

# An Unstable Core: Self-Defense and the Second Amendment

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*In District of Columbia v. Heller, the Supreme Court announced for the first time that self-defense, not militia service, is the “core” of the right to keep and bear arms. However, the Court failed to articulate what that means for the right’s implementation. After Heller, most courts deciding Second Amendment questions have mentioned self-defense only superficially or not at all. Some courts, however, have run to the opposite extreme, leaning heavily on the platitude that firearms have utility for lawful self-defense as a rationale for effectively immunizing them from regulation. This Article examines that inconsistency and considers whether self-defense law itself could provide stability and much-needed guidance for when, how, and which weapons receive constitutional protection. This exercise finds support in both Heller and historical precedent, and offers a helpful lens through which to consider the intersection of the Second Amendment and its stated self-defense purpose. At the same time, however, it exposes a tension within Heller, calling into question whether a Second Amendment grounded in self-defense gives more protection to handguns than to less lethal alternatives.*

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DOI: <https://doi.org/10.15779/Z384T6F38D>.

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## INTRODUCTION

An essential holding in *District of Columbia v. Heller* was that self-defense, not the protection of a “well regulated Militia,”<sup>1</sup> is the “core” and “central component” of the right to keep and bear arms.<sup>2</sup> The Supreme Court was emphatic about this point, referencing self-defense no fewer than eighty-three times.<sup>3</sup> The Court went on to strike down two D.C. laws because they denied “law-abiding, responsible citizens” the right to keep handguns in the home and render them operable when needed for self-defense. *Heller*’s holding and reasoning led to concerns that the opinion expanded the right to keep and bear arms in a way that would cause weapons laws to fall like “dominoes.”<sup>4</sup> This apprehension was driven in part by the fact that a need for self-defense can arise

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

2. *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008). For a discussion of how this reading overturned generations of federal court precedent grounding the Second Amendment in militia service, see Eric M. Ruben & Darrell A. H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 L. & CONTEMP. PROBS. 1, 1–3 (2017). The Supreme Court has not clarified whether interests other than self-defense have Second Amendment salience after *Heller*. See Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 137 (2015) (“[T]he case for Second Amendment coverage of hunting and recreation is tenuous.”); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 52 (2012) (“*Heller* emphatically rejects the position that the Second Amendment’s preamble limits the amendment to guaranteeing the people’s right, collectively, to constitute an armed state militia.”). As a practical matter, post-*Heller* case law has focused on the Second Amendment interest in self-defense, which is almost always the interest asserted by litigants. Consistent with that trend, I do not consider alternative bases for the Second Amendment right in this Article.

3. See *Heller*, 554 U.S. 570. The Supreme Court matched *Heller*’s emphasis, again referencing “self-defense” eighty-three times, two years later in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

4. *Id.* at 679–80 (Stevens, J., dissenting).

virtually anywhere.<sup>5</sup> Yet courts and commentators have failed to consider how self-defense itself is limited, let alone how those limitations might inform post-*Heller* doctrine.<sup>6</sup> Placing self-defense at the core of the Second Amendment did not thereby unfetter the right to keep and bear arms. Rather, *Heller*'s self-defense holding raised a new round of questions about the intersection of the Second Amendment and self-defense that the Court failed to answer.<sup>7</sup>

As in other areas of constitutional law,<sup>8</sup> developing Second Amendment doctrine that is consistent with the Amendment's underlying purpose is crucial to scholarship and jurisprudence.<sup>9</sup> A growing body of literature focuses on what post-*Heller* Second Amendment doctrine should look like,<sup>10</sup> but scant attention has been paid to the role of self-defense in that doctrine.<sup>11</sup>

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5. *Id.*

6. A notable exception is Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017) [hereinafter Miller, *Self-Defense*] (suggesting that the state's traditional role in regulating defensive force may have implications for the Second Amendment).

7. As Justice Stephen Breyer stated in dissent, "self-defense . . . is the beginning, rather than the end, of any constitutional inquiry." *Heller*, 554 U.S. at 687 (Breyer, J., dissenting) (emphasis omitted).

8. See, e.g., William M. Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROBS. 253 (1966) (discussing Fourteenth Amendment doctrine and values); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982) (discussing free speech doctrine and values of liberty and autonomy); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114–16 (1999) (arguing compelled speech interferes with First Amendment value in autonomy); Ann L. Schiavone, *Unleashing the Fourteenth Amendment*, 2016 WIS. L. REV. FORWARD 27 (2016) (considering doctrinal implications of the Fourteenth Amendment's protection of liberty and equality).

9. See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (describing how judicial doctrine implements constitutional meaning); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010) ("In general, interpretation recognizes or discovers the linguistic meaning of an authoritative legal text."); *id.* at 103 ("Conceptually, construction gives legal effect to the semantic content of a legal text.").

10. Many of these efforts propose the migration of rules and standards from other areas of law. See, e.g., Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (discussing how *Heller* invoked First Amendment doctrine); Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429 (2014) (proposing borrowing from First Amendment doctrine to implement the Second Amendment); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 419 (2014) (same); Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L. J. 852 (2013) [hereinafter Miller, *Text, History, and Tradition*] (proposing borrowing from Seventh Amendment doctrine to implement the Second Amendment); *infra* notes 86–90 and accompanying text (discussing how courts have borrowed from First Amendment doctrine in Second Amendment cases since *Heller*).

11. Cf. Eric Ruben & Joseph Blocher, *You Can Lead a Horse to Water: Heller and the Future of Second Amendment Scholarship*, 68 DUKE L.J. ONLINE 1 (2018) (identifying the role of self-defense in the Second Amendment's implementation as a crucial open issue after *Heller*). One body of scholarship has discussed whether the Second Amendment constitutionalized some version of self-defense. See *infra* note 38 (listing sources). These articles did not consider the inquiry made herein: how the law of self-defense informs the Second Amendment. In a recent book and an earlier article, Joseph Blocher and Darrell A. H. Miller contend that self-defense points to Second Amendment values. See JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018) [hereinafter BLOCHER & MILLER, THE POSITIVE

How does self-defense pertain to laws banning weapons on the basis of their lethality<sup>12</sup> or restricting who can carry them on public streets?<sup>13</sup> How is self-defense relevant to the Second Amendment analysis of laws requiring handguns within a residence to be locked unless carried on the person?<sup>14</sup> There are dozens of categories of weapons restrictions, and after *Heller*, all of them are exposed to constitutional challenge.<sup>15</sup> Lower courts must resolve those challenges consistent with the Second Amendment's self-defense core, but how to do so is undertheorized.

The result has been divergent approaches among the lower courts, from ignoring self-defense altogether to insulating guns from regulation by relying on the truism that they *can* be used defensively.<sup>16</sup> Both approaches run the risk of deviating from a truly self-defense-centered Amendment, and the latter approach could imperil much of our regulatory regime.

This Article exposes the pervasive confusion about self-defense in Second Amendment case law. The Article presumes that the Court meant to invoke the traditional legal understanding of self-defense instead of the term's colloquial, natural right, or other meaning. It then proposes a way that traditional legal understanding can play a more integral role in Second Amendment doctrine.<sup>17</sup> In

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SECOND AMENDMENT]; Joseph Blocher & Darrell A. H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 347–54 (2016) [hereinafter Blocher & Miller, *What is Gun Control?*]. To my knowledge, only one article contends that the law of self-defense can inform the boundaries of the post-*Heller* Second Amendment. See Miller, *Self Defense*, *supra* note 6 (tracing the history of common law self-defense from an excuse to a justification and discussing implications for the right to keep and bear arms).

12. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (en banc) (“[T]here is scant evidence in the record before us that the FSA-banned assault weapons and large capacity magazines are possessed, or even suitable, for self-protection.”). In keeping with common practice, I use the term “assault weapon,” although I recognize the term’s imprecision.

13. Some courts have characterized the Second Amendment as protecting a right to “armed self-defense,” which is “as important outside the home as inside.” *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Others have taken a less expansive view of the Second Amendment’s coverage outside the home. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring) (“There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.”); *Williams v. State*, 10 A.3d 1167, 1177–78 (Md. 2011) (“If the Supreme Court . . . meant [for the Second Amendment right] to extend beyond home possession, it will need to say so more plainly.”); Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) [hereinafter Miller, *Guns as Smut*] (proposing a home-bound Second Amendment).

14. See, e.g., *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (upholding requirement that handguns in the home be either locked or kept on the person).

15. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433, app. B (2018) (identifying sixty different types of weapons regulations that have been subject to Second Amendment challenges).

16. See *infra* Part I.B.

17. In this Article, I join those trying to make post-*Heller* doctrine more intelligible. I thus do not set out to corroborate or dispute whether, as a matter of first principle, the Supreme Court was correct to place self-defense, as opposed to the preservation of a well-regulated militia, at the core of the Second

particular, the Article suggests that the limitations of lawful self-defense can inform Second Amendment doctrine by lending principled requirements and procedures for the right to keep and bear arms.

The law of self-defense limits defensive force in various ways. This Article focuses on three limitations in particular: the two key self-defense requirements of necessity and proportionality,<sup>18</sup> and the fact that the right to self-defense is primarily implemented as a defense to criminal charges. As this Article shows, the Supreme Court in *Heller* left open the possibility that similar requirements and procedures could delineate when the Second Amendment protects the right to carry a loaded firearm for use in self-defense.<sup>19</sup> In addition to being consistent with *Heller*, drawing on self-defense law in this way accords with a line of public carry restrictions and judicial precedent from the 1800s.<sup>20</sup> Importing self-defense-derived requirements and procedures into Second Amendment doctrine could help courts fill gaps while staying true to *Heller* and historical case law.

The fit of this doctrinal approach, however, is closer for some Second Amendment contexts than others. The Second Amendment logically protects conduct that must take place far in advance of a confrontation, like acquiring a Second Amendment arm and training to use it. The Article grapples with whether necessity and proportionality, the linchpins of self-defense law, can be adapted for such circumstances.<sup>21</sup> In the absence of a relatively proximate self-defense situation, it is difficult to determine with precision what arms are necessary or proportionate for self-defense. However, this does not mean that self-defense law has no role to play in such circumstances, such as offering normative commitments that should be reflected—and certainly not undermined—in Second Amendment doctrine.

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Amendment right. By juxtaposing *Heller* and our legal tradition of self-defense, however, I expose a tension within *Heller* and a novel critique of the opinion: the majority's ruling is arguably inconsistent with self-defense's orientation away from lethal violence. See *infra* notes 26–27, 286–298, and accompanying text.

18. My analysis includes discussion of two proxies for necessity: imminence and the traditional duty to retreat before using lethal defensive force. See *infra* notes 157–179 and accompanying text. This in no way means that other limitations on lawful defensive force are not relevant, such as the requirement of a “reasonable belief” about the need for defensive force. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 212–13, 225–29 (2018) (summarizing this requirement and contemporary debates about its implementation); *infra* notes 139, 294 (noting other potentially relevant aspects of self-defense law).

19. See *District of Columbia v. Heller*, 554 U.S. 570, 576, 635 (2008).

20. See *infra* notes 220–225 and accompanying text (discussing nineteenth-century legislation and related case law).

21. Cf. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818 (2007) (contending that self-defense requirements can be adapted for circumstances with less urgency and more anticipation than typical self-defense). Volokh notes that rationales for imminence, like avoiding erroneous claims of necessity and therefore avoiding unnecessary deaths, are weaker in some contexts. He suggests that in the medical self-defense context, the focus should be on a “present medical threat (your kidneys are actually failing) and the lack of a satisfactory permitted therapy.” *Id.* at 1824.

Of course, scholars have debated the commitments underlying the right of self-defense.<sup>22</sup> While this Article does not purport to identify all such commitments, it raises one that is evident from the time of the Second Amendment's enactment but is missing from its post-*Heller* implementation: the preservation of life.<sup>23</sup>

The law of self-defense functions to shepherd conflicts away from lethal violence, and thus away from handgun violence, absent rare circumstances.<sup>24</sup> And yet *Heller* assumes that the possession of one lethal weapon, the handgun, receives maximal protection without regard to its lethality.<sup>25</sup> That disconnect—between the orientation of self-defense law and *Heller*'s assumption about handguns—suggests a novel critique of the opinion. In particular, *Heller* may be doctrinally inconsistent by placing lawful self-defense at the core of the right, but neglecting the nonlethal orientation baked into that core.<sup>26</sup> Indeed, this Article considers whether *Heller*'s exaltation of handguns not only exists in tension with that orientation, but actively undermines it.<sup>27</sup>

This Article is but an initial exploration of the intersection of the Second Amendment and the law of self-defense.<sup>28</sup> My goal is neither to exhaust the possibilities regarding this intersection nor to resolve all of the open questions raised by *Heller*'s self-defense holding. My analysis suggests that no uniform rule or standard can accommodate the different ways the Second Amendment and lawful self-defense intersect. Hopefully, given the stakes for both individual self-defense and the government's ability to regulate the tools of violence, other analyses will follow.

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22. See, e.g., DRESSLER, *supra* note 18, at 223–25 (2018) (discussing different theories); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.5 (Oxford Univ. Press 2000) (1978) (same). Fletcher observed that the law governing defensive force is a “composite” and “hybrid” model that reflects “deeper ideological clashes.” *Id.* at 874. In this Article, I use the word “commitment,” but do not purport to distinguish that term from values, principles, orientation, or other words used to describe the normative basis for our legal tradition of self-defense. Cf. Blocher & Miller, *What is Gun Control?*, *supra* note 11, at 348 (stating that it is “of no real significance” whether the Second Amendment’s purposes are called “approaches, theories, values, or principles”).

23. See Paul H. Robinson, *A Right to Bear Firearms But Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-Lethal Weapons*, 89 B.U. L. REV. 251, 252–53, 256 (2009).

24. *Id.*

25. See *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008); *infra* notes 52–57, and accompanying text.

26. Thus, this Article supplements the critique that *Heller* applies originalism in inconsistent ways. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); *infra* note 291 (listing other sources).

27. See *infra* 286–298, and accompanying text.

28. This Article thus joins a growing body of scholarship addressing how post-*Heller* Second Amendment rights intersect with other areas of law. See, e.g., Blocher & Miller, *What is Gun Control?*, *supra* note 11 (tort); Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029 (2018) (federalism); Michael C. Dorf, *Incidental Burdens and the Nature of Judicial Review*, 83 U. CHI. L. REV. ONLINE 97 (2016) (tort); Magarian, *supra* note 2 (First Amendment); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018) (First Amendment).

Part I of this Article identifies and analyzes how *Heller* obfuscated the import of placing self-defense at the core of the right to keep and bear arms, giving way to conflicting lower court analyses and outcomes. Part II proposes a way to clarify the role of self-defense in Second Amendment law: applying self-defense-derived rules and requirements to Second Amendment cases. This framework helps to resolve various live disputes and shows that placing self-defense at the Second Amendment's core need not lead to an unfettered right to arms. The Article concludes with high-level observations about how the law of self-defense suggests that the Second Amendment may be narrower than many courts and scholars assume.

