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Law of the Gun: Unrepresentative Cases and Distorted Doctrine

Eric Ruben[*]

ABSTRACT: There is a familiar saying, "If all you have is a hammer, everything looks like a nail." The so-called Law of the Hammer takes a distinctive form in adjudication. If all judges see is one repeating fact pattern for a given area of law, they might perceive it as archetypical and build the law around it. If that fact pattern does not accurately reflect the field, however, the result can be analytical distortion in terms of both the choice of doctrine and its implementation.

This Article uses Second Amendment jurisprudence to illustrate this phenomenon. It reveals how District of Columbia v. Heller *constitutionalized a policy area far broader than most appreciate, one that involves not only guns but various other weapons. The Article then shows how litigation fails to reflect that breadth. Guns are just one category of "arms" that most Americans choose not to own or carry for self-defense, but guns alone saturate Second Amendment case law. Non-gun arms are out of view when judges establish and apply Second Amendment doctrine. The Article contends that this gun-centricity, by obscuring the ways Americans exercise post-*Heller *Second Amendment rights, has led judges to exaggerate burdens, misread history, and espouse short-sighted doctrine to implement the right to keep and bear arms. More generally, the Second Amendment case study in this Article exposes litigation circumstances that create a heightened risk of such distortion as well as possible solutions.*

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I. INTRODUCTION

The Second Amendment protects the right to keep and bear knives, tasers, clubs, and many other instruments as well as, of course, guns.[1] But what do judges see when deciding the typical Second Amendment case? On one side is a gun owner challenging a gun law. That gun owner is joined by gun rights groups holding themselves out as guardians of the Second Amendment. On the other is the government defending the gun law. The government is joined by groups seeking to prevent gun violence. The parties stake out opposed positions, but they have something in common: a single-minded focus on guns. And if judges look beyond the litigation to the public discourse, they see gun commentary and gun scholarship. The inputs are gun-centric, and this Article shows how the outputs can be, too. The Second Amendment risks becoming the Law of the Gun, when it should be the Law of Arms.[2]

1. The Second Amendment protects a right to keep and bear "arms," not firearms. 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."); *see also infra* Section III.A (discussing meaning of "arms").

2. The title of this Article is a play on the Law of the Hammer or the Law of the Instrument, which has been attributed to philosopher Abraham Kaplan: "I call it *the law of the instrument*, and it may be formulated as follows: Give a small boy a hammer, and he will find that everything he encounters needs pounding." ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 28 (1st ed. 1964). This concept may have literal application for guns —someone with a gun can see threats necessitating gun use where none exist. *See, e.g.*, Josh Solomon, *Six Years After Movie Theater Shooting, Trial Set for Curtis Reeves*, TAMPA BAY TIMES (Feb. 5, 2020), https://www.tampabay.com/news/crime/2020/02/05/trial-date-is-set-in-infamous-movie-theater-shooting [https://perma.cc/GM3N-LC3T] (describing fatal shooting over a dispute

The fact that single cases, and even collections of cases, are frequently unrepresentative of a given legal area has been acknowledged in legal scholarship.[3] Some literature suggests that the unrepresentativeness of particular cases might *always* distort the creation or application of judicial doctrine.[4] However, unrepresentative litigation need not correlate with problematic distortion. For example, Ruth Bader Ginsburg famously represented men to transform gender discrimination law, despite the fact that women were most often targets of such discrimination.[5] But few would argue that the unrepresentativeness of those cases skewed doctrine in a way that somehow failed to account for discrimination against women.

In this Article, I explore when, how, and why unrepresentative cases distort doctrine through a case study of emerging Second Amendment jurisprudence.[6] I expose how Second Amendment litigation does not reflect the full scope of arms that receive constitutional protection. I then trace the doctrinal consequences of that unrepresentativeness, showing how it leads to flawed arguments to strike down gun laws.

In *District of Columbia v. Heller*, the Supreme Court upended generations of jurisprudence when it declared that the "core" interest served by the Second Amendment is private self-defense, not militia service.[7] Commentary has rightfully focused on the accuracy of that transformational holding.[8]

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about cell phone use in a movie theater). As I describe here and in Part II, the phenomenon I explore focuses on the context of judicial analysis.

3. I discuss this scholarship in Part II. Of the rich literature, I rely primarily on TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS (2018); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016); Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377 (2014); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006); and Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

4. *See, e.g.*, Schauer, *supra* note 3, at 894–95 ("[W]hen decisionmakers are in the thrall of a highly salient event, that event will so dominate their thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events.").

5. *See* JANE SHERRON DE HART, RUTH BADER GINSBURG: A LIFE 256–63 (2020) (discussing Ginsburg's advocacy in *Califano v. Goldberg*); FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 65–66 (2009) (describing Ginsburg's representation of Stephen Wiesenfeld).

6. Lisa L. Miller, *The Use of Case Studies in Law and Social Science Research*, 14 ANN. REV. L. & SOC. SCI. 381, 386 (2018) (discussing how case studies in legal scholarship can provide a basis "to generate, refine, question, or challenge extant theoretical frames").

7. District of Columbia v. Heller, 554 U.S. 570, 599, 630 (2008); *see infra* Section III.A.

8. One notable line of scholarship critiques the majority opinion's historical analysis. *See, e.g.*, Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 26, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/T6SW-JLJU] (characterizing *Heller* as "faux originalism," a historical "snow job[]" and "freewheeling discretion strongly flavored with ideology"); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 274 (2009) (calling *Heller* a "new" form of judicial activism based in "originalism"); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 195–201 (2008) (showing through historical analysis how the self-defense understanding of the

Overlooked, however, is another implication of the opinion: by shifting the focus from collective defense to self-defense, the Court greatly expanded the range of constitutionally protected "arms." Indeed, *Heller* used words like "weapon," "thing," and "instrument" in explaining the meaning of "arm."[9] The few courts and commentators to consider the issue agree that covered weapons after *Heller* extend beyond guns.[10] In one opinion, for example, Justice Samuel Alito concluded that stun guns are protected by the Second Amendment given that they "are widely owned and accepted as a legitimate means of self-defense across the country."[11] Countless instruments could satisfy that metric. This Article is the first to categorize the range of weapons that arguably receive constitutional protection under *Heller*.[12]

Yet, Second Amendment litigation is consumed by guns.[13] This is true of high-profile cases as well as more mundane ones. Most scholarship and public commentary on the right to keep and bear arms likewise neglect to consider non-gun weapons.[14] I probe possible reasons for the imbalance, such as the usefulness of guns for fighting a tyrannical government,[15] the role of the gun

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Second Amendment in *Heller* grew out of twentieth-century law and order politics); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1695–97 (2012) (exposing anachronism in *Heller*).

9. *See Heller*, 554 U.S. at 581–82, 584, 592; *infra* Section III.A.

10. *See infra* notes 104–48 and accompanying text (describing this case law and commentary).

11. Caetano v. Massachusetts, 577 U.S. 411, 420 (2016) (Alito, J., concurring).

12. *See infra* Section III.A. Firearms, and handguns in particular, have been the overwhelming focus of legal scholarship on weapons for decades. *See* James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141, 141 (1989) ("Socio-legal scholarship on weapons has been dominated by research and analysis devoted to firearms, especially handguns."). A handful of articles have addressed Second Amendment coverage for non-gun weapons. *See generally* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020) (exploring how self-defense law operates to steer conflicts away from lethal force such as defensive gun usage, and how that self-defense characteristic can inform the implementation of the Second Amendment); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009) (discussing electrical weapons and chemical sprays in relation to the Second Amendment); Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279 (2016) (considering the potential Second Amendment significance of advancing non-lethal weapons technology); David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167 (2013) (discussing the Second Amendment protection of knives).

13. *See generally* 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, at app. C xxiv–xxv (2018) (showing that in post-*Heller* litigation through January 2016 gun cases outnumbered nonlethal weapon cases roughly 50:1).

14. *See supra* note 12 and accompanying text.

15. According to one strand of thought, "the Second Amendment protects a citizen's right to keep and bear arms to use should the militia be needed to fight against invaders, terrorists, and tyrants." *Miller v. Bonta*, No. 19-cv-1537-BEN, 2021 WL 2284132, at *44 (S.D. Cal. June 4, 2021).

rights movement,[16] the intensity with which gun owners value gun rights,[17] and whether there is a regulatory imbalance in which guns are more regulated than other weapons (and are thus better targets for litigation).[18] I contend, however, that none of these factors negate the relevance of non-gun weapons when it comes to implementing the post-*Heller* Second Amendment.

A more relevant factor after *Heller* is how Americans actually own and use arms for self-defense, which *Heller* pronounced to be the "core" interest protected by the Second Amendment.[19] According to *Heller*, handguns are the "most popular weapon" for self-defense.[20] If accurate, that popularity might justify gun-centricity in Second Amendment litigation and doctrine.

But as this Article shows, existing data is in tension with *Heller*'s assumption about handguns.[21] Only a small proportion of self-defense actions involve guns, only a small proportion of arms are guns, and only a tiny proportion of guns are ever used for lawful self-defense. By some measures, fewer than a quarter of eligible Americans own a gun, a much smaller percentage than those who choose not to have a gun but possess knives, clubs, stun guns, chemical sprays, or other instruments that can serve as self-defense

16. The efforts of the gun rights movement to mold public sentiment in the runup to *Heller* is well documented. *See, e.g.*, MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH 61–75 (2019) (describing how the gun lobby has associated the Second Amendment with the individual right to use guns for self-defense); DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 97–148, 99 (2016) (chronicling "the longstanding campaign of the National Rifle Association to establish and defend an individual right to bear arms"); MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 87–137 (2014) (exploring how the NRA's entrance into the political scene recharacterized the public understanding of the Second Amendment); *infra* notes 83–93 and accompanying text (specifically discussing the strategies the NRA employed in the 1970s to shape the current public view that the Second Amendment protects an individual's right to own a gun for self-defense). In addition, gun rights groups make no secret about their use of Second Amendment litigation to expand and protect gun rights. *See infra* notes 165–68 and accompanying text (describing work and mission of the National Rifle Association Civil Rights Defense Fund and other gun rights groups).

17. *See generally* DAN BAUM, GUN GUYS: A ROAD TRIP (2013) (describing the complex and diverse ways guns inform many gun owners' identities).

18. The degree to which this is true is debatable. *See* Jacobs, *supra* note 12, at 145 (observing similarities and differences between the regulation of chemical sprays and firearms, including jurisdictions in which chemical sprays are more strictly regulated); Volokh, *supra* note 12, at 209–16 (same for chemical sprays and electrical weapons).

19. As a practical matter, litigants in post-*Heller* cases overwhelmingly assert an interest in armed self-defense against criminals, not arms for hunting, target shooting, opposing tyranny, or some other end. *See* Ruben, *supra* note 12, at 64 n.2 ("[P]ost-*Heller* case law has focused on the Second Amendment interest in self-defense, which is almost always the interest asserted by litigants.").

20. District of Columbia v. Heller, 554 U.S. 570, 629 (2008); *infra* notes 171–73 and accompanying text (discussing similar references about handgun popularity in *Heller*).

21. *See infra* Section III.B (discussing this data).

weapons.[22] The disparity is especially pronounced when isolating weapons preferences by sex or political ideology.[23] More women and liberals, for example, have reported a preference for carrying less lethal weapons than guns for self-protection.[24] Modern-day empirics underscore the unrepresentativeness of today's gun-centric litigation.

That unrepresentativeness would not be problematic if the judicial analysis in gun cases were not distorted in problematic ways. As I show, however, unrepresentative litigation has led to at least two analytical problems that are relied upon by judges to declare gun laws unconstitutional.[25] First, courts have exaggerated burdens imposed by gun laws.[26] Judges, for example, have written that gun laws "eviscerate" or "destroy" the right to keep and bear arms regardless of how the law treats other weapons.[27] On the basis of such exaggerations, judges have concluded that gun restrictions are per se violations of the Second Amendment. A holistic assessment of personal weaponry puts into stark relief the vast options available for self-defense and puts into perspective the relative place of gun regulation against that backdrop. It complicates facile claims used to pronounce gun laws unconstitutional, such as concluding that a gun restriction "criminaliz[es] exercise of the [Second Amendment] right entirely."[28]

Relatedly, beyond challenging exaggerated claims of Second Amendment burdens, the breadth of arms reinforces arguments for judges to expressly consider weapon alternatives when deciding at least some Second Amendment cases.[29] The Article shows how doing so would provide solutions in confused areas of doctrine, such as explaining how ex-felons can be disqualified from the right to have a gun while maintaining the right to keep and bear arms.[30]

Second, in addition to flawed assessments of Second Amendment burdens, gun-centricity obscures problems that will arise if judges adopt a purely historical test for deciding Second Amendment cases that is favored by

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22. *See infra* notes 186, 192–99 and accompanying text (discussing survey data about modern weapons preferences).

23. *See infra* notes 200–06 and accompanying text.

24. *See infra* notes 201, 206 and accompanying text.

25. *See infra* Section III.C.

26. *See infra* Section III.C.1.

27. *See, e.g.*, Peruta v. Cnty. of San Diego, 824 F.3d 919, 946 (9th Cir. 2016) (Callahan, J., dissenting) (declaring that a licensing regime for carrying handguns "eviscerates the Second Amendment right of individuals to keep and bear arms"); Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1175 (9th Cir. 2014), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016) (declaring that a licensing regime for carrying handguns "affect[s] a destruction of the right to *bear arms*"); *infra* notes 244–48 and accompanying text (providing other examples).

28. Binderup v. Att'y Gen., 836 F.3d 336, 358 (3d Cir. 2016) (Hardiman, J., concurring).

29. *See infra* notes 251–66 and accompanying text (discussing arguments for an adequate alternatives test in Second Amendment cases).

30. *See infra* notes 255–64 and accompanying text.

many gun rights advocates. That test, known as "text, history, and tradition" or "THT"[31] may also appeal to several current Supreme Court Justices if it is a workable doctrinal option.[32] But using THT to adjudicate non-gun cases presents a host of unappreciated difficulties. For example, there is no regulatory history for voltage limits on stun guns or concentration limits on chemical sprays. Indeed, not only is there no direct historical evidence to draw on for such weapons, but analogizing to the treatment of incomparable arms like guns incorporates arbitrary discretion, not objective certitude, into the judicial analysis.[33]

Meanwhile, courts relying on historical precedent have overlooked a significant way challenged historical regulations are disanalogous to the gun policies challenged today.[34] In particular, the focus of right-to-bear arms cases in the nineteenth-century was generally laws targeting a host of personal weapons in one fell swoop, whereas the focus in modern cases is on gun-specific regulations.[35] The modern-day, gun-centric judicial analysis has glossed over that distinction and some judges, in turn, have relied on flawed arguments based in historical analogy to strike down gun laws.

The Second Amendment case study in this Article illustrates circumstances in which unrepresentative litigation risks leading to analytical warping.[36] When, as in the Second Amendment context, a nascent area of law is accompanied by heavy interest group activity, the judicial environment is ripe for distortion. Judges are less likely to be presented with an accurate view of the range of policies and questions implicated by their decisions, and thus

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31. *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 893–907 (2013) (discussing the text, history, and tradition approach).

32. The "text, history, and tradition" approach is often traced to a dissenting opinion by then-Judge Brett Kavanaugh. *See* Heller v. District of Columbia, 670 F.3d 1244, 1276 (D.C. Cir. 2011) [hereinafter *Heller II*] (Kavanaugh, J., dissenting). It may also be embraced by other Justices who self-identify as originalists, including Amy Coney Barrett, Neil Gorsuch, and Clarence Thomas.

33. Then-Judge Kavanaugh suggested that when historical sources do not speak directly to a modern question, one must reason by analogy, identifying "principles" that are relevantly similar in the two time periods. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) ("The constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers.").

34. *See infra* Section III.C.2.

35. *See, e.g.*, JOHN P. DUVAL, ESQ., COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 423 (1839) (1835 law) ("[I]t shall not be lawful for any person in this Territory to carry arms of any kind whatsoever secretly, on or about their persons . . . ."); 1839 Ala. Laws 67, An Act to Suppress the Evil Practice of Carrying Weapons Secretly, § 1 ("That if any person shall carry concealed about his person, any species of fire arms, or any bowie knife, Arkansaw tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending, shall [be punished as prescribed]."); *infra* notes 299–313 and accompanying text (providing other examples and discussing shift to gun-only laws).

36. *See infra* Part III.

may not consider those policies and questions in crafting and implementing doctrine. Unlike Ginsburg's strategy of litigating on behalf of male plaintiffs, whilst judges remained aware of discrimination against women,[37] non-gun weapons are effectively obscured in Second Amendment litigation.

I consider solutions to guard against the distortionary potential of unrepresentative litigation, and I argue that two are most promising, albeit in limited ways.[38] First, advocates can highlight a broader perspective in briefs. In Second Amendment gun litigation, for example, government attorneys and supporting amici can do more to convey the scope of arms relevant to the judicial analysis. Second, and relatedly, judges who become cognizant that the field is both broader and less clear than they assume should espouse minimalism and flexibility when establishing precedent. Both solutions, though modest, cut against ascendant litigation trends, including an increased appetite for widely applicable, rule-based doctrine at the Supreme Court.

This Article does not, and cannot, resolve all questions about how gun-centricity affects Second Amendment law, let alone about the intersection between unrepresentative litigation and doctrinal distortion more generally. To be sure, there are innumerable such questions. As this Article shows, despite rich scholarship on the connection between litigation and doctrinal development, we still know little about why distortion happens in some contexts and not others, how the distortion manifests, and what can be done to prevent it.

That makes the task of considering these issues all the more urgent. In the Second Amendment context, courts are resolving consequential, life-or-death issues.[39] The Supreme Court is considering the next big Second Amendment case, *New York State Rifle & Pistol Association v. Bruen*.[40] The time

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37. *See* DE HART, *supra* note 5, at 258–59 (describing express recognition at oral argument in *Califano v. Goldfarb* that "[m]any of the laws that appeared to discriminate against men . . . also discriminated against women").

38. *See infra* Part IV.

39. Well over 100,000 people are shot every year and nearly 40,000 die from their injuries. *See WISQARS — Web-Based Injury Statistics Query and Reporting System*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 1, 2020), https://www.cdc.gov/injury/wisqars/index.html [https://perma.cc/JM8M-TTBG]; *see also* Philip J. Cook & Harold A. Pollack, *Reducing Access to Guns by Violent Offenders*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 2, 4 (2017) (noting increased risk of death when a firearm, as opposed to another weapon, is present during confrontation). Beyond deaths and injuries, weapons use can adversely affect public safety in other ways. *See generally* Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 NW. L. REV. 139 (2021) (describing how guns can be used to intimidate others in ways that threaten constitutional democracy); Eric Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 L. & CONTEMP. PROBS. 149 (2017) (exploring how guns can adversely affect others beyond deaths and injuries).

40. N.Y. State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643, at *1 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment"). The

is now, before ill-considered doctrinal trajectories are set, to take stock of the broader picture.

