The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings

Alan Brownstein

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol60/iss6/2

This Symposium is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings

ALAN BROWNSTEIN*

INTRODUCTION

When I was asked to participate in this Symposium on the Second Amendment after Heller, I had mixed feelings as to whether or not I should accept the invitation. I have not focused on the meaning of the Second Amendment in my research. Further, as a constitutional and policy matter, I remain conflicted about the underlying issues surrounding gun control laws and the right to bear arms. Put simply, I did not have a horse in this race based on either specific expertise or policy predilection.

However, I thought that the Heller opinion was interesting, provocative, and disturbing in more than enough ways to justify an essay on the decision and its aftermath, so I agreed to write this piece. While there are more critical comments than positive ones in this short Article, none of them go to the core of the substance of the Heller decision. On the basic question of the meaning of the Second Amendment, I reserve judgment.

I. IDEOLOGICAL SLOTH AND CONFUSION

Over the last fifteen to twenty years, the Court has decided several highly controversial cases with strong ideological overtones that can only be described as doctrinal disasters. It is not so much that the holding in each case is persuasive or unpersuasive as to its reasoning, good or bad in normative terms, or right or wrong according to a particular

* Professor of Law, Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, University of California, Davis. B.A. 1969, Antioch College; J.D. 1977, Harvard University. The Author wishes to thank Vikram Amar and Carlton Larson for reading and commenting on early drafts of this Article. I also wish to acknowledge the considerable help I received from my research assistants, Aine Durkin, John Ryan, and Sarah Scott.
methodology for interpreting the Constitution. The problem is that the Court either ducks the critical issue, ignores the doctrinal consequences of its decision by failing to provide a critical part of the analysis, or answers key doctrinal questions with such convoluted or obscure answers that no one has any idea how the holding is to be applied in future cases. I do not know if there is a common explanation for the doctrinally inadequate job the Court does in these cases. Whatever the explanation might be, the Court deserves substantial criticism for failing to perform its supervisory role in providing critical guidance to hundreds of lower federal courts and state courts struggling to interpret the United States Constitution.

The decisions described below are only examples. Unfortunately, many other opinions could easily be added to the ones I mention. These examples ought to be enough, however, to make my point. Consider three cases: In Boy Scouts of America v. Dale, the Court caused considerable confusion by failing to explain how strict scrutiny should be applied when members of protected minority groups are excluded because of their race, gender, nationality, religion, or sexual orientation from associations such as the Boy Scouts, the Little League, or religious summer camps. No attempt was made to explain whether prior freedom of association cases such as Roberts v. United States Jaycees were still good law or on what basis they could be distinguished from Dale's reasoning and holding.

In Lawrence v. Texas, the Court struck down laws prohibiting homosexual sodomy under rational basis review. In doing so, it appeared to apply a more rigorous standard of review reserved for laws abridging fundamental rights, while insisting that it was not doing so. Instead, rational basis review, which is deferential to the point of being nonfatal in fact in virtually all other cases, suddenly and somehow, without plausible explanation, was demanding enough to justify striking down morality-based criminal laws.

In R.A.V. v. City of St. Paul, in order to strike down a hate speech ordinance, the Court announced for the first time that content-discriminatory regulations within a category of unprotected speech, such as fighting words, must be reviewed under strict scrutiny. Confronted with the reality that a broad range of laws would be subjected to constitutional challenge and struck down under this unprecedented
holding, the Court manufactured a laundry list of poorly conceived and described exceptions to try to contain the damage it had done.  

In my judgment, the majority opinion in District of Columbia v. Heller\(^8\) deserves to join this list. The problem with the opinion, of course, is that it does not provide adequate answers to the three critical questions that have to be addressed whenever a fundamental right is recognized under the Constitution: (1) what is the nature and scope of the right, (2) what constitutes an infringement of the right, and (3) what constitutes an adequate justification for the right?  

The majority opinion describes the right to keep and bear arms as essentially the right to have a firearm available for immediate self-defense purposes.\(^9\) That is a start to defining the nature and scope of the right. It identifies the right almost exclusively in instrumental terms,\(^11\) thus implicitly distinguishing it from rights that have a dignitary dimension as well as an instrumental purpose, such as freedom of speech and the exercise of religion.\(^12\) But then the Court goes on to identify what it describes as limitations on the right.\(^13\) This is a nonexhaustive list of situations where the right does not apply either because of the location where the weapon is carried, the nature of the weapon, the identity of the individual asserting the right, or the manner in which the firearm is carried.\(^14\)

It is not altogether clear whether these are intrinsic limitations on the scope of the right or whether they describe justifications for abridging the right. This is a critical distinction because these limitations clearly cover situations where there plausibly could be a need or a justification for carrying a weapon for self-defense purposes. If these limitations are understood to reflect justified restrictions on the exercise of the right, that is, circumstances where the risk to the public good outweighs the value of the right, then these limitations might provide a court some basis for determining whether other restrictions on the exercise of the right could be similarly justified. The Court, however, seems to suggest that the list is grounded in historically recognized

---

7. Id. at 387–90.
11. See id.
14. Id.
exceptions to the scope of the right without any serious attention
directed at the reasoning underlying the exceptions.\textsuperscript{15}

