloss is that the mere existence of publicly armed individuals offends the public peace *because* it terrifies the citizenry. For more on this point, see *infra* notes 414–422 and accompanying text (discussing *State v. Huntly* and *English v. State*); see also *supra* note 214 and accompanying text (discussing *Sir John Knight’s Case*).

246. 4 Blackstone, *supra* note 193, at *149 (comparing Statute of Northampton to “the laws of Solon,” whereby “every Athenian was finable who walked about the city in armour”).

247. See Thomas Y. Davies, Revisiting the Fictional Originalism in *Crawford’s* “Cross-Examination Rule”: A Reply to Mr. Kry, 72 Brook. L. Rev. 557, 558 n.4 (2007) (discussing Framers’ use of Hawkins as resource); see also McDowell, *supra* note 240, at 640 (same).

248. 1 William Hawkins, *A Treatise of the Pleas of the Crown* 516 (John Curwood ed., 8th ed. 1824) (1721).

249. *Id.* Hawkins, however, seems to indicate elsewhere that “great numbers” could number as few as three. See *id.* at 513 (discussing definitions of riot).

250. *Id.* at 516.

251. See Williams, *Death of Tyrants*, *supra* note 127, at 650 (asking, if militia is “really just the equivalent of all able-bodied men,” then “[w]ho will discipline these people, transforming them into a *well-regulated* militia?”).

252. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800 (2008).

pose discipline and presumes some consequence for drilling without adequate discipline.²⁵³ Moreover, the people's militia cannot be kicked free of *all* other references to the militia in the Constitution.²⁵⁴ As Akhil Reed Amar has written, "[i]f 'people' really means virtually all adult Americans, the operative clause loses its linkage to the preamble and becomes hugely overbroad."²⁵⁵ Consequently, one may understand the people in the operative clause as meaning a people's militia. But once the people exercise their right to keep and bear arms as a people's militia and spill out into the street, then that right is textually constrained by the militia clauses in the Constitution. Those clauses curtail the authority of the people's militia to assemble spontaneously.

State and federal governments possess the exclusive constitutional authority to mobilize the people's militia. Article I grants Congress the power to provide laws "for calling forth the Militia to execute the Laws of the Union" and to "suppress Insurrections."²⁵⁶ Article II places the militia in the President's command when called into federal service.²⁵⁷ As a textual matter, therefore, the militia is not mobilized legally if it musters in contravention of the laws of the union or in aid of, rather than in opposition to, insurrection. Put another way, unless the people's militia has been authorized to act by government, armed citizens in the streets may be revolutionaries, rioters, or insurrectionists, but certainly not militia members.

In this sense, the home again works its magic on the text of the Constitution. Just as obscenity is not speech outside the home, an armed man outside the home is not a member of the militia unless state or federal law says that he is. In other words, the Second Amendment contem-

253. See Winkler, *supra* note 107, at 706–07 ("Training and discipline does not simply happen; laws must be adopted to ensure that people . . . understand the rules governing the use of guns.").

254. Ordinarily, terms used in one section in a text are read consistently throughout the text. See *Heller*, 128 S. Ct. at 2790 (noting term "right of the people" should have same meaning in First, Second, Fourth, and Ninth Amendments); see also Bogus, *Hidden History*, *supra* note 228, at 406–07 ("We cannot give 'militia' a different meaning in the Second Amendment than that expressly given to it in the main body of the Constitution without violating cardinal principles of constitutional construction."). As Michael Dorf notes, however, this presents a potential problem because of Congress's plenary power over the militia. See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 *Chi.-Kent L. Rev.* 291, 305–06 (2000) (citing *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990)) (noting varying meanings of "militia" across Constitution and resulting difficulties of interpretation). The solution, as I discuss below, is to understand the people's militia as a home-bound militia whose authority to exercise a right to insurrection is not legal, but political.

255. Akhil Reed Amar, *Comment*, *The Supreme Court 2007 Term: Heller, HLR, and Holistic Legal Reasoning*, 122 *Harv. L. Rev.* 145, 167 (2008).

256. U.S. Const. art. I, § 8, cl. 15. In addition, Article I provides Congress with the power to "organiz[e], arm[], and disciplin[e] the Militia." *Id.* cl. 16.

257. *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

plates a people's militia composed of all citizens, who each have an individual right to bear arms. But this people's militia is a quiescent militia, an inchoate militia. Once the people have begun to gather in the streets, the roused people's militia spills over into the clauses of the Constitution that address the militia and rebellion. Those provisions require that the people's militia be regulated and subordinated to state or federal officials.

The Supreme Court has already implied these textual restrictions on the Second Amendment, albeit in dicta. In *Presser v. Illinois*, a German fraternal organization defied the Illinois government by drilling in public with unloaded weapons.²⁵⁸ The Illinois Militia Act had granted the Illinois militia (what eventually became that state's National Guard) the exclusive right to carry weapons in public.²⁵⁹ It forbade any nonmember of the militia from "associat[ing] themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State, without the license of the Governor."²⁶⁰ Herman Presser, a member of the German fraternal organization, was charged with violation of the Militia Act for participating in the unlawful armed demonstration.²⁶¹ Addressing Presser's conviction, the Court dispelled any notion that the Constitution guaranteed a right to assemble as a spontaneous militia force:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.²⁶²

Individuals may have a right to keep and bear arms, but that right has constitutional meaning only within the home. Outside the home, the undirected, unauthorized bearing of firearms by individuals simply is not

258. 116 U.S. 252, 254–55 (1886).

259. *Id.* at 253.

260. *Id.* (quoting Act of May 28, 1879, Military Code of Ill. art. XI, § 5). Halbrook observes that the impetus for the Militia Act was not to protect the state of Illinois, but to protect industrial interests against a restive labor movement. See generally Halbrook, *Right of Workers*, *supra* note 228, at 949–52 (describing labor unrest motivating passage of Illinois Militia Act).

261. *Presser*, 116 U.S. at 254.

262. *Id.* at 267.

the bearing of arms in a Second Amendment sense, any more than obscenity outside the home is speech in a First Amendment sense. Outside the home, bearing arms means bearing them as part of a militia that is beholden to the regulation of the government. As with obscenity, it is the *home* that mediates not only the constitutional purpose, but the constitutional meaning of these textual provisions.

3. *Historical Arguments.* — The history of the right to public self-defense generally, and the Second Amendment in particular, is conflicted and fragmented. But *Heller* ignores those complications, creating a history of firearms that is more romance than real. The purpose of this Part is not to create a counter-fiction. It cannot show definitively that history mandates a home-bound Second Amendment. Instead, the purpose of this Part is to demonstrate that, as to the highly disputed issue of public self-defense and as opposed to private defense of the home, the most prudent approach is to reserve to local government and the political process, not to the federal courts, judgments about how to preserve balance.

Heller reiterates at several points that an important, perhaps predominant, purpose of the Second Amendment was to preserve a well-armed populace to deter tyranny.²⁶³ The Stuart kings of England, the majority states, had taken sides in a civil war in their own country, and had “succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.”²⁶⁴ The Court concluded from this history that “[t]he right secured in 1689 as a result of the Stuart[] [kings’] abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.”²⁶⁵ The way to prevent the tyrannical rule of another Stuart king, therefore, is by safeguarding a citizens’ militia consisting of “all the able-bodied men,” each of whom is guaranteed a right to keep arms.²⁶⁶ The result, according to the Court, is a militia that is comprised, in effect, of everyone.²⁶⁷ Thus, one may derive from *Heller* that its originalist reading of the Second Amendment supports a right to insurrection.

263. The opinion states that:

[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny. . . . That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms. . . . If, as [petitioners] believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia—if, that is, the organized militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a “citizens’ militia” as a safeguard against tyranny.

District of Columbia v. Heller, 128 S. Ct. 2783, 2801–02 (2008) (citations omitted).

264. Id. at 2798.

265. Id. at 2798–99.

266. Id. at 2801.

267. Id. at 2802.

But *Heller* falls into the trap that David Williams has evocatively described as “Conjuring with the People.”²⁶⁸ Conjuring with the People is the insurrectionist method of condoning a right to revolt against tyranny, without condoning an open-ended right to engage in rebellion, civil war, or cop-killing.²⁶⁹ It essentially avoids the problem by assuming, or “conjuring,” a unified, indivisible, and virtuous People—a People who reflect America’s deep romantic attachment to its own revolutionary origins. The People retain a right to revolt against tyrannical government, but would only and *could* only exercise that right in a spontaneous, unselfish, and utterly justified way.²⁷⁰

Conjuring with the People is a decidedly difficult trick to perform, however, and *Heller* does it poorly. First, as discussed in Part III.B.3.a, *Heller* assumes a simplified English history, one that ignores the deep civil, sectarian, and philosophical strife that led to the development of the people’s militia. Second, as discussed in Part III.B.3.b, *Heller* fails to acknowledge the notion that the United States was constituted in direct response to the national government’s failure to quell armed intrastate turmoil—specifically, Shays’s Rebellion. Third, as discussed in Part III.B.3.c, *Heller* offers no method for distinguishing between the people’s militia and the insurgents who fought against America during the Civil War and its tumultuous aftermath.

Ultimately, *Heller*’s effort to conjure fails, and not only because history and human frailty keep poking out from beneath the Justices’ sleeves. As discussed in Part III.B.3.d, *Heller* simply asks the law to do too much. Taken to its logical conclusion, *Heller* demands that judges adjudicate a supremely nonjudicial issue: When is government so tyrannical as to legitimate its own overthrow?

a. *English History*. — The *Heller* majority states that the right to keep and bear arms preexisted the Constitution.²⁷¹ But the *Heller* opinion does not discriminate between the two very different sources of this pre-existing right. One source of the right is from an affirmative act of governance or organic law. It is a right set out in the English Declaration of

268. Williams, *Conjuring*, *supra* note 227, at 879.

269. As Carl Bogus puts it, the central difficulty of insurrectionist theory is that it presumes that the people decide when the government is tyrannical; but in a democratic form of government, the people also decide who is the government. Not every faction that decides the government is tyrannical can be the people, so who is to decide, and on what basis? See Bogus, *Hidden History*, *supra* note 228, at 387 n.386 (“But who are ‘the people’? Any group that decides for itself that the government is controlled by traitors? And who is ‘the government’ for that matter?”).

270. The problem, as David Williams notes, is that this notion of the “people” does not exist today. See Williams, *Conjuring*, *supra* note 227, at 950 (noting modern constitutional protections of heterogeneity and pluralism mean “people” do not currently exist).

271. See *Heller*, 128 S. Ct. at 2797 (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”); see also *Parker v. District of Columbia*, 478 F.3d 370, 382 (D.C. Cir. 2007) (“[T]he right to arms existed prior to the formation of the new government . . .”).

Rights, later codified as the English Bill of Rights of 1689.²⁷² Within the Declaration was the guarantee “[t]hat the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”²⁷³ According to the *Heller* majority, the Declaration was a direct result of English distrust of Stuart use of “select militias,” game laws, and other methods of disarming religious and political opponents.²⁷⁴

The second source of the right to keep and bear arms is more atavistic. This source not only predates the Constitution, it predates civilization; it is natural law, the Hobbesian inalienable right,²⁷⁵ the inherent “natural right of resistance and self-preservation.”²⁷⁶ The English Declaration described this right to keep and bear arms as the “true, ancient and indubitable right” of all Englishmen.²⁷⁷

The *Heller* opinion collapses these two sources of the Second Amendment’s protections. It simply suggests that by 1791, the Framers “understood [the right] to be an individual right protecting against both public and private violence.”²⁷⁸ But this rhetorical turn papers over the contingent question of who legitimately can threaten the government with arms, and when. Worse, it leaves wholly unresolved what the Court means when it speaks of a “right” of self-defense against the government.

Despite *Heller*’s natural law rhetoric, the right of Englishmen to bear arms “was neither true, ancient, nor indubitable.”²⁷⁹ Instead, the right “was evidently an illusion, as no such legal right had been articulated before 1689.”²⁸⁰ Only by engrafting an organic right to bear arms on seventeenth century notions of natural law did the English “transform[] . . . the political compromise set out in the [English] Bill of Rights into a corollary of the natural right of self-preservation and a . . . deterrent against political oppression.”²⁸¹

Heller’s implication that the Framers unquestionably understood the Second Amendment to legalize a natural right to publicly arm oneself for self-preservation against both government and private violence oversimplifies a far more complex historical record.²⁸² First, contemporary with

272. *Heller*, 128 S. Ct. at 2798.

273. *Id.*

274. See *id.* (discussing examples of disarmament as impetus for Declaration).

275. Some have argued that to deem self-preservation a “right” is misleading, as self-preservation is not a moral or legal statement, but a right only in the philosophical sense that the opposite—self-destruction—is absurd. See, e.g., Hadley Arkes, *First Things* 209 (1986) (noting Hobbes removes morality-based distinctions between justified and unjustified self-defense).

276. 1 Blackstone, *supra* note 193, at *144.

277. See Malcolm, *supra* note 108, at 115.

278. *Heller*, 128 S. Ct. at 2798–99.