This Article proceeds as follows. Part II situates the Article within the literature on litigation and doctrinal development, showing why a case study can be especially illuminating. Part III presents the Article's case study. Section III.A describes the breadth of Second Amendment "arms" and establishes the gun-centricity of litigation. Section III.B contends that gun-centric litigation is an unrepresentative paradigm for considering how Americans exercise Second Amendment rights. Section III.C argues that this unrepresentative litigation paradigm contributes to analytical distortions that accrue to the benefit of broader gun rights: the exaggeration of burdens and the misuse of history. Part IV provides broader takeaways and potential solutions. Section IV.A considers challenges to highlighting the scope of a constitutional field in litigation but contends that amici are well placed to do so. Section IV.B argues that judges should exercise judicial modesty and flexibility in circumstances prone to unrepresentative litigation and accompanying distortion.

II. UNREPRESENTATIVE CASES AND ANALYTICAL DISTORTION

Judges establish doctrinal rules and standards for a broader range of disputes than the case at hand. Whether we consider the "actual malice" rule from *New York Times v. Sullivan*;[41] the one person, one vote test from *Reynolds v. Sims*;[42] a test turning on judicial appraisals of eighteenth-century understandings;[43] or any other judicially crafted doctrine, the effect is the same: to guide decisionmaking in future, similar cases. This basic aspect of adjudication is well established, whether we call it judicial lawmaking,

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case name changed to "Bruen" when Kevin Bruen replaced Keith Corlett as the superintendent of New York State Police.

41. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

42. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (holding that state legislative districts need to have roughly equal populations and setting out one person, one vote standard).

43. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45–46 (1997) (acknowledging descriptive truth regarding a patchwork of interpretive standards, but defending public meaning originalism as a sole interpretive method that presents fewer "difficulties and uncertainties" than alternatives). *But see generally* J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012) (critiquing "cosmic" theories that arose in the second half of the twentieth century and calling for a return to judicial modesty and restraint). This Article accepts the descriptive reality that judges exercise human agency to choose doctrine they think best in a given context. *See* Jamal Greene, Essay, *The Age of Scalia*, 130 HARV. L. REV. 144, 166–67 (2016) (noting that each constitutional right "bears its own bespoke doctrinal formula.").

doctrinal development, or something else.[44] Judges then implement that doctrine in individual cases. But the cases judges use to assess the law's meaning, devise workable doctrine, and execute it are often unrepresentative of the range of disputes on a given issue.[45] They can be unrepresentative in various ways—in terms of their procedural posture, remedial posture, factual posture, and so on.

A basic aspect of the American adjudicatory process, encapsulated by the federal "case" or "controversy" limitation on judicial power,[46] is that judges generally do not issue advisory opinions proclaiming "what the law would be upon a hypothetical state of facts."[47] There are good reasons, including those rooted in "separation of powers, democratic theory, [and] the role of the courts," to limit the judicial power to live disputes.[48] The Supreme Court has opined that this limitation "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."[49]

But again, judges establish doctrinal precedent in such individual cases that applies in others. A risk is that the doctrine established, and the analysis conducted, in any given case does not accurately reflect or cannot resolve the true range of extant policy issues and questions. And though courts can reconsider past doctrine in light of changed understandings,[50] "[o]nce core doctrinal rules and principles have been established . . . they are not easily subject to critical reassessment."[51] Scholarship reveals an incredibly complex

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44. *See* Leong, *Making Rights*, *supra* note 3, at 410 ("It is relatively uncontroversial to say that adjudication involves building doctrine through judicial pronouncements rather than merely deciding disputes according to preexisting principles."); Levinson, *supra* note 3, at 873 ("Constitutional rights do not, in fact, emerge fully formed from abstract interpretation of constitutional text, structure, and history, or from philosophizing about constitutional values.").

45. Of course, there are exceptions. There would not need to be much litigation to reflect the field regarding the twenty-dollar threshold for the Seventh Amendment jury right, for example. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). But when a constitutional provision is vague and underdetermined, like the meaning of "arms," a single case likely will not represent the whole.

46. U.S. CONST. art. III, § 2; *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001) ("Many state courts draw heavily from federal justiciability principles . . . .").

47. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).

48. Schauer, *supra* note 3, at 893.

49. Baker v. Carr, 369 U.S. 186, 204 (1962). The Court in *Baker* was speaking of "constitutional" questions, *id.*, but the limitation applies to all federal legal disputes.

50. *See* Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006) (describing how constitutional free speech and antidiscrimination principles have been influenced by changed understandings of the paradigmatic regulatory scenes those principles address).

51. *See* David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 106 (2020); *see also* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) ("[C]ourts' early resolutions of

picture of a judicial process that can produce distorted doctrine in different ways and for different reasons.

Frederick Schauer, for example, has argued that case-by-case adjudication, combined with cognitive biases afflicting all humans, leads to doctrinal warping.[52] For example, he traces the rule that public officials must prove "actual malice" to make out a successful defamation claim to the highly distinctive circumstances of *New York Times Co. v. Sullivan*,[53] the first time the Supreme Court ever considered such a claim. *Sullivan* was no ordinary defamation suit: "[T]he plaintiff was a powerful public official [in Alabama] using civil litigation as a way of wielding official power."[54] The lower court verdicts awarded damages to Sullivan for an inaccurate advertisement published in the New York Times, which Schauer argues "embodied little other than the jury's (and Alabama's) desire to punish what were perceived to be so-called Northern Agitators."[55] Schauer contends that "the extraordinarily press-protective and plaintiff-restrictive 'actual malice' rule, a rule endorsed by no country in the world," can be traced to how the Justices evaluated such "idiosyncratic features" of the case.[56] In particular, what cognitive psychologists call the "availability heuristic"[57] means that individual cases can "so dominate [judges'] thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events."[58]

While Schauer focuses on cognitive biases, other scholars focus on different ways that litigation can influence the interpretation and implementation of rights. Daryl Levinson persuasively demonstrates how remedies often inform the understanding of rights, as opposed to rights dictating the available remedies.[59] Though he provides many examples, one that seems especially clear is the Supreme Court's reapportionment

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legal issues can become locked-in and resistant to change."); *infra* notes 331–33 and accompanying text (discussing stare decisis).

52. *See* Schauer, *supra* note 3, at 895. No matter the breadth of the aggregate cases, "there is a substantial risk that the common law rulemaker will be unduly influenced by the particular case before her . . . believ[ing] that this case is representative of the larger array." *Id.* at 894.

53. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

54. Schauer, *supra* note 3, at 901.

55. *Id.*

56. *Id.* at 902; *see also id.* at 902 n.79 ("[T]he particular facts of the case produced a rule almost certainly different from what the same justices of the same Court would otherwise have done were they asked simply to make a public figure libel rule, and different from what every other open liberal democracy in the world has subsequently decided to do.").

57. *Id.* at 894–95.

58. *Id.* at 895.

59. *See* Levinson, *supra* note 3.

jurisprudence.[60] As he explains, "[i]t has never been obvious that a principled interpretation of equal protection or other constitutional values necessitates the bright line rule of 'one person, one vote' announced in *Reynolds v. Sims*."[61] Ultimately, Levinson contends, one person, one vote may have been selected as a guiding principle because of "concerns about administrability and legitimacy unrelated to the 'pure' constitutional value of political equality."[62]

Nancy Leong builds on Levinson's analysis, showing how facts and procedures also contribute to the context in which judges create and implement doctrine.[63] In particular, she contends that "Fourth Amendment doctrine is warped because most types of Fourth Amendment claims are litigated *either* in criminal prosecutions *or* in civil actions for money damages."[64] The two contexts offer different remedies (exclusion of evidence vs. money damages);[65] fact patterns (generally, charged/convicted defendants vs. uncharged plaintiffs);[66] and "procedural mechanisms" (appellate courts in criminal cases review lower court fact rulings for clear error and usually in the light most favorable to the government).[67] The upshot, Leong argues, is that the Fourth Amendment is interpreted more narrowly in criminal exclusion cases than in civil damages cases.[68]

Scholarship on popular movements, meanwhile, highlights how paradigm cases can be the result of deliberate, motivated litigation behavior. Litigators know that picking the right plaintiffs and making the right arguments can advance a movement's goals. Interest groups execute long-term, sophisticated, and well-funded strategies that can involve legal losses as well as victories.[69] As Jack Balkin has written, legally enforceable rights are "a

60. *Id.* at 882 (noting the reapportionment history is "a story about remedial concerns determining the existence and shape of a constitutional right").

61. *Id.* at 883.

62. *Id.* at 884 (observing that the remedy "could not be simpler for courts to administer or for states to follow" and, "[r]egardless of whether one person, one vote is the best interpretation of voting equality, it may have been perceived by the Court as the only feasible way of intervening to correct the blatant countermajoritarianism of excessive malapportionment without being caught in the illegitimacy of the 'political thicket'"). Of course, as Levinson notes, it is impossible to prove causation between remedy and right, and other scholars defend the one person, one vote standard on the basis of moral or political theory. *Id.* at 883 n.108, 884.

63. *See* Leong, *Making Rights*, *supra* note 3; Leong, *Improving Rights*, *supra* note 3.

64. Leong, *Improving Rights*, *supra* note 3, at 388.

65. *Id.* at 388–89.

66. *Id.* at 390–91.

67. *Id.* at 391–92.

68. *Id.* at 388.

69. WEINRIB, *supra* note 3, at 12 (noting that the American Civil Liberties Union sometimes "raised claims they expected to lose").

source of power,"[70] and ideology and politics play a role in what cases get litigated and what arguments get raised.[71]

One famous example is the one raised in the introduction: Ruth Bader Ginsburg's advocacy as director of the Women's Rights Project. Ginsburg's selection of *male* plaintiffs in order to trigger enhanced judicial scrutiny of gender-based discrimination in cases like *Califano v. Goldfarb* is well documented.[72] Of course, women, not men, are most frequently the target of gender discrimination. Another example of such motivated litigation is the early development of free speech doctrine. Laura Weinrib's and Timothy Zick's recent accounts are illustrative.[73] Weinrib shows, for example, how free speech cases at the Supreme Court between the World Wars were litigated almost exclusively by one advocacy organization, the American Civil Liberties Union ("ACLU"),[74] which used "free speech as a neutral precept" in an attempt to bolster labor rights.[75] Zick explores how "[s]trategic decisions by constitutional movements and rights activists" led, in part, to the over-expansion of speech rights to the detriment of non-speech rights encompassed in the First Amendment—the Free Press, Assembly, Petition, and Free Exercise clauses.[76]

To be sure, I am not assigning any nefarious meaning to impact litigation nor to social movements, which serve a crucial role in shaping "the social

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70. Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 57 (2004) (noting that constitutional rights "are a powerful form of rhetorical appeal, and . . . the enforcement of rights recognized by the state is backed up [by] the power of the state").

71. *See id.* (noting that vindicating rights, therefore, can further a group's "ideals, interests, and agendas: For the discourse of rights is the discourse of power, the restructuring of rights is the restructuring of power, and the securing of rights is the securing of power").

72. *See generally* STREBEIGH, *supra* note 5, at 65–66 ("Ginsburg hoped to show that discrimination against either sex ultimately hurt both."); DE HART, *supra* note 5, at 256–63 (discussing Ginsburg's advocacy in *Califano v. Goldfarb*); Califano v. Goldfarb, 430 U.S. 199, 204 (1977) (addressing the constitutionality of a "gender-based distinction . . . burdening a widower but not a widow").

73. WEINRIB, *supra* note 3; ZICK, *supra* note 3.

74. *See* WEINRIB, *supra* note 3, at 9. Weinrib observes that the ACLU "was involved in virtually every important free speech case in the federal courts between its founding in 1920 and the Second World War." *Id.*

75. *Id.* at 2, 5. Weinrib describes how the ACLU's initial goal of buttressing labor rights nonetheless failed. *Id.* at 9.

76. *See* ZICK, *supra* note 3, at 122–23. For example, "starting in the 1980s, in both their general advocacy and litigation of specific cases, religious liberty advocates started to abandon the Free Exercise Clause in favor of the Free Speech Clause." *Id.* at 33. In a similar way, litigants chose to rely on the Free Speech Clause even when their cases might "fit more comfortably within the history and language of the Assembly Clause." *Id.* at 82. "In order to make space for the exercise of religious rights in public places, courts have sometimes bent and stretched free speech doctrines and concepts in ways that are likely to complicate their application in other contexts." *Id.* at 125; *see also* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) (examining dynamics that subordinated the Assembly Clause to the Free Speech Clause).

meaning of constitutional principles and the practices they regulate."[77] Nor am I suggesting that unrepresentative litigation necessarily leads to meaningful or problematic distortions. Indeed, to the contrary, I argue in Part IV that there are ways to mitigate such distortion. Rather, my more modest point is that unrepresentativeness exists in litigation and can distort the judicial analysis. Moreover, just as no two cases are alike, the causes of distortion can vary between legal areas, as can their manifestations, consequences, and solutions.

In light of the seemingly infinite ways litigation can be unrepresentative and distort doctrine, case studies can be helpful for elucidating when, why, and how analytical distortions arise and are problematic during the adjudicatory process.[78] The Second Amendment makes a good case study for at least two reasons. First, the Second Amendment is still in its doctrinal infancy. The most important Second Amendment case, *District of Columbia v. Heller*, "is younger than the first iPhone."[79] As a result, there has yet to accrue the amount of Supreme Court precedent that has solidified doctrinal trajectories for other constitutional rights.[80] It is thus easier to perceive the relationship between litigation asymmetries and the judicial analysis because the judicial analysis is not yet dictated by binding precedent. Second, and relatedly, the Supreme Court seems poised to establish a doctrinal trajectory for the right to keep and bear arms, recently granting a petition for certiorari in *Bruen* after a decade with little appetite for adjudicating Second Amendment disputes.[81] As a result, the time is ripe to take stock of the representativeness of Second Amendment litigation before the next big case.

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77. Balkin & Siegel, *supra* note 50, at 929.

78. *See* Miller, *supra* note 6, at 386 (discussing how legal case studies can "generate, refine, question, or challenge extant theoretical frames"); *cf.* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT, at xxix (1979) ("I am not convinced that current knowledge of criminal court processes is well developed, and unless or until there is a substantial body of carefully drawn descriptive and inductive research on which typologies can be drawn and until classifications are made, the benefits of an analysis of a single setting may be as great as, if not greater than, those of comparative studies.").

79. Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

80. For example, Timothy Zick has observed that "the basic principles" set forth in the early free speech cases "would later become modern Free Speech Clause doctrine." ZICK, *supra* note 3, at 122; *see also id.* ("[I]t is only a slight exaggeration to say that one could teach nearly *all* of these fundamental principles simply by studying the Hughes Court decisions.").

81. After the Supreme Court turned down ten certiorari petitions in Second Amendment cases at the end of the end of the 2019 term, sources reported that Chief Justice John Roberts signaled to conservative justices that he might not join them in overturning gun control regulations. Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN (July 27, 2020), https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html [https://perma.cc/DET4-46UR]. The nomination of Amy Coney Barrett to replace Ruth Bader Ginsburg has shifted the Court's alignment on the Second Amendment, which will likely lead to more gun cases on the docket. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html [https://perma.cc/7XVH-65PH]

The next Part focuses on one aspect of modern Second Amendment litigation: its gun-centricity. My focus on that variable should not be read to suggest that other aspects of modern Second Amendment litigation do not also influence the shape of emergent doctrine. If the survey of scholarship in this Part teaches anything, it is that many inputs—indeed, even more than those discussed here[82]—are at play in adjudication. But isolating gun-centricity permits a much deeper look at how a single variable can be unrepresentative and lead to analytical distortions. That, in turn, both furthers our understanding of the Second Amendment and provides a datapoint for evaluating the more generalized accounts of unrepresentativeness discussed in the last few pages.

III. THE GUN-CENTRIC SECOND AMENDMENT

Guns are one category of post-*Heller* arms out of many. Yet, guns are overwhelmingly the subject of Second Amendment litigation and commentary. This Part exposes the breadth of arms, considers whether doctrine should nonetheless be biased in favor of guns, and contends that gun-centricity is distorting the Second Amendment analysis in meaningful ways.

A. OBSCURED SCOPE OF ARMS

In many ways, the gun-centric view of the Second Amendment was seeded decades before the Supreme Court decided *Heller*. Scholars have described the efforts by gun rights advocates to bring about the now-dominant view that the Second Amendment protects an individual right to keep and bear arms for private self-defense.[83] Beginning in the 1970s, the National Rifle Association ("NRA"), for example, funded essay contests, book reviews, and even endowed a professorship.[84] Nineteen of the twenty-seven articles written in the 1970s and 1980s espousing the view that the Second Amendment protects an individual right to bear arms "were written by lawyers who had been directly employed by or represented the NRA or other gun rights

("Judge Amy Coney Barrett, President Trump's pick for the Supreme Court, has compiled an almost uniformly conservative voting record in cases touching on . . . gun rights . . . .").

82. *See, e.g.*, ZICK, *supra* note 3, at 111 ("[I]nternal Court agenda-setting may have influenced the move toward the Free Speech Clause."); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658–67 (2005) (noting that a range of factors influence the construction of judicial decision rules, including institutional competence, costs of error, frequency of unconstitutional action, legislative pathologies, and enforcement costs).

83. *See, e.g.*, FRANKS, *supra* note 16, at 61–75; COLE, *supra* note 16, at 97–148; WALDMAN, *supra* note 16, at 87–137.

84. *See* FRANKS, *supra* note 16, at 64.

organizations."[85] Ultimately, that view broke into mainstream politics, especially within the Republican Party,[86] whose platform now provides:

> We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment. Lawful gun ownership enables Americans to exercise their God-given right of self-defense for the safety of their homes, their loved ones, and their communities.[87]

According to some commentators, "the NRA is almost singlehandedly responsible for" bringing about the "now-dominant view" that the Second Amendment protects a personal right to arms for self-defense.[88] In 2008, after the individual-rights understanding of the Second Amendment was established in scholarship and accepted by the public, it was endorsed by the Supreme Court in *Heller*.

I am simplifying this story, which has received full treatment elsewhere,[89] in order to get to the oft-neglected fact that is most relevant to this Article: only one "arm," the firearm, was at issue in the run-up to *Heller*.[90] The NRA has focused on firearms since its inception as a hunting and sharp-shooting organization after the Civil War.[91] The Republican Party Platform addresses "[l]awful gun ownership."[92] The leading book on *Heller* is titled *Gunfight*.[93] And *Heller*, of course, ruled on the constitutionality of a gun restriction.

Yet the Second Amendment does not mention "firearms," but rather speaks of "arms."[94] And though *Heller* was a gun case, the Court's interpretation of the Second Amendment extended constitutional protection far beyond guns. *Heller* rejected the understanding—reflected in *United States v. Miller*

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85. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 8 (2000).

86. *See* Siegel, *supra* note 8, at 215–26.

87. REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2016, at 12 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5Dben_1468872234.pdf [https://perma.cc/DPE7-2NN6]; *see also* Siegel, *supra* note 8, at 212–15 (showing how the shift on guns within the Republic Party was motivated by a coalition of gun rights advocates).