The problem here, of course, is that fundamental rights doctrine in
contemporary constitutional law is not grounded in historical
applications of the right. The complex doctrinal framework that has
developed for interpreting freedom of speech or the equal protection of
the laws, for example, bears little resemblance to a list of historical
exceptions and applications.\textsuperscript{16} Fundamental rights today are understood
to involve a multi-tiered system of review.\textsuperscript{17} As the Second Amendment
now stands, every case that falls outside the parameters of the \textit{Heller}
holding will require an historical analysis of the scope of, and exceptions
to, the right to bear arms for self-defense purposes.\textsuperscript{18}

The Court does a much worse job in discussing what constitutes an
infringement of the right. It holds that a ban on handguns in the home is
unconstitutional even if homeowners are permitted to possess rifles and
shotguns for self-defense purposes.\textsuperscript{19} The primary justification for this
conclusion is that handguns are more popular than other weapons for
home defense purposes.\textsuperscript{20} Here, mysteriously, history no longer appears
to be relevant. Certainly, there is no discussion of whether handguns
were more popular than long guns in 1791 for self-defense purposes, or
even whether handguns were commonly employed for the defense of the
home in colonial America. Nor is it entirely clear why the current
popularity of a particular means of self-defense determines whether its
prohibition constitutes an infringement of an instrumental right, when

\textsuperscript{15} Id.
\textsuperscript{16} For a recent example illustrating this point we need only look to the Court's recent decision in \textit{Morse v. Frederick}, 127 S. Ct. 2618 (2007), a case involving the free speech rights of students attending
public schools. Justice Clarence Thomas wrote a long concurring opinion detailing why he believed
that the original understanding of the Free Speech Clause did not protect the expressive activities of
public school students. Id. at 2629-36 (Thomas, J., concurring). The other members of the Court,
immersed in the doctrinal framework applied to student speech cases, did not even bother to respond
to his arguments.

\textsuperscript{17} See Brownstein, \textit{supra} note 9, at 893-94.

\textsuperscript{18} Nor is it entirely clear whether the exceptions cavalierly recognized in \textit{Heller} should be
applied without further analysis. The recognized prohibition against allowing felons to possess
firearms may have made much more sense in the past when the number of felonies was relatively
limited. See \textit{Posey v. Commonwealth}, 185 S.W.3d 170, 187 (Ky. 2006) (Scott, J., concurring and
dissenting in part). In the modern regulatory state, an astonishingly long list of infractions are
identified as felonies. Many of them bear little, if any, relationship to whether the individual convicted
of such a crime should be denied the right to possess a firearm for self-defense purposes for his or her
entire life. See, e.g., \textit{id}. For an exhaustive discussion of whether the right to keep and bear arms
guaranteed by a state constitution permits the legislature to prohibit felons from possessing firearms,
see \textit{State v. Hirsch}, 114 P.3d 1104, 1107-36 (Or. 2003). For a scathing critique of the \textit{Heller}
majority's suggestion that the exceptions to the right to keep and bear arms that it identifies are grounded in
the original understanding of the Second Amendment, see Nelson Lund, \textit{The Second Amendment, Heller,

\textsuperscript{19} \textit{Heller}, 128 S. Ct. at 2818.
\textsuperscript{20} Id.
there are arguably equally effective means for accomplishing the right's function, while reducing the risk and cost of the exercise of the right to the general public.\footnote{21}

Moreover, the primary regulation the Court strikes down involved a total ban of handgun possession in the home.\footnote{22} What if a regulation does not involve an outright ban of firearms in the home, but increases the cost of obtaining a gun or otherwise burdens an individual's ability to acquire and possess a firearm? We are told absolutely nothing about what kind of burdens on the possession of firearms, short of a total ban, infringe the Second Amendment and require justification.\footnote{23}

The Court also strikes down a regulation impeding the use of a firearm for home-defense purposes. It holds that the District's requirement of a trigger lock is unconstitutional.\footnote{24} In part, the Court acts as if this requirement would continue in effect even if the homeowner confronted an intruder in his or her home.\footnote{25} Thus, it would be illegal to unlock the trigger lock and use the weapon for self-defense purposes even when a homeowner was subject to assault.\footnote{26} I think that is an implausible interpretation of the ordinance, but I have no doubt that such a law constitutes an infringement of the right as the Court has described it. Later in the opinion, however, without further discussion, the Court states that it violates the Second Amendment for government to prohibit individuals from having a "lawful firearm in the home operable for the purpose of immediate self-defense."\footnote{27} That sounds as if the Court is suggesting that a law would still be unconstitutional if it required a trigger lock on weapons—but explicitly provided that the lock could be removed in circumstances justifying the use of the firearm for self-defense purposes—because of the delay involved in making the weapon operable.\footnote{28}

That interpretation of the Second Amendment raises several questions. Once again, if history is to be our guide, we might want to know just how immediately weapons were available for home-defense purposes.