279. Malcolm, *supra* note 108, at 115.

280. Lund, *Past and Future*, *supra* note 7, at 12.

281. *Id.*

282. I acknowledge in this argument Richard Epstein’s caution that “English history . . . is always suggestive, but never decisive.” Epstein, *supra* note 107, at 173.

the Declaration of Rights, William and Mary signed “An Act for the better securing the Government by disarming Papists and reputed Papists.”²⁸³ This law enabled government officials to disarm Catholics who would not subscribe to an oath and forbade their possession of arms “other than such necessary Weapons *as shall be allowed . . . by Order of the Justices of the Peace . . . for the defense of . . . House or person.*”²⁸⁴ Even if one reads in this disarmament act a right for Catholics to possess arms for self-preservation, it just as clearly contemplates some limitation on that right demarcated by the home.

Second, notwithstanding his celebration of the basic principle of self-defense,²⁸⁵ Blackstone also wrote without hesitation that the Laws of England restricted the public’s ability to assemble with and transport arms.²⁸⁶ Although it is true that by the founding era the bare possession of a gun “for defence of a house” could not be a crime,²⁸⁷ men were still going to the gallows for the public brandishing of arms on the roads and highways of England—at least when disguised.²⁸⁸ Nor does *Heller* address the various laws that Blackstone and his contemporaries identify in English law that outlawed riot, affray, and treason. Blackstone certainly did not countenance a justiciable right to rebel against the government. Self-preservation directed against one’s own country only obtained “when the sanctions of society and laws are found insufficient to restrain the violence of oppression,” and then only with those arms “such as are allowed by law.”²⁸⁹

283. 1688, 1 W. & M., c. 15 (Eng.) (spelling modernized). For further discussion of anti-Catholic bigotry in early modern England and its relationship to the Second Amendment, see Bogus, *Hidden History*, supra note 228, at 379–84.

284. 1 W. & M., c. 15 (Eng.) (emphasis added) (spelling modernized). This language, as with most examples from English history, is ambiguous. On the one hand, it almost certainly preserves some right of even potential insurrectionists to retain weapons in their homes for personal protection; at the same time, the law clearly contemplates government regulation over the types of weapons that an individual may keep in his home, even for self-defense. See Bogus, *Hidden History*, supra note 228, at 384–85 (arguing Declaration of Right was more transfer of power from King to Parliament than from Parliament to people of England).

285. See supra note 276 and accompanying text.

286. See 4 Blackstone, supra note 193, at *149 (“The offence of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace . . .”).

287. See *R v. Gardner*, (1738) 93 Eng. Rep. 1056, 1056 (K.B.) (holding “[t]he bare keeping [of] a gun is no cause of conviction,” since “a gun is necessary for defence of a house, or for a farmer to shoot crows”).

288. See *R v. Baylis*, (1736) 95 Eng. Rep. 188, 188 (K.B.). Baylis, Reynolds, and their accomplices were indicted for violation of King George I and George II’s “Black Act,” which made it a felony for “any person or persons being armed with swords, fire arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, [to] appear in any forest . . . high road, [etc].” *Id.* The defendants in that case were armed with axes, *id.*, although it seems unlikely that such a fact would have made any difference to the outcome of the case.

289. 1 Blackstone, supra note 193, at *143–*144.

b. *American Colonial History*. — But the problem of separating the wicked fifth columnist from the righteous militia member is not unique to English law.²⁹⁰ Even in the unlikely event that the Framers labored on the Second Amendment wholly unschooled in the tension between private arms and public arms in England, the very founding of this nation provided a tough lesson. Revolution begat an independent America, but the United States of America, as a body politic created by the Constitution, was born of Shays's Rebellion.²⁹¹

In 1786, high taxes and rampant farm foreclosures kindled an agrarian uprising in the western counties of Massachusetts.²⁹² Armed bands roamed the Massachusetts countryside, "shutting down the courts and intimidating judges."²⁹³ Their avowed motivation was the natural right to self-preservation; their modus operandi was to march as a people's militia.²⁹⁴ Some units of the state militia that had been mobilized to put down the rebels actually joined them.²⁹⁵ The national government, constrained by the terms of the Articles of Confederation, proved powerless to assist the state government in quelling the rebellion.²⁹⁶ By the end of the year, what eventually became known as Shays's Rebellion was driving eastward toward Boston.

Captain Daniel Shays, a former Continental Army officer, led 1,500 men to seize the armory at Springfield in his eponymous revolt.²⁹⁷ A counterinsurgent force—really a private militia in the employ of the gov-

290. Nelson Lund has questioned whether the English Constitution is illuminating beyond Blackstone's bare belief that arms were necessary for both self-protection and to deter tyranny. See Lund, *Past and Future*, supra note 77, at 15. I disagree that one can be so dismissive of Blackstone's internal contradictions about the right to publicly bear arms, especially if one uses Blackstone as a proxy for original understanding of the Second Amendment.

291. There are several treatments of Shays's Rebellion. For an account specifically in the context of the Second Amendment, see Cornell, *Well-Regulated Militia*, supra note 108, at 30–37.

292. See Jason Mazzone, *The Security Constitution*, 53 *UCLA L. Rev.* 29, 47 (2005) ("Massachusetts levied high taxes in the period of economic hardship . . . following the Revolutionary War, ignoring pleas for relief from farmers who feared foreclosure.").

293. Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 *Chi.-Kent L. Rev.* 195, 195, 211 (2000).

294. See Cornell, *Well-Regulated Militia*, supra note 108, at 32 (reporting Shays's followers claimed to exercise "the first principles of natural self-preservation," organizing themselves into militia regiments and wearing symbols reminiscent of recent War of Independence (internal quotation marks omitted)); see also Luke Day's *Demands to William Shepard*, Jan. 25, 1787, reprinted in *Hampshire Gazette*, Feb. 7, 1787, available at http://www.shaysrebellion.stcc.edu/shaysapp/artifact.do?shortName=gazette_ld7feb87 (on file with the *Columbia Law Review*) (claiming insurgents marched as "body of people assembled in arms," exercising "the first principles in natural self-preservation").

295. Finkelman, supra note 293, at 211.

296. Cornell, *Well-Regulated Militia*, supra note 108, at 33, 36–37 (discussing impotence of national government under Articles of Confederation); Mazzone, supra note 292, at 48 (discussing inability of national government to suppress rebels).

297. Mazzone, supra note 292, at 48.

ernor²⁹⁸—swept out from Boston to meet them. But before they had reached Shays's band, a detachment of citizen soldiers from Springfield had already met their fellow countrymen.²⁹⁹ The leader of the Springfield group, "[f]earing that his troops might support their farmer neighbors . . . opened fire."³⁰⁰ Some of Shays's troops were killed, the others scattered to sanctuaries in New York and Vermont.³⁰¹

The rebellion was over. But the event cowed the Massachusetts government, if only because it could not be certain that other insurgents did not lurk amongst its citizenry. As Jason Mazzone has written, "[t]he sympathy that the farmers' plight evoked in the general population meant that the Massachusetts government could not fully rely on its own militia . . . to put down the revolts."³⁰² In other words, the difference between the citizen soldier and the insurrectionist depended on one's political sympathies.

The immediate reaction to Shays's rebellion was fear, followed by resolution: fear that the new country would be consumed by inter- and intrastate factionalism, and resolution that a stronger national government would be required to preserve the peace.³⁰³ The Articles of Confederation had hamstrung the central government from pursuing the primary duty of all governments: the monopolization of legitimate violence. The United States Constitution was necessary to remedy that defect.

The Framers made pointed reference to Shays's rebellion in their arguments for the Constitution. Edmund Randolph specifically identified the "rebellion [that] had appeared in [Massachusetts]" as evidence of the failure of the Articles of Confederation.³⁰⁴ James Madison questioned the New Jersey delegates' more tepid proposal to reform the Articles: "Will [the plan] secure the internal tranquility of the States themselves? The insurrections in Massachusetts admonished all the States of the danger to which they were exposed."³⁰⁵ Even "Brutus,"³⁰⁶ the Anti-Federalist, did not seem troubled that a select militia of Massachusetts gunmen had violently quashed fellow citizens who themselves

298. See Sean Wilentz, *The Rise of American Democracy* 31 (2005).

299. Mazzone, *supra* note 292, at 48.

300. *Id.*

301. *Id.*

302. *Id.* at 48–49. This fear of a disloyal militia was not new: "For their part," Joyce Malcolm has written, "rank-and-file militiamen were unreliable when called upon to put down internal riots whenever their sympathies lay with the rioters." Malcolm, *supra* note 108, at 4–5.

303. See Cornell, *Well-Regulated Militia*, *supra* note 108, at 39 (noting these fears); Finkelman, *supra* note 293, at 211–12 (discussing subsequent desire for stronger national government).

304. Finkelman, *supra* note 293, at 211.

305. *Opposition to the New Jersey Plan (1787)*, in *The Anti-Federalist Papers and the Constitutional Convention Debates* 79, 83 (Ralph Ketcham ed., 2003).

306. "Brutus" is thought to be Robert Yates of New York. See Bogus, *Hidden History*, *supra* note 228, at 324 n.60.

had claimed a right to revolution: “[The Massachusetts] legislature had formally declared that an unnatural rebellion existed within the state. The situation of Pennsylvania was similar; a number of armed men had levied war against the authority of the state, and openly avowed their intention of withdrawing their allegiance from it.”³⁰⁷

To adopt a strong insurrectionist model—that is, a legally enforceable right to challenge government authority by public bearing of arms—one has to assume, in the face of this evidence, that the Framers were sanguine about the risk of further rebellion. One must conclude that in 1791 the people voted intentionally to place a hair-trigger detonator on the carefully calibrated legal instrument they had just created. Possible, but implausible. As one of my colleagues remarked: “Just as the Constitution is not a suicide pact, neither is it a suicide machine.”³⁰⁸ “[I]n the wake of Shays’s Rebellion,” it is inconceivable that the Framers would have stripped the government of power to disarm “those who are in rebellion or might be in rebellion.”³⁰⁹

c. *The Civil War and Reconstruction.* — Finally, even if one assumes that the Framers had made their peace with a publicly armed populace after the upheaval of English history and Shays’s Rebellion, there is the matter of the American Civil War, or, as must be remembered, America’s War of the Rebellion.³¹⁰

The southern Civil War narrative posits a heroic band of southern yeomen who rose up to strike at what they considered tyranny—namely the imposition of federal antislavery policies on southern landowners and governments.³¹¹ But the South lost the war and, simultaneously, its political legitimacy.³¹² So even if the bloom of a revolution led by the citizens’

307. “Brutus” (Jan. 24, 1788), in *The Anti-Federalist Papers and the Constitutional Convention Debates*, supra note 305, at 291–92.

308. Thanks to Alice Ristroph for this pithy statement; cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

309. Finkelman, supra note 293, at 210. In *Heller*’s hundreds of pages of opinion and dissent, Shays’s rebellion is featured only once in the text, and then as only one among a list of threats that the Framers would have recognized. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2866 (2008) (Breyer, J., dissenting) (arguing most Americans in late eighteenth century “would likely have thought of self-defense primarily in terms of” rebellions, crime along roadways, and outbreaks of fighting with Indian tribes).

310. This, according to Finkelman, is the only official name of the Civil War. See Finkelman, supra note 293, at 210. The fact that the last 140 years has essentially banished this name from common usage is testament to the fact that the South lost the war, but (at least temporarily) won the peace.

311. See *id.* (citing U.S. Dep’t of War, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (1890–1901)).

312. Legal arguments premised on the right to secede from the United States are no longer tenable. See Kopel, *Nineteenth Century*, supra note 228, at 1386 n.96 (“[W]hether rightly or wrongly, [the legal status of secession] was decisively settled by the Union victory in the Civil War.”). I think the Civil War definitively resolved the legality of the related

militia had not faded by the ratification of the Second Amendment, it withered in the fires of Antietam and Gettysburg.³¹³

“Sic semper tyrannis!” John Wilkes Booth shouted after firing a lethal shot into the head of President Lincoln.³¹⁴ His exclamation was a theatrical rant. But it was also the violent culmination of an ideological and legal dispute over the right to rebel against perceived despotism.³¹⁵ The leaders of the Confederate States of America viewed themselves as the true heirs of the founding generation.³¹⁶ To Confederates, 1861 was 1776 all over again: The Yankee Congress was their English Parliament and Abraham Lincoln was their George III.³¹⁷

Right to revolution rhetoric litters the official apologia of the Confederacy. The Mississippi Declaration of the Causes of Secession states:

Utter subjugation awaits us in the Union, if we should consent longer to remain in it. It is not a matter of choice, but of necessity. We must either submit to degradation . . . or we must secede from the Union framed by our fathers, to secure this as well as every other species of property. For far less cause than this, our fathers separated from the Crown of England.³¹⁸

Confederate President Jefferson Davis proclaimed:

Our present political position has been achieved in a manner unprecedented in the history of nations. It illustrates the American idea that governments rest on the consent of the governed, and that it is the right of the people to alter or abolish them at will whenever they become destructive of the ends for which they were established. . . . [W]hen, in the judgment of the sovereign States composing this Confederacy, [the federal Con-

question of whether individuals, rather than states, have a right to secede from the social contract through violence.

313. See Cornell, *Well-Regulated Militia*, supra note 108, at 5 (“To understand how states’ rights theory was drained of its revolutionary potential we must examine the pivotal role that the Civil War and Reconstruction played in transforming the meaning of the Second Amendment.”); Bogus, *Heller and Insurrectionism*, supra note 231, at 257 (“[W]hatever legitimacy [the idea of a right to insurrection] had was extinguished by the Civil War.”).