## I.

### SELF-DEFENSE IN CURRENT SECOND AMENDMENT DOCTRINE

Self-defense pervaded *Heller*'s declaration of an individual right to keep and bear arms, but the opinion failed to translate that emphasis to any doctrinal rules, tests, or standards that could guide decisions about when weapons regulations violate the Second Amendment.<sup>29</sup> This Part analyzes the imprecise ways the majority relied on self-defense in *Heller*. It then identifies two contradictory usages of self-defense in subsequent Second Amendment case law.

#### A. *Self-Defense as the 'Core' of the Right*

Dick Heller initiated his lawsuit because he wanted to own a handgun and render it operable for "lawful self-defense in the home."<sup>30</sup> Two D.C. laws prevented him from doing so: one requiring firearms to be locked or inoperable at all times, and the other entirely banning possession of his desired weapon, a handgun. Heller challenged both laws on the grounds that they violated his Second Amendment rights. For the better part of a century, the judicial consensus was that the militia clause limited the Second Amendment,<sup>31</sup> meaning that Heller was seeking a jurisprudential sea change. He asserted no interest in militia service, but rather an interest rooted in private self-defense. When the case reached the Supreme Court, a bare majority of the Justices outright rejected that self-defense was "merely a 'subsidiary interest' of the right to keep and bear arms."<sup>32</sup> Quite the contrary, after analyzing how the Second Amendment would be understood by "ordinary citizens in the founding generation,"<sup>33</sup> the majority

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29. See FALLON, *supra* note 9, at 5 (observing how judicial "design of implementing strategies" follows "the identification of constitutional meaning").

30. Complaint at 4, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 03-cv-213), ECF No. 1; see also *Heller*, 554 U.S. at 576 & n.2 (construing Heller's complaint "as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense").

31. See Ruben & Miller, *supra* note 2, at 1-3 (describing this consensus).

32. *Heller*, 554 U.S. at 599 (quoting *id.* at 714 (Breyer, J., dissenting)).

33. *Id.* at 577.

deemed individual self-defense the “core” and “central component” of the right.<sup>34</sup>

After placing self-defense at the core of the Second Amendment, the logical next step was to articulate what “self-defense” meant in the context of the Second Amendment and, relatedly, how it informed constitutional doctrine.<sup>35</sup> The Court qualified “self-defense” with the adjective “lawful,”<sup>36</sup> and it characterized the core Second Amendment interest as “being armed and ready for offensive or defensive action in a case of conflict with another person,”<sup>37</sup> a situation governed by the law of self-defense.<sup>38</sup> The most natural reading of the Second Amendment’s “core lawful purpose”<sup>39</sup> is thus self-defense as understood by Anglo-American law.<sup>40</sup> That is the way the dissenting Justices in *Heller* interpreted the majority opinion without any objection.<sup>41</sup> This Article presumes that understanding, though scholars have suggested other possibilities, ranging from a natural right conceptualization of self-defense to “self-defense” as a proxy for unarticulated values.<sup>42</sup>

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34. *Id.* at 599, 630.

35. *Id.* at 687 (Breyer, J., dissenting) (“[S]elf-defense . . . is the *beginning*, rather than the *end*, of any constitutional inquiry.”) (emphasis in original).

36. *Id.* at 630 (majority opinion) (noting “core *lawful* purpose of self-defense”) (emphasis added).

37. *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

38. Two years after *Heller*, the Supreme Court incorporated the Second Amendment to apply against state and local governments in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In its opinion, the Court emphasized that the Second Amendment’s core purpose of self-defense has been “recognized by many legal systems,” thus nodding to the rules and requirements “legal systems” deploy to determine when defensive force is lawful. *McDonald*, 561 U.S. at 767. This reading is also implicit in a body of scholarship focused on whether the Second Amendment constitutionalizes the law of self-defense. See Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2008); Nicholas J. Johnson, *Self-Defense?*, 2 J. L. ECON. & POL’Y 187 (2006); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008); Nelson Lund, *A Constitutional Right to Self Defense?*, 2 J. L. ECON. & POL’Y 213 (2006); Nelson Lund, *The Second Amendment and the Inalienable Right to Self-Defense*, 16 HERITAGE FOUND. (Apr. 17, 2014).

39. *Heller*, 554 U.S. at 630.

40. See Miller, *Self-Defense*, *supra* note 6, at 86 (presuming this understanding).

41. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) (critiquing the majority’s apparent enshrinement of “the common-law right of self-defense in the Constitution”); see also *McDonald*, 561 U.S. at 893 (Stevens, J., dissenting) (similar).

42. See, e.g., BLOCHER & MILLER, THE POSITIVE SECOND AMENDMENT, *supra* note 11 (proxy for unidentified values like autonomy, democracy, or personal safety); Blocher & Miller, *What is Gun Control?*, *supra* note 11, at 347–54 (same); Kopel, *supra* note 38 (natural right). If *Heller* invoked a natural right understanding of self-defense, the common law remains relevant to the extent it “determin[es] or ‘posit[s]’” the boundaries of natural rights. Randy Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853, 863 (1993); see also Randy Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 117–18 (1995) (“Traditionally, this distinction between rightful and wrongful conduct was provided by the common law which determined a person’s legal rights.”). The converse, too, has been suggested: that the common law’s principles are founded, at least in part, on natural rights. See *Commonwealth v. Selfridge* (The Trial of Thomas O. Selfridge for the Killing of Charles Austin, Boston, 1806), 2 Am. St.



To complicate matters further, the Court in *Heller* invoked self-defense in different ways. As the Court framed it, Heller claimed that one of the laws at issue, a firearm storage requirement, violated his “right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense.”<sup>43</sup> “The only dispute” regarding the storage law, as Justice Breyer put it, was “whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense (i.e., that the firearm may be operated under circumstances where the common law would normally permit a self-defense justification in defense against a criminal charge).”<sup>44</sup> The District of Columbia urged the Court to read that exception into the law and Heller agreed that doing so would grant him the relief he sought.<sup>45</sup>

The Court seemed to acknowledge that such a self-defense exception would be salient by going out of its way to find it “precluded by the unequivocal text” of the statute.<sup>46</sup> The majority opinion emphasized the absence of a self-defense exception repeatedly when distinguishing historical firearm storage laws. None of the historical laws would be applied to retrieving and loading a firearm when needed for lawful self-defense.<sup>47</sup> In this view, the law’s constitutional infirmity was that it precluded access to firearms at the time their possession was “necessary” for “immediate self-defense,”<sup>48</sup> signaling that necessity and one of its proxies, imminence—both longstanding limitations on lawful defensive force<sup>49</sup>—were relevant to the Second Amendment analysis. Moreover, an

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Trials 544, 700 (Ma. 1806) (“The principles [of self-defense] which I have thus stated are recognized by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.”). William Blackstone’s treatise on English common law, which *Heller* characterizes as “the preeminent authority on English law for the founding generation,” *Heller*, 554 U.S. at 593–94 (majority opinion) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)), refers to self-defense as a natural right but also sets out how the common law defines that right in practice. See 1 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND \*140 (1765); 4 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND, \*184–85 (1769). As one opinion puts it, the right to self-defense “is founded on the . . . law of nature,” but it is the common law requirement of “necessity of the case, and that only which justifies a killing—on that necessity the right to kill rests.” *Isaacs v. State*, 25 Tex. 174, 177 (Tex. 1860); see also Kopel, *supra* note 38 (observing connections between the natural right of self-defense and common law).

43. *Heller*, 554 U.S. at 576 & n.2.

44. *Id.* at 692 (Breyer, J., dissenting) (citations omitted).

45. *Id.* at 630 (majority opinion).

46. *Id.* (relying also on “the presence of certain other enumerated exceptions” and D.C. Court of Appeals precedent) (citing *McIntosh v. Washington*, 395 A.2d 744, 755–56 (D.C. 1978)).

47. See *id.* at 632–33 (finding it “inconceivable that [a New York law] would have been enforced against a person exercising his right to self-defense,” “unlikely that [a Pennsylvania law] would have been enforced against a person who used firearms for self-defense” “implausible that [a Boston law] would have been enforced against a citizen acting in self-defense”).

48. *Id.* at 576, 635.

49. See, e.g., MODEL PENAL CODE § 3.04(1) (AM. LAW INST., Proposed Official Draft 1962) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”); *infra* Part II.A.1 (discussing these requirements).

“exception” to the firearm storage requirement<sup>50</sup> would most naturally operate as a defense to a charge of violating that requirement, akin to how self-defense operates as a defense to otherwise criminal violence.

The *Heller* majority, however, failed to spell out precisely how those standards would work in the Second Amendment context and ignored them completely when striking down the other law at issue, a handgun ban.<sup>51</sup> Necessity played no apparent role in deciding whether and how the Second Amendment protects the mere possession of a handgun. Instead, the Court relied heavily on the handgun’s appeal. The law prohibited “the most popular weapon chosen by Americans for self-defense in the home,”<sup>52</sup> a weapon “overwhelmingly chosen by American society for [lawful self-defense],”<sup>53</sup> and “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.”<sup>54</sup> The handgun, according to “the American people,” is the “quintessential self-defense weapon.”<sup>55</sup> That supposed popularity,<sup>56</sup> according to the majority, insulated handguns from prohibition, no matter the strength of the government’s regulatory rationale or even whether the law allowed the possession of alternative firearms.<sup>57</sup> In another part of the opinion, the majority endorsed the historical view that it is permissible to ban “dangerous and unusual” weapons, but failed to define that category beyond suggesting it included “M-16 rifles and the like” but not handguns.<sup>58</sup>

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50. *Heller*, 554 U.S. at 630.

51. *Id.* at 629.

52. *Id.*

53. *Id.* at 628.

54. *Id.* at 628–29.

55. *Id.* at 629.

56. The empirical case for the Supreme Court’s assumption that handguns are the most popular weapons for self-defense in the home is far from clear. Nowhere did the Court cite statistics about handgun ownership. Instead, the Supreme Court cited the lower court opinion, *Heller*, 554 U.S. at 628–29, which in turn cited a 1995 empirical study by criminologists Gary Kleck and Marc Gertz about the prevalence of defensive gun uses. *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007). The Kleck/Gertz study did not purport to estimate the prevalence of handgun *ownership* for self-defense. Rather, Kleck and Gertz attempted to estimate the number of annual defensive gun *uses*. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 160 (1995). Most eligible Americans do *not* possess firearms for self-defense (or any other purpose), and the percentage of households that do is dropping, according to one commonly used survey, from 47 percent in 1980 to 31 percent in 2014. See Philip J. Cook and Harold A. Pollack, *Reducing Access to Guns by Violent Offenders*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 2, 5 (2017) (citing data from the General Social Survey). On an individual level, only 22 percent of American adults own a firearm; 78 percent do not. *Id.* Among the minority of Americans who choose to possess a firearm, handguns have become more popular, now comprising 60 percent of new purchases. Deborah Azrael, et al., *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 38, 48 (2017). But that rise in popularity among gun owners is a far cry from declaring handguns “the most popular weapon chosen by Americans for self-defense in the home.” *Heller*, 554 U.S. at 629.

57. See *Heller*, 554 U.S. at 634–35 (refusing to consider any public interests favoring regulation); *id.* at 629 (refusing to consider alternative firearms).

58. *Id.* at 627.

*Heller* did not expound the consequences of placing self-defense at the core of the right to keep and bear arms. The Court suggested that self-defense requirements like necessity and imminence may have purchase for the constitutionality of the firearm storage law but did not explain how.<sup>59</sup> But self-defense requirements had no obvious role when it came to the constitutionality of the handgun ban.<sup>60</sup> Despite dozens of opportunities to clarify the relationship between self-defense and the Second Amendment, the Court has so far refused to do so.<sup>61</sup>

### B. *The Lower Courts and Self-Defense*

In the absence of additional Supreme Court guidance, lower courts have developed Second Amendment doctrine in the course of deciding over one thousand post-*Heller* constitutional challenges to weapons policies.<sup>62</sup> Far from clarifying the role of self-defense, the resulting opinions have run to opposite extremes. Most fail to mention self-defense at all or do so only superficially. Others lean heavily on the platitude that firearms have utility for lawful self-defense in order to immunize them from regulation.

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59. See *supra* notes 43–50 and accompanying text.

60. See *supra* notes 51–58 and accompanying text.

61. The Supreme Court issued rulings in two post-*Heller* Second Amendment cases, but neither greatly adds to an understanding of the doctrinal role for self-defense. In *McDonald v. City of Chicago*, which incorporated the Second Amendment through the Fourteenth Amendment, the Court emphasized that the right to self-defense is “basic,” having been “recognized by many legal systems from ancient times to the present day.” *McDonald v. City of Chicago*, 561 U.S. 742, 767, 791 (2010). By alluding to “legal systems,” the Court again seemed to make a reference to the law of self-defense. But the Court had no reason to consider how self-defense law informs Second Amendment doctrine. The Supreme Court had an opportunity to address that question in *Caetano v. Massachusetts*, but failed to add any clarity. See *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). *Caetano* involved a ban on stun guns that was upheld by the Massachusetts Supreme Judicial Court on the grounds that stun guns were not “arms” as contemplated by the Second Amendment. *Commonwealth v. Caetano*, 26 N.E.3d 688, 691 (Mass. 2015). The law of self-defense has a lot to say about lethal versus non-lethal defensive force, which could have been relevant to deciding the case. See *infra* Part II. But in a two-page per curiam opinion, the Supreme Court vacated and remanded without even mentioning “self-defense.” *Caetano*, 136 S. Ct. 1027. The opinion no doubt reflects the staying power of *Heller*—the justices unanimously agreed that *Heller* required vacatur—but says little more about Second Amendment doctrine. Apart from *McDonald* and *Caetano*, the Supreme Court has refused to intervene in dozens of post-*Heller* Second Amendment cases. See LAW CTR. TO PREVENT GUN VIOLENCE, POST-HELLER LITIGATION SUMMARY 3 (2017). Justice Thomas has filed dissents from denial of certiorari in four of those cases. See *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting) (mem.); *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting) (mem.); *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting) (mem.); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting) (mem.). However, the Court’s apparent reticence may be at an end after the grant of certiorari in *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (Jan. 22, 2019).

62. See Ruben & Blocher, *supra* note 15 (analyzing 1,153 Second Amendment challenges between *Heller* and February 1, 2016); see also Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457 (2012) (discussing the important role of lower federal courts in the development of constitutional law).