\begin{itemize}
  \item \footnote{21} See Brownstein, \textit{supra} note 9, at 908–25.
  \item \footnote{22} See D.C. Code §§ 7-2501.01, 7-2502 (2001).
  \item \footnote{23} Determining the scope of, and exceptions to, state constitutional provisions guaranteeing the right to keep and bear arms has proven to be a daunting task. Some state constitutional provisions employ very broad language. New Mexico, for example, protects the right to keep and bear arms "for security and defense, for lawful hunting and recreational use and for other lawful purposes." State v. Dees, 669 P.2d 261, 262 (N.M. Ct. App. 1983) (quoting N.M. Const. art. II, § 6). But a New Mexico court still determined that this constitutional provision allows the state legislature to prohibit carrying a firearm into a licensed liquor establishment. \textit{Id}.
  \item \footnote{24} \textit{Heller}, 128 S. Ct. at 2818.
  \item \footnote{25} See \textit{id}. at 2717–18.
  \item \footnote{26} See \textit{id}. at 2818.
  \item \footnote{27} \textit{Id}. at 2822.
  \item \footnote{28} See \textit{id}.
\end{itemize}
purposes in the 1780s. Was it feasible or commonplace to have weapons loaded with powder and ball in one's home? If not, does it take longer to unlock a trigger lock today than it would to load a pistol or musket 220 years ago?²⁹

More importantly, the risks of misuse resulting from an unlocked loaded firearm being stored at home in a place where it would be available for "immediate" access—such as the risk that a child or an intoxicated individual might gain access to the weapon—are far greater than the risks that an inappropriate person, such as a child, might gain control of a firearm during the brief period when the owner, under threat of assault or home invasion, was loading a weapon and disabling its trigger lock. Is the Court suggesting that any regulation intended to limit children's access to loaded operable firearms in the home infringes the Second Amendment if it causes any delay in the availability of the firearm for self-defense purposes?³⁰ The Heller opinion gives us no basis for answering such questions.

This issue leads, of course, to the Heller opinion's primary weakness: its failure to suggest what standard of review should be used to evaluate state attempts to justify infringements of the Second Amendment.³¹ This is simply indefensible. The majority says two things about the standard of review to apply in Second Amendment cases. First, it states that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster."³² Second, it rejects Justice Breyer's interest-balancing analysis by arguing that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."³³ I am not fully convinced of the accuracy of the first statement. Even if it is accurate, that conclusion is not so self-evident that it can be asserted without any analysis to support it. As to the second statement, if it is accurate,³⁴ it may have significant repercussions for the way self-defense is understood in tort law and criminal law—an issue I will discuss later in this Article.³⁵

²⁹. See infra Part II.C.
³⁰. See infra Part III.A.
³¹. Heller, 128 S. Ct. at 2868 (Breyer, J., dissenting) ("The [Heller] decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges.").
³². Id. at 2817–18 (majority opinion) (footnote omitted) (citation omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).
³³. Id. at 2821.
³⁴. I have strong doubts that this statement is accurate as well.
³⁵. See infra Part III.B.2.
Let us focus on the first statement. Are there any standards of review applied to enumerated rights that provide a legitimate argument for upholding the District's ordinance banning possession of a handgun in one's home? One possibility is the standard of review the Court applies to content-neutral speech regulations. This standard has been accepted for decades and it clearly applies to laws that burden an enumerated right by interfering with a speaker’s ability to communicate his message to an intended audience.\(^36\) While the standard is far less rigorous than strict scrutiny review,\(^37\) it involves the analysis of three factors: (1) the importance of the state’s interest, (2) the availability of alternative avenues of communication, and (3) a tailoring requirement to insure that the law does not burden substantially more speech than is necessary to achieve the state’s objective.\(^38\)

Does the District’s ordinance prohibiting the possession of handguns in the home and the trigger locking of lawful weapons serve an important governmental interest? Justice Breyer’s dissent identifies a variety of goals that would certainly be considered important under a conventional doctrinal analysis.\(^39\) Public safety, reducing crime, avoiding accidental injuries and deaths resulting from children gaining access to firearms, and limiting teenage suicides are all interests that the District could legitimately assert in defense of its ordinance.\(^40\)

What about the availability of alternative ways to exercise the right—here the right to bear arms in self-defense or more generally the right to defend one’s person and property against assailants or intruders? The Court lists several reasons why a homeowner might prefer to have a handgun available for self-defense purposes and it notes the popularity of handguns for personal security and home protection.\(^41\) But it is at least an open issue if these kinds of arguments would be persuasive if the First Amendment were the constitutional provision at issue rather than the Second.

For the most part, the Court has not seemed to care whether the time, place, or manner of speech restricted by content-neutral regulations was particularly popular or not. The use of loud speakers,\(^42\) soliciting on public property,\(^43\) and posting signs on utility poles\(^44\) are


\(^{40}\) Id.

\(^{41}\) Id. at 2818 (majority opinion) (listing ease of storage, accessibility in an emergency, and ease of use for individuals who lack upper body strength among reasons why handguns are preferable to long guns).


popular means of communicating, but the Court has upheld restrictions on all three of these vehicles for expression. Similarly, arguments about the special utility of locations for speech purposes have not persuaded the Court to strike down content-neutral speech regulations. There is no doubt, for example, that the areas in front of clinics providing abortion services are uniquely effective locations for anti-abortion protestors and sidewalk counselors to communicate with women planning to have abortions, but that reality did not convince the Court to strike down content-neutral regulations of expressive activity in this area. Nor could anyone doubt that the areas proximate to the polls on election day are especially useful locations for the communication of political campaign messages, but the Court upheld a content-discriminatory regulation of political speech in this location.