88. FRANKS, *supra* note 16, at 61.

89. *See Id.*, at 54–103; COLE, *supra* note 16, at 95–139; WALDMAN, *supra* note 16, at 141–60.

90. Mary Anne Franks's critical analysis is a notable exception to the overall neglect of the gun-centricity in commentary about the Second Amendment. Franks links the gun-centricity in *Heller* to "constitutional fundamentalism" and "the unequal allocation of constitutional benefits and burdens on women and minorities." FRANKS, *supra* note 16, at 48.

91. *See* WALDMAN, *supra* note 16, at 87–102 (describing origins and evolution of the NRA); *see also generally* ERIC RUBEN, BRENNAN CTR. FOR JUST., THE GUN RIGHTS MOVEMENT AND "ARMS" UNDER THE SECOND AMENDMENT (June 29, 2021), https://www.brennancenter.org/sites/default/files/2021-06/Ruben_final.pdf [https://perma.cc/4X8Q-ZJWF] (discussing the focus of the NRA and other gun rights groups on expanding gun rights, not weapons rights more broadly).

92. *See supra* note 87 and accompanying text.

93. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

94. U.S. CONST. amend. II.

(1939)—that the militia clause limits the scope of the Second Amendment.[95] Rather, the Court held that the Second Amendment protects at its core an individual right centered around private self-defense.[96] Consistent with that interpretation, the Court defined "arms" as any "[w]eapons of offence" or "thing that a man wears for his defence, or takes into his hands," that is "carri[ed] . . . for the purpose of 'offensive or defensive action.'"[97] The Court was unambiguous about the breadth of the term. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[98] Put another way, the Second Amendment "guarantee[s] the individual right to possess and carry *weapons* in case of confrontation."[99]

To be sure, *Heller* did not say *all* "thing[s]," "instruments," and "weapons" receive protection. The Court qualified that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"[100] but the Court articulated few exceptions to its broad definition. The Court "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,"[101] which has led to a baseline inquiry of whether an arm is "in common use" for lawful purposes.[102] The Supreme Court also said that "dangerous and unusual" weapons are not protected, but failed to explain what falls into that category other than "M-16 rifles and the like."[103]

What instruments are protected by the self-defense-centered Second Amendment after *Heller*? The list is likely long. Indeed, *Heller* itself references both knives and bows and arrows.[104] In one of the few non-gun-focused articles on the Second Amendment, David Kopel, Clayton Cramer, and Joseph Olson argue that the knife is "the most common 'arm' in the United States": "[A]lmost every home has several kitchen knives lying in drawers or in a block

95. United States v. Miller, 307 U.S. 174, 178 (1939) (upholding a restriction on sawed-off shotguns because they did not have a "reasonable relationship to the preservation or efficiency of a well regulated militia").

96. District of Columbia v. Heller, 554 U.S. 570, 599, 630 (2008).

97. *Id.* at 581, 584 (alteration in original) (citing SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed. 1773) and TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)).

98. *Id.* at 582.

99. *Id.* at 592 (emphasis added).

100. *Id.* at 626.

101. *Id.* at 625.

102. *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

103. *Id.*

104. *Id.* at 581–82 (citing CUNNINGHAM, *supra* note 97, and JOHN TRUSLER, THE DISTINCTION BETWEEN WORDS, ESTEEMED SYNONYMOUS, IN THE ENGLISH LANGUAGE, AND, THE PROPER CHOICE OF THEM DETERMINED 37 (3d ed. 1794)); *id.* at 590 (citing PETER BROCK, PACIFISM IN THE UNITED STATES 359 (1968)) (noting "Quaker frontiersmen were forbidden to use arms to defend their families," but must have been tempted on occasion "to seize a hunting rifle *or knife* in self-defense" (emphasis added)).

on the kitchen counter."[105] "In a practical sense," they conclude, "the most frequent way that Americans exercise their Second Amendment rights is by owning and carrying knives."[106] They suggest that the fact that knives can be used at the dinner table, or primarily are used in that way, should not undermine their Second Amendment status. Indeed, the same could be said for guns valued for hunting and target shooting but rarely used for self-defense.

Lest there be doubt about the protected status of knives, courts have agreed that they are Second Amendment arms, even if some balk at *Heller*'s implication that virtually all common knives count,[107] or disagree on whether some are "dangerous and unusual."[108] The leading post-*Heller* case involving knives is *State v. DeCiccio*,[109] in which the Connecticut Supreme Court held that "dirk knives"—which the Court described as "nearly synonymous with the dagger"[110]—are arms for the purposes of the Second Amendment.[111] Consistent with *DeCiccio*, courts after *Heller* overwhelmingly assume or conclude that knives fall within the Second Amendment's scope.[112]

And knives barely scratch the surface. For example, electrical weapons like stun guns almost surely receive protection. In fact, the Supreme Court effectively said as much in *Caetano v. Massachusetts*.[113] Jaime Caetano was suspected of shoplifting and searched by the police, revealing a stun gun.[114] The officers were satisfied Caetano had not stolen anything but arrested her on a separate charge for violating Massachusetts's ban on possession of electrical weapons.[115] At issue was whether a stun gun, a thoroughly modern,

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105. Kopel et al., *supra* note 12, at 168, 195–96.

106. *Id.* at 215.

107. *See, e.g.*, City of Seattle v. Evans, 366 P.3d 906, 910–14 (Wash. 2015) (concluding that dirk knives are constitutionally protected but that a paring knife is not).

108. *Compare* Lacy v. State, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009) (switchblade knives are not protected under Second Amendment), *with* State v. Delgado, 692 P.2d 610, 614 (Or. 1984) (switchblade knives protected under Oregon's constitutional right to keep and bear arms).

109. *See generally* State v. DeCiccio, 105 A.3d 165 (Conn. 2014) (determining if "dirk knives" found in defendant's car are protected by the Second Amendment).

110. *Id.* at 193. The Court acknowledged that the "dirk knife" defies a single, precise definition. *Id.*

111. *Id.* at 197.

112. *See, e.g.*, Muhannad v. Peterson, No. 8:16-CV-349, 2017 WL 5956892, at *4 (D. Neb. Mar. 13, 2017), *aff'd per curiam*, 718 Fed. App'x 452, 453 (8th Cir. 2018) ("The Court assumes, without deciding, that knives intended for self-protection might fall within the scope of Second Amendment protection."); *Evans*, 366 P.3d at 914–15 (opining that dirk knives are constitutionally protected, while concluding that a paring knife is not); Commonwealth v. Fox, No. 17-P-1540, 2018 WL 5660598, at *2 (Mass. Ap. Ct. Nov. 1, 2018) ("Assuming without deciding that knives such as that carried by the defendant are 'arms' within the meaning of the Second Amendment . . . .").

113. Caetano v. Massachusetts, 577 U.S. 411, 412 (2016).

114. *Id.* at 414 (Alito, J., concurring).

115. *Id.* (citing MASS. GEN. LAWS ch. 140, § 131J (2018)). Violating the ban on possessing electrical weapons was punishable by up to two-and-one-half years imprisonment. *Id.* at 421 n.1.

non-gun weapon,[116] counted as an "arm." If the Second Amendment right extended only to firearms, the outcome would be simple—Caetano's challenge would fail despite the fact that stun guns are marketed for self-defense and possessed by hundreds of thousands of Americans.[117] The Massachusetts Supreme Judicial Court ruled that stun guns are "not the type of weapon that is eligible for Second Amendment protection."[118] If Caetano wanted to exercise her right to keep and bear arms, she should "appl[y] for a license to carry a firearm."[119]

But *every* U.S. Supreme Court Justice disagreed with the Massachusetts court's analysis.[120] They explained that "*Heller* rejected the proposition 'that only those weapons useful in warfare are protected,'"[121] and clarified that covered weapons include "those that were not in existence at the time of the founding."[122]

The Supreme Court in *Caetano* stopped just short of holding that banning stun guns violates the Second Amendment,[123] but various other courts have reached that conclusion. In Massachusetts, after the dismissal of the charges in *Caetano*,[124] another challenge to the stun gun ban arose. In *Ramirez v. Commonwealth*, the police stopped a vehicle with a broken taillight and found a stun gun in the defendant's pant pocket.[125] The defendant was charged for the same crime at issue in *Caetano*.[126] This time, the Massachusetts Supreme Judicial Court, "[h]aving received guidance from the [U.S.] Supreme Court

116. The first patent for stun gun was filed in 1972. *See* Commonwealth v. Caetano, 26 N.E.3d 688, 693 (Mass. 2015), *judgment vacated by Caetano*, 577 U.S. (discussing Weapon for Immobilization and Capture, U.S. Patent No. 3,803,463, which was filed on July 10, 1972).

117. *See Caetano*, 577 U.S. at 420 (Alito, J., concurring) (discussing statistics).

118. *Caetano*, 26 N.E.3d at 693.

119. *Id.* at 695.

120. *Caetano*, 577 U.S. at 412. It should go without saying: This was a striking consensus for a Second Amendment case. The other two modern Second Amendment cases, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which incorporated the Second Amendment through the Fourteenth Amendment to apply against state and local governments, were decided by a bare majority of the Justices.

121. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008)).

122. *Id.* at 411 (quoting *Heller*, 554 U.S. at 582).

123. *See, e.g.*, Ramirez v. Commonwealth, 94 N.E.3d 809, 814–15 (Mass. 2018) ("The Supreme Court did not opine as to whether electrical weapons are protected under the Second Amendment or, if they are protected, whether [the Massachusetts ban] is nonetheless constitutional."); Avitabile v. Beach, 277 F. Supp. 3d 326, 335 (N.D.N.Y. 2017) ("[T]he *Caetano* majority did not actually make any affirmative pronouncements about the continuing permissibility of the Massachusetts stun gun ban."). *But see* GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 212 F. Supp. 3d 1348, 1359 n.6 (N.D. Ga. 2016) ("Most recently, in *Caetano v. Massachusetts*, the Supreme Court concluded that a state law banning possession of a stun gun violated the Second Amendment." (citation omitted)).

124. The case "was 'resolved . . . to [the parties'] mutual satisfaction.'" *Ramirez*, 94 N.E.3d at 811 (alteration in original).

125. *Id.*

126. *Id.*

in *Caetano*[,] . . . conclude[d] that stun guns are 'arms' within the protection of the Second Amendment."[127] That same conclusion was reached by a federal court in New York and the Illinois Supreme Court.[128] Currently, only Hawaii and Rhode Island have electrical weapon bans that have not been struck down,[129] though both are subject to ongoing litigation.[130]

Knives and electrical weapons hardly exhaust the scope of non-gun "arms." There is no case law, for example, regarding the Second Amendment status of chemical devices like pepper spray,[131] but they almost surely count under *Heller*'s definition. Chemical sprays have been marketed to the public for self-defense for a half-century and are popular because they are both easy to use and generally non-lethal to a user's family, bystanders, and aggressors.[132]

The simplest and oldest weapon, meanwhile, is the impact weapon.[133] Courts have held that impact weapons like police batons and even nunchaku are covered by the Second Amendment.[134]

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127. *Id.* at 815.

128. Avitabile v. Beach, 368 F. Supp. 3d 404, 411 (N.D.N.Y. 2019) (finding that electrical weapons easily passed the "common use" inquiry because there were "at least 300,000 tasers and 4,478,330 stun guns owned by private citizens across the United States"); People v. Webb, 131 N.E.3d 93, 96 (Ill. 2019) ("Stun guns and tasers may be taken into one's hands and used both for defense or 'to cast at or strike another.' Clearly, stun guns and tasers are bearable arms within the meaning of the second amendment.").

129. New Jersey voluntarily terminated its ban on stun guns, albeit after being sued on Second Amendment grounds. *See* N.J. Second Amend. Soc'y v. Porrino, No. 16-4906 (D.N.J. Apr. 25, 2017) (consent order staying any and all further proceedings in the matter for a period of 180 days).

130. *See* HAW. REV. STAT. ANN. § 134-16 (West 2019); 11 R.I. GEN. LAWS ANN. § 11-47-42 (West 2012); O'Neil v. Neronha, No. 1:19-cv-00612 (BL) (D.R.I. Nov. 22, 2019); Roberts v. Ballard, No. 1:18-cv-00125, (BL) (D. Haw. Apr. 2, 2018).

131. In one recent case, a petitioner challenged a conviction for possessing "a Tear Smoke CN grenade" manufactured by Smith & Wesson in violation on Texas's restriction on "intentionally and knowingly possessing a chemical dispensing device." Stauder v. Stephens, No. 2:13-CV-11, 2016 WL 922192, at *1 (N.D. Tex. Feb. 19, 2016), *report and recommendation adopted*, Stauder v. Stephens, No. 2:13-CV-11, 2016 WL 1029540 (N.D. Tex. 2016). The court concluded that the chemical "grenade" at issue was *not* a Second Amendment "arm," basing the conclusion on, among other things, the unusualness of the weapon for personal self-defense. *Id.* at *9. Texas's restriction on "chemical dispensing device[s]" exempts "small chemical dispenser[s]." *Id.* at *3.

132. *See* Jacobs, *supra* note 12, at 143.

133. M. Mirazón Lahr et al., *Inter-Group Violence Among Early Holocene Hunter-Gatherers of West Turkana, Kenya*, 529 NATURE 394, 394–98 (2016) (describing the use of clubs and bludgeons in the late Pleistocene and early Holocene eras).

134. State v. DeCiccio, 105 A.3d 165, 197–98 (Conn. 2014) (overturning prohibition on transportation of police batons); Maloney v. Singas, 351 F. Supp. 3d 222, 239–40 (E.D.N.Y. 2018) (overturning prohibition on nunchaku). These decisions on the constitutional protection afforded to impact weapons comport with decisions interpreting state constitutional analogues to the Second Amendment. *See, e.g.*, State v. Kessler, 614 P.2d 94, 100 (Or. 1980) (overturning conviction for possession of two billy clubs in the defendant's apartment pursuant to a restriction on "possession of a slugging weapon").

And, similar to how guns and knives are arguably "arms" no matter whether they are owned or used for purposes other than self-defense, the same might be said of countless blunt force objects. Baseball bats are a classic example. Websites feature them as an inexpensive option for personal protection,[135] advise about which specific bat is preferable for self-defense,[136] and instruct on how to use them for that purpose.[137] Some percentage of the many millions of Americans who own baseball bats almost surely consider them part of their self-defense strategy.[138] Baseball bats might be the most obvious example of a common instrument also considered a weapon, but they are by no means the only one.[139]

Indeed, the line between purposely-designed weapons and "improvised" weapons is exceedingly thin.[140] The criminal law has long recognized this reality. Butcher knives, for example, were so frequently used as a weapon in

135. *See, e.g.*, *Best Non-Lethal Self Defence Weapons in 2021*, GEARHUNGRY (Jan. 16. 2018), https://www.gearhungry.com/best-non-lethal-self-defence-weapons [https://perma.cc/6FKA-J6A8]; Sean Tirman, *The 10 Best Non-Lethal Self Defense Weapons for Home Security*, HICONSUMPTION (Apr. 13, 2021), https://hiconsumption.com/best-non-lethal-self-defense-weapons [https://perma.cc/2TG6-WRNN].

136. *See, e.g.*, *Best Bat for Home Defense*, BAT DIG. (2021), https://www.batdigest.com/blog/best-bat-home-defense [https://perma.cc/N9RT-WJCN]; Vijay Singh, *Best Baseball Bat for Self Defense and Home Protection*, BASEBALL GUIDE (May 24, 2021), https://thebaseballguide.com/bat-for-self-defense [https://perma.cc/NVN6-MLYZ].

137. Mike Trout, *How to Use a Baseball Bat for Home Defense*, BASEBALL BATS (2021), https://thebaseballbats.com/baseball-bat-for-home-defense [https://perma.cc/L3BT-FRXC]. Alas, it appears this is not *the* Mike Trout.

138. According to one source, 16 million people in the United States play baseball every year. Rachel Bachman, *Is it 2019 or 1919? Baseball Is One of America's Hottest Sports*, WALL ST. J. (Feb. 19, 2019, 5:03 PM), https://www.wsj.com/articles/is-it-1919-or-2019-baseball-is-one-of-americas-hottest-sports-11550613795 [https://perma.cc/26XH-X68H]. Many more surely own bats. It is hard to know how many of those people consider their baseball bat to be a self-defense weapon. In Russia, where baseball is not popular, hundreds of thousands of baseball bats are bought annually, apparently for use as weapons. *See* Ted Berg, *Report: Russians Buy Tons of Baseball Bats and Almost No Balls*, FOR THE WIN (Sept. 1, 2016, 10:54 AM), https://ftw.usatoday.com/2016/09/russia-baseball-bat-sales-skyrocketing-yikes-road-rage [https://perma.cc/L6VF-62MR] (reporting 500,000 bat purchases and their use for confrontations).

139. In 2018, for example, a university in Michigan purchased 2,500 hockey pucks that it distributed to faculty and students for use in the event of an active shooter. Emily Sullivan, *For Defense Against Active Shooters, University Hands Out Hockey Pucks*, NPR (Nov. 28, 2018, 3:09 AM), https://www.npr.org/2018/11/28/671394863/for-defense-against-active-shooters-mich-school-hands-out-hockey-pucks [https://perma.cc/9GH4-5PCL]. According to the university police chief, throwing the hockey puck at a gunman "would probably cause some injury" and, moreover, "students could 'rush' an active shooter with their pucks" and thereby create a distraction. *Id.*

140. This thin line is underscored by the fact that purposely-designed weapons sometimes have non-weaponry beginnings. *See, e.g.*, State v. Muliufi, 643 P.2d 546, 549 (Haw. 1982) (suggesting "that nunchaku sticks were originally designed as a farmer's tool used to separate chaff from the grain, similar to a thresher. However, nunchakus developed into a defensive weapon against the samurai's sword.").

the 1800s that they were regulated as such.[141] Similarly, modern criminal law considers ordinary objects to be weapons for the purposes of aggravated assault.[142]

Self-defense law, too, has long considered ordinary objects to serve as self-defense weapons, which is highly relevant given that self-defense is the core interest protected by the Second Amendment under *Heller*. In *State v. Wells*, which was decided a year before the Second Amendment was ratified,[143] the court rejected Wells' claim of self-defense in large part because he chose a club over less lethal instruments not designed primarily as weapons: "[N]ear the place where he took up the club with which he struck the deceased there were also the handle of a dung-fork, some blacksmith's hammers, and some old scythes, any of which the prisoner might have taken in his hand as easily as the club with which he gave the mortal stroke."[144]

Courts have had few opportunities to address the Second Amendment status of lawfully owned instruments like baseball bats. In a non-precedential case decided soon after *Heller*, a court assumed that a walking stick could be a Second Amendment arm,[145] though the court nonetheless upheld a prohibition on carrying the walking stick into a library for other reasons.[146] There has been more litigation on improvised weapons under state constitutional rights to keep and bear arms, and judges and commentators disagree about whether an instrument must be designed or marketed as a weapon to receive state constitutional protection as an arm.[147] There is

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141. *See, e.g.*, REVISED STATUTES OF THE STATE OF ARKANSAS, ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE 280 (William Mck. Ball & Sam C. Roane eds., 1838) ("Every person who shall wear any . . . butcher or large knife . . . concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor.").

142. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 2301 (West 1973) (stating that a "deadly weapon" for the purposes of aggravated assault includes a "device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury"); Commonwealth v. McCullum, 602 A.2d 313, 323 (Pa. 1992) (explaining that deadly weapon definition can accommodate "[a]n ax, a baseball bat, an iron bar, a heavy cuspidor, and even a bedroom slipper" depending on the circumstances).

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

144. *Id.* at 426.

145. *See* Aderinto v. Sessions, No. 3:08-2530-JFA-PJG, 2009 WL 2762514, at *2 (D.S.C. Aug. 26, 2009).

146. In particular, the court held that a library is a "sensitive place" where arms can be restricted after *Heller*. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)). In another case, a court rejected a plaintiff's argument that a cell phone he used to record probation officers counted as an "arm," explaining that it is not a "weapon" of either offense or defense. Benzing v. North Carolina, No. 3:17-CV-000619-KDB-DCK, 2020 WL 3439558, at *6 (W.D.N.C. June 23, 2020), *aff'd sub nom.* Benzing v. Treadway, 827 Fed. App'x 350 (4th Cir. 2020).

147. In Washington, for example, a court concluded that covered arms are those "that are designed as weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense," and in making the determination the court considers "the historical origins and use of that weapon" and "the weapon's purpose and intended function." Seattle v. Evans, 366 P.3d 906, 913 (Wash. 2015) (en banc). Under that test, the court determined that a

nothing in *Heller* limiting the scope of arms in that way. Moreover, limiting arms to objects purposely designed as weapons would have the counter-intuitive effect of privileging certain extremely lethal weapons (like guns) over less lethal alternatives (like baseball bats), running afoul of both what the law of self-defense counts as a "weapon" and how that law operates to steer conflicts away from unnecessary lethal violence.[148] To be sure, how to define an "arm" or "weapon" is a difficult question that has received too little scholarly attention after *Heller*. In any event, regardless of whether baseball bats and the like receive Second Amendment protection, the basic point is the same: Covered arms after *Heller* undeniably encompass much more than firearms. A corollary is that the shape of Second Amendment doctrine implicates a much broader regulatory context than gun laws—it implicates the regulation of all private weapons in America.

Yet non-gun cases make up only a tiny fraction of Second Amendment litigation. In another article, Joseph Blocher and I conducted an empirical study of Second Amendment case law.[149] As of February 2016, there were over 1,000 post-*Heller* challenges to restrictions on guns and fewer than twenty to restrictions on nonlethal weapons.[150] When, as here, there appears to be a litigation imbalance, it is important to ask why. After all, it is possible that what appears as skewed litigation can be explained in a way that justifies any resulting doctrinal implications. The next Section considers that question for gun-centric Second Amendment litigation.

B. OBSCURED EXERCISE OF THE RIGHT

The asymmetry between gun and non-gun cases would not be problematic if any resulting distortions are justified by the gun's exalted Second Amendment status. Before analyzing ways gun-centricity is influencing doctrine, I consider whether the gun deserves pride of place in post-*Heller* jurisprudence despite the fact that more Americans possess knives,

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paring knife is not covered. *Id.* A dissenting judge and some scholars, however, define the scope of protection much broader and would consider the paring knife a covered fixed-blade knife akin to a dirk knife. *See id.* at 918–20 (Fairhurst, J., dissenting); Kopel et al., *supra* note 12, at 194 n.146 (asserting the categorical view after *Heller* that any knives that may be useful for self-defense receive Second Amendment protection, and opining that knives that are useless for self-defense, like butter knives, would not receive protection). Historically, some English legal scholars understood the scope of what counts as an "arm" broadly, encompassing even sticks and stones when used as a weapon. Jonah Skolnik, *Observations Regarding the Interpretation and Legacy of the Statute of Northampton in Anglo-American Legal History*, DUKE CTR. FOR FIREARMS L. (Sept. 17, 2021), https://firearmslaw.duke.edu/2021/09/observations-regarding-the-interpretation-and-legacy-of-the-statute-of-northampton-in-anglo-american-legal-history/#_ftn2 [https://perma.cc/PA95-LEDK] (discussing the work of Henry de Bracton and Edward Coke).

148. *See* Ruben, *supra* note 12, at 82–89 (describing the requirements of necessity and proportionality in self-defense law).

149. *See generally* Ruben & Blocher, *supra* note 13 (analyzing post-*Heller* Second Amendment cases through February 1, 2016).

150. *See id.* at app. C, xxiv.

blunt force objects, and other non-gun instruments used for self-defense. I briefly raise three explanations for the primacy of guns that, even if true, are insufficient for tailoring post-*Heller* doctrine to firearms: the usefulness of guns for fighting a tyrannical government, a regulatory gap between guns and non-gun weapons, and the intensity gap between gun owners and other weapon owners (and the related prominence of the gun rights movement). I then consider, empirically and historically, the explanation suggested in *Heller*: that firearms are simply more popular for self-defense.

The Supreme Court in *Heller* did not rule out that the Second Amendment protects an interest in opposing a tyrannical government, in addition to private self-defense. That interest would inherently call for a right to especially lethal weapons like guns. Yet, if tyranny-fighting is a Second Amendment purpose after *Heller*, it would be a narrow one. It might support a right to possess a gun and separately-stored bullets in the home, sufficient opportunity to train, and other lawful militia-related activities.[151] It would not seem pertinent, however, for deciding the sorts of post-*Heller* questions that most often arise, like whether there is a right to be perennially armed in public with a loaded handgun or to have one unlocked on the bedside table. A tyrannical government will not spontaneously appear; neither will the opportunity to oppose it with handguns.

Another explanation for the litigation imbalance would be that guns are more regulated than non-gun weapons and, thus, are more frequently the subject of Second Amendment cases. But while weapons such as pepper spray are regulated differently and less strictly than guns in some regards,[152] in others they are regulated similarly to or even more strictly than guns.[153] Moreover, even to the extent that guns are more regulated than non-guns, that does not mean that the Second Amendment should be construed with only guns in mind. For one thing, the technology for relatively young weapons like chemical sprays and tasers is advancing. Tasers, for example, have become smaller, lighter, and more powerful,[154] and will likely attract more regulatory

151. Many misunderstand the law surrounding private, armed, self-proclaimed "militias." For an inciteful essay on how the law and Constitution relate to private militias, see generally MARY B. MCCORD, BRENNAN CTR. FOR JUST., DISPELLING THE MYTH OF THE SECOND AMENDMENT (June 29, 2021), https://www.brennancenter.org/our-work/research-reports/dispelling-myth-second-amendment [https://perma.cc/H7ST-HXFR] (dispelling the notion that the Second Amendment supports private militias).

152. *See infra* notes 292–94 and accompanying text.

153. Jacobs, *supra* note 12, at 145–49; Volokh, *supra* note 12, at 209–16.

154. Today, the voltage for a common, small stun gun is 50,000, which can debilitate a victim, though some stun gun models carry a voltage in the millions. *See* Christopher Leake, *Police Forces on Alert Over Deadly Million-Volt 'Tasers' Disguised as Mobile Phones*, DAILY MAIL (Feb. 13, 2012), http://www.dailymail.co.uk/news/article-2099921/police-forces-alert-deadly-million-volt-Tasers-disguised-mobile-phones.html [https://perma.cc/7ZX4-Q5W6]; *see also Proposed Non-Lethal Weapons Won't Stop Attacks, Says Union*, DOMINION POST (Dec. 20, 2010), http://www.stuff.co.nz/dominion-post/news/4475609/Proposed-non-lethal-weapons-won-t-stop-attacks-says-union [https://perma.cc/9S49-6KHS] (describing a wireless taser that fires "an electric 'bullet' . . . from a

attention in the future. More fundamentally, so long as non-gun weapons can and do serve the self-defense interest protected by the Second Amendment, they should factor into the creation and implementation of Second Amendment law.

Another potential explanation for gun-centric litigation is that gun owners are more passionate about firearms and thus more litigious than owners of other weapons.[155] Among other things, guns are inherently more dangerous than most privately owned knives, stun guns, chemical agents, and blunt force weapons, and perhaps for that reason they are of greater concern to the public, lawmakers, and those pressing for self-defense-related arms rights. The cultural and societal importance of guns is undeniable, which sets guns apart from other weapons.[156]

Litigation and press surrounding *Caetano*, the stun gun case, is illustrative. The fact that the Supreme Court granted certiorari in *Caetano* is remarkable, as over 150 petitions in Second Amendment cases have been rejected in the thirteen years since *Heller*.[157] The importance of the constitutional issue—the Second Amendment's protection of a non-firearm weapon—is undeniable. Yet as with most non-gun litigation, *Caetano* was largely overlooked. When the case reached the Massachusetts Supreme Judicial Court, just two small Massachusetts-based nonprofit organizations joined as amici.[158] When Caetano petitioned the Supreme Court, those two organizations remained the only amici in the litigation.[159] The Court's per

standard pump-action shotgun."); David Hambling, *Long-range Taser Raises Fears Over Shock and Impact Injuries*, 204 NEW SCIENTIST 24, 24 (2009) (describing research into a "taser grenade" that would have a range of almost 200 feet). The potential power helps to explain why electrical weapons can and do cause deaths, even if their use is nonlethal in the vast majority of cases. *See generally* Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342 (2012) (exploring the relationship between use of electric weapons and excessive force by law enforcement).

155. *See* Jonathan M. Metzl, *What Guns Mean: The Symbolic Lives of Firearms*, 5 PALGRAVE COMMC'NS, no. 35, 2019, at 1, 2 (discussing how "firearms represent forms of selfhood").

156. *See supra* note 39 and accompanying text (noting enormous number of deaths and injuries caused by guns); CAROLINE E. LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE, at viii-ix (2017) (describing historical and cultural prominence of firearms); *see also* Brad J. Bushman, Patrick E. Jamieson, Ilana Weitz & Daniel Romer, *Gun Violence Trends in Movies*, 132 PEDIATRICS 1014, 1014, 1017 (2013) (finding that violent encounters with guns occur more than twice an hour on average among best-selling R- and PG-13-rated films, a rate three times as high for PG-13-rated films when compared to 1985).

157. *See* GIFFORDS L. CTR., POST-HELLER LITIGATION SUMMARY (July 2020), https://giffords.org/wp-content/uploads/2020/07/Giffords-Law-Center-Post-Heller-Litigation-Summary-July-2020.pdf [https://perma.cc/GF7Q-AKEV] ("[T]he Supreme Court has declined to review over 150 Second Amendment cases since *Heller*.").

158. Commonwealth v. Caetano, 26 N.E.3d 688, 689 n.1 (Mass. 2015), *cert. granted, vacated sub nom.* Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (noting the participation of Arming Women Against Rape & Endangerment and Commonwealth Second Amendment).

159. *See* Caetano v. Massachusetts, Docket No. 14-10078 (Sup. Ct. 2016) (listing parties).

curiam opinion was just two pages long with hardly any analysis.[160] That lack of depth was mirrored in the media coverage. The New York Times tucked its discussion of *Caetano* into an article titled "Supreme Court Declines to Hear Challenge to Colorado's Marijuana Laws."[161] *Caetano* reflects the fact that even when non-gun Second Amendment cases are litigated—which is relatively rare—they tend to evade media and public attention.

Compare *Caetano* with challenges to firearms laws. The same term *Caetano* was decided, 41 amici joined briefs at the petition-for-certiorari stage in a challenge to a local firearm storage law.[162] In a challenge to Maryland's prohibition on assault weapons and large-capacity magazines, 70 amici joined briefs at that stage.[163] The petition for certiorari in a case challenging San Francisco's restriction on carrying handguns in public, meanwhile, attracted 74 amici.[164]

The passion and funding of the gun rights and gun safety movements are undeniable. Advocates are eager to vindicate or oppose broader gun rights and often well-funded to do so. There is no "National Taser Association" comparable to the power and finances of the NRA and other gun rights groups who fund and participate in gun cases. The NRA's Civil Rights Defense

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160. Justice Samuel Alito, joined by Justice Clarence Thomas, concurred to explain in greater depth why he believed the electrical weapons ban violated the Second Amendment. Caetano v. Massachusetts, 577 U.S. 411, 422 (2016) (Alito, J., concurring) (per curiam) (complaining that the Supreme "Court's grudging *per curiam* now sends the case back to" the court that "affirmed [Caetano's] conviction on the flimsiest of grounds."). In Alito's view, *Heller* stands for the proposition that any weapon "widely owned and accepted as a legitimate means of self-defense across the country" receives Second Amendment protection. *Id.* at 420. Moreover, in light of the constitutional protection afforded to handguns, which are almost always deadlier than stun guns, refusing protection for stun guns would be illogical:

> Countless people may have reservations about using deadly force, whether for moral, religious, or emotional reasons—or simply out of fear of killing the wrong person. "Self-defense," however, "is a basic right." I am not prepared to say that a State may force an individual to choose between exercising that right and following her conscience, at least where both can be accommodated by a weapon already in widespread use across the Nation.

Id. at 421 (citations omitted); *see also* People v. Yanna, 824 N.W.2d 241, 245 (Mich. Ct. App. 2012) ("Tasers and stun guns, while plainly dangerous, are substantially less dangerous than handguns. Therefore, tasers and stun guns do not constitute dangerous weapons for purposes of Second Amendment inquiries.").

161. Adam Liptak, *Supreme Court Declines to Hear Challenge to Colorado's Marijuana Laws*, N.Y. TIMES (Mar. 21, 2016), https://www.nytimes.com/2016/03/22/us/politics/supreme-court-declines-to-hear-challenge-to-colorados-marijuana-laws.html [https://perma.cc/P55W-R8NV]. The media's inattention to *Caetano* has continued in articles discussing other Second Amendment cases. *See* Jake Charles, *Caetano's Erasure*, SECOND THOUGHTS (Jan. 8, 2020), https://sites.law.duke.edu/secondthoughts/2020/01/08/caetanos-erasure [https://perma.cc/XP3N-6BJ5].

162. *See* Jackson v. City & Cnty. of San Francisco, Docket No. 14-704 (Sup. Ct. 2016) (listing parties).

163. Kolbe v. Hogan, Docket No. 17-127 (Sup. Ct. 2017) (listing parties).

164. Peruta v. San Francisco, Docket No. 16-894 (Sup. Ct.) (listing parties). The Supreme Court rejected the petitions in *Jackson*, *Kolbe*, and *Peruta*.

Fund ("NRA Defense Fund"), for example, states that it has spent about ten million "dollars in support of cases involving individuals and organizations defending the individual right to keep and bear arms and to support legal research and education."[165] The NRA Defense Fund's goal, of course, is not to protect all arms rights but to "establish[] legal precedents in favor of gun owners."[166] Another major gun rights group, the Second Amendment Foundation ("SAF"), invokes the Second Amendment in its very name, but its mission is "promoting a better understanding about our Constitutional heritage to privately own and possess *firearms*."[167] It should come as no surprise that each Second Amendment case to receive argument at the Supreme Court in recent years was brought by an NRA affiliate.[168]

But, under *Heller*, it is not clear that the passion associated with the modern gun rights and gun safety movements should translate to gun-centric doctrine implementing the right to keep and bear *arms* for self-defense.[169] If non-guns are relevant for that purpose, it is hard to justify doctrine that ignores them because highly motivated litigants are saturating the courts with gun cases.[170]

Rather, *Heller* suggests another explanation that could rationalize gun-centric doctrine and that warrants close scrutiny: that guns are simply preferred by Americans for self-defense. While acknowledging the breadth of "arms," the majority then implied that breadth did not translate to American practice. The Court declared that the firearms at issue, handguns, are "overwhelmingly chosen by American society for [self-defense]."[171] The Court added that "American people have considered the handgun to be the quintessential self-defense weapon"[172] and "the most popular weapon . . . for self-defense in the home."[173] The Court did not cite statistics to support these statements but instead referenced the lower court opinion.[174] That opinion, in turn, cited a highly-contested 1995 empirical study about defensive gun

165. *About the NRA Civil Defense Fund*, NRA C.R. DEF. FUND (last updated 2021), https://www.nradefensefund.org/about-us.aspx [https://perma.cc/6F3Q-S25R].

166. *Id.* ("The NRA Civil Rights Defense Fund was established by the NRA Board of Directors in 1978 to become involved in court cases establishing legal precedents in favor of gun owners.").

167. *Mission Statement*, SECOND AMEND. FOUND. (last updated 2021), https://www.saf.org/mission [https://perma.cc/P4L6-NKAJ] (emphasis added).

168. *See generally* N.Y. State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. April 26, 2021) (granting certiorari to case brought by firearms owners' association); N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (case brought by firearms owners' association and individual firearms license holders).

169. *Cf.* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1007 (2016) (critiquing how the wealthiest civil litigants exert an inordinate influence on the rules governing civil procedure).

170. *See infra* notes 195–206 and accompanying text (describing relevance of non-gun weapons for self-defense).

171. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

172. *Id.* at 629.

173. *Id.*

174. *Id.* at 628–29 (citing Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

uses,[175] which did not opine on firearm possession or usage relative to other weapons.[176] If it were true that any or all firearms were most popular for self-defense, that *might* justify not only a litigation asymmetry, but also doctrinal biases in favor of guns.[177]

It is thus important to consider closely the relative popularity of firearms for private self-defense. The following Sections do so, exploring weapons preferences today and at the time of the founding.

1. Weapons and Self-Defense Today

The Supreme Court's declaration that handguns are "overwhelmingly chosen by American society for [lawful self-defense]" is an empirical claim for which the Court offered no evidence.[178] To be sure, there is little doubt that firearms are abundant—there are hundreds of millions of them in the United States.[179] But researchers trace most guns to multiple-gun owners, and about half to "super-owners," 3 percent of the adult population that own 17 guns on average.[180] The raw number of guns in America is thus insufficient to prove *Heller*'s empirical point about handgun popularity. More probative would have been evidence of relative weapons preferences and relative defensive weapons usages.

Surveys can help to evaluate the overlap between firearms, other weapons, and self-defense practices today. Of course, surveys are not perfect.

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175. *Parker*, 478 F.3d at 400 (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182–83 (1995)). *But see* David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1430 (1997) ("The Kleck and Gertz (K-G) paper has now been published. It is clear, however, that its conclusions cannot be accepted as valid.").

176. *See generally* Kleck & Gertz, *supra* note 175 (focusing specifically on defensive gun uses). Two years after *Heller*, in *McDonald v. City of Chicago*, the Supreme Court repeated these assertions about handgun popularity and reemphasized their significance. McDonald v. City of Chicago, Ill., 561 U.S. 742, 767–68 (2010) ("Explaining that 'the need for defense of self, family, and property is most acute' in the home, we found that [the Second Amendment] right applies to handguns because they are 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' . . . . Thus, we concluded, citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" (citations omitted)).