### 1. *Self-Defense as a Nonfactor in Second Amendment Cases*

In light of the unclear role of self-defense in *Heller*, it is unsurprising that one approach in the lower courts has been to ignore it altogether. My recent empirical study of Second Amendment case law identified 1,153 legal challenges after *Heller*; for 761 of them, the court's opinion did not refer to the challenger's interest in self-defense at all.<sup>63</sup> Of those that did, many simply cite *Heller* regarding the Second Amendment's self-defense core before relying on other tools to resolve cases.<sup>64</sup>

Courts considering Second Amendment questions after *Heller* have coalesced around a two-part methodology<sup>65</sup> employed in other areas of constitutional jurisprudence, including free speech cases.<sup>66</sup> At step one, they inquire whether regulated conduct, people, or weapons fall within the scope of the Second Amendment.<sup>67</sup> If not, then no constitutional problem exists. If so, however, the court proceeds to the second step and decides the proper level of scrutiny to apply.<sup>68</sup>

At step one, courts have derived the scope of the Second Amendment right from non-self-defense sources. For example, over half of Second Amendment opinions rely on language in *Heller* about categories of laws that are “presumptively lawful.”<sup>69</sup> That list includes:

prohibitions on carrying concealed weapons[, or] . . . 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.<sup>70</sup>

63. Ruben & Blocher, *supra* note 15 (data for self-defense references on file with author).

64. *See, e.g.,* *United States v. Guerrero-Leco*, 446 Fed. App'x 610 (4th Cir. 2011) (quoting *Heller*'s holding that “the Second Amendment confers an individual right to bear arms for self-protection” before remanding for application of the two-part approach described in text accompanying notes 65–68, *infra*).

65. *See* Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (“A two-step inquiry has emerged as the prevailing approach . . .”); *see also* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015) (noting that the two-part methodology had been largely adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits), *cert. denied*, 136 S. Ct. 2486 (2016).

66. The Third Circuit's decision in *United States v. Marzarella*, credited as the first to describe the two-part framework, cited the First Amendment ruling in *United States v. Stevens* as its inspiration. *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (citing *United States v. Stevens*, 533 F.3d 218, 233 (3d Cir. 2008), *aff'd*, 559 U.S. 460 (2010)). A similar framework applies in equal protection cases. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (first determining classification, then choosing corresponding level of scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (same).

67. *Marzarella*, 614 F.3d at 89.

68. *Id.*

69. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008); Ruben & Blocher, *supra* note 15, at 1488–89 (60 percent of lower court decisions cite *Heller*'s list of presumptively lawful historical regulations).

70. *Heller*, 554 U.S. at 626–27 (citations omitted).

*Heller*'s list appears to have nothing to do with any understanding of self-defense. Ex-felons and the mentally ill maintain their self-defense rights, but, according to the list, lose their Second Amendment rights.<sup>71</sup> People do not leave their self-defense rights at the door of "sensitive" places, but do abandon their Second Amendment rights.<sup>72</sup> Lower court reliance on *Heller*'s list of Second Amendment limitations might be explained by precedential, pragmatic, or historical rationales,<sup>73</sup> but it cannot be understood by reference to the operation of lawful self-defense. And importantly, *Heller*'s exceptions are not exhaustive and do not point to principled limitations beyond the specific categories of enumerated laws.<sup>74</sup>

Historical weapons laws also provide guidance at step one.<sup>75</sup> This is unsurprising—*Heller* said that "longstanding" regulations, including those on its list of exceptions,<sup>76</sup> are "presumptively lawful."<sup>77</sup> More generally, the opinion has been called "the finest example" of "'original public meaning' jurisprudence ever adopted by the Supreme Court."<sup>78</sup> But basing Second Amendment decisions solely on historical weapons laws presents immense challenges. For one thing, it strains the competency of judges, who are not trained as historians and often do not have access to or time to review the entire historical record.<sup>79</sup> Even more

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71. *Id.*

72. *Id.*

73. To be sure, the historical rationales may fall short of the originalist metrics purportedly guiding the *Heller* majority. See Siegel, *supra* note 26, at 198 (noting "questions about the temporal locus of authority" for these exceptions).

74. *Heller*, 554 U.S. at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.")

75. See, e.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("[A] regulation that is 'longstanding,' which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[L]ongstanding limitations are exceptions to the right to bear arms."); see also Blocher, *supra* note 10, at 413 ("*Heller* categorically excludes certain types of 'people' and 'Arms' from Second Amendment coverage, denying them any constitutional protection whatsoever.")

76. See *supra* note 70 and accompanying text.

77. *Heller*, 554 U.S. at 627 & n.26.

78. Randy E. Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J. (June 27, 2008), <https://www.wsj.com/articles/SB121452412614009067> [<https://perma.cc/ZX37-3S9H>]. But see Miller, *Text, History, and Tradition*, *supra* note 10, at 858 (2013) (noting that the *Heller* majority "refuse[d] to explain how [its] history-centered test may operate in litigation"). In light of *Heller*'s emphasis on originalist theory, then-judge Brett Kavanaugh called for text, history, and tradition to govern all Second Amendment decision-making. See, e.g., *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) (concluding that "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny"). In practice, courts cite historical sources to decide less than 20 percent of Second Amendment challenges. Ruben & Blocher, *supra* note 15, at 1492.

79. See *Peruta v. City of San Diego*, 742 F.3d 1144, 1155 n.6 (9th Cir. 2014), (noting the court "will inevitably miss some [historical precedents]" because "[t]he briefs filed in this appeal were able to address only so many before running up against word limits"), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700

troublingly, history often provides ambiguous insight.<sup>80</sup> For example, historical precedent exists to support a homebound Second Amendment right,<sup>81</sup> an unfettered public carry right,<sup>82</sup> and various shades in between.<sup>83</sup> The Second Circuit opined in one public carry case that “[h]istory and tradition do not speak with one voice here.”<sup>84</sup> Perhaps as a result, historical inquiry is not prominent in the vast majority of Second Amendment opinions.<sup>85</sup> Finally, we cannot assume that basing Second Amendment boundaries solely on the presence or absence of historical weapons policies, like basing them on *Heller*’s list of exceptions, will comport with the Second Amendment’s self-defense purpose.

Another source of guidance at step one bears mentioning: First Amendment free speech analogies.<sup>86</sup> The Supreme Court referenced First Amendment doctrine in *Heller*,<sup>87</sup> and likely because of what Timothy Zick calls the First Amendment’s “expansionist tendencies,”<sup>88</sup> it is a favored analogue for gun rights proponents. But “[t]he modern free speech right is a function of a unique history

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F.3d 185, 204 (5th Cir. 2012) (“We[] face institutional challenges in conducting a definitive review of the relevant historical record.”); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 50 (2012) (characterizing originalist judges as “play[ing] amateur historian”).

80. See WILKINSON, *supra* note 79, at 51 (“[T]rue history is often tentative and qualified, and the danger exists that judicial certitude will do a disservice to both the judicial and historical crafts.”).

81. See, e.g., Miller, *Guns as Smut*, *supra* note 13; Eric M. Ruben & Saul Cornell, *Firearm Regionalism: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 134 (2015) (discussing public carry prohibitions in frontier towns in the era of the Fourteenth Amendment).

82. See, e.g., *Bliss v. Kentucky*, 12 Ky. (2 Litt.) 90, 92 (1822) (striking down a concealed carry ban, explaining that the right to bear arms “existed at the adoption of the [Kentucky] constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms”).

83. The oft-cited Statute of Northampton imposed circumstantial limitations on public carry. *See* 2 Edw. 3, c. 3 (1328), *reprinted in* 1 THE STATUTES OF THE REALM 258 (mandating that individuals “bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in [f]airs, [m]arkets, nor in the presence of the [j]ustices or other [m]inisters, nor in no part elsewhere, upon pain to forfeit their [a]rmour to the King, and their [b]odies to prison at the King’s pleasure”). William Blackstone cited this law in his *Commentaries on the Laws of England*, noting that “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.” 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*148–49.

84. *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012); *see also* WILKINSON, *supra* note 79, at 42 (“[T]he main defect of originalism is that historical research is often inconclusive.”).

85. See Ruben & Blocher, *supra* note 15, at 1492 (noting that 16 percent of lower court decisions include separate historical analysis).

86. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (looking to the First Amendment for guidance on the two-step framework).

87. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“Of course the right was not unlimited, just as the First Amendment’s right of free speech was not, . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”) (citing *United States v. Williams*, 553 U.S. 285 (2008)).

88. See Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L. Q. 621, 673 (2019); *see also* Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018).

and some distinctive attributes” not shared by the Second Amendment.<sup>89</sup> Most significantly, First Amendment doctrine is geared toward protecting values other than self-defense,<sup>90</sup> making it at best an imperfect guide for assessing the coverage of the Second Amendment.

In practice, courts applying the first step of the two-step inquiry have reached imprecise conclusions about whether and how challenged regulations impinge conduct within the scope of the Second Amendment. Courts are frequently uncertain about the scope of the right to keep and bear arms because many cases defy easy historical answers, are not resolved by *Heller*'s list of exclusions, or bear little resemblance to First Amendment disputes. Judges considering public carry cases have generalized that the Second Amendment “must have *some* application in the . . . context of the public possession of firearms,”<sup>91</sup> but the precise coverage is unknown. Likewise, those deciding challenges to assault weapon bans have said they “cannot be certain whether . . . prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms.”<sup>92</sup>

Unsurprisingly, then, cases are often decided at step two: the application of tiered scrutiny. The Fourth Circuit summed up the trend:

[W]e are not obliged to impart a definitive ruling at the first step of the . . . inquiry. And indeed, we and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step.<sup>93</sup>

The second step requires determining how much protection to give regulated conduct, people, or arms. That protection has typically corresponded to standards of review familiar to free speech jurisprudence.<sup>94</sup> *Heller* expressly rejected rational basis review,<sup>95</sup> so courts generally apply heightened scrutiny, either intermediate or strict. The standard of review in free speech cases varies depending on the burden on free speech, and courts have said the same applies in Second Amendment cases: the greater the burden on the right, the stricter the scrutiny.<sup>96</sup>

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89. Zick, *supra* note 88, at 674 (highlighting “the textual and conceptual capaciousness of ‘speech’ and the ubiquity of communicative activity,” and how “free speech rights have long been a cornerstone of American democracy”).

90. See Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 169–71 (2017) (discussing distinctive First and Second Amendment purposes).

91. *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (italics in original).

92. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

93. *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013).

94. See *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

95. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

96. See, e.g., *Marzarrella*, 614 F.3d at 96–97.

So far, lawful self-defense, the stated core of the right, has factored only on the margins in this tiered scrutiny framework, if at all.<sup>97</sup> Some judges rely on *Heller*'s emphasis on the acute need for self-protection within the home to apply stricter scrutiny to restrictions affecting home possession than to restrictions affecting public possession.<sup>98</sup> This binary approach can be criticized as over-reading *Heller*,<sup>99</sup> however, and some courts have rejected it altogether.<sup>100</sup> A more stable basis for the home/public distinction would be self-defense law, which has traditionally extended a broader right to use lethal defensive force in the home than in public.<sup>101</sup> Post-*Heller* doctrine has not adopted that grounding, however.

Other lower courts have considered a lesser standard of review when a banned weapon is not truly necessary for self-defense in light of alternatives.<sup>102</sup> In *Kolbe v. Hogan*, for example, the Fourth Circuit noted that Maryland's ban on assault weapons and large-capacity magazines "leav[es] citizens free to protect themselves with a plethora of other firearms and ammunition. Those include magazines holding ten or fewer rounds, nonautomatic and some semiautomatic long guns, and—most importantly—handguns. The handgun, of course, is 'the quintessential self-defense weapon.'"<sup>103</sup>

And yet *Heller* itself seems to stand in the way of this usage of self-defense. The Supreme Court declared that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."<sup>104</sup> Judges have invoked that

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97. The continued viability of such a framework is an open question. At oral argument in *Heller*, Chief Justice John Roberts called tiered scrutiny "baggage that the First Amendment picked up" and questioned why the court would adopt tiered scrutiny in the Second Amendment context when "we are starting afresh." Transcript of Oral Argument at 44, *Heller*, 554 U.S. 570 (No. 07-290). Ultimately, the *Heller* majority opted for a categorical approach, but did not close the door on tiered scrutiny, as reflected by its widespread adoption by lower courts.

98. See, e.g., *Heller*, 554 U.S. at 635 (stating that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) (considering a safe storage law a violation of the "core" of the Second Amendment right because it involved a restriction in the home).

99. See *Heller*, 554 U.S. at 635 (alluding to the need for "future evaluation" of issues not before the court).

100. See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) (concluding that the Second Amendment right in the home and in public are coequal).

101. Under the "castle doctrine," individuals in their home can lawfully use lethal force even if they could safely retreat and avoid a confrontation. On the other hand, individuals in public situations historically had a duty to retreat if they could safely do so. Many jurisdictions have moved away from duty-to-retreat in favor of stand-your-ground, but the Model Penal Code espouses the traditional rule. See, e.g., MODEL PENAL CODE § 3.04(2)(b)(ii) and (2)(b)(ii)(A) (AM. LAW INST., Proposed Official Draft 1962); *infra* note 165 and accompanying text (discussing castle doctrine).

102. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017).

103. *Id.* (quoting *Heller*, 554 U.S. at 629).

104. *Heller*, 554 U.S. at 629.



statement to oppose an alternatives analysis,<sup>105</sup> but the issue has not received careful consideration in relation to *Heller*'s holding about the Second Amendment's self-defense core. Indeed, an alternatives analysis that considers the availability of sufficient, less lethal weapons—not just equally lethal alternatives—might find support in analogies to the self-defense requirement of necessity.<sup>106</sup>

Most post-*Heller* Second Amendment opinions thus fail to closely consider self-defense, leaving a doctrinal void. The next Section describes how some judges have sought to fill it in a way that effectively immunizes guns from regulation.

## 2. *Self-Defense as a Shield to Firearm Regulation*

Far from ignoring self-defense's relevance, some courts have invoked it as a boundless construct that implies a relatively unfettered right to have and carry handguns. If one assumes that the Second Amendment provides maximal protection to handgun possession, a possible conclusion is that the Second Amendment must protect a right to carry a handgun virtually everywhere. After all, as Justice Clarence Thomas observed in a recent dissent, “[s]elf-defense has to take place wherever a person happens to be.”<sup>107</sup>

Three federal courts of appeals have applied parallel logic to strike down restrictions on carrying handguns in public. Rejecting the home/public binary, the Seventh Circuit relied on the notion that “self-defense . . . is as important outside the home as inside” to strike down Illinois's total prohibition on carrying handguns in public.<sup>108</sup>

The District of Columbia and Hawaii imposed a lesser restriction on public carry by establishing a permitting system that required an applicant to show good cause, or a heightened risk of being attacked, before they could obtain a permit to carry handguns in public.<sup>109</sup> In *Wrenn v. District of Columbia*, the D.C. Circuit

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105. See, e.g., *Kolbe*, 849 F.3d at 161–62 (Traxler, J., dissenting) (arguing that an alternatives analysis was “expressly rejected” by *Heller*) (emphasis omitted).