If we shift the analysis from traditional public forums to nonpublic forums, the lack of concern about the utility (or popularity) of a location for speech purposes is even more obvious and extreme. The Court has upheld restrictions on soliciting in airports and the interior sidewalks leading to post offices, on political speech trying to reach military personnel on military bases, on advocacy groups seeking donations as part of a federal workplace charity drive, on a candidate seeking to participate in a candidates’ debate, and on a union’s access to the intraschool mail system available to the rival union contemporaneously representing school district employees. There can be little doubt that these locations were often the preferred and most effective locations for the speech in question, but either content-neutral or content-discriminatory restrictions on expression were upheld under a “reasonableness” standard of review in each case.

If we apply the criterion evaluating alternative avenues of communication to the District’s prohibition against possessing a handgun in one’s home, we would have to ask whether the law permits alternative avenues for using firearms to protect one’s person and property or,

45. Id.; Heffron, 452 U.S. at 634-44; Kovacs, 336 U.S. at 87-88.
47. Hill, 530 U.S. at 729-30.
55. See supra notes 49-54.
56. In reviewing statutes banning certain assault weapons, some courts have upheld the restrictions against state constitutional challenges asserting a right to keep and bear arms for self-defense purposes by arguing, in part, that the ban does not violate the constitutional guarantee
alternatively, whether it permits alternative, but effective, means of self-defense which do not require the use of firearms. As to the first question, rifles and shotguns are an obvious alternative to handguns. If we use free speech cases as analogies, neither the alleged utility nor the popularity of handguns would be dispositive factors. An argument can certainly be made that long guns are less adequate alternatives for self-defense purposes than handguns, but if the free speech cases are our guide, it is certainly an open question as to how rigorously courts will evaluate the adequacy of alternatives. If the question is expanded to include alternatives other than firearms, then a range of home protection approaches ranging from alarm systems to dogs would have to be considered as well.

As to the narrow tailoring requirement, this is a fairly weak standard that requires only a moderate connection between means and ends. There is language in *Ward v. Rock Against Racism* that suggests that as long as the challenged law is more effective in furthering the state's interests than any of the regulatory alternatives available to the legislature, the Court will uphold the content-neutral law against a petitioner's free speech claim. That language may overstate the Court's actual approach to this part of the test. It is hard to believe, for example, that the Court would uphold a law that is only marginally more effective, but dramatically more burdensome to speech, than alternative regulations. But even this more rigorous interpretation still describes a relatively lenient standard of review.

because "the ban does not cover a significant percentage of firearms that continue to be available for citizens to possess" for self-defense purposes. See Benjamin v. Bailey, 662 A.2d 1226, 1235 (Conn. 1995); see also Robertson v. City & County of Denver, 874 P.2d 325, 333 (Colo. 1994). The availability of alternative weapons for self-defense has been discussed in other circumstances as well. See, e.g., Webb v. State, 439 S.W.2d 342, 343 (Tex. Crim. App. 1969) (explaining that restricting a felon's ability to carry firearms does not offend the right to keep and bear arms for self-defense purposes protected by the state constitution "because appellant might have armed himself with any other weapon not prohibited in the article"). In one interesting case, the defendant was prosecuted for violating a Colorado law declaring it to be unlawful for an alien to hunt or kill any wild bird or animal in the state "and to that end" also declaring it to be unlawful for an alien to own or possess a firearm. People v. Nakamura, 62 P.2d 246, 246 (Colo. 1936). The defendant was arrested carrying a shotgun and three pheasants he had killed. *Id.* The Colorado Supreme Court held that the second part of the statute violated the Colorado constitutional provision guaranteeing residents the right to bear arms in defense of home, person, and property, and could not be applied against the defendant. *Id.* at 247. Two dissenting justices argued, however, that if the defendant had other firearms available to him in his home for self-defense purposes and used his shotgun for hunting purposes, the statute could be validly applied against him. *Id.* at 247-48 (Bouck, J., dissenting).


58. It is worth noting that the more rigorous understanding of the tailoring requirement would involve the Court in the exact kind of interest balancing that the majority opinion in *Heller* insists is never a part of fundamental-rights jurisprudence. See District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).
Applying this factor to the D.C. ordinance may be problematic. One could certainly argue that there are alternatives to a total ban on having a handgun in one's home for furthering many of the state's gun control objectives. The trigger lock requirement is easier to justify. If the state's objective is to prevent children from obtaining access to loaded firearms (an obviously legitimate and important state interest), it is hard to see how this goal could be furthered without imposing some burdens on a weapon's availability for immediate self-defense. The District's ordinance could be amended to require the unloading and locking of weapons in one's home whenever there was any serious likelihood that children would visit. That is a more narrowly tailored law, but it still imposes substantial burdens on the individual's right to keep and bear arms for self-defense purposes.

The Court does suggest in certain free speech cases that the home is a uniquely important location both as a sanctuary where individuals may be free from intrusive communications they do not want to receive and as a site for the homeowner's expression. The Court's opinion in City of Ladue v. Gilleo, which struck down a law prohibiting homeowners from displaying signs on their property, emphasized the "special respect" owed to the home as a site for individual expression. It also examined the three factors described above with more rigor than it usually applies in reviewing content-neutral laws. Perhaps by focusing on the special status of the home as a unique location for the exercise of the right to bear arms for self-defense purposes, a court could strike the District's laws down under the standard of review described above. That conclusion does not seem so self-evident to me, however, that it excuses the Court from engaging in the requisite analysis.