177. To be sure, there still would be reason to critique such a popularity-based doctrine. *See* Eric Ruben, *Is the Handgun America's 'Most Popular' Self-Defense Weapon? It's a Crucial Question at the Supreme Court*, BRENNAN CTR. FOR JUST. (Nov. 5, 2019), https://www.brennancenter.org/our-work/analysis-opinion/handgun-americas-most-popular-self-defense-weapon-its-crucial-question [https://perma.cc/MR8D-GRK9] (discussing reasons why, "[a]s a matter of constitutional methodology, the [*Heller*] majority's decision to peg constitutional protection to a contemporary weapon's popularity is misguided").

178. *Heller*, 554 U.S. at 628.

179. Deborah Azrael, Lisa Hepburn, David Hemenway & Matthew Miller, *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 38, 38 (2017).

180. *See* Lois Beckett, *Meet America's Gun Super-Owners – with an Average of 17 Firearms Each*, GUARDIAN (Sept. 20, 2016), https://www.theguardian.com/us-news/2016/sep/20/gun-ownership-america-firearms-super-owners [https://perma.cc/XLX9-KU97].

When it comes to self-reported acts of self-defense, for example, there is no external validation, and whether someone believes themselves to be a self-defender as opposed to an unlawful aggressor is often a question of perspective.[181] Some proportion of proclaimed defensive weapons uses are surely unlawful—for example, one study found a majority of self-reported defensive gun uses could not be justified as lawful self-defense[182]—and this inflates the numbers. Meanwhile, some gun owners may opt not to reveal their gun ownership or usage out of a fear of government confiscation or for some other reason,[183] which would deflate the numbers. In addition, polling on non-gun weapons ownership, carrying, and use is underdeveloped because most surveys about weapons focus solely on guns. Moreover, surveys often differ from one another in how they ask questions, and comparisons between surveys must be qualified accordingly.

Surveys nonetheless offer more rigor than *Heller*'s conjecture. This Section considers evidence from the National Crime Victimization Survey ("NCVS"), a primary source of data on crime victimization in the United States;[184] the General Social Survey ("GSS"), a "highly respected" source of data on household and individual firearms possession;[185] and other surveys asking questions about relative preferences and usages of guns and other weapons.[186] These surveys cast doubt on *Heller*'s assumptions, suggesting

181. D. Hemenway, D. Azrael & M. Miller, *Gun Use in the United States: Results from Two National Surveys*, 6 INJ. PREVENTION 263, 266 (2000).

182. *Id.*

183. *See* David Yamane, *Why Surveys Underestimate Gun Ownership Rates in the U.S.*, GUN CURIOUS (Feb. 11, 2019), https://guncurious.wordpress.com/2019/02/11/why-surveys-underestimate-gun-ownership-rates-in-the-u-s [https://perma.cc/2SBA-PNCQ] (suggesting that gun ownership rates are higher than commonly used surveys conclude).

184. *See generally National Crime Victimization Survey (NCVS)*, BUREAU OF JUST. STAT. (2019), https://bjs.ojp.gov/data-collection/ncvs [https://perma.cc/N6A7-LKYL] [hereinafter BUREAU OF JUST. STAT.] (providing primary source data on crime victimization in the United States). The NCVS is far larger than smaller private surveys, like the one relied on by the lower court in *Heller*, *supra* notes 175–77, for which "the reported self-defense gun uses are too few to provide stable disaggregate estimates about the epidemiology of self-defense gun use." David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007-2011*, 79 PREVENTATIVE MED. 22, 22 (2015). The NCVS collects data on nonfatal crimes reported or unreported to the police from a nationally representative sample of about 160,000 unique persons in about 95,000 households. BUREAU OF JUST. STAT., *supra*. Once selected, eligible individuals in households are interviewed every six months over the course of three-and-one-half years about victimization since the last interview. *Id.*

185. PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 3 (2d ed. 2020).

186. *See Court TV Poll: March 2001 [Roper #31108618]*, ROPER CTR. (Mar. 2001), https://ropercenter.cornell.edu/ipoll/study/31108618/questions#12f85240-dd4c-4ac6-8dd0-ac1bfd831999 [https://perma.cc/3ABL-4NLD]; *Gallup News Service Poll # 2007-33: 2008 Presidential Election [Roper #31088846]*, ROPER CTR. (Oct. 2007), https://ropercenter.cornell.edu/ipoll/study/31088846/questions#2dd2df52-9fc8-4d1d-a50e-184a1369ee7e [https://perma.cc/JG4N-WECD]; *CBS News/60 Minutes/Vanity Fair Poll: Genetically Modified Food/Sports/Gun Control [Roper #31091058]*,

instead that a super-majority of Americans choose not to possess firearms, which are used in just a tiny fraction of self-defense situations. As noted above, more Americans surely own knives and other objects that can be used as weapons.[187] And, according to some surveys, when Americans are asked about weapon preferences, non-gun weapons are preferred, possessed, and used by as many or more Americans.

According to the NCVS, fewer than 1 percent of crime victims report using a gun in self-defense, and roughly the same percentage report using another weapon.[188] The NCVS reflects demographic variations in weapon preferences that I discuss further below.[189] Males were more than three times as likely to report using a gun in self-defense than females (1.4 percent vs. 0.4 percent), despite equal likelihood of being crime victims.[190] Of course, the rate of weapons possession is higher than the rate of usage; most people never need to use a weapon for self-protection. The NCVS does not seek to measure weapons possession, though the GSS and other surveys do.[191] According to the GSS, as of 2018, 35 percent of households and 22 percent of individuals possess a firearm.[192] The percentage of households with firearms has dropped over time—in 1977, 54 percent reported owning a gun.[193] It is too soon to know how the surge in gun sales in 2020 and 2021 will affect these statistics.[194]

ROPER CTR. (Jan. 2013), https://ropercenter.cornell.edu/ipoll/study/31091058 [https://perma.cc/D25Q-YXL9] [hereinafter CBS News Poll].

187. *See supra* notes 105–06 and accompanying text.

188. Between 2007 and 2011, when crime victims were present, they used guns and "other weapons" to threaten or attack a perpetrator in roughly equal proportions, and each in less than 0.9 percent of incidents. Hemenway & Solnick, *supra* note 184, at 25 tbl.3b; *see also* MICHAEL PLANTY & JENNIFER L. TRUMAN, BUREAU OF JUST. STAT, FIREARM VIOLENCE, 1993-2011, at 12 (2013), https://www.bjs.gov/content/pub/pdf/fv9311.pdf [https://perma.cc/5PZ4-4734] (noting that "about 44% of victims of nonfatal violent crime offered no resistance, . . . 22% attacked or threatened without a weapon (e.g., hit or kicked), and 26% used nonconfrontational methods (e.g., yelling, running, hiding, or arguing)"). For unknown reasons, those who used guns appear to be less likely than those using other weapons to be injured *before* their gun use, but there is no meaningful difference between guns and other weapons in the likelihood of an injury during or after weapons use. *Id.* Likewise, in property crimes, there is little difference in whether property is ultimately taken when a gun is used defensively (38.5 percent) as opposed to when another weapon is used defensively (34.9 percent). Hemenway & Solnick, *supra* note 184, at 26 tbl.4a.

189. *See infra* notes 200–06 and accompanying text.

190. Hemenway & Solnick, *supra* note 184, at 23–24.

191. *See* COOK & GOSS, *supra* note 185, at 3.

192. *Id.* Among the Americans who choose to possess a firearm, handguns have become more popular, now comprising 60 percent of new purchases. Azrael et al., *supra* note 179, at 48 tbls.3 & 4. Cook and Goss note other surveys report individual gun ownership ranging between 22 percent and 30 percent. COOK & GOSS, *supra* note 185, at 3.

193. COOK & GOSS, *supra* note 185, at 3.

194. *See* Jaclyn Diaz, *1st-Time Gun Buyers Help Push Record U.S. Gun Sales Amid String of Mass Shootings*, NPR (Apr. 26, 2021, 5:06 AM), https://www.npr.org/2021/04/26/989699122/1st-time-gun-buyers-help-push-record-u-s-gun-sales-amid-string-of-mass-shootings [https://perma.cc/FY2K-MWKF]. Data suggests that the surge was driven in part by first-time gun owners. *Id.* It appears

Meanwhile, Americans widely view non-gun weapons as effective for self-defense. In 2001, one survey reported that 76 percent of respondents believed that "[c]arrying mace, pepper spray, a whistle or similar protection" would be "very" or "somewhat" effective "as a way of protecting yourself against crime," as compared to 49 percent who thought the same of "[c]arrying a gun, knife or other weapon."[195] In that survey, 33 percent of respondents said that they had carried "mace, pepper spray, a whistle or similar protection," compared to 24 percent who said they had carried "a gun, knife or other weapon."[196] A 2007 survey reported that more respondents had carried pepper spray or mace for self-defense (14 percent) than a gun (12 percent), and the same percentage had carried a knife (12 percent).[197] A 2013 survey reported the same percentage of people carrying a gun for protection (12 percent), though a slightly smaller percentage of people carrying pepper spray or mace (10 percent) and a substantially lower percentage of people carrying a knife (7 percent).[198] Most respondents (66 percent) reported never carrying any weapons for self-protection.[199]

An important consideration captured by some surveys is that weapons preferences are not monolithic, but vary by factors such as demographic, geography, and political ideology.[200] According to the 2013 survey, more females carried pepper spray or mace (17 percent) than guns (9 percent), while more men carried guns (16 percent) than pepper spray or mace (2 percent).[201] This data may reflect how guns can be "especially impractical and dangerous tools for women."[202] Guns in the home, for example, "are statistically far more likely to endanger rather than protect women" and are associated with a 500 percent increase in the chance a woman is unlawfully

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that year-over-year sales for some non-lethal weapons increased at an even higher rate than gun sales in 2020. *See* Stephanie Pagones, *Taser Consumer Sales Jumped 300% in 2020 Amid Year of Unrest, Violence: CEO*, FOX BUS. (Mar. 9, 2021), https://www.foxbusiness.com/lifestyle/consumer-taser-sales-spike-2020-unrest-crime [https://perma.cc/U2EW-FH4N].

195. *Court TV Poll: March 2001 [Roper #31108618]*, *supra* note 186. The language in this survey is imprecise and should be qualified accordingly—mace and pepper spray could be viewed as "other weapons."

196. *Id.* (questions 6 and 8).

197. *Gallup News Service Poll # 2007-33: 2008 Presidential Election [Roper #31088846]*, *supra* note 186 (questions 36, 37, and 39). Surveys differ in their methodologies and the formulation of their questions which could explain discrepancies between them. Conclusions drawn from comparing between these surveys should be qualified accordingly. My goal here is not to draw such comparisons as between different surveys, but rather to highlight data signaling the relative popularity of non-gun weapons for self-defense.

198. CBS News Poll, *supra* note 186 (question 7).

199. *Id.*

200. As Professors Philip J. Cook and Kristin A. Goss have observed, "[g]un owners are not a representative sample of the American public." COOK & GOSS, *supra* note 185, at 4.

201. CBS News Poll, *supra* note 186 (question 7 crosstab).

202. FRANKS, *supra* note 16, at 89.

killed during domestic violence situations.[203] According to one study, women in California who brought a handgun into the home for self-defense were *more* likely to be killed by an intimate partner and had a 50 percent higher risk of homicide overall.[204]

Weapons preferences also vary by geography and political ideology. According to the 2013 survey, respondents from the south were more likely to have carried a gun (17 percent) than those in the northeast (10 percent), northcentral (11 percent), or west (8 percent), and New York and California have led a recent surge in taser sales.[205] And, perhaps unsurprisingly in light of modern gun politics, twice as many liberals had carried pepper spray or mace (12 percent) as guns (6 percent), while more than two times as many conservatives had carried guns (16 percent) as pepper spray or mace (7 percent).[206]

This data complicates *Heller*'s contention that handguns are "overwhelmingly chosen by American society for [self-protection]."[207] Although many Americans choose guns, most do not, and many prefer other weapons. This, in turn, calls into question whether gun litigation is representative of the Second Amendment field after *Heller*, as well as whether modern self-defense preferences rationalize doctrine biased in favor of gun rights.

2. Weapons and Self-Defense at the Founding

Heller's discussion of handgun popularity was keyed to modern-day preferences, but the majority's primary temporal focus was the late 1700s. The Court set out to understand the right to keep and bear arms in light of how it would be understood by "ordinary citizens in the founding generation."[208] Some lower-court opinions, taking their cue from *Heller*, highlight the exercise of self-defense at the founding. As one opinion put it, "[w]hen the Second Amendment was ratified . . . [f]irearms were considered essential for defense of the home and hearth."[209] However, the picture was more complex. We know less about self-defense at the founding than today

203. *Id.* at 90.

204. Garen J. Wintemute, Mona A. Wright & Christiana M. Drake, *Increased Risk of Intimate Partner Homicide Among California Women Who Purchased Handguns*, 41 ANNALS OF EMERGENCY MED. 281, 282 (2003); *see also* SHERRY F. COLB, BRENNAN CTR. FOR JUST., THE ROLE OF FANTASY IN THE BATTERED WOMAN'S RIGHT TO BEAR ARMS 4–5 (2021), https://www.brennancenter.org/our-work/research-reports/role-fantasy-battered-womans-right-bear-arms [https://perma.cc/R8GH-F2AC] (explaining how guns can be unhelpful for women trying to defend themselves at home in domestic violence situations).

205. CBS News Poll, *supra* note 186 (question 7 crosstab); Pagones, *supra* note 194 (noting that more tasers are sold to consumers in California and New York than any other states).

206. *Id.*

207. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

208. *Id.* at 576–77.

209. Mai v. United States, 974 F.3d 1082, 1084, 1088 (9th Cir. 2020) (Bumatay, J., dissenting) (characterizing the Second Amendment as protecting, at the founding, "the core right of gun ownership for self-defense of the home").

because there was nothing like today's surveys and studies to provide estimates of defensive weapons uses. Much of what we do know, however, suggests that non-gun weapons may have been as or more important than guns for private self-defense.

Scholars have spilt plenty of ink establishing the commonness of gun ownership during the founding era,[210] but less on how frequently firearms were possessed or used for "lawful" and "immediate" self-defense—what *Heller* pronounced as the "core" of the Second Amendment right.[211] Firearms, of course, feature in any narrative about the Revolutionary War (or, for that matter, any American military conflict). At the founding, they also were important tools for hunting. And formal or informal "shooting [competitions] were major events in rural communities."[212] There is substantial overlap between Americans who engaged in these activities and those who did so with firearms. When we focus on private self-defense, however, the overlap shrinks.

Although we do not have statistical records of defensive weapons uses, we have some data about the flip side of the equation: criminal weapons uses. Historian Randolph Roth has documented how firearms were rarely used in intrafamilial homicides, for example. He writes, "[f]amily and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists."[213] The same was likely true of confrontational situations that called for immediate defensive force.

In this regard, it is important to keep in mind the state of firearms technology at the time. It is easy to project today's guns back to the colonial

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210. According to probate records, they were owned by at least 50 percent of the population. *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1782 (2002) (providing data based on probate inventories, which "are usually regarded as the best source of information about what items of personal property were owned in early America, but they are incomplete"); Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 WM. & MARY Q. 223, 224 (2002) (noting "roughly half of all households owned at least one working gun").

211. *Heller*, 554 U.S. at 630, 635.

212. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 221 (2d ed. 2018). Target shooting has long been an internationally recognized sport. The first modern Olympics, in 1896, featured five events that involved rifle or pistol shooting. *See* BILL MALLON & TURE WIDLUND, THE 1896 OLYMPIC GAMES: RESULTS FOR ALL COMPETITORS IN ALL EVENTS, WITH COMMENTARY 97 (1998). Today, some put the number of participants in target shooting in the United States at over 30 million annually. *See* S. Lock, *Number of Participants in Target Shooting in the United States from 2006 to 2017 (in millions)*, STATISTA (Feb. 13, 2020), https://www.statista.com/statistics/191962/participants-in-target-shooting-in-the-us-since-2006 [https://perma.cc/98DF-T7RH].

213. Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 276 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019).

or founding era, but the reality was much different then. When the first Europeans set foot in America, for example, the most common firearms were matchlocks, meaning "they were fired by bringing a lighted slow-match into contact with the priming powder,"[214] after which they were reloaded through "a long and complicated procedure."[215] This made them less effective for many confrontations than other weapons.[216]

Firearms advanced by the time of the founding era but remained limited in ways relevant to self-defense confrontations. By the eighteenth century, the matchlock was widely replaced by the flintlock,[217] a more reliable design. Yet, like the matchlocks that preceded them, these founding-era guns were muzzle-loaders that were slow to load and generally kept and carried unloaded because they were "liable to misfire."[218]

These characteristics obviously limited the usefulness of historical guns when it came to private confrontations. As the Texas Supreme Court commented over a half-century after the founding, "[t]he gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. . . . The bowie-knife differs from these in its device and design; it is the instrument of almost certain death."[219] Indeed, even in war settings during the founding era, "battles were frequently decided in hand-to-hand combat with the bayonet" because "[o]nce the opposing troops closed with each other there was no time to reload."[220] The Revolutionary War battles

214. HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA: 1526-1783, at 12 (1956).

215. *Id.* at 15.

216. According to one historical weapons expert, the crossbow was more important than the matchlock firearms settlers had on hand. *See id.* at 7. Until the early seventeenth century, common firearms remained "so heavy that a forked rest was required to hold the barrel steady in firing." *Id.* at 14. Even when matchlock firearms became lighter, they remained limited, and "could not compete either in speed of firing or in accuracy with the Indian's arrow." *Id.* at 19.

217. *Id.* at 19, 38.

218. Roth, *supra* note 213, at 275 (noting that muzzle-loaded firearms were "liable to misfire" and "could not fire multiple shots"). British troops patrolling colonial streets in Boston, for example, would carry unloaded muskets and only load before they prepared to fire. *See* FREDERIC KIDDER, HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770, at 67 (1870) (according to deposition of Charles Hobby, the "soldiers load[ed] their muskets about the Custom-house door, after which they all shouldered"); *id.* at 72 (deposition of Peter Cunningham); *Id.* at 130 (testimony of Ebenezer Bridgham); *id.* at 207 (testimony of Joseph Hinkley). Owners of black powder guns are still advised to keep and carry their guns unloaded. *See, e.g.*, *Muzzleloader Safety Rules*, REMINGTON (last updated 2021), https://www.remington.com/support/safety-center/safety-and-shooting-tips/muzzleloader-safety-rules [https://perma.cc/65ZR-B8S3]. In his dissent from denial of certiorari in *Jackson v. City and County of San Francisco*, Justice Clarence Thomas wrote that a requirement to store firearms in a locked container or disabled with a trigger lock violated the Second Amendment because it would take too much time to load the gun in an emergency situation. Jackson v. City & Cnty. of San Francisco, 576 U.S. 1013, 1013 (2015) (Thomas, J., dissenting). At the founding, however, such delay was inherent given the state of the technology.