106. See *infra* notes 286, 296–298, and accompanying text (further discussing this possibility). I am not the first scholar to consider the viability of a Second Amendment alternatives analysis—others have suggested that such a test could be supported by First Amendment analogies. See Joseph Blocher & Darrell A. H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 282, 284, 291 (2016). Paul H. Robinson has also opined that the increasing effectiveness of less-than-lethal weapons could render firearms unnecessary for many self-defense situations. See Paul H. Robinson, *Shoot to Stun*, N.Y. TIMES (July 2, 2008), <https://www.nytimes.com/2008/07/02/opinion/02robinson.html> [<https://perma.cc/L6YB-ZVB9>].

107. *Peruta v. California*, 137 S. Ct. 1995, 1998–99 (2017) (mem.) (Thomas, J., dissenting) (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)).

108. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

109. See *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018), *reh'g en banc granted*, No. 12-17808, 2019 WL 494053 (9th Cir. Feb. 8, 2019); *Wrenn v. District of Columbia*, 864 F.3d 650, 655–56 (D.C. Cir. 2017). This regulatory regime is fairly common. See, e.g., N.J. STAT. ANN. § 2C:58-4 (West 2019) (requiring applicant to demonstrate a “justifiable need to carry a handgun”); N.Y. PENAL LAW

struck down the District's good-cause policy, noting that the Second Amendment's "core lawful purpose" is self-defense, and the need for that might arise beyond as well as within the home."<sup>110</sup> This supported the conclusion that "possession and carrying—keeping and bearing—are on equal footing."<sup>111</sup> Just as *Heller* found a right to *possess* handguns regardless of need, the D.C. Circuit concluded that citizens have a right to *carry* them in public regardless of need.<sup>112</sup> By the D.C. Circuit's logic, requiring an advance showing of need, as mandated by the D.C. law, "*completely* prohibits most residents from exercising the constitutional right to bear arms."<sup>113</sup>

After *Wrenn*, a Ninth Circuit panel reached a similar conclusion in *Young v. Hawaii*, which involved Hawaii's good-cause law.<sup>114</sup> The court emphasized "the centrality of self-defense" in *Heller*,<sup>115</sup> and, like the D.C. Circuit, concluded that handgun carry rights presumably pertain wherever self-defense might occur.<sup>116</sup> Hawaii law limited public carry permits to those who could show "reason to fear injury to the applicant's person or property,"<sup>117</sup> a standard rarely if ever met in the eyes of the government agents implementing the scheme. The Court struck down the policy as violating the Second Amendment.<sup>118</sup>

The decisions in *Wrenn* and *Young* have resulted in a circuit split, as other courts have upheld good-cause policies under intermediate scrutiny. Yet no courts or commentators have scrutinized the way the D.C. Circuit and Ninth Circuit invoked self-defense to maximize gun rights. In an earlier Fourth Circuit case, Judge J. Harvie Wilkinson III warned that "[t]he notion that 'self-defense has to take place wherever [a] person happens to be' . . . portend[s] all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities."<sup>119</sup> Another critique, unexplored in case law and scholarship, is that the boundless portrayal of self-defense espoused in *Wrenn* and *Young* overlooks limitations on lawful self-defense. The next section considers those limitations and how they might inform Second Amendment doctrine.

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§ 400.00 (McKinney 2017) (requiring applicant to demonstrate "proper cause," interpreted to mean a "special need for self-protection," *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

110. *Wrenn*, 864 F.3d at 657 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008)).

111. *Id.* at 666.

112. *Id.* (finding a Second Amendment right to "carry a gun in the face of ordinary self-defense needs").

113. *Id.* at 665 (emphasis in original).

114. *See Young*, 896 F.3d 1044.

115. *Id.* at 1051.

116. *Id.* at 1068 ("Once identified as an individual right focused on self-defense, the right to bear arms must guarantee *some* right to self-defense in public.").

117. *Id.* at 1048.

118. *See id.* at 1074.

119. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring) (quoting *Volokh*, *supra* note 107, at 1515).

## II.

## BRINGING SELF-DEFENSE LAW INTO FOCUS

As the discussion of case law in the last Part demonstrates, courts are unclear about the proper role of self-defense in deciding Second Amendment cases. However, they have overlooked a straightforward approach seemingly suggested by *Heller*: borrowing from the law of self-defense to inform Second Amendment doctrine.

The notion of taking from one doctrinal area, like self-defense, to implement another, like the Second Amendment, is not new. Nelson Tebbe and Robert Tsai have shown that “[w]herever constitutional interpretation happens, borrowing is likely to be found,”<sup>120</sup> in part “to take advantage of accumulated wisdom” from better-developed areas of law.<sup>121</sup> Indeed, this is already happening in Second Amendment law and scholarship.<sup>122</sup> Given that the Supreme Court oriented the Second Amendment around lawful self-defense and arguably invoked the self-defense requirements of necessity and imminence in *Heller*,<sup>123</sup> the law of self-defense would seem an obvious source of guidance. However, it has yet to play a prominent role in the analysis.

One possible explanation for the omission is a tendency to look within the Constitution for analogues. Tebbe and Tsai focused their review on migrating law from one constitutional area to another.<sup>124</sup> Courts and scholars likewise have focused on migrating other constitutional doctrine to the Second Amendment, ranging from First Amendment to Seventh Amendment rules and standards.<sup>125</sup>

Yet each constitutional right “bears its own bespoke doctrinal formula,”<sup>126</sup> which sometimes involves drawing on sources of law beyond the four corners of the Constitution. For example, Fourth Amendment cases have drawn on common and positive law to derive constitutional standards.<sup>127</sup> William Baude and James

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120. Nelson Tebbe & Robert Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 464 (2010) [hereinafter Tebbe & Tsai, *Constitutional Borrowing*]. *But see* Jennifer E. Lauren, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (critiquing borrowing from constitutional tort doctrine to define the good faith exception to the Fourth Amendment exclusionary rule); Nelson Tebbe & Robert Tsai, *Notes on Borrowing and Convergence*, 111 COLUM. L. REV. SIDEBAR 140 (2011) (responding to Professor Lauren).

121. Tebbe & Tsai, *Constitutional Borrowing*, *supra* note 120 at 467.

122. *See supra* notes 86–90 and accompanying text (discussing efforts to import doctrine from the First Amendment into the Second).

123. *See supra* notes 48–49 and accompanying text.

124. Tebbe & Tsai, *Constitutional Borrowing*, *supra* note 120, at 464 (indicating that they are focusing on “appropriations” “that span discrete fields of domestic constitutional law”).

125. *See supra* notes 10, 86–90.

126. Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 166–67 (2016).

127. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (“In reading the [Fourth] Amendment, we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing, since [a]n examination of the common-law understanding of an officer’s authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.”) (citations omitted) (internal quotation marks omitted); *Florida v. White*, 526 U.S. 559, 563 (1999)

A. Stern recently argued that positive law should be even more integrated in Fourth Amendment doctrine.<sup>128</sup> Likewise, in the Fifth Amendment takings context, constitutional law draws on both common and positive law to determine protected property interests.<sup>129</sup> Drawing on the law of self-defense to develop principled Second Amendment doctrine would not be aberrational.

This Part describes two basic requirements of lawful self-defense—necessity and proportionality—before discussing their potential application to Second Amendment doctrine.

#### A. *Necessity and Proportionality in Self-Defense Law*

By grounding the Second Amendment in lawful self-defense, the Supreme Court also grounded it in a carefully circumscribed body of law. The government criminalizes acts of physical aggression in order to achieve its basic goal of minimizing private violence.<sup>130</sup> Lawful self-defense is an exception to this general sanction. Self-defense is only lawful when necessary and proportional. Those requirements have the effect of shepherding conflicts away from violence, and especially lethal violence.<sup>131</sup> As one scholar put it:

Force can be used only when necessary. Deadly force can be used *only* to prevent death or great bodily harm and, in many jurisdictions, only if there is no possibility of retreat. So, in principle, the law requires that the attacked party submit to a non-deadly beating rather than defend with deadly force. The law prefers retreat and loss of honor to the unnecessary taking of life. And it generally construes the requirements of retreat and necessity very strictly.<sup>132</sup>

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(same); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (same); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (same); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1820, 1833–34 (2016). *But see* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739–41 (2000) (challenging the historical provenance of using Framing-era common law to delineate the Fourth Amendment’s boundaries).

128. Baude & Stern, *supra* note 127, at 1833–34.

129. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”) (internal citation omitted); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (limiting Fifth Amendment compensation obligation in regulatory takings contexts by reference to “the State’s law of property and nuisance”); Baude and Stern, *supra* note 127, at 1842 (“[T]he property rights protected by the Fifth Amendment are defined by extrinsic sources of positive law, typically state law, rather than by the Constitution itself.”).

130. *See* Joshua Dressler, *Justification and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163 (1987) (noting that “the taking of human life” is “the most serious crime against a person that can be committed”).

131. *See* Robinson, *supra* note 23, at 252–53, 256.

132. Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL’Y 105, 115 (1990).

Traditional self-defense law, it has been said, “tilt[s] in favor of the preservation of human life.”<sup>133</sup> Edward Coke referenced the “precious regard the Law hath of the life of man.”<sup>134</sup> Blackstone did the same, explaining a person’s duty to retreat by reference to “a real tenderness of shedding his brother’s blood.”<sup>135</sup> Traditionally, these values dovetailed with the notion that the state monopolized lawful force. Indeed, historically, homicide was justified only under limited circumstances, such as the prevention of a small number of specified felonies, in which a person “acted as an actual or implicit agent of the sovereign.”<sup>136</sup> Killing purely in private self-defense, and not to prevent one of those specified felonies, was only excusable, requiring a sovereign pardon after trial and conviction.<sup>137</sup> Over time, the law has come to treat self-defense as a justification for violence; but invoking the right to self-defense still requires exposure to the same criminal justice system that punishes unjustified violence.<sup>138</sup> Lawful self-defense still requires a showing of necessity and proportionality.<sup>139</sup>

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133. Miller, *Self Defense*, *supra* note 6, at 89. Of course, as with other legal areas, commentators do not agree on a single self-defense philosophy. George Fletcher noted that the law governing defensive force is a “composite” and “hybrid” model that reflects “deeper ideological clashes.” FLETCHER, *supra* note 22, at 874. The same is surely true of the Second Amendment. See Blocher & Miller, *What is Gun Control?*, *supra* note 11, at 348 (noting that no “single account of the Second Amendment will command unanimous support, any more than agreement has emerged regarding a theory of free speech or equal protection”).

134. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 56 (1st ed. 1644).

135. 4 BLACKSTONE, *COMMENTARIES*, *supra* note 42, at \*185; *see also id.* at \*186 (“the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law.”).

136. Miller, *Self Defense*, *supra* note 6, at 88–89.

137. *Id.* at 87–95; *see also* Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 436 (1976) (“[T]hose who acted in defense of property fared better under the evolving law than those who acted solely in defense of their person.”).

138. Aggressive stand-your-ground laws are chipping away at this procedural characteristic of self-defense. In Florida, for example, defendants can invoke self-defense as an immunity to prosecution, avoiding trial altogether. *See* FLA. STAT. §§ 776.012–.013 (2019). Such procedural departures from traditional self-defense law are an area in need of further scholarly exploration.

139. Paul Robinson’s treatise on criminal law defenses provides the following definition of self-defense:

Conduct constituting an offense is justified if:

- 1) an aggressor unjustifiably threatens harm to the actor; and
- 2) the actor engages in conduct harmful to the aggressor
  - a) when and to the extent necessary for self-protection,
  - b) that is reasonable in relation to the harm threatened.

2 PAUL ROBINSON CRIM. L. DEF. § 132 (2018). The first requirement, an unjustifiable threat to the actor, is what Robinson terms a “triggering condition” for self-defense. It reflects the fact that lawful self-defense cannot arise in the absence of a threat, and even then, only arises when the threat is unjustified. One generally cannot invoke self-defense against a police officer executing an arrest, for example, nor after first unlawfully attacking someone. *See id.* § 131(b)(2). The unjustifiable-threat requirement may have purchase for the Second Amendment, as might the requirement of a “reasonable belief” in the necessity of defensive force, *supra* note 18. However, the focus of my analysis is on the second and third

### 1. Necessity

By the 1500s, consensus had already formed that a person killing in self-defense could go free only if the person reasonably believed the killing was necessary.<sup>140</sup> From then on, common law treatises regularly underscored the role of necessity. In the eighteenth century, Matthew Hale wrote that it must be “necessity, which obligeth a man to his own defense and safeguard.”<sup>141</sup> William Hawkins agreed that “[i]t must be owing to some unavoidable Necessity, to which the Person who kills another must be reduced without any manner of Fault in himself.”<sup>142</sup> Blackstone likewise limited excusable homicide in self-defense to “sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law.”<sup>143</sup>

The first reported self-defense opinion in the United States, *State v. Wells*, was issued the year before the Second Amendment’s adoption.<sup>144</sup> After the defendant struck a fatal blow with a club during a fight,<sup>145</sup> he told witnesses that he never believed himself to be in serious danger.<sup>146</sup> The New Jersey Supreme Court used the defendant’s statements to reject his claim of self-defense: “[N]o man is justified or excusable in taking away the life of another unless the necessity for doing so is apparent as the only means of avoiding his own destruction or some very great injury, neither of which appears to have been reasonably apprehended in the present case.”<sup>147</sup>

In 1806, this understanding was repeated in the jury charge in *Commonwealth v. Selfridge*, which was characterized as a “leading American authority on the Law of Self-Defense.”<sup>148</sup> Fearing an attack, Thomas Selfridge purchased a pistol.<sup>149</sup> He later encountered an enemy, armed with a walking stick, on a Boston street. A confrontation ensued, Selfridge was struck over the head with the walking stick, and he fired the pistol, killing his adversary.<sup>150</sup> At his trial for manslaughter, Selfridge claimed self-defense.<sup>151</sup>

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requirements ((2)(a) and (2)(b)), which correspond to the longstanding requirements of necessity and proportionality.

140. See Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 310–11 (1963).

141. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 478 (1736).

142. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 69 (1716).

143. 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*184.

144. *State v. Wells*, 1 N.J.L. 424 (N.J. 1790).

145. *Id.* at 426, 430.

146. *Id.* at 430.

147. *Id.* (emphasis added).

148. *Commonwealth v. Selfridge*, 2 Am. St. Trials 544, 549 (Mass. 1806).