314. The phrase translates to “thus always to tyrants!” Bogus, *Heller and Insurrectionism*, supra note 231, at 265.

315. See *id.* at 257 (“Insurrectionism has been present throughout American history.”).

316. See Emory M. Thomas, *The Confederacy as a Revolutionary Experience I* (Univ. of S.C. Press 1991) (1971) (“Confederate Southerners often compared themselves to the American revolutionaries of 1776. Jefferson’s generation had struck a blow for ‘home rule’ to preserve established rights and liberties against tyrannical Parliamentary usurpations.”).

317. See *id.* (“Both ‘revolutions’ sought independence, violent overthrow of an existing political structure, yes; but also political separation to conserve rather than to create. In this sense only were they revolutionaries, or so the Confederates thought.”).

318. *A Declaration of the Immediate Causes Which Induce and Justify the Secession of the State of Mississippi from the Federal Union*, para. 20 (1861), available at http://avalon.law.yale.edu/19th_century/csa_missec.asp (on file with the *Columbia Law Review*).

stitution] has been perverted from the purposes for which it was ordained . . . the Government created by [it] should cease to exist. In this they merely asserted the right which the Declaration of Independence of July 4, 1776, defined to be “inalienable.”³¹⁹

Other Confederate leaders echoed these sentiments. In an address to the Confederate Congress, southern politicians harkened to “the right for which the colonies maintained the war of the revolution, and which our heroic forefathers asserted to be clear and inalienable.”³²⁰ The Confederates asserted a wholly legal and constitutional basis for their rebellion, a right “confined within the narrowest limits of historical and constitutional right.”³²¹ Theirs was “a popular uprising of self-sacrificing citizens,”³²² a people who “rose *en masse* to assert their liberties and protect their menaced rights.”³²³

This belief persisted long after the official surrender of the South. When remnants of the Confederacy formed themselves into private militia groups, such as the Ku Klux Klan,³²⁴ initiates were interrogated with the following question: “Do you believe in the *inalienable right of self-preser-*

319. Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), available at http://avalon.law.yale.edu/19th_century/csa_csainau.asp (on file with the *Columbia Law Review*). Abraham Lincoln firmly rejected this constitutional sense of a right to revolution: “It is safe to assert that no government proper ever had a provision in its organic law for its own termination. . . . [T]he Union will endure forever—it being impossible to destroy it except by some action not provided for in the instrument itself.” Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in 1 Documents of American History 385 (Henry Steele Commager ed., Prentice Hall 1975) (1938) [hereinafter Commager, Documents]; see also Williams, Conservative Revolution, *supra* note 230, at 424–25 (discussing and quoting same).

320. Address of [Confederate] Congress to the People of the Confederate States, reprinted as A Rebel Manifesto, N.Y. Times, Feb. 25, 1864, at 1 [hereinafter Rebel Manifesto].

321. *Id.* Note that the Confederates believed they were in fact *preventing* a revolution. Their Address is remarkable for its insistence that they were not “remitted to brute force or natural law” and, astonishingly, its rejection of the sentiment that “[a] people has but one dangerous enemy, and that is Government.” *Id.* Theirs was, they believed, precisely the type of “conservative revolution”—a revolution that purports to *restore* a constitutional order usurped by the government—that David Williams and others have written about. See, e.g., Williams, Conservative Revolution, *supra* note 230, at 424–25 (discussing idea of conservative revolution as held by southerners during Civil War); see also Kopel, Nineteenth Century, *supra* note 228, at 1468 (stating early constitutional commentators “saw the use of arms to restore the Constitution and to remove a government that was destroying the Constitution as a method of upholding the law, not as ‘insurrection’”).

322. George C. Rable, Rebels and Patriots in the Confederate “Revolution,” *in* In the Cause of Liberty 63, 75 (William J. Cooper, Jr. & John M. McCardell, Jr. eds., 2009).

323. Rebel Manifesto, *supra* note 320; see also Amar, Bill of Rights, *supra* note 178, at 258 (noting change in Second Amendment militia purposes because “Massachusetts militiamen may have fought for freedom at Lexington and Concord in 1775, but Mississippi militiamen had killed for slavery at Vicksburg in 1863”).

324. As Carole Emberton has noted, the Klan and other white supremacist organizations “replicated not only many aspects of antebellum militia organization but also its symbolic importance to the Southern way of life.” Carole Emberton, *The Limits of*

vation of the people against the exercise of arbitrary and unlicensed power?”³²⁵ The Klan’s leading spokesperson, former Confederate general Nathan Bedford Forrest, proclaimed that the Klan was simply attempting to restore the old Constitution from northern usurpers: “I loved the old Government in 1861,” he stated, “I love the old Constitution yet.”³²⁶ When asked about the character of the Klan, Forrest replied that “[i]t is a protective, political, military organization.”³²⁷

Insurrectionist theorists tend to alight gingerly on the Civil War and Reconstruction period. They typically forage through this period for evidence that Reconstruction leaders intended to apply Second Amendment self-defense rights to the states through the Fourteenth Amendment.³²⁸ But insurrectionist theorists tend to keep secession and the Klan at a safe distance. They do not linger on the Civil War’s impact on insurrectionism itself, finding comfort in the revolutionary glow of Jefferson and other eighteenth century luminaries.³²⁹ But to skirt this history and pull from the nineteenth century a Second Amendment right to revolution as if there were no Civil War ignores what Akhil Reed Amar has vividly described as the “jagged gash between Amendments Twelve and Thirteen.”³³⁰

Insurrectionists are almost certainly right on one point. It is difficult to gainsay that prominent members of the Reconstruction Congress had come to believe that the right to keep arms was an individual, as opposed to a collective, right. As the members of the Thirty-Ninth Congress debated and passed the Civil Rights Act of 1866 and the Fourteenth Amendment, they specifically identified the *de jure* and *de facto* disarmament of blacks by state or private terrorist organizations as an affront to the citizenship rights of the new freedmen.³³¹ For this reason, whatever

Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 *Stan. L. & Pol’y Rev.* 615, 620 (2006).

325. Organization and Principles of the Ku Klux Klan, reprinted in Commager, Documents, *supra* note 319, at 500 (emphasis added).

326. An Interview with N.B. Forrest (1868), reprinted in *Reconstruction* 92 (Richard N. Current ed., 1965).

327. *Id.* at 93.

328. See, e.g., Stephen P. Halbrook, The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights, 41 *Baylor L. Rev.* 629, 650 (1989) [hereinafter Halbrook, Arms in Texas] (discussing extension of Second Amendment rights to freedmen); Kopel, Nineteenth Century, *supra* note 228, at 1447–54 (discussing right to bear arms in light of Reconstruction and incorporation); see also *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (incorporating Second Amendment to states).

329. See Kopel, Nineteenth Century, *supra* note 228, at 1515 (arguing Fourteenth Amendment reinforced fundamental purposes of Second Amendment); cf. Lund, Self-Preservation, *supra* note 111, at 112 (“Although the War Between the States altered the political constitution of the country in many important ways, it did not alter the essential, timeless tension between the need for governmental power and the need to control that power in the interest of political liberty.”).

330. Akhil Reed Amar, *America’s Constitution* 360 (2005).

331. See, e.g., Halbrook, Freedmen, *supra* note 108, at 71–74, 120–31 (exploring these arguments); Akhil Reed Amar, *The Second Amendment: A Case Study in*

the view of the Founders in 1791, by the nineteenth century a right to arms had become personal.

But to view Reconstruction as simply transmuting a collective right to arms into a personal and *portable* right to self-defense for freedmen is problematic. First, congressional leaders who voiced support for protecting freedmen's access to arms frequently, though not exclusively, posed the problem as one of *home* protection. Kansas Senator Samuel Pomeroy, for example, phrased the right to arms as a "safeguard[] of liberty," but specifically spoke of the freedman's *homestead*, the "citadel of his love."³³² Violence in self-defense, should it occur, was to happen "if the cabin door of the freedman is broken open and the intruder enters for [vile] purposes."³³³

Second, if a personal right to carry firearms for protection became a fundamental part of American citizenship after Reconstruction, how did this accord with the Klan's professed desire for self-defense? If the freedmen had a natural, inalienable right to possess firearms for self-protection and to assemble themselves into private patrols to do so, then did the Klan have a reciprocal right? If not, do judges alone make the rules as between the aggressor and the defender?

Indeed, this very issue was at the heart of one of the most closely followed Klan trials of the Reconstruction era. In the spring of 1871, William Avery, a former Major in the Confederate Army, and at least forty Klansmen, embarked on a campaign of terror in York County, South Carolina.³³⁴ Incompetent or collusive local law enforcement did nothing to squelch the violence.³³⁵ The editors of *Harper's Weekly* were in despair: "The Ku-Klux had apparently absolute control. . . . It was a complete system of terror; . . . It is a situation very much graver and more deplorable than that of the whiskey insurrection in Pennsylvania . . . or Shay[s]'s rebellion in Massachusetts" ³³⁶ The editors had stiff words for Klan

Constitutional Interpretation, 2001 Utah L. Rev. 889, 899–900 [hereinafter Amar, Second Amendment] (discussing Reconstruction understanding of Second Amendment); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 346 (1991) (discussing Reconstruction understanding of right to bear arms).

332. Kopel, *Nineteenth Century*, supra note 228, at 1451–52 (quoting Cong. Globe, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy)).

333. *Id.*; see also Cong. Globe, 41st Cong., 2d Sess. 2673–74 (1870) (statement of Sen. Edmunds) (describing outrages of Klan as masked men "coming towards my *house*" and "entering *homes*"); Halbrook, *Freedmen*, supra note 108, at 120 (quoting Senator Charles Drake of Missouri concerned about citizens disarmed despite "a burglar coming *into your house* at night" (emphasis added)).

334. Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 Emory L.J. 921, 924 (1984).

335. See *id.* at 925 (describing how "local law enforcement officials thwarted" efforts to make arrests).

336. *The Apologists of the Ku-Klux*, *Harper's Wkly.*, Apr. 29, 1871, at 378.

apologists: "Any tendency to justify such a situation is a disposition to tolerate anarchy."³³⁷

By May, northwestern South Carolina was so out of hand that President Grant suspended the writ of habeas corpus.³³⁸ The federal government then brought several prosecutions under anti-Klan legislation.³³⁹ These prosecutions alleged that the Klan had kept freedmen not only from the ballot box, but also from exercising their constitutional rights to arms.

But existing insurrectionist scholarship never satisfactorily addresses one glaring detail. The Klan premised their defense on a professed belief that the Reconstruction government was *arming* freedmen and their allies and *disarming* southern whites.³⁴⁰ As George Rable has written, when southern Republicans finally convinced the federal government to arm black militia companies to suppress the Klan and enforce freedmen's rights, the "conservative protest came swiftly and predictably."³⁴¹ Partisans claimed that the Republican governments were using the black militiamen for political advantage.³⁴² White recusants decried law enforcement as nothing more than criminal thugs in uniform.³⁴³ Insurgents organized whites-only rifle companies and conducted full dress parades to intimidate local authorities.³⁴⁴ Southerners based their "continued defiance of national power on an appeal to the Anglo-Saxon tradition of resistance to tyranny, particularly the spirit of 1776."³⁴⁵ Ac-

337. *Id.*

338. Hall, *supra* note 334, at 925.

339. See, e.g., Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Enforcement Act, ch. 114, 16 Stat. 140 (1870).

340. Stephen Halbrook acknowledges that this was a component of the southern defense of the Klan, but does not conclude that it has bearing on limitations on the right to bear arms. See Halbrook, *Freedmen*, *supra* note 108, at 140.

341. George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* 103 (1984) [hereinafter Rable, *No Peace*]. Michael Perman notes the catch-22 that the southern Republican legislatures found themselves in: They needed the militia, which was overwhelmingly African American, to maintain order, but any time the militia was used, the Republican governments were denounced as despots. They wanted to protect the freedmen's franchise from Klan terror, but any laws they passed were lambasted as partisan. Finally, the mere presence of blacks bearing arms raised the specter of a racial conflagration. See Michael Perman, *Emancipation and Reconstruction* 105–06 (2d ed. 2003).

342. Rable, *No Peace*, *supra* note 341, at 103–04.

343. See Otis A. Singletary, *Negro Militia and Reconstruction* 114 (McGraw-Hill 1963) (1957) (discussing accusations of criminal activity on part of militia).

344. See *id.* at 129; see also Perman, *supra* note 341, at 114 (noting familiar pre-electoral pattern in South of white intimidation of freedmen which included "[m]ilitary drilling and campaigns of night-time terror").