219. Cockrum v. State, 24 Tex. 394, 402 (1859).

220. *See* PETERSON, *supra* note 214, at 199.

of Stony Point and the final Yorktown campaign were waged almost entirely with bayonets.[221]

And what of handguns, which *Heller* called "the quintessential self-defense weapon?"[222] Only "[a] distinct minority of colonists" owned pistols at the time of the founding[223]—which, according to one historian, made up less than ten percent of the firearm stock.[224] This, of course, cuts against any notion that pistols were commonly owned, let alone used, for self-defense.[225]

This account is necessarily tentative because of the lack of framing-era surveys, and it should not be read to suggest that firearms were never used or valued for private self-defense at the founding. The point, rather, is that if private self-defense is to guide Second Amendment doctrine, self-defense trends at the founding, like self-defense trends today, do not clearly justify doctrine biased in favor of gun rights. The next Section discusses how, nonetheless, gun-centric litigation is resulting in such biased doctrine.

C. WARPED ANALYSIS

Gun-centricity has distorted the Second Amendment analysis, including in two ways that are used by some judges to explain the invalidation of gun laws. First, courts neglecting non-gun alternatives have exaggerated the burden imposed by gun restrictions, leading to hasty conclusions that gun regulations are unconstitutional. Second, some judges have been too quick to embrace purely historical tests for deciding Second Amendment cases without appreciating the challenges such doctrine will present for non-gun weapons. When looking for historical precedent, meanwhile, judges have misconstrued 1800s weapons cases by overlooking the fact that those cases focused on regulations applicable to a broad range of weapons, not gun-only policies. The result, again, has been flawed arguments for striking down gun laws, this time on the basis of inapt historical analogies.

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221. *See id.* at 200 ("At Stony Point the muskets were unloaded and American bayonets alone carried the day."); *id.* ("Washington in the climatic Yorktown campaign exhorted his men to place their principal reliance on the bayonet."); *see also Baron von Steuben Shows the Army a Bayonet Is Not a Grilling Tool*, NEW ENG. HIST. SOC'Y (2018), https://www.newenglandhistoricalsociety.com/baron-von-steuben-shows-the-army-a-bayonet-is-not-a-grilling-tool [https://perma.cc/932U-F77D] (describing increased use of bayonets during war).

222. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

223. Kevin M. Sweeney & Saul Cornell, *All Guns Are Not Created Equal*, THE CHRON. OF HIGHER EDUC. (Jan. 28, 2013), https://www.chronicle.com/article/all-guns-are-not-created-equal/?bc_nonce=yl4ezgqxk1fr1nyysqdip&cid=reg_wall_signup [https://perma.cc/QP2D-MPLG].

224. Kevin M. Sweeney, *Firearms, Militias, and the Second Amendment*, *in* THE SECOND AMENDMENT ON TRIAL 310, 342 (Saul Cornell & Nathan Kozuskanich eds., 2013); *see also* ROBERT SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 31–37 (2015) (discussing gun ownership at the founding); JOHNSON ET AL., *supra* note 212, at 142–43 (discussing common gun models in the seventeenth and eighteenth centuries).

225. *But see* GEORGE C. NEUMANN, BATTLE WEAPONS OF THE AMERICAN REVOLUTION 230 (2011) ("Civilians commonly carried pocket-size [pistols] for protection whenever traveling.").

1. Distorting Burdens and Neglecting Alternatives

In a gun-centric world in which the only "arm" is a firearm, firearms restrictions intuitively cut deeper into the right to keep and bear arms than in a world where there are myriad alternatives. *Heller*, for example, despite defining "arms" broadly, nonetheless failed to actually consider the gun law at issue in that broader context. This failure may have been due to the Court's unsupported declarations that the handgun is the "the most popular weapon chosen by Americans for self-defense in the home," "overwhelmingly chosen by American society for [lawful self-defense]," and "the quintessential self-defense weapon" according to "the American people."[226] As discussed above, these are questionable empirical statements.[227] In one place in its discussion, the Court abruptly switched the frame to just firearms, contending that handguns are "the most preferred *firearm* in the nation to 'keep' and use for protection of one's home and family."[228] That narrower framing (firearms instead of weapons) accompanied the Court's conclusion that the Second Amendment burden imposed by the D.C. handgun ban was so severe that no further analysis was necessary: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights," banning handgun possession in the home "would fail constitutional muster."[229]

One way to conceptualize the gun-centric distortion at play in *Heller* is as a denominator problem.[230] If the denominator is all conduct protected by a right, and the numerator is the subset of that conduct subject to a regulation, then the larger the numerator relative to the denominator the closer the regulation gets to a total "ban" on protected conduct. And, once a court "characterize[es] . . . a law as a ban[, that] tends to trigger a per se rule of invalidity . . . ."[231] As Joseph Blocher has shown, if the relevant denominator is a "class of arms," then courts must decide what counts as such a class.[232] There has been insufficient consideration about the appropriate denominator in Second Amendment cases, including whether the denominator is static across regulatory contexts (restrictions on home possession versus public carry, for example). If the right to bear arms is viewed

226. *Heller*, 554 U.S. at 628–29.

227. *See supra* Section III.B.1.

228. *Heller*, 554 U.S. at 628–29 (emphasis added) (quoting Parker v. District of Columbia, 478 F.3d 379, 400 (D.C. Cir. 2007)).

229. *Id.* The Court spent just seven pages considering the handgun ban at issue, *id.* at 628–35, after devoting 55 pages to analyzing whether the Second Amendment protected an individual right centered around private self-defense, *id.* at 573–628.

230. *See* Joseph Blocher, *Bans*, 129 YALE L.J. 308, 343–51 (2019) (discussing the Second Amendment's denominator problem).

231. *Id.* at 314; *see also id.* at 325 ("[T]here can be little doubt that where the Court sees a ban, it is more likely to strike the law down.").

232. *Id.* at 351 (quoting Heller v. District of Columbia, 670 F.3d 1244, 1288 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

through a functional lens,[233] the denominator should arguably be set broadly at arms adequate for self-defense, the "core" interest protected by the Second Amendment.[234]

Yet *Heller* did not consider non-gun arms in its discussion of handguns and neither do lower courts. Lower court judges rely on *Heller*'s assumption that handguns are the "quintessential self-defense weapon" to exaggerate, or for non-guns deflate, Second Amendment burdens. On one hand, they minimize the burden imposed by restrictions on non-handguns, scrutinizing restrictions to such weapons less stringently than they would a handgun restriction. In a recent case involving the regulation of butterfly knives, the district court emphasized "*Heller*'s unique concerns about handguns" which are "*overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]*."[235] *Heller*, the lower court noted, "made much of" the handgun's status as "the 'quintessential self-defense weapon.'"[236] That "prominent discussion" and the "special consideration" afforded handguns meant that a ban on a different weapon was scrutinized less strictly.[237] In fact, as discussed above, surely more Americans own knives than guns.[238] Similarly, in a case involving nunchaku, a federal district court focused on the fact that, "unlike handguns, nunchaku are not considered 'the quintessential self-defense weapon,' by 'the American people,' and thus a ban on their possession arguably does not impose nearly the same burden as a handgun ban on the Second Amendment right to bear arms for the purpose of self-defense."[239] Again, more Americans undoubtedly possess blunt force instruments than guns.[240]

On the other hand, courts conclude that general firearm restrictions or specific handgun restrictions impose the severest burden possible on the Second Amendment. Without considering non-gun weapons at all, judges declare that firearm restrictions "destroy[]" or "eviscerate" the Second Amendment and therefore require "*Heller*-style per se invalidation."[241]

This phenomenon is evident in lower court cases addressing the issue pending now before the Supreme Court in *Bruen*: the constitutionality of strict

233. *See id.* at 342 (contending this is arguably the most appropriate lens).

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

235. Teter v. Connors, 460 F. Supp. 3d 989, 1002 (D. Haw. 2020) (emphasis and alterations in original).

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

237. *Id.* at 1005 (citation omitted). After comparing to handgun bans, the court called the butterfly knife ban a "modest infringement" on the Second Amendment right and applied intermediate scrutiny. *Id.*

238. *See supra* notes 105–06 and accompanying text.

239. Maloney v. Singas, 106 F. Supp. 3d 300, 311 n.17 (E.D.N.Y. 2015) (quoting *Heller*, 554 U.S. at 629).

240. *See supra* notes 133–39 and accompanying text.

241. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1170, 1172 (9th Cir. 2014), *vacated on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016); Peruta v. Cnty. of San Diego, 824 F.3d 919, 946 (9th Cir. 2016) (en banc) (Callahan, J., dissenting).

permitting requirements for publicly carrying handguns for self-defense. These laws generally require a showing of heightened need to carry a handgun for self-defense—something separating the permit applicant's security needs from the general public.[242] They typically do not, however, address the right to carry other arms.[243]

When a Ninth Circuit panel considered such a handgun permitting requirement, the panel struck down the law after declaring that "regulations affecting a *destruction* of the right to bear arms," which is how the panel characterized the handgun permitting law, "cannot be sustained under any standard of scrutiny."[244] In another opinion about handgun carry permits, a dissenting judge wrote that the licensing regime "*eviscerates* the Second Amendment right of individuals to keep and bear arms as defined by *Heller* and reaffirmed in *McDonald*."[245] An opinion out of the D.C. Circuit concluded that requiring a showing of good cause before receiving a permit to carry a concealed handgun "*destroys* the ordinarily situated citizen's right to bear arms."[246] These courts made these absolutist pronouncements without so much as mentioning the possibility of carrying other arms.

This gun-centric distortion is also evident for other Second Amendment issues. For example, a judge wrote that disqualifying felons from possessing guns "criminaliz[es] exercise of the [Second Amendment] right *entirely*."[247] Similarly, a district judge opined that a gun restriction targeting the mentally ill "*completely eviscerate[s]* Second Amendment rights."[248] Given that the Second Amendment protects far more than gun possession, the impingements in these cases are less total than these judges suggest, and the Second Amendment analysis should be adjusted accordingly. Judges should not rely

242. *See, e.g.*, N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021) (providing for concealed carry licenses for applicants if they show "proper cause"); Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 257 (1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981) (interpreting "proper cause" under Penal Law § 400.00(2)(f) to require "a special need for self-protection distinguishable from that of the general community").

243. *See, e.g.*, N.Y. PENAL LAW § 400.00 (McKinney 2021) (titled "Licenses to carry, possess, repair and dispose of firearms"). This is not to say that the carrying of other arms is not regulated. It often is, including in New York. The point is that challenged public carry restrictions generally address only a single arm, and the judicial analysis in cases considering those restrictions is likewise focused on that single arm.

244. *Peruta*, 742 F.3d at 1175 (emphasis added and omitted).

245. *Peruta*, 824 F.3d at 946 (Callahan, J., dissenting) (emphasis added).

246. Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017) (emphasis added); *see also id.* (characterizing the law as a "destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense in any fashion at all" and a ban "on the ability of most citizens to exercise an enumerated right").

247. Binderup v. Att'y Gen., 836 F.3d 336, 358 (3d Cir. 2016) (Hardiman, J., concurring) (emphasis added).

248. Keyes v. Sessions, No. 1:15-cv-457, 2017 WL 11068791, at *16 (M.D. Pa. 2017) (emphasis added) (arguing that 18 U.S.C. "§ 924(g)(4) operates to completely eviscerate Second Amendment rights").

on notions of the "destruction" of the right in these cases to short-circuit scrutiny and deem gun laws unconstitutional.

Considering gun-centricity begs a related question of whether Second Amendment doctrine should expressly look to alternatives to guns as a reason to insulate gun laws from Second Amendment challenges, at least in some contexts. At first blush, such an analysis was foreclosed by *Heller*. The Court stated 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."[249] *Heller*'s statement, which makes no mention of other types of arms, has subsequently been used to oppose doctrine that would justify any gun restrictions on the basis of alternative arms.[250]

In an earlier Article, I argued that a Second Amendment alternatives analysis that considers the availability of sufficient, less lethal weapons is a logical extension of the self-defense requirement of necessity.[251] In particular, self-defense law considers whether lethal defensive force was reasonably perceived as necessary, which in turn calls for an inquiry into reasonable alternatives to lethal force.[252] Second Amendment law arguably should not stray from the law regulating its core interest of self-defense, in which case the availability of alternative arms (especially less lethal ones) might factor into the doctrine.[253] Joseph Blocher and Darrell Miller have likewise argued that considering alternatives would harmonize Second Amendment law with First Amendment law, which takes into consideration whether time, place, and manner restrictions "leave open ample alternative channels for communication of the information."[254] Appreciating the vast scope of alternative "arms" used for self-defense confrontations enhances these arguments.

As a practical matter, considering alternatives could be especially helpful in explaining why certain widely-accepted firearm restrictions pass constitutional muster. For example, consider the constitutionality of restrictions on possessing weapons following a felony conviction. Such laws

249. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

250. *See, e.g.*, Caetano v. Massachusetts, 577 U.S. 411, 421 (2016) (Alito, J., concurring) (citing *Heller*'s statement in support of the notion that "the right to bear other weapons is 'no answer' to a ban on the possession of protected arms"); Kolbe v. Hogan, 849 F.3d 114, 161–62 (4th Cir. 2017) (Traxler, J., dissenting) (emphasis omitted) (arguing that an alternatives analysis was "expressly rejected" by *Heller*).

251. Ruben, *supra* note 12, at 79, 103–04.

252. *See, e.g.*, Paul H. Robinson, Essay, *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, 253 (2009) (noting that "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).

253. Ruben, *supra* note 12, at 103–104, 105.

254. *See* Blocher & Miller, *supra* note 12, at 291 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981)).

exist in every jurisdiction in the country.[255] Challenges to them are regularly rejected,[256] but the rationale for rejection is intensely debated.[257] Some courts and commentators have asserted that a criminal conviction completely removes a person from the Second Amendment's coverage.[258] Others have taken a different approach, concluding that convictions do not automatically or permanently carve people out from the Second Amendment's protection.[259] Then-Judge Amy Coney Barrett, in particular, questioned whether it is appropriate to conceive of a person as losing Second Amendment rights entirely following a conviction.[260] Justice Barrett's skepticism comports with how we think about other individual rights.[261] But how, then, are we supposed to rationalize what Barrett nevertheless characterized as the "common sense" conclusion "that legislatures have the power to prohibit dangerous people from possessing guns"?[262]

This is a context where *Heller* (likely, inadvertently) is consistent with a role for alternative arms. The Supreme Court cautioned that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of *firearms* by felons,"[263] which of course is narrower than a

255. *See, e.g.*, 18 U.S.C. § 922(g)(1) (2018) (criminalizing possession of firearms by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year"); RESTORATION OF RIGHTS PROJECT, 50-STATE COMPARISON: LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS (July 2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges [https://perma.cc/6GUN-XJRT] (conducting a 50-state survey). A smaller number of jurisdictions impose similar limitations on the possession of other types of weapons like stun guns and pepper spray. *See* Volokh, *supra* note 12, at 226; Jacobs, *supra* note 12, at 149.

256. *See* Ruben & Blocher, *supra* note 13, at 1481.

257. *See generally* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 L. & CONTEMP. PROBS. 53 (2020) (discussing conceptual debate regarding how to think about categorical firearm disqualifications).

258. *See, e.g.*, United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (concluding "that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment," and holding that Section 922(g)(1) is "a constitutional avenue to restrict the Second Amendment right of certain classes of people," including convicted felons); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009) ("*Heller* categorically excludes certain types of 'people' and 'Arms' from Second Amendment coverage, denying them any constitutional protection whatsoever.").

259. *See, e.g.*, Binderup v. Att'y Gen., 836 F.3d 336, 356–57 (3d Cir. 2016) (granting as-applied relief to two plaintiffs challenging the federal felon-in-possession law, 18 U.S.C. § 922(g)(1)) (en banc); United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014) (noting that "the Eighth Circuit has left open the possibility that a person could bring a successful as-applied challenge to § 922(g)(1)" but rejecting defendant's as-applied challenge because he had multiple violent felony convictions); *see also* Kanter v. Barr, 919 F.3d 437, 442–45 (7th Cir. 2019) (describing circuit split).

260. *See Kanter*, 919 F.3d at 451–53 (Barrett, J., dissenting).

261. *See generally* Charles, *supra* note 257 (comparing, for example, how courts have limited free speech under the First Amendment to how courts have limited Second Amendment rights).

262. *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

263. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (emphasis added).

prohibition on possession of all arms. The relevant question in a world in which there is more than one type of arm arguably should be whether it is constitutional to take one highly lethal arm off the table after a conviction, not whether it is permissible to remove Second Amendment rights completely. Framed in this way, a conviction puts in jeopardy a person's gun rights, but not all Second Amendment rights. This relates back to the discussion of burdens: When viewed through the lens of all covered arms, felon-in-possession laws simply do not, as one judge put it, "completely eviscerate[] the Second Amendment right."[264] Similar reasoning could apply in other contexts, including restrictions on publicly carrying handguns that do not foreclose the carrying of less lethal arms.

To be sure, it is easy to imagine an alternatives analysis going too far and resulting in an anemic Second Amendment right. As one judge observed in a stun gun case, "the baseball bat [the plaintiff] already owns certainly counts as the type of thing a determined person could pick up and use for self-defense. What other self-defense weapons could be banned by pointing to baseball bats as a so-called 'adequate alternative?'"[265] A challenge would be how to implement an alternatives analysis in a way that does not under-protect the right to keep and bear arms. Considering alternatives might make more sense in some contexts (like the rights to carry weapons in public or to possess them following a conviction) than others (like the right to possess weapons in the home). This Article should not be read to minimize the challenge of articulating a workable alternatives analysis, which deserves much more judicial and scholarly attention.[266]

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264. *See, e.g.*, *Binderup*, 836 F.3d at 364.

265. Avitabile v. Beach, 368 F. Supp. 3d 404, 417 (N.D.N.Y. 2019).

266. Another counterargument to the consideration of alternatives is that the Second Amendment protects an unqualified interest in weapon choice or autonomy, which "resonates with the strongly libertarian flavor of much gun-rights rhetoric." *See* 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, 348–50 (2016) (considering various possible theoretical underpinnings of the Second Amendment, including autonomy). This perspective can be gleaned in a recent, now-vacated, opinion about large-capacity magazines, where a Ninth Circuit panel opined that "the Second Amendment limits the state's ability to second-guess a citizen's choice of arms if it imposes a substantial burden on her right to self-defense." Duncan v. Becerra, 970 F.3d 1133, 1141 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021). The opinion went on to defer to those who "find solace in the security of a handgun equipped with [a large-capacity magazine]," striking down a prohibition on magazines holding more than 10 rounds. *Id.* Accepting a Second Amendment interest in unfettered weapon choice would, of course, undercut the doctrinal import of the breadth of personal weaponry. It also would have other far-reaching implications, expanding the Second Amendment right well beyond the current judicial consensus. *Cf.* Blocher & Miller, *supra* at 349 (suggesting a Second Amendment autonomy interest could overexpand the Second Amendment). Bans on 10-plus-round magazines, for example, have been upheld by every federal appeals court to consider them, despite the fact that many Americans may "find solace" in owning them. *Duncan*, 970 F.3d at 1141. A less-than-absolute interest in weapon choice, in contrast, might accommodate some role for alternatives. The intersection of the Second Amendment and individual autonomy is yet

2. Over-relying on and Misreading History

Gun-centric litigation has contributed to other doctrinal problems, including as regards the use and misuse of history. To set the stage, this Section first summarizes an ongoing debate about the appropriate methodology to apply in Second Amendment cases.