149. *Id.* at 548. Evidence suggested that Selfridge “had been informed an attack upon him was intended.” *Id.* at 693.

150. *Id.* at 548. The precise sequence of events was disputed, but at minimum the fight arose suddenly. *Id.*

151. *Id.* at 693 (noting that the killing by the defendant was “confessed as well as proved,” leaving the “great question in the case[:] whether according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved”).

Judge Isaac Parker's jury charge emphasized necessity as the core limitation on lethal defensive force.<sup>152</sup> In a statement representative of many others, Parker explained that self-defense only exculpates the defender if he "use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power."<sup>153</sup>

Today, necessity remains "the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense."<sup>154</sup> The D.C. Circuit noted in *United States v. Peterson* that "[t]he law of self-defense is a law of necessity"; the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly.<sup>155</sup> As Paul Robinson puts it, defensive force is only lawful "when and to the extent necessary for self-protection."<sup>156</sup>

The requirements of imminence and retreat are two doctrinal proxies for ensuring that killing in self-defense is truly necessary. The permissible use of force in self-defense is generally limited to situations in which an individual has a reasonable anticipation of "imminent" harm.<sup>157</sup> If not, "there may be avenues

152. See, e.g., *id.* at 697 ("If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defense set up has failed, and the defendant must be convicted. . . . If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted."); *id.* ("[U]nless the defendant has satisfactorily proved to you that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he has been guilty of manslaughter."); *id.* at 700 ("But if . . . he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise, than by the death of the assailant—then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent.").

153. *Id.* at 690.

154. *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

155. *Id.* at 1229 (citation omitted). *Peterson* is used in leading casebooks to demonstrate self-defense principles. See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 516–22 (2019); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 870–71 (2017).

156. 2 ROBINSON, *supra* note 139, at § 132.

157. See WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4, 205 at n.51 (October 2017 Update) (collecting citations); see also ALA. CODE § 13A-3-23 (2019); ARK. CODE ANN. § 5-2-606 (2019); COLO. REV. STAT. ANN. § 18-1-704 (2019); CONN. GEN. STAT. ANN. § 53a-19 (2019); FLA. STAT. ANN. § 776.012 (2019); GA. CODE ANN. § 16-3-21 (2019); ILL. COMP. STAT. ANN. ch. 720, § 5/7-1 (2019); IND. CODE ANN. § 35-41-3-2 (2019); IOWA CODE ANN. § 704.3 (2019); KAN. STAT. ANN. § 21-5222 (2019); KY. REV. STAT. ANN. § 503.050 (2019); LA. REV. STAT. ANN. § 14:20 (2019) (homicide only); ME. REV. STAT. ANN. tit. 17-A, § 108 (2019); MISS. CODE ANN. § 97-3-15 (2019) (homicide only); MO. ANN. STAT. § 563.031 (2019); MONT. CODE ANN. § 45-3-102 (2019); N.H. REV. STAT. ANN. § 627:4 (2019); N.M. STAT. ANN. § 30-2-7 (2019) (homicide only); N.Y. PENAL LAW § 35.15 (2019); N.D. CENT. CODE § 12.1-05-03 (2019); OR. REV. STAT. § 161.209 (2019); S.D. CODIFIED LAWS § 22-16-35 (homicide only) (2019); TENN. CODE ANN. § 39-11-611 (2019) (homicide only); UTAH CODE ANN. § 76-2-402 (2019); WASH. REV. CODE § 9A.16.050 (2019) (homicide only); WIS. STAT. ANN. § 939.48 (2019) (deadly force).

open to the defendant to prevent [threatened violence] other than to kill or injure the prospective attacker.”<sup>158</sup> Given the close relationship between imminence and necessity, it is arguably redundant for self-defense law to require showings of both.<sup>159</sup> Yet the dominant view, both historically and now, is to make separate inquiries into necessity and the temporal proximity of a threat.<sup>160</sup>

Requiring retreat before the exercise of deadly force is also a manifestation of the necessity requirement, albeit one limited to certain lethal confrontations.<sup>161</sup> William Blackstone wrote:

[T]he law requires that the person, who kills another in his own defence [during a sudden affray], should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother’s blood.<sup>162</sup>

Judge Parker adopted this view in *Selfridge*, stating that before using lethal force in self-defense, a man must “use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreating as far as he can.”<sup>163</sup>

A traditional exception to the retreat requirement is when lethal self-defense occurs in the home. As Blackstone explained, “the 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.”<sup>164</sup> The so-called “castle” doctrine is accepted by all American jurisdictions.<sup>165</sup> This traditional distinction between the scope of permissible self-defense in the home and outside the home, as noted above,<sup>166</sup> could be helpful in drawing principled distinctions in Second Amendment law.

158. See LAFAYE, *supra* note 157, at § 10.4(d), 206.

159. See, e.g., KADISH ET AL., *supra* note 155, at 914 (“[If imminence is a proxy for necessity,] why should imminence and necessity be independent requirements?”).

160. *Id.* Different authorities have offered different articulations of the imminence requirement. In Blackstone’s description, the timing of the unjustified threat had to be quite close to the defensive response, “when certain and immediate suffering would be the consequence of waiting for the assistance of the law.” 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*184. Blackstone’s might be closest to the “imminence” formulation that predominates in many jurisdictions. But the standard has been relaxed elsewhere. The Model Penal Code, for example, permits the use of defensive force when “immediately necessary” in response to unlawful force by another “on the present occasion.” MODEL PENAL CODE § 3.04(1) (AM. LAW INST., Proposed Official Draft 1962); see also ARIZ. REV. STAT. ANN. § 13-404 (2019); DEL. CODE ANN. tit. 11, § 464 (2019); HAW. REV. STAT. § 703-304 (2019); NEB. REV. STAT. § 28-1409 (2019); N.J. STAT. ANN. § 2C:3-4 (2019); PA. CONS. STAT. ANN. tit. 18, § 505 (2019); TENN. CODE ANN. § 39-11-611 (2019); TEX. PENAL CODE ANN. § 9.31 (2019).

161. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT (1991).

162. 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*184–85.

163. Commonwealth v. Selfridge, 2 Am. St. Trials 544, 691 (Ma. 1806).

164. 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*223.

165. See KADISH ET AL., *supra* note 155, at 924 (noting that “[a]ll American jurisdictions” accept the castle doctrine).

166. See *supra* note 101 and accompanying text (discussing this possible application of castle doctrine).



In recent years, the duty to retreat before resorting to lethal defensive force in situations outside the home has been a subject of great debate. However, this debate is not new.<sup>167</sup> Though it would not firmly take root in the United States until the 1800s, some English commentators had already questioned the requirement of retreating in public places.<sup>168</sup> The ascension of a no-retreat rule in some parts of the United States in the 1800s was in no small part due to the strong notion of personal autonomy that likewise ascended during that time period, coupled with a sense that requiring an innocent person to retreat because of another's wrongful threat was codifying cowardice.<sup>169</sup>

But it would be incorrect to conclude that no-duty-to-retreat has been universally accepted by penal law drafters and experts. At the turn of the nineteenth century, Joseph Beale wrote an influential article advocating duty-to-retreat as the optimal rule.<sup>170</sup> When the Model Penal Code was drafted in 1962, its authors agreed.<sup>171</sup> In 1978, George Fletcher predicted that the legal tide would turn in that direction.<sup>172</sup> The tide did not turn, however, in large part because of an effort led by the National Rifle Association to codify no-duty-to-retreat across much of the country.<sup>173</sup> Today, “[i]n decisions based on common-law principles, there has been a distinct tendency to favor a requirement of retreat in settings outside the home.”<sup>174</sup> But the majority of the states—at least twenty-eight of them—have passed laws eschewing that requirement.<sup>175</sup>

The controversy over stand-your-ground laws highlights a complexity inherent in using self-defense law to set Second Amendment boundaries: self-defense law is not static through time or between jurisdictions. Resolving which legal understanding of self-defense should serve as a baseline is a significant second-order question, but its significance should not be overstated for two reasons. First, change has happened primarily on the margins; the basic requirements of necessity and proportionality are universally accepted, even in

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167. See generally Joseph H. Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903) (summarizing historical debate).

168. See, e.g., MICHAEL FOSTER, REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER (1762); see also Beale, *supra* note 167 at 573–76 (discussing Foster's writing on retreat).

169. See, e.g., *Erwin v. State*, 29 Ohio St. 186, 199–200 (Ohio 1876) (“[A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.”). Interestingly, while jurists in many American jurisdictions were persuaded to scrap the duty to retreat by English commentators like Michael Foster, England retained the traditional duty to retreat. See BROWN, *supra* note 161, at 7.

170. See Beale, *supra* note 167 at 573–76.

171. MODEL PENAL CODE § 3.04(2)(b)(ii) (AM. LAW INST., Proposed Official Draft 1962).

172. FLETCHER, *supra* note 22, at 867–68 (“Though the case law remains conflicted, the future might well be reflected in the Model Penal Code's recommending the duty to retreat as the norm.”).

173. See LAFAYE, *supra* note 157, § 10.4(f) (discussing National Rifle Association's push for stand-your-ground laws).

174. KADISH ET AL., *supra* note 155, at 921–22.

175. See “Stand Your Ground” Laws, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws> [<https://perma.cc/8D62-A9QR>].

stand-your-ground jurisdictions, and have been essentially immune to change.<sup>176</sup> Second, to the extent there are material differences between self-defense laws, the resulting baseline issue is not intractable. Rather, it resembles other areas of constitutional law that look to background law for doctrinal guidance.<sup>177</sup> I do not take a position in this Article about how to resolve this baseline question—for example, whether courts should assume a static self-defense baseline set at the time of the Second Amendment’s adoption in 1791<sup>178</sup> or a baseline that shifts through time and even from jurisdiction to jurisdiction.<sup>179</sup> For the purposes of my analysis, I focus on the mechanics of how the basic, universal doctrinal requirements of necessity and proportionality might translate to Second Amendment doctrine.

## 2. Proportionality

The requirement of proportionality, which limits permissible defensive force to that which is “reasonable in relation to the harm threatened,”<sup>180</sup> is less prominent in historical discussions than necessity. However, “[t]here can be little doubt that proportionality is a clearly recognized requirement in Anglo-American Law.”<sup>181</sup> The Model Penal Code Commentaries emphasize that it is a “common law principle that the amount of force used by the actor must bear a reasonable relation to the magnitude of the harm that he seeks to avert.”<sup>182</sup>

Proportionality in self-defense law reflects the legal system’s “recognition of the value of human life”<sup>183</sup> and a general belief that excessive force is unnecessary and unreasonable. So, for example, in the 1705 case *Cockroft v.*

176. See, e.g., *Erwin v. State*, 29 Ohio St. 186, 199 (Ohio 1876) (adopting stand-your-ground, but then noting that the “taking of life in defense of one’s person cannot be either justified or excused, except on the ground of *necessity*,” which must be “imminent at the time . . . and no man can avail himself of such necessity if he brings it upon himself”).

177. See *supra* notes 127–129 and accompanying text (discussing uses of positive and common law in Fourth and Fifth Amendment doctrine).

178. After all, *Heller* espoused the view that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

179. See generally Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, U. ILL. L. REV. (forthcoming) (highlighting ways that federal constitutional rights are not uniform throughout the country).

180. 2 ROBINSON, *supra* note 139, at § 132; see LAFAVE, *supra* note 157, at § 10.4(b) (“[T]he amount of force [one] may justifiably use must be reasonably related to the threatened harm which [one] seeks to avoid.”).

181. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 218 n.72 (1982).

182. MODEL PENAL CODE AND COMMENTARIES 47 (Official Draft and Revised Comments 1985); cf. 4 BLACKSTONE, COMMENTARIES, *supra* note 42, at \*181–82 (noting that “[t]he law of England . . . is too careful of the lives of the subjects . . . nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death”).

183. See Robinson, *supra* note 181, at 218 (explaining why “an actor [with] no other option but deadly force to prevent the stealing of apples . . . [must] sacrifice her apples out of regard for the life of the thieves”); see also *supra* notes 134–135 and accompanying text (quoting Blackstone and Coke).

*Smith*, Sir John Holt, the Chief Justice of England, declared that the plea of self-defense is unavailable during an affray “where the second assault is *excessive*,” such as when Smith “bit a joint off from the plaintiff’s finger” after the plaintiff “ran his finger towards Smith’s eyes.”<sup>184</sup> As Chief Justice Holt explained, “hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other.”<sup>185</sup>

The proportionality requirement was invoked in both of the Framing-era cases discussed in the last subpart: *Wells* and *Selfridge*. In *Wells*, the defendant picked up and wielded a club in a fistfight, resulting in a skull fracture and the victim’s death.<sup>186</sup> The defendant’s self-defense claim failed in part because he used lethal force despite a nonlethal threat. As the court put it, “[T]he attack of the deceased was without any kind of weapon that might have rendered it necessary for the prisoner to avail himself of the instrument which occasioned the death.”<sup>187</sup>

This statement is especially interesting when viewing the intersection of self-defense and the right to keep and bear arms. The court expressly linked its determination of unnecessary, disproportionate force to the specific arm chosen by the defendant.

In addition to charging the jury on the requirement of necessity, Judge Parker in *Selfridge* also instructed that if the circumstances of the attack “denote an intention to take away [Selfridge’s] life, or do him some enormous bodily harm; [he] may lawfully kill the assailant.”<sup>188</sup> Judge Parker then elaborated, linking the lawfulness of lethal force to the weapon used by an aggressor: “I doubt whether self-defense could in any case be set up, where the killing happened in consequence of an assault only, unless the assault be made with a weapon which if used at all, would probably produce death.”<sup>189</sup>

Today, U.S. jurisdictions universally accept some form of the proportionality requirement. Penal codes generally differentiate between “deadly” and “moderate” force, and delineate when *deadly* force is justified in self-defense.<sup>190</sup> “All authorities agree” that deadly defensive force is permissible when a person is threatened with unjustified “death or serious bodily injury.”<sup>191</sup> Only nondeadly force can be used to defend oneself against less serious threats.<sup>192</sup>

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184. *Cockcroft v. Smith*, [1705] 11 Mod. 43, 88 Eng. Rep. 872 (K.B.) (Holt, C.J.) (emphasis in original).

185. *Id.*

186. *State v. Wells*, 1 N.J.L. 424, 426 (N.J. 1790).

187. *Id.* at 430.

188. *Commonwealth v. Selfridge*, 2 Am. St. Trials 544, 691 (Mass. 1806).

189. *Id.* at 696.