345. Rable, *No Peace*, *supra* note 341, at 63. Rable notes that many conservative southerners were nearly obsessive about finding historical parallels to their current position under Reconstruction. While the 1776 trope was most common, recusant southerners also compared themselves to the Irish during English rule, or to the French people under the Jacobins. See *id.* at 62.

cordingly, some called their members “minute men.”³⁴⁶ In effect, the Klan was all but arguing—just as their English forebears had done—that the government was arming a “select militia.” As a result, they had no choice but to take up arms against this usurpation and fight for self-preservation as a mobilized unit of the people’s militia.³⁴⁷

Reverdy Johnson, counsel for the accused Klan members, explicitly pursued this defense in the South Carolina trials. According to Johnson, the Klan’s call to arms was a blow against tyranny: “[A]rms had been placed . . . in the hands of the colored race, and they were divided into companies; arms of the best kind, arms against which no squirrel gun would be any protection whatever.”³⁴⁸ Johnson ventured, “[I]s [the colored man] to have a musket placed in his hands and a white man refused it? . . . [T]o permit one class of citizens to bear arms, and to practically deny them to the other, is to place that other in subjection to the former.”³⁴⁹ To his clients, and any other American, “that would be *tyranny unbearable and utterly abhorrent to every principle upon which our institutions rest.*”³⁵⁰

Under the circumstances, violence was only natural, according to Johnson. When such a tool of tyranny as a select militia of blacks had been armed, “[w]hat is the husband to do? What is the brother to do? What is the son to do? Band themselves together as a defense against any such threats as were apprehended.”³⁵¹ And the source of this right to organize oneself and police the countryside in white sheets for threats?: “*Self defense is a law of nature*, written as a duty on the heart of every man as he comes from the hand of his Creator.”³⁵² The trial court, however, sidestepped the Second Amendment issue, stating that it was not presently prepared to address it.³⁵³ It never did.³⁵⁴

Self-defense in response to political oppression and corruption became a recurrent theme among Klan apologists. The Senate minority report on the congressional Klan Hearings, submitted by Senator Frank Blair of Missouri, included reports by Texas recusants who complained of being disarmed by the governor and put “at the mercy of the policeman

346. Singletary, *supra* note 343, at 141.

347. See *id.* at 130 (“In order to furnish justification for [their] excesses . . . the defensive and protective roles of the clubs were played up.”); see also Rable, *No Peace*, *supra* note 341, at 63 (“[W]ar against radicalism . . . became for many southerners a sacred duty performed to vindicate the memory of the founding fathers.”).

348. Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States Circuit Court, November Term, 1871, at 425 (Ben Pitman & Louis Freeland Post eds., 1872) [hereinafter *Klan Proceedings*].

349. *Id.* at 151.

350. *Id.* (emphasis added).

351. *Id.* at 425.

352. *Id.* at 426 (emphasis added).

353. *Id.* at 142–43.

354. See Halbrot, *Freedmen*, *supra* note 108, at 141, 144–45 (reporting Second Amendment issue was never addressed due to procedural technicalities).

and the men of the State Guard.”³⁵⁵ The minority report complained of “emancipated-slave regiments” who “parade in State or Federal uniform, armed cap-a-pie with the most approved weapons.”³⁵⁶ Meanwhile, “the white men are denied the right to bear arms or to organize, even as militia, for the protection of their homes, their property, or the persons of their wives and their children.”³⁵⁷ The minority report was careful not to “justify [or] excuse” Klan violence,³⁵⁸ but left “Congress and the country” to make its own assessment of the legitimacy of such violence.³⁵⁹ It was up to these political actors to assess whether Reconstruction “would not naturally produce . . . counter-organizations” such as the Klan.³⁶⁰ Congress was not moved.

Nonetheless, insurrectionist theorists continue to revel in natural rights to self-preservation without adequately addressing the legal consequences of this history. It is one thing to conclude, as Halbrook does, that Confederates (like the Catholics of England) might have retained a right to keep personal firearms in their homes for protection.³⁶¹ It is quite another to conclude that the right to bear arms included the right to assemble armed under the banner of self-defense.³⁶²

Whatever Reconstruction lawmakers thought about the Second Amendment, they did not understand it to facilitate a guerilla campaign between southern factions, resolved solely by ex post litigation over who

355. Rep. John Scott, Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, H.R. Rep. No. 42-41, pt. 1, at 426 (1872) [hereinafter Klan Hearing Report] (minority report).

356. *Id.* at 439.

357. *Id.*

358. *Id.* at 440.

359. *Id.* at 448 (“We think, from the glimpse we have enabled Congress and the country to obtain of the condition of the Southern States, there will be but little difficulty in understanding how Ku-Kluxism sprang up there.”).

360. *Id.* at 454.

361. See Halbrook, *Freedmen*, *supra* note 108, at 140 (noting “English Declaration of Rights of 1689 guaranteed the right to have arms exclusively to Protestants,” and analogizing situation to that of Confederates). Reconstruction leaders expressed their concerns about freedmen self-defense, but were just as interested in imposing draconian military rule in the wake of Klan outrages. See Cong. Globe, 41st Cong., 2d Sess. 2745–46 (1870) (statement of Sen. Drake) (discussing steps to suppress Klan). Senator Drake of Missouri, whom Halbrook cites as supporting incorporation, despaired of the “quarter of a million of rifles, muskets, pistols, to say nothing of other arms” in rebel hands, which “this Government ought to have taken from them if to do it [the Government] had had to *search every habitation in all the southern States*.” *Id.* at 2744 (emphasis added).

362. As Carole Emberton has written, a primary goal of Reconstruction legislatures and administrators was to “establish new legal and political controls . . . that would hopefully ensure that Southerners’ militant tendencies never again manifested . . . popular expression.” Emberton, *supra* note 324, at 626. Contra Halbrook, *Freedmen*, *supra* note 108, at 43 (concluding Reconstruction Congress meant to guarantee individual right to “the latest firearms of all kinds” to use against “criminals and terrorist groups” including “lawless law enforcement” and right “to carry arms on one’s person” in public).

had shot first.³⁶³ Prophylactic measures were required. Military authorities in the South prohibited the carrying of concealed weapons and the sale of pistols.³⁶⁴ One general order outlawed any organization “of white or colored persons bearing arms,” except authorized forces of the United States military.³⁶⁵ Even after direct military control gave way to civilian government, officials still sharply curtailed public arms to avoid disorder. In South Carolina, for example, any persons found drilling or parading in the state, other than members of the government-sanctioned militia, could be fined and imprisoned.³⁶⁶ The Governor of Texas decreed in 1871 that no private persons could carry firearms on election day.³⁶⁷ Congressional majorities who investigated the Klan and approved of its suppression were signally unswayed by southern gripes about disarmament of white citizens and the arming of an official militia.³⁶⁸ To assume that the Klan’s self-defense argument should have gained much constitutional traction during Reconstruction is, to borrow a phrase, grotesque.

Fundamentally, the Civil War could not have left the Second Amendment’s meaning unaffected, any more than it could have left the meaning of the Three-Fifths Clause or the Fugitive Slave Clause unaffected.³⁶⁹ There was no specific repeal of these clauses—there is no

363. Halbrook appears to conclude that the Reconstruction Congress incongruously disbanded predatory state militias during Reconstruction, only to contemporaneously guarantee their members a constitutional right to assemble as private militia or so-called “self-defense” associations. Compare Halbrook, *Freedmen*, supra note 108, at 68–70 (discussing disbanding of southern militias), with *id.* at 77–78, 161–64 (discussing infringements of right of freedmen to assemble with arms as voluntary military organization).

364. See Emberton, supra note 324, at 621 (discussing restrictions on carrying of firearms in Reconstruction South).

365. *Id.* (quoting Dep’t of the South, General Order No. 7 (Sept. 1, 1866), in 1 *Documentary History of Reconstruction* 211 (Walter Fleming ed., 1966)).

366. See Singletary, supra note 343, at 21; cf. *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886) (finding no right to drill as military company).

367. See Singletary, supra note 343, at 38. None of this activity, however, was completely beyond reproach, as there were some substantiated claims of state governments using the official militia to intimidate voters. But the solution to that problem cannot be found in a constitutional right to march to the polling place as an armed band. See *id.* at 139 (noting white supremacist paramilitary organizations were particularly active at election time).

368. See *Klan Hearing Report*, supra note 355, at 83–84, 99–100 (describing incidents of violence and necessity of suppressing them). Representative William D. Kelley specifically remarked that Congress had the authority—and all the reason necessary—to declare portions of the South in rebellion and resume martial law. See *Cong. Globe*, 42d Cong., 1st Sess. 339 (1871) (statement of Rep. Kelley) (stating belief that South was in organized rebellion and describing resulting necessity of imposing martial law). But instead of establishing military rule or supporting freedmen in a guerilla war against the Klan and southern governments, Congress chose to use law and the federal courts through the Civil Rights Acts and the Enforcement Acts. See supra note 339 and accompanying text.

369. Although their conclusions diverge slightly, a number of academics have recognized that the Second Amendment’s meaning changed with the Civil War. For a

amendment, for example, that commands that a person held to labor no longer shall be delivered up to the master—but everyone understands that these terms, as originally understood, have no further legal significance.³⁷⁰ The same is true of the Second Amendment. If an ill-formed right to rebel against the government was conceived in Philadelphia, it was strangled at Appomattox.³⁷¹

4. *Insurrection and Justiciability: Or, “When You Strike at a King, You Must Kill Him.”*³⁷² — Strong insurrectionist interpretations of the Second Amendment are deeply flawed, whether derived from the text or from seventeenth, eighteenth, or nineteenth century history. But this is not necessarily because strong insurrectionist interpretations are extratextual or unhistorical—the evidence is far too conflicted on that score. The problem is prudential. Strong insurrectionist theories assume that the law can answer a quintessentially political question: When is it justifiable to overthrow the government? No manageable judicial standards exist to answer this question. The entire interpretive enterprise is folly.³⁷³

Nevertheless, *Heller* treats the inescapably political question of who is an insurgent and who is a patriot as if the answer were constitutionally self-evident. This is understandable. It is easy to identify the tyrant when

sample, see, e.g., Cornell, *Well-Regulated Militia*, supra note 108, at 5 (stating theory that Second Amendment changed with Civil War and Reconstruction); Amar, *Second Amendment*, supra note 331, at 910 (stating Fourteenth Amendment “invites a new understanding [of the Second Amendment] in which local militias are no longer the unambiguous heroes, and the Union’s army is no longer the presumed villain”).

370. Compare Cong. Globe, 38th Cong., 1st Sess. 1325 (1864) (documenting attempt to expressly repeal Fugitive Slave Clause in language of Thirteenth Amendment), with Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 *Harv. L. Rev.* 1468, 1489 (2007) (recognizing Thirteenth Amendment rendered fugitive slave clause “inoperative”), and George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 *Va. L. Rev.* 1367, 1373 (2008) (noting Thirteenth Amendment abrogated any right to compensation for or service of slave).

371. “Whether or not the Founding Fathers envisioned a right to armed revolution, the architects of Reconstruction certainly did not.” Emberton, supra note 324, at 626; see also Cornell, *Well-Regulated Militia*, supra note 108, at 5 (arguing Civil War changed revolutionary aspect of Second Amendment); Bogus, *Heller and Insurrectionism*, supra note 231, at 257 (arguing any legitimacy of idea of armed citizenry “was extinguished by the Civil War”). I should reiterate that the notion here is of a legally cognizable right, as opposed to some claim of a natural right or a positive right bestowed by a democratically responsive government. In this regard, the Civil War and Reconstruction both giveth and taketh away. The Fourteenth Amendment likely incorporated the Second Amendment as a personal right, but also constrained whatever broad rights to self-defense and insurrection it may have originally protected.

372. Ralph Waldo Emerson penned this comment to Oliver Wendell Holmes, who presumed to criticize Plato in an essay. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 43 (1993) (emphasis omitted). Thanks to Chris Bryant for the reference.

373. As Judge Learned Hand once wrote, “[r]evolutions are often ‘right,’ but a ‘right of revolution’ is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution.” *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950), aff’d, 341 U.S. 494 (1951).

one speaks of a long-dead foreign monarch. It is far more difficult to identify the tyrant when one speaks of one's own government. After all, the Stuart select militias no doubt viewed themselves as lawful suppressors of antigovernment radicals, not as oppressors of their fellow Englishmen.³⁷⁴ Their Parliamentary or anti-Stuart rivals, who just as determinedly disarmed their Catholic countrymen,³⁷⁵ likely viewed themselves in the same manner. Given this fundamental disagreement in terms, the only difference between a villainous select militia disarming liberty-loving members of the people's militia and a heroic unit of the people's militia disarming insurrectionists is which militia has the better media (or military) strategy.³⁷⁶ To the soldier, an insurrectionist and a revolutionary look exactly the same.³⁷⁷

374. See David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, at 236–37 (9th ed. 1969) (noting majority support for Stuart King Charles II's militias and his subjects' "detestation of rebellion" after English Civil War); cf. David G. McCullough, 1776, at 12–17 (2005) (discussing perspective of English Parliament and military concerning American revolutionaries).

375. See *supra* notes 283–284 and accompanying text (discussing parliamentary legislation designed to disarm Catholics so as to better secure government from insurgents). For a more modern example, one need only compare the vastly different public perceptions of government disarmament of members of the Black Panther Party in the 1960s and the government disarmament of the Branch Davidians or Ruby Ridge white supremacists in the 1990s.

376. "Often the difference between an 'insurrection' and a 'revolution' is the outcome of the endeavor—the latter term being used to describe those that succeed, the former those that fail." Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 *BYU L. Rev.* 137, 164 n.92.

For an example of how public perception plays a role, compare the Black Panther manifesto from 1966 which stated:

We believe we can end police brutality in our black community by organizing black self-defense groups that are dedicated to defending our black community from racist police oppression and brutality. The Second Amendment to the Constitution of the United States gives a right to bear arms. We therefore believe that all black people should arm themselves for self-defense.