The dissenting Justices in *Heller* complained that the majority failed to provide "a framework for constitutional analysis."[267] The majority's retort was simple: "one should not expect [the Court] to clarify the entire field" in its "first in-depth examination of the Second Amendment."[268] In the years after *Heller*, questions about the appropriate methodology to apply have featured prominently in Second Amendment litigation, with a consensus approach emerging, accompanied by a dissenting view.

Every federal circuit to decide the methodological issue has adopted a two-part framework borrowed from other areas of constitutional law.[269] First, courts inquire whether regulated conduct, people, or weapons fall within the scope of the Second Amendment.[270] Second, if so, the court then evaluates the law under either intermediate or strict scrutiny depending on the law's burden on the right to keep and bear arms.[271] This approach is flexible—indeed, flexible enough to accommodate and incorporate a range of weapons. But it is vehemently contested in some dissenting opinions as being either too lax or inconsistent with *Heller*.[272]

The leading doctrinal alternative is the THT test raised in the introduction.[273] Then-Judge Brett Kavanaugh, for example, opined that "*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition."[274] Subsequently, other judges have similarly

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another theoretical issue about the right to keep and bear arms that warrants more scholarly attention.

267. *Heller*, 554 U.S. at 722 (Breyer, J., dissenting).

268. *Id.* at 635 (majority opinion).

269. *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").

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

271. *Id.*

272. *See, e.g.*, Mai v. United States, 974 F.3d 1082, 1087 (2020) (Bumatay, J., dissenting) ("It is difficult to square the type of means-ends weighing of a government regulation inherent in the tiers-of-scrutiny analysis with *Heller*'s directive that a core constitutional protection should not be subjected to a 'freestanding "interest-balancing" approach.'").

273. *See supra* notes 31–33 and accompanying text.

274. Heller v. District of Columbia, 670 F.3d 1244, 1272–73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

called for adopting this judicial test.[275] With the changed composition of the Supreme Court, including the elevation of Justice Kavanaugh, THT may appeal to a majority of the Justices. Indeed, after the most recent Second Amendment case at the Supreme Court was rejected as moot,[276] four Justices cryptically voiced "concern that some federal and state courts may not be properly applying" Second Amendment doctrine.[277] Soon thereafter, the Court denied ten pending certiorari petitions, prompting two Justices similarly to bemoan the Court's willingness to tolerate "blatant defiance" of its Second Amendment precedent.[278]

But THT has not been evaluated outside the gun-centric context. Indeed, Kavanaugh wrote that THT is relevant for determining "the constitutionality of *gun* bans and regulations."[279] To be sure, even in gun cases, THT does not always provide clear answers,[280] something that even proponents of a strictly historical approach acknowledge.[281] But the problems multiply as we consider weapons more broadly.

Even for weapons with a long lineage, like knives, history may prove indeterminate. Historical regulations precluded the carrying of certain large

275. *See, e.g.*, *Mai*, 974 F.3d at 1087 (Bumatay, J., dissenting) (critiquing the two-step approach and advocating for THT); United States v. McGinnis, 956 F.3d 747, 762 (5th Cir. 2020) (Duncan, J., concurring) (same); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J., dissenting) (same); Mance v. Sessions, 896 F.3d 390, 398 (5th Cir. 2018) (Willett, J., dissenting) (same); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring) (same); *id.* at 710 (Sutton, J., concurring) (same).

276. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

277. *Id.* at 1527 (Kavanaugh, J., concurring) (noting that he shared that concern with Justice Alito, whose opinion was in turn joined by Justices Thomas and Gorsuch). Justice Alito, for his part, wrote, "[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." *Id.* at 1544 (Alito, J., dissenting).

278. Rogers v. Grewal, 140 S. Ct. 1865, 1867–68 (2020) (Thomas, J., dissenting from denial of certiorari, and joined by Justice Kavanaugh on this point); *see also* Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/NDU6-FUEE] (explaining Justice Barrett's endorsement of originalism and textualism).

279. Heller v. District of Columbia, 670 F.3d 1244, 1272–73 (Kavanaugh, J., dissenting) (emphasis added).

280. There are no clear historical reference points, for example, for "ghost guns" designed to stonewall criminal investigations. *See* United States v. McSwain, No. CR 19-80, 2019 WL 1598033, at *3 (D.D.C. Apr. 15, 2019) (describing a "ghost gun" as "a weapon that lacks a serial number [and] . . . is therefore untraceable by law enforcement"). Moreover, as Judge J. Harvie Wilkinson has observed, "true history is often tentative and qualified" and historical research is "often inconclusive." WILKINSON, *supra* note 43, at 42, 51. Judges have concluded as much when trying to draw on history to decide gun cases. *See, e.g.*, Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("History and tradition do not speak with one voice here.").

281. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) ("[A]nalyzing the history and tradition of gun laws in the United States does not always yield easy answers.").

knives like the "Bowie knife."[282] Today, like the nineteenth century regulation of Bowie knives, legislators are concerned with blade length. Unlike the 1800s regulations, however, modern laws speak more precisely about permissible lengths. In Chicago, carried knives must be less than two and one-half inches.[283] In Los Angeles, Michigan, Rhode Island, and Vermont, the permissible length is up to three inches.[284] In Colorado, it is unlawful to carry a concealed knife longer than three and one-half inches.[285] In Connecticut, the maximum length is four inches, unless the knife is an "automatic" or "stiletto," in which case it is restricted to one and one-half inches.[286] Iowa and North Dakota bar public carry of knives longer than five inches.[287] The historical restriction on Bowie knives will do little to assist courts in determining the constitutionality of a restriction on carrying blades longer than two and one-half inches versus four inches versus five inches. Yet, such difficulties, which are bound to arise in future non-gun cases, are out of view for judges advocating for THT.

New weapons technology, meanwhile, begets new regulatory approaches and novel constitutional issues. Consider chemical sprays, whose potency depends on the chemical used,[288] concentration,[289] grind,[290] and viscosity.[291] Michigan and Wisconsin limit the active ingredient for pepper spray (oleoresin capsicum) to no more than 18 percent or 10 percent respectively.[292] Wisconsin also prohibits the sale of pepper sprays with a range

282. *See, e.g.*, 1837-38 Tenn. Pub. Acts 200–01, An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, chapter 137, § 2. Though "there is no one specific knife that can be exactingly described as a Bowie knife," the defining attribute appears to be their large size. Kopel et al., *supra* note 12, at 181 (quoting NORM FLAYDERMAN, THE BOWIE KNIFE: UNSHEATHING AN AMERICAN LEGEND 490 (2004)).

283. MUN. CODE CHI. § 8-24-020(f) (2021).

284. L.A. MUN. CODE § 13.62.010 (2021); MICH. COMP. LAWS ANN. § 750.226 (West 2021); 11 R.I. GEN. LAWS § 11-47-42(3) (2021); VT. STAT. ANN. tit. 13 § 4013 (2021).

285. COLO. REV. STAT. ANN. §§ 18-12-105(1)(a), 18-12-101(f) (West 2021).

286. CONN. GEN. STAT. ANN. § 53-206(a) (West 2021).

287. IOWA CODE ANN. § 702.7 (West 2021); N.D. CENT. CODE ANN. § 62.1-01-01 (West 2021).

288. The first chemical spray widely available for defensive purposes was phenacyl chloride ("CN"), or tear gas. *See* ERIC H. HOLDER, JR., LAURIE O. ROBINSON & JOHN H. LAUB, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 3 (2011), https://www.ncjrs.gov/pdffiles1/nij/232215.pdf [https://perma.cc/C5BE-FPGW]. In the 1950s, a more potent compound, 2-chlorobenzalmalononitrile ("CS") hit the markets. *Id.* In the 1980s and 1990s, oleoresin capsicum ("OC"), a compound extracted from chili plants to make pepper spray, was marketed as an alternative to CN and CS. *Id.*

289. *See* TECH. ASSESSMENT PROGRAM, NAT'L INST. OF JUST., U.S. DEPT. OF JUST., OLEORESIN CAPSICUM: PEPPER SPRAY AS A FORCE ALTERNATIVE 2 (1994).

290. Similar to how the strength of coffee varies by grind, the finer pepper is ground before oil is extracted to make pepper spray, the stronger the spray will be. *Id.*

291. The less viscous the OC solution, the easier it will be to spray as a mist and the greater the weapon's effective range. *Id.*

292. *See* MICH. COMP. LAWS § 750.224d(ii) (2018); WIS. ADMIN. CODE JUS § 14.05 (2001).

of over 20 feet.[293] Most jurisdictions take a less precise approach such as limiting cannister size.[294] It is not hard to imagine states opting for the Michigan/Wisconsin approach in the future, however, or regulating one of the other indicators of potency.[295] Historical weapons law precedent will be unhelpful for dealing with the constitutionality of such regulations, but that eventuality is obscured by the gun-centricity of modern-day litigation.

To be sure, even then-Judge Kavanaugh recognized, in the abstract, this issue. He wrote that "when legislatures seek to address new weapons that have not traditionally existed . . . , there obviously will not be a history or tradition of banning such weapons . . . . [I]n such cases, the proper interpretive approach is to reason by analogy from history and tradition."[296] But what is the historical analogy for the amperage in a taser or the chemical, let alone its concentration, viscosity, or range, in a chemical spray? Kavanaugh did not say, nor could he—modern weapons are similar to older ones only at such a high level of generality (as weapons, for example) as to be doctrinally unhelpful. Yet this reality is obscured because there simply are insufficient non-gun cases to reveal it.[297]

No matter what role history plays in Second Amendment doctrine, meanwhile, the historical analysis has been skewed in a gun-centric way that tends to expand gun rights. In particular, courts have analogized to nineteenth-century state-court opinions addressing the right to keep and bear arms,[298] but they have overlooked how the challenged historical restrictions regulated far more weapons than guns alone. Some 1800s opinions included sweeping language about the destruction or evisceration of the right akin to

293. WIS. ADMIN. CODE JUS § 14.06 (2001).

294. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-401.6(a)(7) (West 2011) (permitting the use and possession of "tear gas" and functional equivalents so long as the "device or container does not exceed 150 cubic centimeters[,] . . . [the] cartridge or shell does not exceed 50 cubic centimeters, and . . . [the] gas device or container does not have the capability of discharging any cartridge, shell, or container larger than 50 cubic centimeters"); N.Y. PENAL LAW § 265.20(14)(a) (McKinney 2020) (excluding from certain regulations a "pocket-sized" "self-defense spray device").

295. *See supra* notes 288–91 and accompanying text.

296. Heller v. District of Columbia, 670 F.3d 1244, 1275 (Kavanaugh, J., dissenting).

297. This critique is not unique to the Second Amendment even if it is especially pronounced in that context because the essence of the right to keep and bear arms revolves around a type of evolving technology—weaponry. In a Fourth Amendment case, for example, Justice Alito commented that "it is almost impossible to think of late–18th-century situations that are analogous to" GPS searches. United States v. Jones, 565 U.S. 400, 420 (2012) (Alito, J., concurring). In a different case, the Court pondered whether "an e-mail [is] equivalent to a letter" or "a voicemail [is] equivalent to a phone message slip," concluding that such comparisons are unhelpful to provide notice to police officers or guidance to courts tasked with enforcing the Fourth Amendment protections. Riley v. California, 573 U.S. 373, 401 (2014). *See generally* Han, *supra* note 51, at 75 (exploring how technology can "introduc[e] novel scenarios that reach beyond the paradigmatic circumstances upon which the existing scope of the right has been established").

298. *See supra* notes 244–48 and accompanying text.

the language quoted above from modern opinions.[299] But the context was different then because the courts were expressly considering regulations that swept more broadly than the gun policies at issue in many modern Second Amendment cases.[300] As I argue above,[301] restricting a panoply of personal weapons intuitively imposes a greater burden on the right to keep and bear arms than restricting just one weapon. Yet that nuance is overlooked in the gun-centric analysis.

Heller arguably demonstrates this pathology. The Court cited *State v. Reid*, an Alabama Supreme Court opinion from 1840, as an example of how a regulation can amount to "a destruction of the right" to bear arms.[302] *Heller* failed to mention, however, that the Alabama law in *Reid* restricted the carrying of "any . . . deadly weapon."[303] *Heller* characterized several other 1800s opinions in ways that also could suggest that they were solely gun laws. The majority wrote that "[i]n *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons)."[304] The Georgia statute considered in *Nunn*, however, did not prohibit "carrying pistols" alone, but expressly targeted various "Deadly Weapons."[305]

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299. *See, e.g.*, State v. Reid, 1 Ala. 612, 616 (1840) (discussing how a regulation can "amount[] to a destruction of the right" to bear arms); *supra* notes 245–48 and accompanying text.

300. To be sure, there were some historical laws that targeted firearms alone. For example, it would not make sense to include knives or impact weapons in a law addressing unlawfully "firing" weapons, a target of regulation dating back to at least the 1700s. *See, e.g.*, 1792 Md. Laws 22 ("That if any person or persons shall fire any gun or pistol in the said town, such person or persons shall, for every such offense, forfeit and pay the sum of five shillings current money."). The same was true of early safe storage laws, which focused on the risks presented by highly flammable gun powder. *See, e.g.*, 1786 N.H. Laws 383–84, An Act to Prevent the Keeping of Large Quantities of Gun-Powder in Private Houses in Portsmouth, and for Appointing a Keeper of the Magazine Belonging to Said Town. Laws regulating the sale of firearms to Native Americans, too, frequently limited the scope of the restriction to firearms due to a concern about empowering enemies in battle. *See, e.g.*, J. HAMMOND TRUMBULL, THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT: PRIOR TO THE UNION WITH NEW HAVEN COLONY 79 (1665) ("It is Ordered, that noe man within this Jurisdiction . . . shall sell or give to any Indean, directly or indirectly, any such gun or gunpowder, or shott, or lead, or mould, or military weapons, or armor . . . .").

301. *See supra* notes 230–34 and accompanying text.

302. District of Columbia v. Heller, 554 U.S. 570, 629 (quoting *Reid*, 1 Ala. at 616–17).

303. *See* 1839 Ala. Acts 67, An Act to Suppress the Evil Practice of Carrying Weapons Secretly (regulating "any species of fire arms, or any bowie knife, Arkansaw tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon").

304. *Heller*, 554 U.S. at 629 (citing Nunn v. State, 1 Ga. 243, 251 (1846)). There are many reasons to be wary of *Nunn* that go beyond the scope of this Article. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 123 (2015) (noting "*Nunn* and similar cases were the product of a unique regional culture during a unique period in the nation's development").

305. 1837 Ga. Laws 90, An Act to Guard and Protect the Citizens of this State, Against the Unwarrantable and too Prevalent use of Deadly Weapons (restricting the sale, possession, and carrying "of the hereinafter described weapons, to wit: Bowie, or any other kinds of knives,

Heller likewise relied on a Tennessee Supreme Court case, *Andrews v. State*, which struck down a statute *Heller* characterized as forbidding "openly carrying a pistol 'publicly or privately, without regard to time or place, or circumstances.'"[306] But as with the law in *Nunn*, the Tennessee statute at issue in *Andrews* was not limited to handguns, but also extended to other weapons, too.[307] Indeed, the 1800s restrictions that get the most attention in modern Second Amendment case law generally applied to a broad array of weapons, but are treated in modern opinions as if they are analogous to today's gun laws.[308]

Legislators singled out firearms for separate regulatory treatment around the turn of the twentieth century because of the public threat posed by increasingly dangerous firearm technology.[309] At that time, judges appreciated the fact that only one arm out of many was at issue. For example, in 1911, New York passed the Sullivan Law, which required permitting for the possession of pistols.[310] When the law was challenged as violating the Second Amendment, the appellate court emphasized the focus on "one particular kind of arm."[311] The effect of the law was that "the citizen may not have that particular kind of weapon without a permit, as it had already said that he might not carry it on his person without a permit."[312] The law at issue in *Bruen*, now before the Supreme Court, is the lineal descendent of those century-old New York policies, and still today addresses just one of many arms: the handgun.[313]

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manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defense, pistols, dirks, sword canes, spears, &c").

306. *Heller*, 554 U.S. at 629 (quoting Andrews v. State, 50 Tenn. 165, 187 (1871)).

307. 1869-1870 Tenn. Pub. Acts 13, An Act to Preserve the Peace and Prevent Homicide, (prohibiting possession of "a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver").

308. For example, jurisdictions barred concealed carry of "arms of any kind whatsoever" or any "other deadly weapon." *See, e.g.*, DUVAL, *supra* note 35, at 423 ("[I]t shall not be lawful for any person in this Territory to carry arms of any kind whatsoever secretly, on or about their persons . . . ."); 1862 Colo. Sess. Laws 56, An Act To Prevent The Carrying Of Concealed Deadly Weapons In The Cities And Towns Of This Territory ("If any person or persons shall . . . carry concealed upon his or her person any pistol, bowie knife, dagger, or other deadly weapon, [they shall be fined].").

309. *See* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 311 (2019) ("The general public's broad support for firearms regulations in the early twentieth century can be partly attributed to the United States leading the western civilized world in crimes and homicides committed . . . . To many contemporaneous observers, the root of the problem was indiscriminate pistol toting."). As a New York State Coroner's Office Report noted, "[t]he increase of homicide by shooting . . . indicates the urgent necessity of the proper authorities taking some measures for the regulation of the indiscriminate sale and carrying of firearms." *Revolver Killings Fast Increasing*, N.Y. TIMES (Jan. 30, 1911), at 4 (quoting N.Y. State Coroner's Office Report).

310. *See* 1911 N.Y. PENAL LAW 195.10 (codifying N.Y. Penal Law § 1897, ¶ 3).

311. People ex rel. Darling v. Warden of City Prison, 154 A. D. 413, 423 (N.Y. App. Div. 1913).

312. *Id.* In rejecting the challenge to the Sullivan Law, the court also relied on the basis, rejected in *McDonald*, that the Second Amendment does not apply to the states. *Id.* at 419. That aspect of the opinion is less relevant to exploring today's gun-centric litigation.

313. *See* N.Y. State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643, at *1 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners'

The distinction between gun laws and broader weapons laws went overlooked in *Heller*'s historical analysis and has been overlooked by lower courts. The result is that modern-day opinions rely on inapt historical analogies to strike down gun-specific laws. Indeed, each of the modern-day opinions discussed above that found that gun laws destroyed or eviscerated the Second Amendment cited 1800s precedent for support without acknowledging this important distinction.[314]

IV. IMPLICATIONS AND SOLUTIONS

This Article has described how Second Amendment litigation focuses almost exclusively on gun rights, despite the fact that guns are just one arm that most Americans choose not to have or carry for self-defense. I have argued that judges overlook the breadth of weapons and weapons policies implicated by the Second Amendment. As a result, the Second Amendment analysis in some opinions has been distorted in concrete ways. This Part considers broader implications and potential solutions.