190. See MODEL PENAL CODE AND COMMENTARIES § 3.04, 47 (Official Draft and Revised Comments 1985).

191. *Id.*

192. Disagreements persist about whether other types of harms justify the use of deadly force. For example, some jurisdictions limit lawful lethal defensive force to threats of death or serious bodily

*B. Using Self-Defense Law to Construct Second Amendment Doctrine*

The regulation of violence is a basic concern of government; so too is the regulation of the instruments of violence. Despite the “persistent myth” to the contrary, weapons regulation has always been a part of American legal history.<sup>193</sup> Justifiable self-defense operates as an exception to general proscriptions on violent conduct,<sup>194</sup> adjudged by reference to notions of necessity and proportionality. This Part considers whether Second Amendment doctrine can operate similarly, mandating an affirmative defense to weapons restrictions that is governed by necessity and proportionality.

Infusing such self-defense requirements into Second Amendment doctrine can help evaluate regulations on when a person can carry a weapon on their person for use in self-defense. Specifically, in this view, the Second Amendment protects a right to an affirmative defense when carrying a weapon is reasonably necessary and proportionate to a particularized threat. Second Amendment doctrine need not, in contrast, protect a right to carry in the absence of such a threat. This approach finds support in both *Heller* and nineteenth-century precedent.

This Part considers two broad categories of restrictions: first, those on possessing and carrying operable guns in anticipation of confrontation, and second, those on acquiring guns for that purpose. The first category reflects a situation in which self-defense law and processes can be imported into Second Amendment doctrine with relatively minor adjustments. The second category highlights a situation in which the fit is weaker but Second Amendment law could still benefit from themes animating lawful self-defense.

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injury, *see, e.g.*, N.J. STAT. ANN. § 2C:3-4(b)(2) (2019) (“The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm.”). Model Penal Code jurisdictions add “kidnapping or sexual intercourse compelled by force or threat,” Model Penal Code § 3.04(2)(b) (Am. Law Inst., Proposed Official Draft 1962) (emphasis added), and others include additional specified crimes, *see, e.g.*, TEX. PENAL CODE ANN. § 9.32(a)(2)(B) (2019) (“A person is justified in using deadly force against another . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.”). This Article does not consider whether the Second Amendment protects weapon possession to defend against these other harms. *See supra* note 2 (discussing this Article’s focus on self-defense).

193. *See* BLOCHER & MILLER, THE POSITIVE SECOND AMENDMENT, *supra* note 11, at 19–21 (describing historical gun laws); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 115 (2009) (“Gun safety regulation was commonplace in the American colonies from their earliest days.”). As political scientist Robert Spitzer puts it:

“[W]hile gun possession is as old as America, so too are gun laws. . . . Gun laws were not only ubiquitous, numbering in the thousands; they spanned every conceivable category of regulation, from gun acquisition, sale, possession, transport, and use, including deprivation of use through outright confiscation, to hunting and recreational regulations, to registration and express gun bans.”

ROBERT SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 5 (2015).

194. *See* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 13 (1968) (“Killing in self-defen[s]e is an exception to a general rule making killing punishable.”).

1. *Possessing and Carrying Arms for Use in Confrontations*

The Supreme Court made clear in *Heller* that the Second Amendment protects accessing a loaded handgun in the home in one important circumstance: when necessary for immediate self-defense. A requirement that lawfully owned firearms always be kept inoperable in the home “makes it impossible for citizens to use them for the core lawful purpose of self-defense,” and, hence, such a requirement is unconstitutional.<sup>195</sup>

This Section shows how that reasoning leaves open the possibility of deriving limitations to the Second Amendment right from limitations on lawful self-defense. As a doctrinal matter, those limitations could inform the constitutional analysis of two categories of regulations, each addressing circumstances closely related to the use of arms in self-defense: in-home storage laws and public carry restrictions.

a. *Firearm Storage Laws*

The D.C. law challenged in *Heller* required home-stored firearms to be inoperable “at all times.”<sup>196</sup> The parties and Justices construed *Heller*’s complaint as seeking to “render a firearm operable and carry it about his home in that condition *only when necessary* for self-defense.”<sup>197</sup> The government contended that the law had an unwritten self-defense exception, but the *Heller* majority found such an exception “precluded by the unequivocal text” of the statute.<sup>198</sup> The law did not permit rendering a firearm operable for “immediate” self-defense, and therefore was unconstitutional.<sup>199</sup> As Justice Breyer framed this holding, “the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense.”<sup>200</sup> That exception would logically apply as an affirmative defense to the charge of violating the storage requirement, just as self-defense operates post hoc to justify otherwise criminal violence. Thus, in this view, a firearm storage law could be made to harmonize with the Second Amendment so long as such a defense is available and is judged constitutionally sufficient.

This conception of the Second Amendment would greatly clarify the outcome in some Second Amendment disputes. In *Jackson v. City and County of San Francisco*,<sup>201</sup> for example, the Ninth Circuit considered a local ordinance requiring handguns in the home to be locked or disabled with a trigger lock unless carried on the person.<sup>202</sup> The law obviously allowed accessing a loaded

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195. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008).

196. *Id.*

197. *Id.* at 576 (emphasis added).

198. *Id.* at 630.

199. *Id.* at 635.

200. *Id.* at 692 (Breyer, J., dissenting).

201. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

202. *Id.* at 958.

firearm when “necessary” for “immediate” self-defense: so long as a gun was on the person, it could be loaded and unlocked. Nowhere, however, did the court consider the constitutional salience of that fact. Instead, the court upheld the law under intermediate scrutiny,<sup>203</sup> drawing a vigorous rebuttal by Justice Thomas, who dissented from the Supreme Court’s denial of cert and contended that the Ninth Circuit’s application of intermediate scrutiny neglected the petitioner’s Second Amendment interest in self-defense.<sup>204</sup> Because the ordinance went well beyond providing a self-defense exception to the storage requirement, however, the law in *Jackson* arguably did not impinge the right to keep and bear arms at all, and heightened scrutiny was superfluous.

Analogizing to the law and operation of self-defense could help resolve cases like *Jackson*, but it also would introduce uncertainty about how to define “necessity.” Self-defense necessity and Second Amendment necessity logically cannot be coextensive. The Second Amendment contemplates anticipatory arming, something not covered by ordinary self-defense principles.<sup>205</sup> If an elderly man, alone in his home, sees an unfamiliar person on his porch at night, it would not be reasonably necessary to shoot at the stranger, but is it reasonably necessary to preemptively arm? When self-defense requirements are adapted for Second Amendment doctrine, they must be calibrated to the distinct circumstance of arming in advance of a confrontation.

To be sure, “perhaps [self-defense’s] most important aspect” is that “it is a preemptive action.”<sup>206</sup> The lawful use of defensive force, in other words, takes place in advance of an anticipated attack. Distinguishing between necessity in anticipatory arming and necessity in anticipatory force is a question of degree, not kind.<sup>207</sup>

Moreover, necessity accommodates some flexibility even within the self-defense context. Commentators have disagreed on the proper definition of “imminence” and some have argued that imminence should be construed differently depending on the circumstances.<sup>208</sup> One example is the case of a battered person who kills an abuser when an assault is not imminent, such as when the abuser is sleeping. The prevailing approach in these cases is not to alter

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203. *Id.* at 966.

204. *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2800–01 (2015) (Thomas, J., dissenting).

205. See GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 73 (1988).

206. Larry Alexander, *The Need to Attend to Probabilities—For Purposes of Self-Defense and Other Preemptive Actions*, 55 SAN DIEGO L. REV. 223, 223 (2018).

207. Cf. Vera Bergelson, *Self-Defense and Risks*, in *THE ETHICS OF SELF-DEFENSE* 131–32 (2016) (“Self-defense is preemptive by nature, so uncertainty arises on many levels, for example determining what defensive force is necessary to fend off a particular right violation.”).

208. See *supra* note 160 (describing variations).

the imminence requirement,<sup>209</sup> but some scholars argue for a looser approach,<sup>210</sup> and some jurists have agreed.<sup>211</sup> Others have argued for a less strict approach in other circumstances. For example, Eugene Volokh has proposed a relaxed version of imminence for “medical self-defense,” which he describes as protecting one’s “life using medical procedures that don’t involve killing, such as compensated organ transplants or the use of experimental drugs.”<sup>212</sup> In such situations, Volokh suggests, “imminence” should only require “a present medical threat.”<sup>213</sup> A Second Amendment-based defense would similarly require loosening the imminence standard. Ultimately, the question of whether the standard is met would be answered by a judge or jury at trial.

A related complexity is that a person may arm in anticipation of the need to brandish a gun, not just to fire it. Considering brandishing opens the door to complicated baseline questions. How does self-defense treat brandishing relative to shooting, and to the extent there are differences, which one should control for the Second Amendment analysis? Though there is an intuitive difference between the risks presented by brandishing and by shooting, self-defense law does not always distinguish between the two. For example, both brandishing and shooting present a threat of death or grave bodily injury that can justify lethal defensive force in response.<sup>214</sup> Meanwhile, in some jurisdictions, brandishing is considered a disproportionate response to non-grave threats.<sup>215</sup> In those places, the law treats both brandishing and firing a gun as deadly force for self-defense purposes.<sup>216</sup>

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209. See, e.g., *State v. Norman*, 378 S.E.2d 8, 15 (N.C. 1989) (critiquing proposed loosening of imminence standard in battered person cases and noting that the “imminence requirement ensures” that human lives are taken only “upon the reasonable belief it is necessary to prevent death or great bodily harm”); *Commonwealth v. Sands*, 553 S.E.2d 733, 737 (Va. 2001) (applying traditional imminence standards to uphold a murder conviction in a battered wife context).

210. See KADISH ET AL., *supra* note 155, at 914 (discussing debate). This position, in turn, has spawned creative arguments that imminence serves a purpose other than necessity, so should not be discarded so easily. See, e.g., Kimberly Kessler Ferzan, *Defendant Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 255–56, 260–62 (2004) (contending that imminence “stak[es] out the type of threats that constitute aggression,” which is the “critical question” in self-defense cases).

211. See, e.g., *State v. Janes*, 850 P.2d 495, 506 (Wash. 1993) (“A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out.”).

212. See Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818, 1824 (2007).

213. *Id.* at 1824.

214. MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d)(ii), 3.07(2)(b) (AM. LAW INST., Proposed Official Draft 1962).

215. See, e.g., *Hairston v. State*, 54 Miss. 689, 691 (Miss. 1887) (pointing a gun is deadly force); *People v. Magliato*, 68 N.Y.2d 24, 29, (N.Y. 1986) (“The risk of serious injury or death and the capacity presently to inflict the same are central to the definition [of ‘deadly physical force’], not the consequence of defendant’s conduct or what he intended.”); *Commonwealth v. Jones*, 332 A.2d 464, 466 (Pa. Super. Ct. 1974) (“Wielding a knife certainly amounts to the use of deadly force.”).

216. The Model Penal Code takes a different approach, excluding brandishing from the definition of deadly force “so long as the actor’s purpose is limited to creating an apprehension that he will use deadly force if necessary.” MODEL PENAL CODE § 3.11 (AM. LAW INST., Proposed Official Draft 1962). In the Commentaries, the drafters acknowledged a “diversity of opinion” on this issue. MODEL PENAL

*b. Public Carry Restrictions*

In addition to restrictions on rendering a firearm operable in the home, the constitutionality of restrictions on *carrying* a loaded gun *in public* might also be adjudged through self-defense-style rules. Among the most contentious areas of Second Amendment litigation are challenges to such restrictions. Courts have struck down absolute bans on public carry in the few places they remained after *Heller*.<sup>217</sup> However, federal appellate courts are split on the constitutionality of good-cause regimes that require a showing of need in order to obtain a permit to carry a handgun in public.<sup>218</sup> Some judges have contended that good-cause regimes are unconstitutional because the Second Amendment presumptively protects perennial arming for lethal defensive force.<sup>219</sup>

Borrowing from the law of self-defense would require rejecting that limitless proposition. Instead, it would endorse a generally applicable restriction on public carry only if combined with a constitutionally required exception for narrow, need-based circumstances. Self-defense is limited by notions of necessity. So, too, can be the Second Amendment. Self-defense is implemented as a defense to criminal sanction. So, too, can be the Second Amendment.

When it comes to public carry restrictions, this framework has historical roots. In 1836, Peter Oxenbridge Thacher<sup>220</sup> instructed a grand jury that in Massachusetts “no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, *without reasonable cause to apprehend an assault or violence to his person, family, or property.*”<sup>221</sup> Judge Thacher likely was interpreting a recently passed Massachusetts restriction providing that if someone carrying a weapon disturbed the public peace or caused someone reasonable fear, the armed person could be forced to post a surety.<sup>222</sup> The law,

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CODE AND COMMENTARIES 160 (Official Draft and Revised Comments 1985); *cf. id.* (noting that “[w]hen the Model Code was drafted, the balance of judicial authority favored the view that a person is not justified in threatening to shoot [to defend property] if he would not be justified in actually shooting”). The Model Penal Code’s approach—which reflects “a restriction of the criminal law”—is justified by reference to “other means” of controlling “the display and use of firearms,” namely restricting or banning their possession and carriage. MODEL PENAL CODE AND COMMENTARIES 161 (citing English Firearms Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 12). After *Heller*, a ban would be unconstitutional.

217. See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (Illinois); *Palmer v. District of Columbia*, 59 F.Supp.3d 173 (D.D.C. 2014) (District of Columbia); *People v. Aguilar*, 2 N.E.3d 321 (Ill. 2013) (Illinois).

218. See *supra* notes 109–119 and accompanying text (highlighting circuit split).

219. *Id.* (discussing *Wrenn and Young*).

220. Thacher was a respected jurist whose decisions and writings “had made him known throughout the country.” See 3 THE AMERICAN REVIEW: A WHIG JOURNAL OF POLITICS, LITERATURE, ART AND SCIENCE 222, 223 (1846).

221. PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK, FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF THE TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A. D. 1836, AND ON MONDAY, MARCH 13TH, A. D. 1837, 27 (1837) (emphasis added).

222. 1836 Mass. Acts 750 (“If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or



however, provided a self-defense-styled exception for persons with a “reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property.”<sup>223</sup> At least seven states adopted similar surety laws with self-defense exceptions.<sup>224</sup>

An 1871 Texas regulation bore an even closer resemblance to self-defense law. To counter Texas’s high rates of violence after the Civil War, the Texas government passed a measure prohibiting the carrying of pistols, titled an “Act to regulate the keeping and bearing of deadly weapons.”<sup>225</sup> The law provided an affirmative defense, however, to a defendant who could show “reasonable grounds for fearing an unlawful attack on his person,” provided that “such ground of attack shall be immediate and pressing.”<sup>226</sup> Another section of the law provided that making out the defense required showing “that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage.”<sup>227</sup>

The 1871 Texas law was widely enforced after its enactment,<sup>228</sup> leading to various challenges under both federal and Texas constitutional rights to keep and bear arms. In *State v. Duke*, the Texas Supreme Court emphatically upheld the law.<sup>229</sup> It found that while the Second Amendment did not apply to state and local governments<sup>230</sup>—the widely held understanding at the time<sup>231</sup>—the Texas constitutional right to keep and bear arms did apply. That provision read “Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.”<sup>232</sup> The Texas Supreme Court upheld the Act, declaring:

[The law] undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly *when needed for self-defense* or in the public service, and the right to have one at the home or place

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violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace. . . .”).