October 1966 Black Panther Party Platform and Program, *What We Want, What We Believe*, ¶ 7, reprinted in *The Black Panthers Speak 3* (Philip S. Foner ed., 2002). The Panthers' Second Amendment fundamentalism did not gain much support in California, where then-Governor Ronald Reagan signed legislation to disarm them. See generally Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 *San Diego L. Rev.* 947, 960–61, 981 (1999) (examining both Panthers' views on guns and California legislature's motivations for passing statute to disarm them). Compare this to the vocal (and eventually violent) support for modern right wing movements that invoke the Second Amendment for their purposes. See Siegel, *supra* note 21, at 229 (exploring Second Amendment popular constitutionalism in reaction to federal law enforcement).

377. See Bob Woodward, *State of Denial* 266 (2006). Woodward cites a Central Intelligence Agency officer, Bob Richer, who identifies the three elements of an insurgency as: "[1] popular support, [2] sustained armed attacks or sabotage, and [3] the ability to act at will and move independently." *Id.*; see also U.S. Dep't of the Army & U.S. Dep't of Def., *U.S. Army Counterinsurgency Handbook* § 1-2 (2007) ("[A]n insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government . . . while increasing insurgent control."). From a

And therein lies the problem. When it is unclear who is a public defender and who is a public scourge, the question of who is in the right is not a legal question, but a political one.³⁷⁸ Once the people begin to assemble armed in the streets, intimidating government and exercising their right to revolution, the Constitution is at an end.³⁷⁹ Any other approach only thrusts the judiciary into a controversy that it has no tools to resolve. Whether a government has become so tyrannical, such that revolution in self-defense is necessary, is no more justiciable than whether the states have a republican form of government.³⁸⁰

Luther v. Borden,³⁸¹ a seminal case in nonjusticiability doctrine, illustrates this point. In *Luther*, litigants asked the Court to resolve a dispute arising from a domestic insurrection in Rhode Island called the Dorr Rebellion. After independence, Rhode Island did not draft a new constitution, but simply incorporated the fact of its independence into the seventeenth century royal charter.³⁸² That document included a property requirement for suffrage. This arrangement persisted, despite the fact that it eventually disenfranchised over half of Rhode Island's population.³⁸³

Rhode Island's government proved intransigent. In response, a cadre of individuals led by Thomas Dorr convened an extraconstitutional "People's Constitutional Convention," submitted the new constitution with its provision for universal white male suffrage to the voters, declared

strictly military point of view, these definitions apply equally to white supremacists in South Carolina circa 1871 and to minutemen in Massachusetts in 1775.

378. In this legal sense, "there can be no 'right to revolution' in any system." Sidney Hook, *Paradoxes of Freedom* 113 (1987); see also Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 Cal. L. Rev. 601, 618 (2009) (arguing "right to resist [government coercion] is not a legally enforceable claim, but rather a [Hobbesian] 'blameless liberty'" sounding in natural, rather than positive, law).

379. See McAfee, *supra* note 227, at 56–57 (arguing exercise of "right" to insurrection "is necessarily an extra-legal act, not to mention a step of last resort"). For a nuanced critique of this position, see David C. Williams, *The Mythic Meanings of the Second Amendment* 87–88 (2003) (arguing constitutional right of revolution is not logically incoherent). Williams suggests that history is ambiguous as to whether the Framers intended to create a constitutional, as opposed to natural, right to insurrection. *Id.* at 87. He counters that the Framers would have understood a revolution meant to restore constitutional norms—as opposed to mere resistance to legitimate government—as a constitutional right to revolution. *Id.* In any event, Williams understands that the Framers could have wanted to preserve a *legal* right to weapons in case a *natural* right to insurrection became necessary. *Id.* at 88. That may be true, but if that is the case, the question becomes when the legal right ends and the natural right begins. I propose that the legal right ends at home.

380. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) (deciding whether state has republican form of government is question "solely committed by the Constitution to the judgment of Congress").

381. 48 U.S. 1 (1849).

382. *Id.*

383. Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 Harv. L. Rev. 1125, 1127 (1987).

ratification, and demanded that the existing state government hand over the levers of power to the new “Suffragist” government.³⁸⁴

Unsurprisingly, the existing Rhode Island government refused. So, the Suffragists armed themselves and launched a military campaign. The existing “Chartist” government responded in turn: It called out the militia to suppress the insurrection, declared martial law, and arrested hundreds of Suffragists.³⁸⁵

With crumbling military and political support, the Suffragists attempted to buttress their legitimacy through the courts. Suffragist Martin Luther sued a Chartist militiaman, Luther Borden, for attempting to arrest him without a warrant.³⁸⁶ Martin Luther’s argument was elegant: The Suffragists had initiated a convention, the majority had voted for the new constitution, and they were thus the legitimate republican form of government guaranteed by the United States Constitution. In contrast, the Rhode Island Chartist government was a usurper. Hence, Borden was not a legitimate member of the Rhode Island militia, but the tool of a pretended government and a trespasser.³⁸⁷

The Court refused to intervene in the matter. “[A]t the time . . . the trespass is alleged to have been committed [the state was in disarray] and threatened to end in bloodshed and civil war.”³⁸⁸ But the Court would not decide whether the militia member was a trespasser or law enforcement official, because that question required the Court to pronounce one government or the other legitimate. It could not answer because the very act of decision confirmed the legitimacy of the government rendering the decision:

Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. . . . If [a court] decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.³⁸⁹

The political branches, not the Court, determine which state government is legitimate: “If there is an armed conflict . . . it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government.”³⁹⁰ The Court concluded that it was “the President [who] must, of necessity, decide which is the government, and which

384. *Id.* at 1129.

385. *Id.* at 1130.

386. *Id.*

387. See *id.*

388. *Luther v. Borden*, 48 U.S. 1, 35 (1849).

389. *Id.* at 40.

390. *Id.* at 43.

party is unlawfully arrayed against it, before he can perform the duty [to quell insurrections] imposed upon him by the act of Congress.”³⁹¹

As *Borden* recognizes, politics determines who is the insurrectionist and who is the patriot, who is the citizen soldier and who is the rioter.³⁹² If politics declares that only certain persons armed in public are the militia, such as the police, the National Guard, or bounty hunters, and everyone else armed in the street is a potential insurgent or a criminal, that is politics’ prerogative.³⁹³ If the people do not like this rule, their recourse is to the ballot box or to the barricades, but not to the Constitution.

5. *The Second Amendment and the “True Man.”* — One could conclude at this stage that the Second Amendment does not protect the public bearing of arms when the purpose is to threaten government. One might respond, however, that the Amendment guarantees a right to publicly bear arms when the purpose is other than to challenge government authority. Surely the Second Amendment must forbid restrictions on the right to carry arms in public when the purpose is to defend against ordinary criminals.³⁹⁴ In other words, the Second Amendment concerns itself not with where the arms are borne but why they are borne.

391. *Id.* Note that the *Borden* Court explained that Congress *could*, but was not constitutionally *required* to, seek a judicial determination of when a state is in rebellion. *Id.* Similarly, the judiciary was without power to determine the lawful government either while civil war was raging or after order was restored. *Id.* To inject the Court into those affairs would turn the “Constitution of the United States [into] a guarantee of anarchy, and not of order.” *Id.*

392. Thomas Jefferson, often misquoted, recognized that important point. His quip that a “little rebellion now and then is a good thing” was not an expression of a constitutional right to insurrection, but rather a description of a political reality—one that would be resolved by the political branches. See David Thomas König, Thomas Jefferson’s Armed Citizenry and the Republican Militia, 1 *Alb. Gov’t L. Rev.* 250, 263 (2009). Jefferson’s Declaration of Independence is a *political* document, offered because of a “decent [r]espect to the [o]pinions of [m]ankind.” The Declaration of Independence para. 1 (U.S. 1776). The international community would decide the justness of the Americans’ actions.

393. Such a law, of course, would have to comply with equal protection and due process. But there can be no suspect class when the categories at issue are armed policemen, permitted to patrol the streets by law, versus unarmed civilians, who are not. Equally, a state could declare all its citizens militia members, or members of “citizen patrols,” and allow them to be armed in public, or declare all citizens over eighteen, twenty, or thirty years of age to be members of the militia. Cf. *Presser v. Illinois*, 116 U.S. 252, 264–67 (1886) (holding drilling as private militia is not right attributable to national citizenship). Nor are there equal protection issues if the fundamental right to arms does not extend outside of the home.

394. Policing this distinction becomes extremely difficult in practice. One can easily imagine a gang member wearing a pistol in his belt, the purpose of which is to defend against confrontation from *both* rival gang members *and* the local constabulary forces. Strong insurrectionist theorists tend to view lawless citizens, lawless law enforcement, and lawless government as indistinguishable for Second Amendment self-defense purposes. See Kopel, Nineteenth Century, *supra* note 228, at 1454 n.358 (arguing individual criminals and criminal armies are simply points along self-defense “continuum”).

A right to public self-defense against common criminals—“true man” or “no retreat” or “stand your ground” theories of the Second Amendment³⁹⁵—has some historical traction. On a personal level, the common law has for many centuries accommodated a self-defense exception in the criminal arena, and in some cases courts have construed this common law exception to include a right to carry arms for personal defense in public.³⁹⁶ In addition, some courts have construed the common law to permit spontaneous assemblages of the citizens for law enforcement purposes, even without direct summons by the local magistrate.³⁹⁷

But this right has never been uniform or unlimited. Self-defense against criminals “is a doctrine of modern rather than of medieval law.”³⁹⁸ Initially, a person could only rightfully kill a criminal in execution of the law.³⁹⁹ Private lethal self-defense was a capital crime which required conviction and sentence, but for which the defender could seek, and was routinely granted, pardon from the sovereign.⁴⁰⁰

Further, judges frequently indulged in seemingly arbitrary and legislative linedrawing as self-defense doctrine developed. Edward Coke, William Stanford, Matthew Hale, and William Hawkins all reported that one could kill a robber in self-defense, but perhaps not an attempted murderer or an attempted rapist.⁴⁰¹ Two armed men may be suitable for

395. See generally *supra* Part III.B.3 (tracing historic invocation of Second Amendment as means of public self-defense). Again, the assumption of this Part is that it makes little sense to discuss a Second Amendment right to carry weapons for self-defense without a discussion of whether the Second Amendment (as opposed to statutes or common law) also preserves a constitutional right to use those weapons.

396. See 1 Hawkins, *supra* note 248, at 489 (discussing right of “persons of quality” to carry arms); see also *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (stating individuals have constitutional right to carry weapons openly); *State v. Duke*, 42 Tex. 455, 459 (1874) (speaking of right to carry pistol openly).

397. See *R v. Pinney*, (1832) 172 Eng. Rep. 962, 974 & n.3 (K.B.) (indicating military officer may act without authority of magistrate and discussing obligation of citizenry to suppress riots); Malcolm, *supra* note 108, at 3 (discussing duty placed upon people to “watch and ward”). But see 1 Hawkins, *supra* note 248, at 516 (discussing, with reservations, private assemblages to put down riots).

398. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 *Harv. L. Rev.* 567, 567 (1903); see also Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* 4 (1991) (citing Beale and noting English common law imposed duty to retreat in threatening situation).

399. Beale, *supra* note 398, at 567–68 (“[H]omicide could be justified only when done in execution of the king’s writ . . .”).

400. *Id.* at 568. The history of common law self-defense formalistically distinguishes “excusable” homicide from “justifiable” homicide. The former required the King’s pardon to avoid punishment, whereas the latter did not. See Brown, *supra* note 398, at 4. Pardon was only available in extremely narrow circumstances, primarily dealing with officially deputized authority. *Id.*

401. See Beale, *supra* note 398, at 572 (noting it was often considered permissible to “execute the law upon felons,” but “attempted murder or rape could not . . . be justifiably prevented by a private person”). Beale’s interpretation of these sources has been challenged by other scholars, however, as explained in Richard A. Rosen, *On Self-Defense*,

self-defense, but add a third and the entire group could be charged with riot or unlawful assembly.⁴⁰²

Hawkins, for one, was reluctant to allow private law enforcement by groups of armed individuals, stating that “it seems to be extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for [private individuals] to go so far in common cases [of lawlessness], lest, under the preten[s]e of keeping the peace, they cause a more enormous breach of it.”⁴⁰³ Other common law authorities suggested that such private actions be permitted, but only to prevent felonies in the nature of a rebellion.⁴⁰⁴ Even so, killing a potential assailant in self-defense was not always a complete defense to criminal liability, even if the facts proved that such self-defense was necessary. The defender could still be forced to forfeit property to the crown as a penalty.⁴⁰⁵

That English common law imposed a duty to retreat only adds to the confusion. At common law, violent self-defense could be justified if the victim of such violence made every effort to avoid the confrontation.⁴⁰⁶

Imminence, and Women Who Kill Their Batterers, 71 N.C. L. Rev. 371, 385 n.39 (1993) (discussing conflicting interpretations of English statutes on point).