II. Heller and Originalism

A large part of the majority opinion in Heller is grounded in an original-intent or original-understanding interpretation of the Second Amendment. Pursuant to that analysis, the Court concludes that the Second Amendment protects the individual right to keep and bear handguns in one's home for the purpose of immediate self-defense. Both the District of Columbia's ban on handgun possession in the home

59. In free speech cases, the Court has frequently expressed reservations about total bans "that foreclose an entire medium of expression." See City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).
61. 512 U.S. at 58.
62. See Gilleo, 512 U.S. 43
64. Id. at 2788-802.
and its requirement that permissible weapons be unloaded and disassembled or trigger locked are found to violate this right.\(^6\)

The obvious obstacle to interpreting the Second Amendment to mean what the *Heller* majority says it means is that the text of the Second Amendment says nothing about handguns or self-defense.\(^6\) The Court provides a variety of arguments to explain and justify its interpretation notwithstanding its apparent dissonance with the text. I am only going to discuss three of these arguments because I think they raise interesting questions about how an originalist methodology works. I do not maintain that the concerns and criticisms I direct at these arguments necessarily suggest that the Court's conclusion about the Second Amendment protecting an individual right to bear arms for self-defense purposes is incorrect. The Court justifies its conclusion with a variety of other arguments and evidence in addition to the ones I discuss,\(^6\) and I do not discount their persuasiveness. As noted, I remain agnostic on the basic question of the meaning of the Second Amendment.

A. GRAMMATICALY-GROUNDED ORIGINALISM

First, there is what I would call the grammatical argument. The Second Amendment includes two clauses. The first (the prefatory or justification clause) states, "A well regulated Militia, being necessary to the security of a free State"; the second (the operative clause) states, "the right of the people to keep and bear Arms, shall not be infringed."\(^6\) The problem for the Court, of course, is to determine what these clauses mean and how they fit together.

The Court's answer—and that of several scholars who have studied the subject—is based in part on rules of grammar. Nelson Lund argues, for example:

The most significant grammatical feature of the Second Amendment is that its preamble is an absolute phrase, often called an ablative absolute or nominative absolute. Such constructions are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended. . . .

Another significant grammatical feature of the Second Amendment is that the operative clause is a command. Because no word in that command is grammatically qualified by the prefatory assertion, the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted, or even if the preamble is demonstrably false.\(^9\)

---

65. Id. at 2818–19.
66. See U.S. Const. amend. II.
67. *Heller*, 128 S. Ct. at 2790–99, 2805–12 (examining contemporary sources to interpret the right to keep and bear arms as well as post-ratification case law, legislation, and commentary).
68. U.S. Const. amend. II.
This analysis suggests that the prefatory clause about well-regulated militias means nothing or next to nothing for interpretative purposes.

The Court's analysis assigns marginally more meaning to the prefatory clause than Lund does, but not much more. Justice Scalia explains that the prefatory clause

does not limit [the operative clause] grammatically, but rather announces a purpose. . . .

Logic demands that there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. 70

At least it does not control the meaning of the operative clause if that clause is expressed in "clear, unambiguous terms." 71

This grammatical analysis raises two questions. The first, obviously, is whether or not the Court's reasoning about grammar is correct. The majority opinion cites authorities supporting its position. 72 Justice Stevens's dissent cites authorities disputing the majority's contentions. 73

This discussion led me to think about a different question, however. What exactly is the role that grammatical rules should play in interpreting the Constitution pursuant to an original-understanding

---


Professor Lund's position is at odds with the basic and long accepted linguistic principles we have discussed [in this brief]. While it is true that absolute phrases are grammatically independent, it is and has been beyond debate for more than 200 years that absolute constructions function as adverbial phrases modifying the main clause. In the case of the Second Amendment, we have shown that the absolute clause affirmatively states the cause or reason for the Second Amendment's existence. That significantly affects the meaning of the main clause . . . .

Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D. et al. as Amici Curiae Supporting Petitioners at 10 n.6, Heller, 128 S. Ct. 2783 (No. 07-290).

70. Heller, 128 S. Ct. at 2789.

71. Id. at 2789 n.3 (quoting J. Sutherland, Statutes and Statutory Construction 47.04 (5th ed. 1992)). There are numerous other explanations of how the prefatory, purpose, or justification clause fits with the operative clause of the Second Amendment. See, e.g., David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & Pol. 1, 59 (1987) (arguing that the Second Amendment serves two purposes: "The first purpose was to recognize in general terms the importance of a militia to a free state. . . . The second purpose was to guarantee an individual right to own and carry arms."); David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588, 617 n.116 (2000) (suggesting that the inclusion and placement of three commas in the Second Amendment supports the conclusion that the Amendment was meant "to be read as a unitary whole" that serves the purpose of "protect[ing] the militia against federal interference").

72. Heller, 128 S. Ct. at 2789.

73. Id. at 2828–29 (Stevens, J., dissenting); see also J. Harvie Wilkinson III, Of Guns, Abortions, and the Unraveling Rule of Law, 95 Va. L. Rev. 253, 268 & nn.63–64 (2009) (discussing authorities marshaled by both Justices Scalia and Stevens to support their grammatical argument).
analysis? Grammar might be relevant if we were focusing on the original intent of the drafters of a document. I think this is less likely to be dispositive when textual language is the product of collaborative efforts; however, the argument is not implausible. But how much should grammatical rules control constitutional interpretation that is allegedly based on the common understanding of the polity? Would it be clear to citizens that a prefatory clause setting out the purpose of an operative clause should not be considered in interpreting the meaning of the operative clause?