223. *Id.*

224. See Ruben & Cornell, *supra* note 81, at 132–33 n.61 (collecting similar statutes in Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, and Pennsylvania).

225. Law of April 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, reprinted in 6 H. Gammel, *Laws of Texas* 927 (1898); see also Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 97–101 (2016) (recounting history of Act).

226. Law of April 12, 1871, ch. 34, § 1.

227. *Id.* at § 2.

228. Frassetto, *supra* note 225, at 107 (“The new prohibition on public carry was widely enforced across the State, especially by the state police.”).

229. *State v. Duke*, 42 Tex. 455, 459 (Tex. 1874).

230. *Id.* at 457 (citing *Borran v. Baltimore*, 32 U.S. 243 (1833)).

231. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 153–56 (1998).

232. TEX. CONST. of 1869, art. I, § 13.

of business.<sup>233</sup>

One could argue that variations between the text of the Texas constitution and the Second Amendment make the former an inapt analogue for the latter. Differences include express declarations in the Texas constitution that the right protects keeping and bearing arms for self-defense and that the right is not absolute, but rather is subject to regulation.<sup>234</sup> Yet both of those characteristics were grafted on the Second Amendment in *Heller*.<sup>235</sup>

*State v. Duke* was the only historical ruling on the salience of a self-defense exception cited by the *Heller* majority.<sup>236</sup> However, another favorably cited case, *State v. Reid*,<sup>237</sup> also reflects an eighteenth-century court suggesting that the boundaries of the right to keep and bear arms may be informed by notions of self-defense necessity.<sup>238</sup> The defendant in *Reid*, a local sheriff,<sup>239</sup> was convicted of carrying a concealed weapon in violation of Alabama's concealed carry ban and challenged his conviction under Alabama's right to keep and bear arms.<sup>240</sup>

233. *Duke*, 42 Tex. at 459 (emphasis added).

234. See TEX. CONST. of 1869, art. I, § 13.

235. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (“[T]he inherent right of self-defense has been central to the Second Amendment right.”); *id.* at 595 (“Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”) (citation omitted) (emphasis in original).

236. *Id.* at 581. Indeed, as 1800s regulations go, the Texas law was unique in the way it expressly related public carry to self-defense need. At least one other state followed Texas’s example: In 1882, West Virginia passed a law banning the public carriage of “any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character.” 1882 W. Va. Acts ch. 135, § 7. Violating the provision was a misdemeanor. *Id.* The law set up an affirmative defense if a defendant tried for violating the provision “shall prove to the satisfaction of the jury that . . . he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self defense and for no other purpose.” *Id.* In *State v. Workman*, 14 S.E. 9 (W. Va. 1891), the Supreme Court of Appeals of West Virginia upheld a conviction under the law where a man received a threat of violence and then began carrying a pistol without ever reporting his concerns to the public authorities. *Id.* at 12. As the authoring judge explained, “where nothing further appears in evidence for the defense than a mere threat of violence which has been communicated to the prisoner, I doubt whether it ought in any case to be considered sufficient to compel an acquittal under the statute, especially where sufficient length of time has elapsed to have enabled the prisoner to seek the protection of the law.” *Id.* The Court also addressed the constitutionality of the law under the Second Amendment, but did so applying a collective-right view, finding pistols not covered by the Amendment, *id.* at 11, and therefore rendering the opinion less helpful than *Duke* for illuminating the post-*Heller* constitutionality of such a provision. Most public carry regulations in the 1800s, meanwhile, took a more categorical approach such as banning concealed carry altogether and permitting open carry under almost all circumstances. See Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 623–37, 641–56 (2012) (providing an overview of restrictions and case law on public carry). As a result, most courts did not have the opportunity to rule on the type of regulation involved in *Duke*. *Id.*

237. *Heller*, 554 U.S. at 629 (citing *State v. Reid*, 1 Ala. 612, 616–17 (Ala. 1840)).

238. But see O’Shea, *supra* note 236, at 626–27 (describing ambiguity in the breadth of the right to bear arms and the corresponding scope of regulatory authority under *Reid*).

239. *Reid*, 1 Ala. at 621.

240. *Id.* at 614–15.

The Supreme Court of Alabama upheld the conviction, noting that the law permitted the open carrying of arms.<sup>241</sup> In doing so, the court emphasized that “[t]he right guaranteed to the citizen, is not to bear arms upon all occasions and in all places, but merely ‘in defence of himself and the State.’”<sup>242</sup> It went on to interpret the right to bear arms in light of that aim, noting that “if in any case, it should appear to be indispensable to the right of defence that arms should be carried concealed about the person, the act ‘to suppress the evil practice of carrying weapons secretly,’ should [not] be so construed, as to operate a prohibition in such case.”<sup>243</sup> In *Reid*, however, “no such necessity seems to have existed.”<sup>244</sup> Indeed, because the defendant was a sheriff, he “needed no arms for his protection, his official authority furnished him an ample shield.”<sup>245</sup>

If the Second Amendment demands a necessity-derived exception to public carry offenses, then licensing the carrying of handguns on the express basis of necessity—as good-cause regimes do—is not per se unconstitutional, contrary to the outcomes in *Wrenn* and *Young*.<sup>246</sup> Both cases implied that requiring a showing of necessity before a person can exercise the right to carry a weapon is facially unconstitutional.<sup>247</sup> As those courts would have it, a person has a right to carry a handgun no matter their need for self-defense. But to the extent modern good-cause statutes already bake necessity into the statutory scheme, that should insulate them, not undermine them, in the constitutional analysis.<sup>248</sup>

Of course, today’s good-cause laws, unlike both self-defense and the 1800s public carry restrictions, are licensing schemes. The 1830s Massachusetts and 1870s Texas laws did not license public carry, but rather set up a post-hoc decision rule for judges or juries to consider following a violation of the public carry restrictions.<sup>249</sup> In that regard, they paralleled the implementation of the right to self-defense. As a policy matter, administering weapons laws ex ante through a licensing scheme, rather than ex post at trial, has various advantages for the weapon bearer. Chief among them is the security of knowing that a decision to carry will not be second-guessed later by a judge or jury. However,

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241. *Id.* at 621.

242. *Id.* at 616. *Heller* made a similar point, that the Second Amendment does not “protect the right of citizens to carry arms for *any sort* of confrontation.” *Heller*, 554 U.S. at 595.

243. *Reid*, 1 Ala. at 621–22.

244. *Id.* at 622.

245. *Id.* at 621.

246. *See supra* notes 109–118 and accompanying text (discussing *Wrenn* and *Young*).

247. *Id.*

248. My argument here is directed at the facial validity of good-cause laws, not whether they are implemented fairly in a given jurisdiction. In other words, I take issue with the conclusion that it is per se unconstitutional to require a showing of heightened need before a person can lawfully carry a handgun. I do not address in this Article the constitutional problems that arise if a facially valid good-cause regime were implemented so strictly as to resemble a de facto ban, which is an allegation made in some public carry litigation. *See, e.g.*, *Young v. Hawaii*, 896 F.3d 1044, 1071 n.21 (“Hawaii counties appear to have issued only *four* concealed carry licenses in the past *eighteen years*.”) (emphasis in original).

249. Law of April 12, 1871, ch. 34, §§ 1–2, 1871 Tex. Gen. Laws 25.

licensing has a major drawback when viewed through the lens of self-defense law, regardless of whether the permitting scheme requires a showing of good cause<sup>250</sup>: it is impracticable during times of true emergency.

A tight migration of self-defense law to the Second Amendment context would call for a right to carry a handgun without a license in those emergency scenarios, similar to the public carry exception in the 1871 Texas law. Besides that example, a more recent analogue is the application of the criminal law justification of necessity.

*State v. Crawford* shows how necessity doctrine can apply in the public carry context.<sup>251</sup> Before 1972, Maryland had a Texas-style law that allowed concealed carry of handguns only as “a reasonable precaution against apprehended danger,” to be adjudged after a violation of the otherwise applicable ban.<sup>252</sup> In 1972, the General Assembly revised the public carry scheme to require a permit for public carry of handguns (whether open or concealed), the issuance of which generally depended on a showing of good cause.<sup>253</sup> The issue in *Crawford* was whether a person could still carry a handgun without a license during “the unexpected and sudden circumstance when an individual is threatened with present, impending danger to his life or limb and as a consequence has no time to seek other protection.”<sup>254</sup> The court answered in the affirmative, holding that the justification of necessity applied to the situation.<sup>255</sup>

If the Second Amendment requires a post hoc rule that incorporates the notion of necessity, the outcome in *Crawford* would be constitutionally required by the Second Amendment. Some jurisdictions do not allow the defense of necessity in the circumstances that arose in *Crawford*.<sup>256</sup> In those places, the Second Amendment would require such a defense.<sup>257</sup>

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250. For a description of different licensing regimes and data about their relative prevalence, see Ali Rowhani-Rahbar et al., *Loaded Handgun Carrying Among US Adults, 2015*, 107 AM. J. PUB. HEALTH 1930 (2017).

251. *State v. Crawford*, 521 A.2d 1193 (Md. 1987).

252. *Id.* at 693 & n.2. The law differed from the Texas statute in that it allowed open carry of handguns so long as the carrier did not have “the intent or purpose of injuring any person in any unlawful manner.” *Id.*

253. *Id.* at 693–95. That scheme, which exists to this day, has been upheld in the face of a Second Amendment challenge. See *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

254. *Crawford*, 521 A.2d at 1199.

255. *Id.*

256. See LAFAVE, *supra* note 157, § 10.1(a), 157 (noting “defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values”).

257. For another possible analogue, consider the jury instruction at murder trials in various jurisdictions that a “person who has been threatened with death or serious bodily harm and has reasonable grounds to believe that such threats will be carried into execution, has the right to arm himself in order to combat such an emergency.” *Bevley v. Commonwealth*, 36 S.E.2d 331, 333 (Va. 1946); see also *State v. Summers*, 188 S.E. 873, 875 (W. Va. 1936) (holding that an appropriate instruction was that “one who has been threatened with murderous assaults and who has reason to believe that such assaults will be made, may arm himself for defense and in such case no inference of malice can be drawn from the fact of preparation for it”); Oklahoma Jury Instruction, DE WITT C. BLASHFIELD, 2

The approach just outlined will, of course, invite objections. One is that if necessity was not required for possession of an *unloaded* handgun in the home in *Heller*,<sup>258</sup> it likewise should be immaterial for the carrying of an unloaded handgun in public. This argument only has force to the extent that home possession and public carry are afforded identical protection. However, many courts have assumed that the Second Amendment right is weaker in public than in the home because of language in *Heller*.<sup>259</sup> The traditional law of self-defense supports that view through the castle doctrine, which recognizes a broader zone of autonomy within the home than in public.<sup>260</sup> Moreover, there are strong pragmatic grounds to protect home possession of an unloaded gun that need not extend to public possession. As discussed below in the context of firearm acquisition,<sup>261</sup> any constitutionally protected gun use presumes the acquisition of an unloaded gun and ammunition, both of which would logically be stored in the home.

Another likely objection is that implementing the Second Amendment with self-defense-delineated doctrine would mean that people have no constitutional right to carry a loaded, operable gun in case they encounter random acts of violence, when they would be lawfully allowed to use the gun for self-defense. According to this view, regardless of the fact that most people who carry guns never face such situations, the Second Amendment must protect the ability to be constantly armed with a gun in case one arises. This objection boils down to the position adopted by *Wrenn* and *Young*: the Second Amendment presumptively

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BLASHFIELD'S INSTRUCTIONS TO JURIES: CIVIL AND CRIMINAL CASES § 3892, at 2704 (defendant "might lawfully arm himself for the purpose of self-defense in anticipation of . . . threats being carried into execution." provided that the executed threats "would endanger his life or subject him to great bodily harm" and the defendant "feared or had reason to fear that such threats were liable to be carried into execution"). The instruction is refused, however, when a person preemptively arms without perceiving any specific threat. *See, e.g.,* *Wilson v. Commonwealth*, 487 S.E.2d 857, 862 (Va. Ct. App. 1997). These charges seem to have been given mostly in jurisdictions applying an inference of malice in murder trials when a deadly weapon is used. Such inferences have fallen out of favor, *see* Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 436 (2008) (discussing trend away from deadly weapon inferences), but these charges are still relevant in demonstrating the use of necessity as a doctrinal limitation on anticipatory arming.

258. *See supra* notes 51–58 and accompanying text (discussing *Heller*'s handgun holding).

259. *See, e.g.,* *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012) ("The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home. *Heller* reinforces this view."); *supra* note 98 and accompanying text (discussing cases espousing this view).

260. *See* Miller, *Guns as Smut*, *supra* note 13 at 1304–10 (using castle doctrine to support a homebound right). This distinction should not be overstated. The castle doctrine only obviates the duty to retreat; it does not affect the overarching rule of necessity, which is in effect within and without the home alike. Miller notes that the inside-outside distinction has constitutional salience across different areas of constitutional doctrine. *Id.* (describing how the First Amendment, Fourth Amendment, Fifth Amendment, and others reflect that "[t]he home occupies a special place in the pantheon of constitutional rights") (quoting *United States v. Craighead*, 539 F.3d 1073, 1077 (9th Cir. 2008)).

261. *See infra* notes 262–275 and accompanying text.

protects a right to keep and bear handguns wherever lawful self-defense *might* occur.<sup>262</sup>

The proposed framework would not constitutionally protect perpetual gun-carrying, and thus would not protect gun-carrying in advance of such unanticipated attacks. As noted, this outcome is consistent with *Heller*'s ruling on the D.C. firearm storage law and some historical precedent.<sup>263</sup> Moreover, the alternative would be wildly overinclusive, protecting gun carrying during times when the need for self-defense with a gun is remote or nonexistent,<sup>264</sup> which in turn could present a threat to public safety.<sup>265</sup> Courts could reasonably reject such an expansive, overly protective doctrinal approach.<sup>266</sup>

Indeed, another consideration weighing in favor of self-defense-styled rules is that the alternative—constitutionally protecting constant gun carrying—places at risk the law of self-defense itself. If the Second Amendment protects a broad right to carry handguns virtually everywhere and at all times, and most Americans choose to exercise that right, conflicts would regularly present a threat of lethal violence, and lethal force would regularly be perceived as a reasonably proportional and necessary response.<sup>267</sup> In such a world, necessity and proportionality mean less, no longer moderating between lethal and

262. See *supra* notes 109–118 and accompanying text.

263. See *supra* notes 196–245 and accompanying text.

264. Cf. PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 21 (2014) (“[T]here is one defensive gun use per year against an intruder for every 3,500 homes that keep guns.”).