402. See, e.g., *Queen v. Soley*, (1701) 88 Eng. Rep. 935, 937 (Q.B.) (“If *three* come out of an ale-house and go armed, it is a riot. Though a man may ride with arms, yet he cannot take two with him to defend himself even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.”). Compare 1 Hawkins, *supra* note 248, at 489 (stating “persons of quality” could carry arms with their retinue), with *id.* at 516 (suggesting assemblage of persons in public to protect one who has been threatened is breach of peace). The distinction between riot and unlawful assembly—both breaches of the peace—may have turned on whether the group offered some type of violence, although the *Soley* court noted the “obscur[ity]” of that definition. *Soley*, 88 Eng. Rep. at 936.

403. 1 Hawkins, *supra* note 248, at 517. Hawkins also ventured that some distinction be made between self-defense in a town as opposed to in the country, because one could ostensibly seek aid in a town, although he gave no indication as to where a judge would draw such a line. See *id.* at 83–84 (suggesting person has duty to retreat from confrontation in town, as distinguished from country or highway, before using self-defense).

404. Compare *id.* at 517 (noting risks of private law enforcement in “common cases”), with 5 Richard Burn et al., *The Justice of the Peace and Parish Officer* 336 (28th ed. 1837) (citing Gordon Riots for proposition that private individuals could do anything to prevent perpetration of felony). The fact that this source material is so conflicted—and in the case of the Gordon Riots, contemporaneous—only casts doubt on an unambiguous reserve in the Constitution for an individual right to public self-defense.

405. See 1 Hawkins, *supra* note 248, at 84 (citing statute of Henry VIII clarifying “question and ambiguity” concerning justifiable homicide in self-defense); see also Edward Coke, *The Third Part of the Institutes of the Laws of England* 55 (1797) (“And yet such a precious regard the law hath of the life of man, though the cause was inevitable, that at the common law he should have suffered death: and though the statute of Glocester save his life, yet he shall forfeit all his goods and chattels.”); Fiona Leverick, *Killing in Self-Defence* 42, 74 n.38, 75 n.39 (2006) (noting persistence of forfeiture and duty to retreat in common law cases).

406. See Brown, *supra* note 398, at 4 (discussing duty to retreat until “the wall [is] at [one’s] back” before killing in self-defense would be justified); L.S. Rogers, Annotation, *Homicide: Extent of Premises Which May Be Defended Without Retreat Under Right of*

The exception to this doctrine was that a person confronted *in his own home* by a stranger had no duty to retreat.⁴⁰⁷ As then-Judge Cardozo summarized two centuries later:

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England.⁴⁰⁸

This has been referred to as the “castle” doctrine.⁴⁰⁹

American perceptions of armed public self-defense were just as ambivalent as in England. To the extent the Framers of the 1791 Bill of Rights used an English common law framework for its provisions, it is unsurprising that their understanding of armed self-defense would be as infected with the same imprecision and ambiguity as their English sources.⁴¹⁰

As American common law matured, jurists began to abandon the preexisting English common law duty to retreat from confrontation in public places and to adopt a “true man” or “stand your ground”

Self-Defense, 52 A.L.R.2d 1458, § 1 (1957) (“According to the severe requirements of the original common-law rule, a person attacked by another, *except in his own dwelling*, was required to ‘retreat to the wall,’ if practicable, before taking the life of his assailant.” (emphasis added)); see also Coke, *supra* note 405, at 55 (noting only when defender falls back to hedge or wall may he use force in return); Beale, *supra* note 398, at 570 (citing case of chaplain who killed another and alleged self-defense; justices rejected defense since “he was bound to flee as far as he could with safety of life”); *id.* at 574 (noting “king and his laws” were to vindicate injury at common law and so private persons were required to flee from attack rather than “take capital revenge one of another” (quoting 1 Hale, *supra* note 211, at 481)). But see *Erwin v. State*, 29 Ohio St. 186, 195–98 (1876) (citing common law authorities Michael Foster and Edward Hyde East for no duty to retreat view); Brown, *supra* note 398, at 6–7 (discussing Foster and East rejection of duty to retreat).

407. See 1 Hale, *supra* note 211, at 486 (noting unlike other cases of self-defense, man need not retreat if threatened in his own home); Beale, *supra* note 398, at 574 (“In one case a person attacked might properly defend himself against attack without retreating, that is, where he was attacked in his dwelling-house.”). For an exhaustive treatment of the castle doctrine and its origins, see generally Caplan & Wimmershoff-Caplan, *supra* note 245, at 1076–135.

408. *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

409. See Caplan & Wimmershoff-Caplan, *supra* note 245, at 1076–135.

410. As previously discussed, Blackstone assumed that legislatively imposed limits on the public carrying of weaponry survived the English Bill of Rights—an assumption that the Second Amendment may well have incorporated. See *supra* note 286 and accompanying text. Further, Blackstone specifically rejected the Lockean notion that a man had a right to kill an aggressor in public. Blackstone rejoined: A “well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system.” Suk, *True Woman*, *supra* note 191, at 242 (quoting 4 Blackstone, *supra* note 193, at *181–*182 (internal quotation marks omitted)). Note how Blackstone uses the term “well-regulated,” which became a term of art in the Second Amendment. Compare the work of Nelson Lund, who cites Locke for the proposition that the “common defense” means a private right and duty to defend oneself and others. Lund, *Self-Preservation*, *supra* note 111, at 118.

model.⁴¹¹ But this was a chaotic process, taking place as a case-by-case progression—not as a uniform rule of constitutional law, much less a uniform concept of constitutional understanding. Further, courts began to depart in large numbers from the common law duty to retreat after the Fourteenth Amendment had become part of the Constitution,⁴¹² suggesting that public—as opposed to home—self-defense is not as firmly established as a fundamental right as those seeking incorporation would suggest.⁴¹³

Two examples dramatize this ambivalence. In *State v. Huntly*, a man named Robert Huntly was charged and convicted in a North Carolina court of “riding or going armed with unusual and dangerous weapons, to the terror of the people.”⁴¹⁴ The prosecution alleged that after a dispute over slaves, Huntly had “arm[ed] himself with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed, did go forth and exhibit himself openly . . . and publicly declare a purpose [to kill] one James H. Ratcliff and other good citizens of the State.”⁴¹⁵ The North Carolina Supreme Court was quite dismissive of the defendant’s Second Amendment argument. It suggested that because the arms that he should have been using to defend the state were abused to terrorize his fellow citizens, he deserved “the severer condemnation for the abuse of the high privilege.”⁴¹⁶ It upheld the conviction, but not without stating: “[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime.”⁴¹⁷

411. Suk, *True Woman*, *supra* note 191, at 243. For a historical treatment of this subject, see generally Brown, *supra* note 398, at 3–39 (discussing evolution of duty from origins in England, where Crown sought to retain monopoly over conflict resolution, to its abandonment in United States, where brave “true man” model reflected societal changes).

412. Richard Maxwell Brown notes, for instance, that “two of the most influential” cases departing from the duty to retreat were decided in 1876 and 1877, respectively; the Fourteenth Amendment, by contrast, was proposed in 1866 and ratified in 1868. See Brown, *supra* note 398, at 8.

413. The test for whether a right is so fundamental as to apply to the states is whether it is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations and quotation marks omitted) (holding right to assisted suicide is not fundamental). In *Erwin v. State*, the Ohio Supreme Court remarked that cases and commentators on the right to self-defense in public and the right to retreat had “left the question in some obscurity.” 29 Ohio St. 186, 194 (1876). Strangely, the Ohio court claimed that reference to the “principles of the common law” which had created the problem was the way to resolve the “apparent or real confusion.” *Id.*

414. 25 N.C. (3 Ired.) 418, 418 (1843).

415. *Id.*

416. *Id.* at 422.

417. *Id.* at 422–23. One question this quotation raises is whether the liberty identified in this passage is a fundamental liberty that comes from the Second Amendment, or a

While *Huntly* provides some historical evidence that firearms carried for self-defense against private threats were protected, the support is ambivalent at best and frequently contradicted. As the North Carolina case itself indicates, some antebellum jurists, like their eighteenth century brethren, considered a firearm ipso facto an “unusual weapon” that should never “be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.”⁴¹⁸

In contrast to *Huntly*, in *English v. State*, an 1871 case from the Texas Supreme Court, the court held that a Texas law prohibiting the carrying of “pistols, dirks, and certain other deadly weapons” was not a violation of the right to bear arms under either the federal or state constitution.⁴¹⁹ Citing the very same passage from Blackstone as was cited in *Huntly*, the Texas court could barely contain its contempt for natural law theories of a right to bear arms in public: “It is useless to talk about personal liberty being infringed by laws such as that under consideration. The world has seen too much licentiousness cloaked under the name of natural or personal liberty; natural and personal liberty are exchanged, under the social compact of States, for civil liberty.”⁴²⁰ The court went on to warn that “[w]e must not go back to that state of barbarism in which each claims the right to administer the law in his own case.”⁴²¹ It should be noted, however, that the statute at issue preserved a right to a firearm on one’s own premises.⁴²²

An 1874 *New York Times*⁴²³ editorial expressed similar ambivalence. In a piece titled *A Question for Arkansas*, the editors acknowledged that

liberty that comes from an affirmative grant of the North Carolina legislature—hence the qualification that the firearm must be carried for a “lawful purpose.”

418. *Id.* at 422.

419. 35 Tex. 473, 473 (1871).

420. *Id.* at 477.

421. *Id.*

422. Halbrook is dismissive of this court as being a tool of Reconstruction authorities, and rendering decisions when much of the state was disenfranchised as rebels. See Halbrook, *Arms in Texas*, supra note 328, at 661 & n.161 (“A product of military occupation, the reconstruction court’s decisions would not be considered binding precedents in later years.”). Perhaps, but similar arguments could be made about the legitimacy of the Thirteenth, Fourteenth, and Fifteenth Amendments as well. Further, a prosecution for the mere carrying of a firearm in public was upheld as late as 1906, long after Reconstruction had ended. In *Woodroe v. State*, 96 S.W. 30, 30 (Tex. Crim. App. 1906), a woman was fined for carrying a firearm in public, even though she had been acquitted on the grounds of self-defense for using the firearm in her own home. As the court explained in sustaining the conviction: “A party may act in self-defense in a difficulty, and at the same time violate the law against carrying a pistol.” *Id.* at 31.

423. For a discussion of the use of print media, including the *New York Times*, as an aid to assess original public understanding, see generally David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866–1868*, 30 *Whittier L. Rev.* (forthcoming 2009) (manuscript 2–3, on file with the *Columbia Law Review*) (noting due to expansion in popular media, “Americans in 1866 had extensive and timely reports explaining the intent behind the [Fourteenth Amendment] which Congress would put before them”).

“[i]n most of the Southern States, the keeping and bearing of arms is considered an indispensable adjunct to the freedom of an American citizen.”⁴²⁴ This was a right understood by the newly emancipated African Americans: “The freedman, in his progress toward the full dignity of citizenship, considers the purchase of a revolver one of his greatest advances.”⁴²⁵

But the editors then savaged Arkansas lawmakers for allowing unchecked public weaponry: “When a mob assembles in a Southern State, it is certain to be an ‘armed mob.’”⁴²⁶ According to the *New York Times*, “the highly chivalric and amusing practice of ‘shooting at sight’” was still widespread, and consisted chiefly of “a species of running duel, renewed whenever enemies meet, until one or the other falls.”⁴²⁷ Arkansas’s capital had been turned into an “[e]ntrenched camp” where “[i]nnocent citizens are killed in the streets; negroes are massacred in the back country, and an officer of the United States has a pistol leveled at his head.”⁴²⁸ As for democratic discourse: “[A] weapon is considered the natural arbiter of discussion. It is the proud vindicator of its owner’s thoughts.”⁴²⁹ While public self-defense may have been necessary at one time, lawmakers “have doubtless by this time seen the folly of permitting it to remain an inalienable right.”⁴³⁰ The editors endorsed regulations like those in contemporary Texas:

The habitual carrying of weapons by private citizens is a continual menace against the Government—a protest against complete enforcement of and subordination to law; . . . it is the duty of those in power . . . to pass an act regulating the ‘keeping and bearing of arms.’ . . . In these modern days, with a free press, with free speech, with every facility for revolution when it is really necessary, there is no longer any sense in allowing every man to be his own policeman, and the executor of his own vengeance.⁴³¹

424. Editorial, *A Question for Arkansas*, N.Y. Times, May 11, 1874, at 4 [hereinafter *A Question for Arkansas*]. The editors also quoted the Arkansas Constitution, which states that “[t]he citizens of this State shall have the right to keep and bear arms for their common defense.” *Id.* (internal quotation marks omitted) (quoting Ark. Const. art. II, § 5).

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*; see also *supra* note 217 and accompanying text (discussing how public brandishing of firearms deters and distorts democratic interchange and debate).

430. *A Question for Arkansas*, *supra* note 424.