Consider a constitutional provision that states the following: "Widely available information about government policies and decisions being critical to the operation of a democracy, the right to a free press shall not be abridged." Would this purpose for protecting the press be relevant to the way the general public understood the operative command of this constitutional requirement? According to the grammatical logic of Heller, the prefatory clause here about supplying information related to government policies should not limit or expand the scope of the operative clause protecting the freedom of the press. I think there is a fair argument, however, that people reading this provision would believe that the constitutional protection guaranteed by this provision extended to reporting and editorials relevant to public policy, but they might be far less certain that periodicals, or sections of periodicals (the comics pages, for example), published for entertainment or recreational purposes were also covered by the provision. Maybe that is a grammatically incorrect interpretation, but it is not clear to me why the nuances of grammar should be thought to control the popular understanding of what language means. If we had clear evidence that people debating a constitutional provision gave it a grammatically incorrect interpretation, surely the evidence of what people actually believed the provision to mean would outweigh what the rules of

74. If originalism is taken seriously, it delegates decisions about constitutional interpretation to historians who try to determine what people understood the Constitution to mean 220 years ago. This cedes extraordinary authority over a constitution for 300 million people to a limited academic class. That is a troubling conclusion for many of us. It is even more troubling to think that critical questions about fundamental rights and government power are to be determined by those few experts who can provide an authoritative analysis as to how rules of grammar were understood to operate more than 200 years ago.

75. If the purpose language comes after the operative clause, courts take that language into account in determining the scope of the right. Thus, in interpreting a state constitutional provision guaranteeing that "[e]very citizen has a right to bear arms in defense of himself and the state," the Supreme Court of Connecticut explained that

[the limiting language of the provision may be understood to establish two related principles. First, it demonstrates that the bearing of arms is not valued in and of itself, but only as a means to particular ends. Second, it clearly indicates what purposes are not accorded explicit constitutional protection: the bearing of arms for any purpose other than the defense of one's self or the state.

Benjamin v. Bailey, 662 A.2d 1226, 1231 (Conn. 1995).
grammar suggested. The more open question is how we should evaluate grammatical rules of construction that conflict with commonplace associations that may be inferred from introducing a constitutional command with a statement of its purpose.

In addition to the Second Amendment, there is one other constitutional provision that explicitly states a purpose for its operational command. The Patent and Copyright Clause in Article I Section 8 states that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Supreme Court has held that in this context, the purpose of the power (to promote the progress of science and the useful arts) does control the meaning assigned to the power and the way that it can be exercised. Lund argues that "[u]nlike the Second Amendment, this provision contains an operative clause that sets out a purpose (to promote the progress of useful knowledge) and a subordinate phrase that specifies the means by which that purpose may be pursued (patents and copyrights)." But I can easily imagine both provisions being understood in the same way. Both the Second Amendment and the Patent and Copyright Clause state a purpose and a right or power intended to implement that purpose. Accordingly, the right or power in both cases should be understood to further the goal or purpose that explains their inclusion in the Constitution.

The *Heller* opinion does suggest that a prefatory clause might be used to resolve an ambiguity as to the meaning of the operative clause. One could certainly argue that there is some ambiguity as to the meaning and scope of the phrase "freedom of the press," and the prefatory clause in my example could be used to clarify it. A similar argument might be applied to the "right to keep and bear arms" language of the Second Amendment, but the *Heller* opinion does not take that suggestion seriously. It does recognize what I would think are inherent ambiguities in this operative clause. The Court suggests, for example, that the right to keep and bear arms may be intended to serve multiple purposes. That leaves open the possibility that one of those purposes may be more important than the others and that exercises of the right that implicated

---

78. Lund, *supra* note 69, at 239.
80. *Id.* at 2801-02.
that purpose may deserve more rigorous protection than other exercises of the right.

The Court also recognizes numerous limitations on the right, including: the nature of the weapons that fall within its scope, the manner in which weapons could be carried in public (concealed weapons could be prohibited), the locations where the right applies, the characteristics of individuals who may be denied the right, and the conditions and qualifications under which weapons might be sold in commerce.\(^{81}\) Surely, the range and rigor of these limitations is sufficiently ambiguous that a prefatory clause might inform a court as to how they should be understood. But the Court in *Heller* gives no indication that the prefatory clause is relevant to resolving any of these questions.

Eugene Volokh has written a thoughtful article arguing that prefatory language describing the purpose of a right was quite common in constitutional texts and that it would make little sense to interpret those provisions to require that the operative clause was never broader or narrower than the purpose designated in the text.\(^{82}\) But his analysis does not fully resolve the problem of interpreting the Second Amendment’s language. Volokh does not claim that justification clauses have no influence on the interpretation of a right.\(^{83}\) Indeed, he concedes, as the Court does in *Heller*, that “[t]o the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it.”\(^{84}\) He goes on to explain, however, that “[t]he justification clause can’t take away what the operative clause provides.”\(^{85}\) To avoid being circular, however, that argument must assume that some core meaning of the operative clause is sufficiently unambiguous that it can be understood in its own right without regard to any clarification provided by the justification clause. If the operative clause is sufficiently ambiguous that it needs to be clarified by the justification clause, the justification clause cannot reasonably be criticized as taking away what the operative clause provides because the justification clause determines what the operative clause means in the first place.