265. The presence of a firearm during a conflict intensifies the conflict. See Philip J. Cook & Harold A. Pollack, *Reducing Access to Guns by Violent Offenders*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 2, 4 (2017) (noting increased risk of death when a firearm, as opposed to another weapon, is present during confrontation). Various studies also indicate that states with more restrictive licensing schemes for the public carrying of firearms experience significantly lower rates of gun-related homicides and other violent crimes. See, e.g., Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. URBAN HEALTH 383 (2018); John J. Donohue III et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Penal Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198 (2019); John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis*, 16 J. EMP. L. STUDIES 198, 199 (1999); Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923–29 (2017).

266. Cf. FALLON, *supra* note 9, at 6–7 (discussing how courts make “practical, instrumental, and tactical judgments about the appropriate role of the judicial branch” when developing constitutional rules and standards).

267. This downstream consequence on the law of self-defense of an unduly broad understanding of the Second Amendment is not farfetched. The rise and fall of the doctrine of chance medley, a precursor to provocation, has been attributed to the presence of weapons. See Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 312 (1963). In the sixteenth century, the “custom of wearing side-arms” meant that sudden affrays often turned deadly. Such killings lacked the premeditation characteristic of murder, but had more culpability than would warrant exculpation. *Id.* at 310–13. Chance medley filled the void, providing a middle ground. *Id.* It fell into disuse, however, when “the custom of wearing sidearms became disestablished.” *Id.*

nonlethal defensive force.<sup>268</sup> Elected officials in some jurisdictions may choose to dilute longstanding self-defense limitations in this way by embracing unrestricted gun carrying,<sup>269</sup> but it is difficult to see how the Second Amendment requires that outcome, especially if the legal tradition of self-defense is at its core.

*Heller* made clear that the Second Amendment does not “protect the right of citizens to carry arms for *any sort* of confrontation.”<sup>270</sup> Adapting self-defense law for Second Amendment doctrine is a principled way to approximate the confrontations contemplated by the post-*Heller* Second Amendment.

## 2. *Acquiring Specific Types of Firearms*

The previous section suggests that Second Amendment doctrine can usefully draw on the law of self-defense with respect to carrying a weapon for an imminent confrontation, but what about protected Second Amendment conduct further in advance of a confrontation, such as the acquisition of an arm? Before taking up an operable handgun for self-defense in the home or in public, one must first acquire an unloaded handgun and ammunition to load it. It would be untenable to require a person to wait for a cognizable necessity to arise before acquiring a gun.<sup>271</sup> And, indeed, *Heller* suggests a distinction between how the Second Amendment treats acquiring a handgun that would be locked in the home and unlocking and loading the handgun when necessary for immediate self-defense.<sup>272</sup> The distinction is logical.

The question arises, then, whether self-defense law can offer any doctrinal guidance for protected conduct that must far precede the use of defensive force. The earlier in time relative to a potential conflict, the harder it is to clearly define necessity and proportionality by reference to how those limitations operate for the purposes of self-defense. Likewise, a post hoc legal process, such as an affirmative defense, ceases to be a workable way of implementing the right. This challenge would come up in connection with various regulations, perhaps most prominently bans on the acquisition of assault weapons and large capacity magazines (“LCMs”).

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268. See *supra* Part II.A (discussing these requirements).

269. See *infra* notes 167–175 (discussing adoption of stand-your-ground laws); see also Larry Copeland & Doug Richards, *Ga. Governor Signs “Guns Everywhere” into Law*, USA TODAY (Apr. 23, 2014), <https://www.usatoday.com/story/news/nation/2014/04/23/georgia-gun-law/8046315> [<https://perma.cc/VP37-BTNZ>].

270. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

271. Cf. Michael Steven Green, *Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 158 (2002) (making a similar point if the right to keep and bear arms is understood as an instrumental right to enable popular revolt).

272. See *supra* notes 51–61 and accompanying text (discussing *Heller*’s rulings with respect to a firearm storage law and handgun ban).

Assault weapons and LCMs are frequently the weapons of choice for mass shooters, and thus are an obvious regulatory target.<sup>273</sup> At the same time, however, they have become popular among many gun owners.<sup>274</sup> Prohibiting these weapons generates high-profile Second Amendment litigation. Most courts have upheld such bans, though for very different reasons and over vehement dissents.<sup>275</sup> The Second Circuit, for example, upheld bans in New York and Connecticut under intermediate scrutiny.<sup>276</sup> The Fourth Circuit, in contrast, relied on *Heller*'s statement that the Second Amendment does not protect "dangerous and unusual" weapons.<sup>277</sup> Dissenting judges in that case opined that no matter their dangerousness, assault weapons receive Second Amendment protection because of their popularity.<sup>278</sup>

The rules and requirements of self-defense law do not fit as closely in this context as they do in the context of storage laws or public carry restrictions.<sup>279</sup> Among other things, a post hoc decision rule is impracticable. Moreover, self-defense law is generally indifferent as between different ways to apply lethal force. The self-defense requirements of necessity and proportionality speak to the circumstances under which lethal force can be applied, not which lethal weapon can be used. If force is so excessive that it recklessly causes collateral injury or death, it can give rise to liability for battery or involuntary manslaughter,<sup>280</sup> but that liability does not turn on the self-defense requirements of necessity and proportionality, the focus of this Article.<sup>281</sup>

And yet even in this context, one can imagine a role for the concepts of necessity and proportionality that would render the constitutional analysis more consistent with the core purpose of self-defense. Assault weapons with LCMs,

273. See Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (May 31, 2019), <https://www.motherjones.com/politics/2012/07/mass-shootings-map> [<https://perma.cc/EQ8G-BCKJ>] (showing that over 10 percent of the firearms used in mass shootings (as defined by the study) from 1982 to 2012 were assault weapons, and over 25 percent used a high capacity magazine).

274. See Jon Schuppe, *America's Rifle: Why so Many People Love the AR-15*, NBC NEWS, (Dec. 27, 2017), <https://www.nbcnews.com/news/us-news/america-s-rifle-why-so-many-people-love-ar-15-n831171> [<https://perma.cc/2Y43-329N>] ("In 2004, 107,000 [AR-15s] were made. In 2015, the number was 1.2 million, according to the National Shooting Sports Foundation (NSSF). . . .").

275. One such dissent was written by then-Judge Brett Kavanaugh. See *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Thomas also is on record questioning the lower court consensus. See *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting).

276. See *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015).

277. See *Kolbe v. Hogan*, 849 F.3d 114, 135–38 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017).

278. *Id.* at 151–60 (Traxler, J., dissenting); see also *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring in the judgment) ("the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes").

279. The fact that the framework cannot apply across the board is not fatal to that framework. I anticipate that the Second Amendment right will spawn a nuanced patchwork of doctrine for different contexts, as has happened for other rights.

280. See LAFAVE, *supra* note 157, at § 10.4(g).

281. I do not consider in this Article whether the law of battery or involuntary manslaughter might also inform the Second Amendment analysis of particularly dangerous weapons.



for example, “tend to result in more numerous wounds, more serious wounds, and more victims” than other guns,<sup>282</sup> calling into question whether their use is “proportionate” to any reasonably anticipated harm. Proportionality, in this sense, might add clarity to *Heller*’s exclusion of “dangerous and unusual” weapons,<sup>283</sup> defining the phrase to include weapons out of proportion to common threats.<sup>284</sup>

Yet any line drawing based on which firearms are necessary or proportionate would surely be contested for all but the most destructive firearms. Indeed, a common critique of bans on assault weapons is that those weapons are not materially different from other rifles.<sup>285</sup> Deciding on relative lethality as between different firearms and then determining when a firearm becomes disproportionate to likely threats is a difficult endeavor.

The burden would be lessened to the extent that Second Amendment doctrine also adopted an alternatives analysis. Self-defense law takes stock of alternatives, especially less lethal ones. As Paul Robinson has colorfully noted, “a person with a tenth degree karate black belt who shoots a knife-wielding attacker when he could instead safely and easily disarm the attacker with an expert kick” cannot assert that the shooting was justified, because it was unnecessary.<sup>286</sup> If that notion is adapted for the Second Amendment, a court might inquire whether an assault weapon is necessary for self-defense in light of less lethal alternatives.

However, *Heller* refused to consider alternatives to handguns in the context of home possession.<sup>287</sup> To be sure, the only alternatives raised by the government were other lethal weapons—long guns. But the opinion could be read to reject a role for any alternatives, including less lethal ones, given the handgun’s popularity:<sup>288</sup> “It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.”<sup>289</sup>

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282. N.Y. State Rifle & Pistol Ass’n v. Cuomo, 804 F.3d 242, 262 (2d Cir. 2015).

283. Courts have struggled to make sense of this carve-out. *See, e.g.*, Kolbe, 849 F.3d at 135–36 (noting a range of questions about determining what counts as “dangerous and unusual”).

284. One could argue that military-style weapons are proportionate to *some* threats, like terrorist attacks. But that train of thought is limitless, whereas *Heller* made clear that the Second Amendment right, like all rights, is limited. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (endorsing historical exclusion of “dangerous and unusual” weapons). Proportionality would operate in reference to common threats rather than rare hypothetical situations demanding the rapid firing of thirty bullets.

285. *See, e.g.*, James B. Jacobs, *Why Ban “Assault Weapons”?*, 37 CARDOZO L. REV. 681, 707 (2015) (“So-called ‘assault weapons’ are not machineguns or automatic-fire weapons, but are semiautomatics functionally identical to scores of firearms that are not classified as assault weapons.”).

286. *See* Robinson, *supra* note 23, at 253.

287. *Heller*, 554 U.S. at 629 (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

288. *Id.* The functional differences between handguns and long guns were also addressed in various amicus briefs in *Heller*. *See* Blocher & Miller, *What is Gun Control?*, *supra* note 106, at 292 n.79.

289. *Heller*, 554 U.S. at 629.

*Heller's* handgun holding, and the notion of weapon popularity on which it rests, is problematic for many reasons.<sup>290</sup> This Article raises another unexplored ground for critique: to the extent it places handguns atop the Second Amendment hierarchy of arms, *Heller* is in tension with the logical implications of placing lawful self-defense at the Second Amendment's core. Scholarship has explored the ways that *Heller's* historical analysis is incoherent.<sup>291</sup> Tensions between *Heller* and self-defense principles present fertile ground for subsequent exploration and critique.

#### CONCLUSION

*Heller's* essential holding was to place lawful self-defense at the core of the Second Amendment. This Article contends that this core is unstable. Despite ten years of post-*Heller* litigation, the role that self-defense plays in Second Amendment doctrine remains unresolved. Considering the Second Amendment through the lens of self-defense law's requirements and procedures offers a novel perspective that might bring stability. Judges have stated that the Amendment protects the carrying of handguns regardless of necessity<sup>292</sup> and does not calibrate protection as between different weapons on the basis of their dangerousness.<sup>293</sup> If self-defense law and principles are guides for Second Amendment doctrine,<sup>294</sup> those conclusions are dubious.

Beyond doctrinal implications, focusing on our legal tradition of self-defense suggests broader conclusions for Second Amendment theory. The law of self-defense reflects a commitment to shepherding conflicts away from violence, especially lethal violence. The Supreme Court's allusion to necessity

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290. See *supra* note 56.

291. Judge Richard Posner called it "faux originalism," a historical "snow job[]" and "freewheeling discretion strongly flavored with ideology." Richard Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [<https://perma.cc/6RQD-UARG>]. Judge Harvie Wilkinson III called it a "new" form of judicial activism based in "originalism." J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 274 (2009). Reva Siegel chronicled the "temporal oddities" in *Heller*—the way the Court used authority from various time periods to support its conclusions about the original understanding of the text of the Second Amendment. Siegel, *supra* note 26, 195–201. Saul Cornell has relentlessly exposed anachronism in the opinion. See, e.g., Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695 (2012).

292. See *supra* notes 107–118 and accompanying text.

293. See *supra* note 278 and accompanying text.

294. The discussion here is by no means exhaustive. Both self-defense and the right to keep and bear arms are complex rights with extensive commentary. I do not consider, for example, the intricacies of the first component of Paul Robinson's definition of self-defense, that a threat giving rise to lawful defensive force must be unjustified. See 2 ROBINSON, *supra* note 139, at § 132. I also leave to future projects self-defense doctrine relating to reasonableness, mistake, defense of others, defense of property, or any number of other relevant factors for defensive force. See generally LAFAVE, *supra* note 157, at § 10.4.

when ruling on the D.C. firearm storage law in *Heller*,<sup>295</sup> as ambiguous as it was, can be read as heeding this overarching self-defense orientation. By contrast, broad claims of virtually unfettered gun rights stray from that commitment.

This conclusion challenges the modern Second Amendment orthodoxy and part of *Heller* itself, which both assume that one type of highly lethal weapon, the handgun, receives maximal constitutional protection.<sup>296</sup> Bringing the Second Amendment in line with its self-defense core may call for a “fundamental reordering” of that understanding.<sup>297</sup> “Arms” encompasses more than firearms,<sup>298</sup> and respecting the self-defense value in preserving all life should mean reducing the protection afforded to firearms relative to that afforded to less lethal weapons. More generally, if we take *Heller* at its word that self-defense is at the core of the Second Amendment, then the right to keep and bear arms cannot be as broadly protective of gun rights as many assume.

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295. See *supra* notes 46–49 and accompanying text (discussing *Heller*’s holding regarding the D.C. firearm storage law).

296. See *supra* notes 51–57 and accompanying text.

297. See Tebbe and Tsai, *Constitutional Borrowing*, *supra* note 120 at 464, 481 (suggesting that “good faith” borrowing can lead to such a “fundamental reordering”).

298. The Supreme Court went to great lengths to make clear that “arm” does not mean “firearm,” but “weapon.” Framing-era dictionaries, the Court explained, defined arms as “[w]eapons of offence, or armour of defence.” *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (quoting Samuel Johnson, 1 *Dictionary of the English Language* 106 (4th ed. 1978)); see also *id.* (defining arm as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another”) (quoting Timothy Cunningham, 1 *A New and Complete Law Dictionary* (1771)). “Thus,” the Court concluded, “the most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’” *Id.* at 582; see also *id.* at 592 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”). Sources relied on by the majority invoked “arms” to refer to bows and arrows, *id.* at 581 (citing Cunningham, *supra*), and knives, *id.* at 590 (citing P. BROCK, *PACIFISM IN THE UNITED STATES* 359 (1968)).