431. *Id.* The *New York Times* made a distinction regarding the home. At *home*, self-defense was understandable: “Burglary, or attempt at house-breaking in the nighttime, may be fairly met with fire-arms. . . . He may be shot down without mercy; self-preservation demands it.” Editorial, *Human Life Too Cheap*, N.Y. Times, Aug. 9, 1876, at 4. But the killings of a huckleberry thief and a trespassing swimmer, on the other hand, went beyond the pale. *Id.* The real danger was not the common criminal, but those men whose “sense of any private wrong is so strong . . . that under the influence of a sudden resentment

Not even the Supreme Court was immune to this apparent fickleness. Two Supreme Court decisions, two years apart, took seemingly diametrically opposed views of the duty to retreat from confrontation: one that endorsed a no duty to retreat theory of self-defense,⁴³² another that adopted such a duty.⁴³³ The one distinguishing feature between the two cases was protection of the home. In *Beard v. United States*, a homeowner clubbed an assailant with his gun about fifty yards from his home in the curtilage, killing him.⁴³⁴ As to whether Beard could have killed the man in his home, the Court had absolutely no doubt.⁴³⁵ The question was whether this right to defend the home extended to the curtilage around the home. In this case, the Court concluded that it did, and Beard was entitled to a new trial.⁴³⁶

In the other case, *Allen v. United States*, Allen killed a man in a field that was not within his property.⁴³⁷ The Court expressly distinguished *Beard* on the ground that *Beard* “was the case of an assault upon the defendant upon his own premises.”⁴³⁸ *Beard* left undisturbed “[t]he general duty to retreat instead of killing when attacked.”⁴³⁹

Finally, one must again address the legal significance of Reconstruction and the Klan.⁴⁴⁰ The Klansmen were terrorists who claimed to be a posse comitatus.⁴⁴¹ Their organizational documents

they . . . take human life in what they consider self-defense.” *Id.* Compare these remarks with my previous discussion of eighteenth century sources that reposed the power of resolving conflict in the hands of the sovereign. See, e.g., supra note 399 and accompanying text; cf. Editorial, *The Fourth in Utah: Proclamation Forbidding Armed Displays Except by Order of the Governor—Trouble Apprehended*, *N.Y. Times*, July 1, 1871, at 1 (reporting acting governor of Utah had forbidden “all musters, parties or gathering of the militia of Utah, or of armed persons within the Territory” in response to another self-proclaimed “official” who had called out militia).

432. *Beard v. United States*, 158 U.S. 550, 562 (1895) (“The weight of modern authority . . . establishes that when a person, being without fault . . . is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.”).

433. *Allen v. United States*, 164 U.S. 492, 498 (1896) (finding no error in “instruction of the court that the [defendant] was bound to retreat as far as he could before slaying his assailant”). For a discussion of these two cases and an early survey of self-defense law, see generally Beale, supra note 398.

434. 158 U.S. at 553.

435. See *id.* at 559 (“We have no hesitation in answering this question in the affirmative.”).

436. *Id.* at 559–60 (“[W]e cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling-house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling-house.”).

437. 164 U.S. at 494.

438. *Id.* at 498.

439. *Id.*

440. See supra Part III.B.3.c.

441. The “posse comitatus,” or “power of the county,” was the ancient common law duty of private citizens to aid in the apprehension of rioters, insurrectionists, or criminals at the request of the sheriff. Along with the “hue and cry” and other doctrines, it not only permitted, but required, able bodied male citizens to arm themselves and seize

prove as much. The very first object of the order, according to the Klan's founding document, is "[t]o protect the weak, the innocent, and the defenseless, from the indignities, wrongs and outrages of the lawless, the violent, and the brutal."⁴⁴² The Klan's avowed object was to protect themselves, as well as their property, livelihood, and neighbors, from criminals—of whom government authorities were merely a variety.⁴⁴³

This was a central theme of the Klan's legal defense during the Klan trials.⁴⁴⁴ According to their counsel, if the accused truly believed that blacks were responsible for civil disorder and crime, "and honestly believed that other Wrongs would be committed upon them and their neighbors . . . then they not only did not commit the offense charged in this indictment, but they did what they had a *right* to do. *They acted in self-defense.*"⁴⁴⁵ Speaking of one of the accused Klan members, counsel for the Klan asked: "Do you suppose [the accused] thought he was joining anything bad? *Had he any motive other than for protection?* . . . He knew nothing about these Klans . . . and he supposed . . . *that they were organized in self-defense.*"⁴⁴⁶

To read into the Second Amendment a right to possess a firearm for public self-protection that cannot be abridged by legislatures is to accord the Klan members' motives for carrying weapons undue constitutional weight. It is to credit the Klan's self-defense justification for nightriding, a defense the Reconstruction Congress found incredible.⁴⁴⁷

Indeed, the Klan's claim to exercise an ancient community policing function, or a right to "coon" hunt at midnight, was merely the latest chapter in a long history of criminal pretext. As Malcolm has noted, the English Game Laws, ostensibly concerned with poaching, were actually motivated in part by the fact that armed hunting parties were opportunities for popular insurrection and riot.⁴⁴⁸ The Framers rejected a version of the Second Amendment that would have explicitly preserved a right to

wrongdoers. See Malcolm, *supra* note 108, at 3 (discussing "hue and cry," "watch and ward," and "posse comitatus" as among "local peacekeeping tasks" (emphasis omitted)).

442. The Ku Klux Klan Organization and Principles 1868, reprinted in Commager, Documents, *supra* note 319, at 498–500.

443. See Kopel, Nineteenth Century, *supra* note 228, at 1454 n.358 (arguing criminals and unlawful law enforcement were simply two ends of spectrum).

444. See *supra* notes 348–352 and accompanying text (describing strategy in South Carolina trials).

445. Klan Proceedings, *supra* note 348, at 172 (emphasis added).

446. *Id.* at 413 (emphasis added).

447. See *supra* note 361.

448. See Malcolm, *supra* note 108, at 12 (citing 2 Blackstone, *supra* note 193, at *412) (listing prevention of popular insurrection via disarmament of populace as one ground for passage of game laws). Malcolm states that game laws were rendered a virtual nullity by the Elizabethan era. *Id.* at 13. It is not so clear, however, that persons were not still prosecuted for the public brandishing of weapons, and in at least one case it appears that a group was actually hanged under these game laws. See *R v. Baylis*, (1736) 95 Eng. Rep. 188, 188 (K.B.).

arms for hunting.⁴⁴⁹ The Klan and other white supremacist organizations merely recycled guile that had existed for centuries. They professed that their organizations were purely “defensive” or “social.”⁴⁵⁰ They were riding to improve young men’s “horsemanship.”⁴⁵¹

Reconstruction lawmakers saw through these charades. The Klan and its supporters had offered “any plausible excuse for outrages which admit of none.”⁴⁵² The Klan’s protestation that freedmen were on a binge of rampant lawlessness was a subterfuge.⁴⁵³ Congress offered no sympathy to Klan supporters who “themselves, complaining of bad laws, excuse or encourage the masked and armed mobs that override all law.”⁴⁵⁴ *Harper’s Weekly* similarly accused Klan defenders of offering a “pretense [of] regard for the Constitution and for the safeguards of liberty,” when the consequence would be “the encouragement of crime and of those who would gladly trample upon the Constitution.”⁴⁵⁵ Given this history, the Constitution does not clearly require governments to legislate distinctions between a weekend hunting party and an armed mob, even if such distinctions are politically prudent or better public policy.⁴⁵⁶

449. The Pennsylvania minority suggested language that specifically carved out a right to keep arms for hunting. The rejected language stated as follows:

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), reprinted in *The Case Against the Constitution* 77 (John F. Manley & Kenneth M. Dolbeare eds., 1987). James Madison himself had introduced, as a Virginia legislator, hunting restrictions that penalized those who “bear a gun out of his [e]nclosed ground.” Cornell, *Well-Regulated Militia*, supra note 108, at 29 (quoting James Madison, *A Bill for the Preservation of Deer* (1785)). Note, however, the exception for carrying firearms on one’s own property.

450. Singletary, supra note 343, at 130, 134.

451. *Id.* at 134.

452. Klan Hearing Report, supra note 355, at 100. The Klan Hearing Report cites numerous familiar arguments made by the Klan and its sympathizers—emphasizing crime, corrupt officials, etc.—and dismisses each of them as “pretext.” See *id.* at 83 (characterizing perceived usurpation of Congress as “pretext for crimes and lawlessness that, unchecked, could end only in anarchy”); see also *id.* at 84 (identifying Klan’s announced animosity toward carpetbaggers as “but a pretext for the hostilities visited upon others”).

453. See *id.* at 84 (noting lack of testimony to suggest any “serious apprehension of general or combined lawlessness by the negroes”).

454. *Id.* at 99.

455. Excusing the Ku-Klux, *Harper’s Wkly.*, Nov. 25, 1871, at 1098.

456. Whether federal and state legislators make common sense distinctions between the two is a wholly separate matter. The question is whether a federal court may hold state legislation restricting firearms near public schools, for example, invalid on Second Amendment grounds because it sweeps in the hunter who wants to pick up his son from school, or the mother who is afraid of being ambushed by her ex-husband.

As demonstrated, the public bearing of firearms for self-defense, even against ordinary criminals, is deeply contested—far more than the now-settled issue of private home ownership.⁴⁵⁷ It seems imprudent for the Court to make definitive pronouncements about constitutional guarantees to public self-defense when the history of public self-defense was and remains so mutable.⁴⁵⁸ The alternative is to commit the judiciary, in the broadest sweep of circumstances, to the very error that Justice Scalia warned against: the case-by-case adjudication of the Second Amendment right by the third branch of government.⁴⁵⁹

The way to resolve this historical indeterminacy, in light of *Heller*, is to understand the Second Amendment as guaranteeing only that right which received overwhelming acknowledgement from Blackstone to Brandeis: a right to possess an appropriate firearm, at home, suitable for use against private threats. The Second Amendment right to self-defense, like the right to use obscenity, should be limited to a narrow form of castle doctrine. Public self-defense, community policing, hunting, trap shooting, or other public uses of firearms then become arenas in which politically responsive and institutionally competent branches of government can make fine-grained judgments about effective crime control, accident prevention, and public welfare. Further, this home-bound construction of the Amendment reflects the least historically contested threat that could have animated the right to keep and bear arms in the first place—the threat posed by a fellow citizen who may want to break into your house to harm you.

C. *Pragmatic and Political Palatability*

The Constitution is not self-enforcing any more than it is self-defining. It must be implemented through doctrines, rules, and categories.⁴⁶⁰

457. Nelson Lund, for example, has identified an 1852 treatise, which notes “a handful of apparently conflicting state decisions on the constitutionality of restrictions on the right to bear arms in public.” Lund, *Originalist Jurisprudence*, supra note 129, at 1364 (citing Francis Wharton, *A Treatise on the Criminal Law of the United States* 726–27 (2d ed. 1852)).

458. Wilkinson, supra note 124, at 267 (arguing Court should defer to democratic process on close constitutional questions); see also Posner, *Defense of Looseness*, supra note 170, at 34 (arguing Court in *Heller* “gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation”).

459. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (“A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).

460. See Richard H. Fallon, *The Supreme Court 1996 Term, Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 57 (1996) (arguing implementation of Constitution requires “crafting of doctrine by courts”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 877–79 (1996) (discussing how Constitution is interpreted according to common law doctrinal principles); Winkler, supra note 107, at 685 (noting rights are not absolute and “the extent to which legislation can permissibly burden a right is largely determined by the doctrinal rules, tests, and other devices the Court adopts to ‘implement’ the right”).

As Richard Fallon has explained, “[i]dentifying the ‘meaning’ of the Constitution is not the Court’s only function.”⁴⁶¹ The Court has already identified the “meaning” of the Second Amendment: It preserves a personal right to firearms. But stopping there misses the “crucial mission of the Court [which] is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”⁴⁶²

On that score, Justice Scalia seems to agree: “There are times when even a bad rule is better than no rule at all.”⁴⁶³ If there is a time when the Constitution demands a rule, it is the time when government must determine where and when an individual is entitled to possess a deadly weapon. Municipalities need to know how to write legislation that protects the public welfare. Police officers need to know when they can seize a weapon to prevent a crime.⁴⁶⁴ The consequences of getting the right level of protection wrong are “unusually great” in the context of firearms, and these negative consequences are worsened by the sclerotic and blunt nature of constitutional lawmaking, as opposed to the more supple and incisive device of legislation.⁴⁶⁵

The home-bound Second Amendment meets that practical need for flexibility and precision. It permits legislators and executives to regulate firearms without concern over amorphous judicial standards found elsewhere in the Supreme Court’s jurisprudence. No legislator need worry about whether a student sheds his Second Amendment rights at the schoolhouse door if she wants to prevent students (even the bullied ones) from bringing a firearm onto school grounds; no mayor needs to worry about whether she can prevent a group of Nazis from marching through the streets of Skokie, rifles in hand.⁴⁶⁶ This approach also avoids perhaps the worst possible solution to the question of scope, which would be an extremely fact intensive, arbitrary, and incomprehensible doctrine akin to Fourth Amendment search and seizure jurisprudence.⁴⁶⁷ It similarly

461. Fallon, *supra* note 460, at 57.

462. *Id.*

463. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

464. See Dorf, *supra* note 88, at 225–26 (arguing uncertainty surrounding *Heller* decision threatens useful crime control legislation in New York City).

465. See Winkler, *supra* note 107, at 713 (raising separation of powers concerns). For a similar discussion in the context of marriage equality for same-sex couples, see generally Darrell A.H. Miller, *State DOMAs, Neutral Principles and the Mobius of State Action*, 82 Temp. L. Rev. (forthcoming 2009) (on file with the *Columbia Law Review*).