It is worth repeating at the outset of this discussion that some degree of distortion can always be expected in the judicial process. Discrete cases will *never* be perfectly representative of the broader range of questions implicated in a legal area. And, judges, like all humans, have cognitive biases that might be especially pronounced when faced with a discrete set of adjudicatory facts.[315] These realities inform a broad critique of judicial competency,[316] but my goal in this Part is to stay within the institutional boundaries as they currently exist; how can litigants and courts working within our current judicial framework reduce the likeliness of distortion due to unrepresentative litigation? I cannot propose a panacea, but I discuss some potential, partial solutions that pertain to advocates as well as judges.

A. BRINGING ATTENTION TO THE BROADER FIELD

When litigation asymmetries exist with respect to a right, one corrective is to balance out the litigation to remove the asymmetry, and thereby illuminate a more complete picture of the right. In that vein, some scholars have emphasized "the importance of deciding enough cases in order to clarify the scope of constitutional rights."[317] The hope is that if the raw number of cases is sufficient, the judiciary will operate like a laboratory, with judges considering a comprehensive spectrum of cases for any given issue and

applications for concealed-carry licenses for self-defense violated the Second Amendment"); *supra* notes 242–43 (discussing New York's concealed carry permitting law).

314. *See supra* notes 244–48.

315. *See* Schauer, *supra* note 3, at 894–95.

316. *Id.* at 916–17.

317. Leong, *Making Rights*, *supra* note 3, at 418 (critiquing this view); *id.* at 410–14 (summarizing commentary).

developing doctrinal approaches to accommodate the range of cases.[318] By the time an issue lands on the Supreme Court's docket, the Justices can survey lower court case law, settle disagreements, and establish uniform standards.

Second Amendment litigation demonstrates, however, that even with ample litigation such an efficient laboratory-like process is not preordained. The unrepresentativeness explored in this Article—gun-centricity—will not just disappear with a net increase in Second Amendment cases. Indeed, the Second Amendment defies assumptions about how one might expect litigation to proceed. Gun cases outpace nonlethal weapons cases 50 to 1 despite evidence that challenges to restrictions on nonlethal weapons enjoy a higher success rate.[319] After those losses, meanwhile, litigants in gun cases appeal at rates that surpass appeal rates in other types of civil litigation.[320] In short, parties in gun cases are often undeterred by low chances of success, and those who exercise Second Amendment rights with other instruments rarely litigate.[321] Whether the bias toward gun cases is due to well-financed, litigious advocacy organizations, regulatory asymmetry (with guns being regulated

318. *See generally* Maureen N. Armour, *Federal Courts as Constitutional Laboratories: The Rat's Point of View*, 57 DRAKE L. REV. 135 (2008) (considering the role of the lower federal courts in the creation and implementation of Supreme Court doctrine); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 441 n.215 (2007) ("Scholars have debated whether or not it is beneficial to allow legal issues to 'percolate' in the lower courts, thereby producing a divergence of approaches which may then inform the Supreme Court's ultimate resolution of an issue.").

319. *See* Ruben & Blocher, *supra* note 13, at 1482 ("Litigants . . . fared better when they challenged regulations on nonlethal weapons (25 percent success) than other types of weapons.").

320. Ted Eisenberg has found that, in general, 19 percent of nontried civil cases resulting in a definitive judgment are appealed. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 (2004). In contrast, Joseph Blocher and I found that at least 28 percent of civil Second Amendment cases in federal courts are appealed. Ruben & Blocher, *supra* note 13, at 1472–73.

321. This pattern defies the usual assumptions about litigation behavior. George Priest and Benjamin Klein famously hypothesized that litigants "form rational estimates" of the likelihood of a particular outcome and litigate, as opposed to settle, cases when they are most likely to prevail. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–6 (1984). This theory has proved accurate in many contexts. *See generally* Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypothesis: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59 (2016) (offering mathematical proofs of some of the hypotheses derived from Priest and Klein's work). But the Priest-Klein hypothesis does not necessarily extend to the issues and arguments that litigants raise in any given case. *See, e.g.*, Jason Rantanen, *Why Priest-Klein Cannot Apply to Individual Issues in Patent Cases* 3 (U. Iowa Legal Stud., Rsch. Paper No. 12-15, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132810 [https://perma.cc/ED8T-NL9G]. It also may not apply equally well across categories of litigation, such as ideologically driven gun litigation. This phenomenon in Second Amendment litigation has caught the attention of commentators who offer various explanations. Adam Samaha and Roy Germano, for example, have suggested that the surprising litigation rates in gun cases may reflect the stakes of gun rights for advocates and resources available to the litigation arm of the gun rights movement. Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 861 n.176 (2017).

more strictly than non-guns), or something else, we can expect a similar litigation imbalance to persist.[322]

More litigation alone is thus unlikely to correct the problem. But is it possible to incentivize more non-gun cases seeking to vindicate taser rights, pepper spray rights, and so on? If possible, then the asymmetry between gun cases and non-gun cases would be reduced, the scope of the right to keep and bear arms would be reflected in litigation, and we could expect the judicial analysis to improve.

This sort of solution has been proposed in other contexts. Zick, for example, proposes such a strategy for "reclaim[ing] the Free Exercise Clause": "developing cases and arguments centering on the principle of *religious* discrimination—instead of, or in certain contexts in addition to, expressive discrimination."[323] In that way, litigants can "force courts to re-engage with [the Free Exercise Clause] as an independent guarantee."[324] Leong, likewise, proposes litigating rights "in multiple contexts simultaneously," which among other things increases the likeliness that "the people and factual circumstances presented are . . . roughly representative of the people and factual circumstances to which the resulting legal principles will be applied."[325]

But *how* do we motivate such litigation? If non-gun cases have not been prominent in the 13 years since *Heller*, there is little reason to expect them to suddenly arise in the future, especially absent a broader shift in the public's appetite for bringing non-gun cases. The interrelationship between public sentiment and constitutional lawmaking is widely acknowledged. Zick observes that the undeveloped jurisprudence of the First Amendment's Press Clause, for example, "track[s] the public's apparent sense of the value of a free press."[326] David Cole has credited the concerted effort by gun advocates to change public perceptions about the Second Amendment with bringing about *Heller*.[327] Litigation, in this view, is secondary to public sentiment.[328]

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322. And unlike an actual laboratory, the case-or-controversy requirement discussed above, *supra* notes 46–49 and accompanying text, means that judges cannot balance out unrepresentative litigation to achieve a representative picture. *Cf.* U.S. FOOD & DRUG ADMIN., EVALUATION AND REPORTING OF AGE-, RACE-, AND ETHNICITY-SPECIFIC DATA IN MEDICAL DEVICE CLINICAL STUDIES 5 (2017) ("[I]t is important that clinical trials include diverse populations that reflect the intended use population."); Lauran Neergaard & Federica Narancio, *Push Is Underway to Test COVID-19 Vaccines in Diverse Groups*, ASSOCIATED PRESS (Sept. 18, 2020), https://apnews.com/article/health-us-news-ap-top-news-virus-outbreak-clinical-trials-b31d556907b671cdc15ab6024aaa6d87 [https://perma.cc/NJ2V-5LQZ] ("Scientists say a diverse group of test subjects is vital to determining whether a vaccine is safe and effective for everyone and instilling broad public confidence in the shots once they become available.").

323. ZICK, *supra* note 3, at 129.

324. *Id.*

325. Leong, *Improving Rights*, *supra* note 3, at 410.

326. ZICK, *supra* note 3, at 96.

327. COLE, *supra* note 16, at 95–148.

328. *Id.*

Advocates for weapons regulation thus might find benefit in educating the public about the many non-gun instruments available for self-defense, as well as their protection by the Second Amendment, in order to shift popular conceptions of the right to keep and bear arms. If the public appreciated that Second Amendment rights are not just gun rights and understood how self-defense looks in practice, that could eventually both motivate litigation and alter the picture judges see when they look past the case at hand to the public square.

Or, perhaps, there is some legislative way to realign litigation incentives. Leong, for example, notes how providing for attorneys' fees can motivate litigation where it otherwise is lacking.[329] Yet such a solution would require legislative will to broaden the scope of weapons restrictions subject to litigation. When it comes to legislation implicating guns, however, the legislative process is arguably more pathological than the judicial process.[330] Moreover, even if it were possible to implement a broad public education campaign about the true expanse of arms or pass a law that would incentivize more non-gun cases, there is an urgency for more immediate corrective action. Precedent is being established that will constrain future decisions.[331] Stare decisis has myriad virtues,[332] but it means that misguided doctrine is "sticky" and hard to revisit once set.[333] And the Supreme Court, with its grant of certiorari in *Bruen*, has signaled that it is ready to start setting Second Amendment doctrine. Something else, besides non-gun cases, is needed.

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329. Leong, *Improving Rights*, *supra* note 3, at 431–32.

330. *See generally* Jacob D. Charles, *Securing Gun Rights By Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. (forthcoming 2022) (discussing examples of gun control legislation faltering even when garnering widespread public support); *see also* ALEX TAUSANOVITCH, CHELSEA PARSONS & RUKMANI BHATIA, CTR. FOR AM. PROGRESS, HOW PARTISAN GERRYMANDERING PREVENTS LEGISLATIVE ACTION ON GUN VIOLENCE (2019), https://www.americanprogress.org/issues/democracy/reports/2019/12/17/478718/partisan-gerrymandering-prevents-legislative-action-gun-violence, [https://perma.cc/NN44-GHFC] (discussing how partisan gerrymandering creates a disconnect between the public's desire for gun legislation and legislative action).

331. *See* Hathaway, *supra* note 51, at 606 ("The doctrine of stare decisis . . . creates an explicitly path-dependent process. Later decisions rely on, and are constrained by, earlier decisions.").

332. *See* Han, *supra* note 51, at 106 (noting that stare decisis insulates the law from "the vicissitudes of public debate"); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 73 (1991) (supporting "the traditional view that precedents should be overruled only when the prior decision was wrongly decided and there is some other important disadvantage in respecting that precedent"); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (noting the necessity for continuity over time with respect to precedent).

333. *See* Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 92 (2019) ("[L]egal doctrine is often 'sticky,' refusing to budge for some time or in some places or to some degree even after popular sentiments and habits of thought have shifted."); *see also supra* note 51 and accompanying text (noting resolution of legal issues too early can create misguided doctrines resistant to change).

That "something else," I contend, must involve finding solutions in existing *gun* litigation. Gun rights advocates are unlikely to draw attention to non-gun weapons that might dilute the monopoly guns have in Second Amendment jurisprudence, but governments defending against Second Amendment challenges and amici can do so.[334] Indeed, drawing attention to the overlooked scope of the policy landscape constitutionalized by *Heller* would be a textbook contribution in an amicus brief. Commentators have observed the trend of "amicus overload,"[335] and perhaps this is true in Second Amendment cases.[336] However, an overflow of amicus briefs does not minimize the importance of briefs that are "additive to the party discussion, and contribute to the Court's knowledge base in some significant way."[337] The Supreme Court's rules invite "brief[s] that bring[] to the attention of the Court relevant matter not already brought to its attention by the parties."[338] Amicus briefs highlighting the scope of weapons covered by the Second Amendment, the sorts of questions that doctrine will need to address, and the relative burden on Second Amendment rights imposed by a given gun restriction, would do just that.[339]

The proposal of bringing new arguments in litigation is admittedly modest, yet will likely face resistance and, of course, counterarguments. Parties currently advocating for gun restrictions may instinctively hesitate to suggest that the Second Amendment protects a broader range of weapons than guns. After all, gun-safety advocates failed to participate in *Caetano* and have lined up in defense of non-gun weapons restrictions in other cases.[340]

The failure to put guns into a broader weapons perspective may be due to a fear that acknowledging an expanded range of protected weapons could lead to a net increase in individuals keeping and bearing them, which such advocates view as undesirable. Moreover, there is uncertainty about how

334. Leong, *Improving Rights*, *supra* note 3, at 432 (noting the importance of encouraging "robust amicus practice").

335. Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 135 (2017); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL'Y 33, 34 (2004) (noting an 800 percent increase in amicus brief filings from the decade beginning in 1946 to the decade beginning in 1986); Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, LAW.COM (Nov. 18, 2020, 6:11 PM), https://www.law.com/supremecourtbrief/2020/11/18/amicus-curiae-at-the-supreme-court-last-term-and-the-decade-in-review [https://perma.cc/X9HZ-ALH6] ("The 2019–20 term had more than 900 amicus briefs filed in argued cases, the highest average number of amicus briefs per case ever.").

336. *See supra* notes 162–64 and accompanying text (describing quantity of amicus briefs submitted in high-profile Second Amendment cases).

337. Lynch, *supra* note 335, at 69.

338. SUP. CT. R. 37.1.

339. *See* Diane L. McGimsey, *Expert Q&A on Best Practices for Amicus Briefing*, PRAC. L., Aug./Sept. 2016, at 18, 19 (noting that the best amicus briefs "[p]resent[] arguments or theories not advanced by the parties . . . includ[ing] offering alternative legal grounds for deciding the case").

340. *See, e.g.*, Teter v. Connors, Docket No. 20-15948 (9th Cir.) (listing parties).

judges would respond to a broader view of arms. In a world where chemical agents, tasers, knives, and other arms are covered by the Second Amendment, courts might use the broader understanding of arms not to moderate gun rights but to broaden other weapons rights in ways that could exacerbate public safety concerns. We might end up with a public carry regime, for example, that includes long-blade knives and baseball bats *in addition to* handguns. Negative externalities of expansive gun rights, including the suppression of speech and other freedoms,[341] could be made worse. We might end up with more weapons deaths and injuries, not less. After all, non-gun weapons can be dangerous, too, as the January 6, 2021, insurrection at the U.S. Capitol made all too clear.[342]

These fears are understandable, but they must be viewed in light of a sober assessment of the post-*Heller* Second Amendment. A logical implication of *Heller*, accepted by the courts,[343] is that the Second Amendment protects weapons beyond guns. The question is not *whether* knives, tasers, chemical sprays, and blunt force weapons are protected under *Heller*, but *how* they are protected relative to other arms and especially guns. It is, of course, impossible to know how judges will respond to a more comprehensive understanding of arms and the Second Amendment regulatory context when deciding gun cases. But those who are seeking to realize a vision of the Second Amendment that would accommodate reasonable gun regulations must consider the very real possibility that, on its current trajectory, all weapons are protected but none more so than the most lethal ones, guns. Expanding the frame to include other weapons highlights gun-centric flaws in current doctrine that, this Article contends, facilitate the overturning of gun laws. Exposing those flawed arguments should be of interest to gun safety advocates.

B. Exercising Judicial Modesty in the Face of Uncertainty

This Article also speaks to the problem of judicial doctrine-making and implementation when unrepresentative litigation conceals the policies and questions implicated in a given legal area. While the Second Amendment case study does not lend itself to a grand theory of when such circumstances will exist, it does highlight two contextual factors signaling that litigation might be unrepresentative and that the risk of distortion is pronounced: cases involving nascent areas of law and heavy interest-group involvement. When those factors are present, the broader picture can be obscured even when

341. *See* Blocher & Siegel, *supra* note 39; Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 252–53 (2018).

342. *See, e.g.*, Joe Guillen & Jennifer Dixon, *Michigan Man Arrested for Hitting Police with Hockey Stick During Capitol Breach, FBI Says*, USA TODAY (Jan. 21, 2021, 3:52 PM), https://www.usatoday.com/story/news/nation/2021/01/21/wixom-hockey-stick-attack-capitol-breach/6661275002 [https://perma.cc/35WK-KN6J] (detailing the arrest of a man who hit police with a hockey stick).

343. *See supra* Section III.A.

judges try to look past the case at hand to other precedent, scholarship, and public commentary. In such situations, an apparently unified front can conceal a more complex reality, and judges should accordingly proceed with both caution and flexibility.

This recommendation parallels the common wisdom about judging during times of technological change. In the Fourth Amendment context, for example, Orin Kerr contends that "[w]hen technology is in flux, Fourth Amendment protections should remain relatively modest until the technology stabilizes."[344] David Han advocates generally for "flexible, open-ended, and narrowly applied standards" when technology is rapidly advancing.[345] In the absence of such methodological modesty, the law risks "doctrinal obsolescence," with "the perpetuation of rules and principles that do not sensibly fit the world that we currently inhabit."[346]

Returning to the Second Amendment example, in the pre-*Heller* days, a flexible judicial approach prevailed in right-to-keep-and-bear-arms cases. Adam Winkler has written how state courts before *Heller* decided right-to-arms questions by inquiring whether a regulation was "reasonable,"[347] a no-doubt loose inquiry, but one flexible enough to deal with judicial uncertainty. After *Heller*, most lower courts have adopted a different, but still flexible, approach for resolving Second Amendment cases. In particular, the consensus approach described above[348] preserves room for new understandings of the scope of the Second Amendment's protection. The application of broad, rigid rules, in contrast, like THT, can stunt the law from responding to such new understandings.

This call for methodological restraint, however, is in tension with countervailing calls for the adoption of far-reaching judicial rules. Commentators have noted that the "[Supreme] Court increasingly seems to favor rules over standards."[349] A plurality of Justices seems to prefer rules based solely in history and tradition.[350] In other words, inertia at the Court might be moving away from the solution I am proposing. Thus, I hasten to emphasize that my point is not that rules will never be appropriate, but rather that they are unwise until courts develop a thorough understanding of the scope of a legal area, which has not yet happened for the Second Amendment

344. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004).

345. *See* Han, *supra* note 51, at 114.

346. *Id.* at 130.

347. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716 (2007) ("The states have applied a reasonable regulation test to a wide array of gun control measures . . . .").

348. *See supra* notes 269–71 and accompanying text.

349. *See* Blocher, *supra* note 230, at 314.

350. *See supra* notes 32 & 279 and accompanying text (discussing methodological views of current Justices).

as a result of the gun-centricity of post-*Heller* litigation.[351] To the extent the Justices are tempted to set bright-line rules in future Second Amendment cases, they should recall the Supreme Court's caution in *Heller* that "one should not expect [the Court] to clarify the entire field" in the "Court's first in-depth examination of the Second Amendment."[352] Given the gun-centricity of litigation during the past 13 years, it would still be premature to try to do so now.

V. CONCLUSION

Litigation is often viewed as reflecting a sort of natural logic that extends to the selection of cases for resolution and the common law process of developing and implementing coherent doctrine. Yet this laboratory process does not always self-execute without a glitch. Second Amendment jurisprudence demonstrates how unrepresentative litigation can lead to analytical distortions. By illustrating a more nuanced picture of that phenomenon for a consequential area of law, I hope to advance our understanding of the judicial process more generally.

351. *Cf.* Han, *supra* note 51, at 130–31 (making a similar point with regard to technological change).

352. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).