Identifying such a clear and unambiguous meaning for the right to keep and bear arms is a hard job. Indeed, it is a hard job for any right if we take the right seriously. Ultimately, the problem with both Volokh’s and the Court’s analyses of the two clauses in the Second Amendment is that they focus on the meaning of the right in a way that ignores the role

\(^{81}\) Id. at 2816-17.
\(^{83}\) Yassky, *supra* note 71, at 617 (“At most... Volokh’s work shows that the scope of a constitutional provision is not necessarily limited by its ‘purpose clause’—he provides no excuse for ignoring the Second Amendment’s purpose clause altogether . . . ”).
\(^{84}\) Volokh, *supra* note 82, at 807.
\(^{85}\) Id.
of doctrine in giving an enumerated right constitutional meaning. As noted previously, what is involved in interpreting a right is not only an analysis of the overall scope of the right, but also determining what infringes the right and what state interests might justify such infringements. Thus, one may reasonably argue that the language of the justification clause relating to militias may not “take away” the core idea that there is an individual right to keep and bear arms. But that does not mean that the justification clause should not influence what constitutes an infringement of the right (e.g., whether restrictions imposing particular kinds of burdens on certain firearms in identified locations constitute an abridgement of the right) or the level of review applied to different kinds of firearm regulations.

Consider freedom of speech as an example. The standards of review applied in free speech cases vary in their rigor based on the courts’ evaluations of various factors including the kind of speech at issue, the location where the speech occurs, and the nature of the regulation that limits speech. I can easily imagine various prefatory clauses that would inform courts about the purpose of an operative clause stating that freedom of speech shall not be abridged. While the prefatory clause need not be interpreted to mean that the scope of the right is limited to expression that furthers only that one designated purpose, it might certainly provide guidance as to the hierarchy of interests the right protects and the rigor with which certain alleged infringements of the right should be reviewed. A prefatory clause describing the importance of open and robust debate to the operation of democratic self-government, for example, would suggest a different doctrinal hierarchy than a prefatory clause describing the importance of speaking authentically and without constraint to the dignity of the individual.

Similarly, one might argue that the right to keep and bear arms for militia-service purposes constitutes the core of the right and, as such, any government interference with arms suitable for this purpose should be carefully scrutinized. The right to keep and bear other arms for other purposes might also be covered by the right, but as auxiliary purposes. Accordingly, when the right is exercised to serve those additional purposes and a law is challenged as interfering with that exercise, a greater burden on the right might be necessary to determine that an infringement has occurred and less compelling justifications for infringing the right might be held to be adequate to sustain the law.

Under this analysis one might argue that a law prohibiting possession of a handgun in one’s home while allowing possession of a rifle or a shotgun (leaving aside for the moment the additional

86. See supra Part I.
87. See CHEMERINSKY, supra note 9, at 931–40, 986–1154.
requirement of a trigger lock) does not violate the core meaning of the right to keep and bear arms (or, to use Volokh's language, that such a law does not employ the justification clause to "take away what the operative clause provides"). Rifles have greater utility for military purposes than handguns. They have value for self-defense purposes. They are more accurate weapons than handguns. Because of the difficulty of concealing them, they may be far less likely to be used for criminal purposes. Thus, there are legitimate reasons why a state might express a regulatory preference for a means of exercising the right that resonates with the text over another means of exercising the right that has no direct textual support. The justification clause in the Second Amendment may not compel a court to uphold such a law. But I would think that a court would have the discretion to take the justification clause into account in this way—at least it would if the text of the Constitution is recognized as a primary source of its meaning.

The Court's analysis recognizes no such discretion. It insists that the core meaning of the right to keep and bear arms protects the right to possession and immediate access to handguns for self-defense purposes and that state interference with such access requires particularly rigorous justification. That conclusion not only ignores the purpose set out in the justification clause in the text (since immediate access to handguns in one's home has no utility for "militia" services, however that term is defined), it also elevates a different purpose, personal defense of one's home and physical security, which is never mentioned in the text, and interprets it to control what constitutes an infringement of the right and the rigor with which such infringements must be reviewed.

B. TEXT AND ORIGINALISM DISSONANCE

The Court's lack of interest in using the prefatory clause about the importance of militias to understand the meaning of the operative clause about the right to keep and bear arms is explained in significant part by another aspect of its analysis. It is not simply grammar that renders the militia clause of limited interpretative importance. As the majority explains in response to Justice Breyer's contention that keeping arms for self-defense purposes was of secondary importance in the drafting and

88. Volokh, supra note 82, at 807.
90. The lack of a connection between immediate access to firearms in one's home and militia or military service can be illustrated by government policies regarding the firearms of police officers. In Buffalo, New York, for example, each police officer is instructed that, when at home, all ammunition should be removed from his service handgun and stored in a location separate from the handgun. Also, officers are advised to lock the weapon in some manner, and instruction is given on three different means of locking the weapon to prevent it from firing.

adoption of the Second Amendment, there is a difference between the reason that a right is “codified in a written Constitution” and the purpose furthered by the right itself.91

Thus, the majority suggests that it is largely irrelevant that the text of the Second Amendment says nothing about self-defense and refers to some other purpose for enumerating the right to keep and bear arms in the Constitution. Indeed, according to the Court, it would not matter if in fact “self-defense had little to do with the right’s codification,” because the right at issue preexisted the adoption of the Bill of Rights and it was understood to be a right to keep and bear arms for self-defense purposes in its pre-constitutional form.92 Put briefly, the argument seems to be that the pre-constitutional meaning of a right referenced by language in the text is more important for interpreting the meaning and scope of the right than the actual language adopted in the document itself.