466. Cf. *Nat’l Socialist Party v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (holding Nazis who wanted to march through heavily Jewish portion of Chicago area were entitled to procedural safeguards of their First Amendment rights).

467. See, e.g., Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 287 (1984) (calling Court’s Fourth Amendment jurisprudence “incomprehensible”); Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 Rutgers L.J. 719, 769

circumvents the second worst alternative: a hollow “time, place, and manner,” “reasonable restriction,” or “undue burden” regime that would leave legislatures, lower courts, and individuals unsure as to what, precisely, would constitute a permissible restriction.⁴⁶⁸

Compared to the right to obscenity, moreover, the definitional problems associated with firearms are slight. Unlike art or literature, the right to bear arms does not require much, if any, protection of minority sentiment. Outside the home, First Amendment speech becomes non-protected obscenity only when it satisfies the familiar standard set out in *Miller v. California*.⁴⁶⁹ Hence, the film *I, Claudius* may be an exemplar of modern American filmmaking in Chelsea and a disgusting stag film in Albany, but in the latter case, the defendant has the option of arguing that the film provides some serious public value.

In Second Amendment jurisprudence, minority interests merit little protection from popular will. The person who feels truly at liberty from government or private threats only when he strolls about the streets with bandoliers and a machine gun is much like the person who feels truly at liberty only when he scans obscene magazines on a public park bench. Mere assertions of personal autonomy are insufficient to make either activity constitutionally protected. Whatever incremental contribution to public safety or public discourse the person’s activity may entail is so negligible as to be constitutionally insignificant. Neither person has a constitutional claim.⁴⁷⁰

(2007) (calling it “arbitrary and irrational”). But cf. Alschuler, *supra*, at 287–88 (noting problem with Fourth Amendment jurisprudence is not too few categories, but too many).

468. See Wilkinson, *supra* note 124, at 277 (calling “undue burden” test “eye-of-the-beholder” test); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 579–80 (1991) (Scalia, J., concurring) (denying existence of intermediate scrutiny in First Amendment speech analysis, and stating “we should avoid wherever possible . . . a method of analysis that requires judicial assessment of the ‘importance’ of government interests”); Stewart Jay, *Ideologue to Pragmatist?: Sandra Day O’Connor’s Views on Abortion Rights*, 39 *Ariz. St. L.J.* 777, 817 (2007) (reporting criticism that “the undue burden standard . . . is unprincipled, and thus provides no standard at all”); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 *Geo. Wash. L. Rev.* 757, 760 (1986) (criticizing Court for “cursory manner” in which it generally answers time, place, and manner inquiries). But see Volokh, *Implementing the Right*, *supra* note 166, at 1472 (suggesting “undue burden” analysis may be appropriate in some circumstances).

469. An “average person, applying contemporary community standards,” must find that “the work, taken as a whole, appeals to the prurient interest;” the work must “depict[] or describe[], in a patently offensive way, sexual conduct specifically defined by the applicable state law;” and the work, “taken as a whole,” must “lack[] serious literary, artistic, political, or scientific value.” 413 U.S. 15, 24 (1973) (citations omitted).

470. As discussed above, as a matter of text and doctrine, the former may be thoroughly regulated in public because such behavior does not qualify as “bearing arms” for Second Amendment purposes. Similarly, the latter may be thoroughly regulated because it is not “speech” in the First Amendment sense. Courts could, of course, adopt a kind of “contemporary community standards” test—perhaps similar to an “in common use” test—to define those arms that are acceptable to carry in public. But, as I argue *infra*, that calculus is already made, and better made, by political branches, which reflect local

Further, with a home-bound Second Amendment, the criticisms of existing firearms regulations—that they distinguish weapons based on wholly cosmetic factors or unsupported assumptions about their lethality—will be made in legislative hearings rather than courts. Whether restricting the commercial availability of multi-round clips, fingerprint obscuring pistol grips, sniper rifles, or flash suppressors is “narrowly tailored,” “rationally related,” or even “overbroad” has little meaning outside the home, because the very enterprise is not of a constitutional dimension.⁴⁷¹

Inevitably, legislation will sweep within its restrictions persons who may need a weapon in public—the woman being stalked by an ex-husband—or leave out persons who should not have a gun in public—the stalking ex-husband. But it is far better for legislatures to make such judgments for two reasons. First, legislatures are better at calibrating restrictions correctly. While a law may be over- or under-inclusive, it will be so to a lesser degree than a court ruling, which is fashioned from the brute facts of a particular case. Second, even if legislation falls short of or overshoots the target, legislators can respond with ameliorative legislation. By contrast, a court must wait for parties to come forward with a lawsuit.⁴⁷²

Moreover, this home-bound approach limits, but does not eliminate, the extent to which courts become entangled in interminable—not to mention bizarre—determinations of *which kinds* of arms must be protected to defend the people adequately against a tyrannical national or state government. A machine gun? An antipersonnel mine?⁴⁷³

A categorical approach, based on distinctions between the home and the public arena, is far more conducive to the current Court’s preference for originalism. Rather than requiring a court to evaluate interests—compelling, substantial, or rational—and undue burdens, this approach resolves questions such as what qualifies as a Second Amendment “arm” or to “keep and bear” with reference to history and, where that history is unclear, with respect for institutional competence.⁴⁷⁴

gun culture, than by dubious expert testimony on whether the bearing of those arms contributes to overall safety or community defense.

471. Cf. Winkler, *supra* note 107, at 719–26 (describing state court use of these standards in state constitutional law).

472. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 279 (1974) (noting “[j]udicial processes are ill suited to the rapid alteration of rules,” in part because of sequential sampling process for formation of rules).

473. See Wilkinson, *supra* note 124, at 280 (warning judicial oversight of various gun control measures threatens to “suck the courts into a quagmire”). This approach also minimizes strange linedrawing exercises, such as concluding that the Second Amendment guarantees a right to a clip of ammunition with ten bullets but not eleven.

474. It also offers some interesting approaches to the problem of characterizing “arms.” Arms in the home could include only those arms sufficient to protect the average home, and perhaps its curtilage. Weapons and ammunition with the ability to penetrate walls—such as armor piercing rounds or dynamite—or to fire over long distances—like

Another justification for this approach is its caution and respect for federalism and the political branches. When we talk about constitutional rights in the current era we generally mean the judiciary taking issues out of the hands of the elected branches of government, state or federal. Congress has shown little interest in legislating on gun issues, a demonstration of the strength of advocacy organizations such as the NRA.⁴⁷⁵ Moreover, states and municipalities, far more sensitive to local needs and gun cultures, should be given free reign to design gun control policy that fits their specific demographic.⁴⁷⁶

Further, Second Amendment jurisprudence has the potential to displace a significant amount of state law. As indicated previously, it is meaningless to discuss a right to keep and bear arms without a corresponding right to *use* such arms. As such, *Heller* has committed itself to preempting some state self-defense law.⁴⁷⁷ But other areas of state law—seemingly remote from the Second Amendment—are also potentially implicated. If deadly self-defense is an area of federal constitutional law, shouldn't the greater also include the lesser?⁴⁷⁸ Nondeadly self-defense, authority to effect a citizen's arrest, false imprisonment, and self-help in the apprehension of felons or repossession of property all come into play. The Court has indicated on repeated occasions its reluctance to unnecessarily displace state law with constitutional commands.⁴⁷⁹ Since the Second Amendment federalizes some portion of self-defense doctrine, it is prudent to keep that preemption as narrow as possible.

high-powered rifles and rocket launchers—would not constitute “arms” at all and could be regulated, even in the home.

475. See, e.g., Siegel, *supra* note 21, at 207–12 (discussing NRA opposition to gun restrictions). In fact, rather than hostility, Congress has been interested—at times eager—to protect gun rights. See Protecting the Second Amendment and Hunting Rights on Federal Lands Act of 2008, H.R. 5646, 110th Cong. (2008) (allowing individuals to carry firearms in national parks to extent allowed by state in which national park is located).

476. Also, violence and self-defense tend to be localized phenomena. A spike in the incidence of muggings in Dayton, Ohio does not much affect the quality of life in Pasadena, California. This is in sharp contrast to speech, which, with the advent of the internet, is now a global phenomenon, and the protection of which is designed to facilitate communication widely.

477. See Brownstein, *supra* note 125, at 29–49 (discussing how *Heller* could affect not only criminal self-defense law but also tort liability pertaining to storage of weapons, negligent use of weapons in self-defense, and other scenarios).

478. For an example of this reasoning, see *Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890) (holding sovereign immunity, which by textual terms of Eleventh Amendment prevents suits only by citizen of one state against another state, also forbids suits by citizen against his or her own state); see also Brownstein, *supra* note 125, at 24 (making similar observation).

479. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (“In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (“[A]s a rule we should be and are reluctant to federalize matters traditionally covered by state common law.” (internal quotation marks omitted)).

Finally, the home-bound Second Amendment is politically palatable.⁴⁸⁰ Opinion polls demonstrate that an overwhelming majority of Americans believe that individuals should have the right to possess firearms.⁴⁸¹ This majority quickly fragments, however, when the questions turn to details about where and when this right should be exercised, and the types of firearms that people should have a right to possess.⁴⁸² This polling suggests that a public debate on gun control and gun rights is better resolved through democratic channels than court adjudication.⁴⁸³ Citizens want a voice in the debate. Although popular sentiment is not of specific constitutional importance, courts should not be reluctant to adopt a defensible constitutional approach when it just happens to coincide with popular will.

CONCLUSION

Treating guns like smut will not resolve all the issues that continue to dog Second Amendment jurisprudence after *Heller*. If self-defense is a

480. For a slightly different take on the political popularity issue, see O'Shea, *supra* note 77, at 373 (discussing public support for *Heller*'s "personal purpose-centered approach to the Second Amendment").

481. See Opinion Research Corp., Most Americans Say the Constitution Guarantees the Right to Own a Gun, Latest CNN/Opinion Research Corporation Poll Shows (June 28, 2008), at http://www.opinionresearch.com/fileSave%5CCNNPR_Gun_6_28_2008.pdf (on file with the *Columbia Law Review*) (showing sixty-seven percent of adults believe Second Amendment guarantees right of each person to own gun); Press Release, Quinnipiac Univ. Polling Inst., American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, but They Don't Want Government to Ban It 7 (July 17, 2008), at <http://www.quinnipiac.edu/x1284.xml?What=gun%20ownership&strArea=&strTime=24&ReleaseID=1194#Question015> (on file with the *Columbia Law Review*) [hereinafter Quinnipiac University Poll] (showing seventy-eight percent of registered voters oppose amendment banning individual right to gun ownership).

482. See ABC News, Mental Health Measures Broadly Backed, but Culture Gets More Blame than Guns 5-6 (Apr. 23, 2007), at <http://abcnews.go.com/images/US/1037a1VaTechGuns.pdf> (on file with the *Columbia Law Review*) (noting majority of adults favor nationwide ban on semi-automatic handguns and assault weapons, but oppose ban on concealed weapons or sale of handguns); Gallup Poll, Guns (Apr. 30, 2009), at <http://www.gallup.com/poll/1645/Guns.aspx> (on file with the *Columbia Law Review*) (noting majority of adults from 1990 through October, 2007 have favored stricter laws on sale of firearms); Pew Research Ctr. for the People and the Press, Americans Now Divided over Both Issues: Public Takes Conservative Turn on Gun Control, Abortion 9 (Apr. 30, 2009), at <http://people-press.org/reports/pdf/513.pdf> (on file with the *Columbia Law Review*) (noting each survey from 1993 to 2008 found greater percentage of adults believing it was more important to control gun ownership than to protect right of Americans to own guns); Quinnipiac University Poll, *supra* note 481, at 7 (showing fifty-four percent of registered voters support stricter gun control laws). The purpose of citing these statistics is not to validate their authenticity, but rather to demonstrate that, even within a generous margin of error, the debate over gun rights and gun control is vigorously contested.

483. See *NRA v. City of Chicago*, Nos. 08-4241, 08-4243, 08-4244, slip op. at 8 (7th Cir. June 2, 2009) ("The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate.").

legitimate reason to possess a handgun at home, would criminal sentencing enhancements due to possession of a firearm become unconstitutional? Could government take the unlikely step of so restricting the commercial availability of guns that only guns in situ in the home, or those made by enterprising amateur gunsmiths, would be beyond regulation? *Heller* presumes that government can still regulate especially dangerous weapons—high explosives or biological agents—but the reasons for this regulation are opaque. Perhaps these restrictions lie not in the distinction of the home, but, as with child pornography, because select government incursions into the domestic perimeter are necessary to destroy the civilian market for these arms.⁴⁸⁴ What does this proposal say about motor homes or college dormitories? What does it say about deadly self-defense between couples or family members? These questions remain unresolved. The home-bound Second Amendment will not, and cannot, provide answers to all of them.

But what the home-bound Second Amendment does, and does well, is narrow the theatre of operation. Debate about good or bad gun control policies, whether more or fewer guns prevent crime, and whether possessing a gun makes a society safer or less so is foreshortened only in those circumstances where the impact is least dramatic and least controversial—in the home. Elsewhere, the battle can rage on in the place the Framers unquestionably hoped it would: the town halls and assembly rooms of our country.

484. Furthermore, whether such weapons are found outside of the home or within it, they may not qualify as “arms” for purposes of the Second Amendment.