This kind of an originalist analysis raises interesting questions that have implications for the ongoing debate between advocates of originalist and non-originalist methodologies for interpreting the Constitution. One of the conventional arguments raised against a non-originalist methodology for interpreting the Constitution is as powerful as it is simple: what is the point in adopting a written constitution, it is argued, if judges can ignore the language of the text and read new non-enumerated mandates into the constitution?93 That is certainly not a bad argument, but it is not limited in its application to criticisms of non-originalist interpretations of the Constitution. It also applies to originalist arguments that suggest that the Constitution was intended and understood to mean something that is very different from what it actually says. As the dissonance between text and alleged original understanding increases, the value of committing the Constitution’s commands to writing becomes less obvious and less useful.94

91. Heller, 128 S. Ct. at 2801.
92. Id.
94. This general point has been stated clearly by others. Dennis J. Goldford, for example, writes:

The surprising paradox of originalism... is that originalism, due to its assumptions about language and interpretation, in fact cannot explain the democratically grounded binding capacity of the Constitution on which it stakes its claim to theoretical and political validity. The purpose of a Constitution may well be to get everything down on paper, in language, in order to bind future generations, but originalism's focus on the original understanding—that is, the writers' intentions or the ratifiers' understanding—in fact presupposes a marked lack of trust in the capacity of language to bind. We must infer from originalism's focus on original understanding that, despite its emphasis on the constitutional text, what binds us is not the language of the text but rather the understanding of the people who wrote and ratified the language of the text. The paradox here is that if originalism truly believed in the binding capacity of language that it affirms, it would lose its raison d'être: Originalism can claim to be a necessary guide to constitutional interpretation only because it denies the binding capacity of language that it purports to affirm.

Id. at 12.
Probably the most obvious example of this kind of dissonance is the Court's Eleventh Amendment jurisprudence. The text of the Eleventh Amendment says nothing about either sovereign immunity or suits by citizens of a state against their own state government.\footnote{5} Notwithstanding this absence of even a pretense of textual support for its reasoning, the Court has interpreted the Eleventh Amendment to protect the sovereign immunity of states against suits brought by their own citizens alleging violations of federal statutory and constitutional law.\footnote{6} In doing so it has stated explicitly that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition... which it confirms."\footnote{7}

To be fair, the majority in *Heller* cares more about the language of the Second Amendment than the Court does about the language of the Eleventh Amendment. Still, the Court's willingness to subordinate explicit textual language in the Second Amendment to uncodified presuppositions about the meaning of the right to bear arms produces the same kind of a dissonance, although to a more limited degree. Similarly, the Court's distinction between the reasons for codifying a right into the Constitution (which it dismisses as largely irrelevant to its interpretation) and the pre-constitutional purposes of the right (which it accepts as dispositive for interpretative purposes) suggests that the language chosen to be in the document is of secondary importance.

The core problem with this kind of an analysis is that it cannot easily be limited. An unstated predicate to the Court's Eleventh Amendment and Second Amendment jurisprudence is that the drafters of the Constitution and the Bill of Rights and the citizens who ratified it did not care that the text of the Constitution did not come close to saying what they intended it to mean or believed it to mean. Even when there was obvious language available to communicate an accurate statement of the scope and purpose of a power or a right, it was perfectly acceptable to ignore that language and substitute words that suggested something entirely different in place of a clear statement of what was intended. That conclusion, however, undermines our commitment to the entire text of the Constitution. Why should we care about the words chosen to be in the text of the Constitution today if no one thought that textual language was particularly relevant or important when the document was adopted?

This concern is amplified by one of the arguments offered by the majority to support their conclusion that the purpose of protecting the

\footnote{5. See *U.S. Const.* amend. XI.}
right to keep and bear arms was to guarantee "an individual citizen's right to self-defense." The Heller opinion notes that, prior to the adoption of the United States Constitution, two states, Pennsylvania and Vermont, included in their state constitutions language that provided for a right to keep and bear arms for self-defense purposes—"for the defence of themselves." After the Constitution was ratified, between 1789 and 1820, seven states adopted state constitutional provisions guaranteeing their citizens the right to bear arms "in defense of themselves and the state" or guaranteeing each citizen the right to bear arms "in defense of himself and the State." To the majority, these provisions "unequivocally" expressed protection for an individual's right to self-defense.

What the majority fails to consider is a different question raised by the evidence it cites with approval: if clear and unambiguous language from state constitutions was available to the drafters of the Second Amendment to demonstrate that the right to keep and bear arms was intended to guarantee to citizens the right to use firearms for self-defense purposes, why does the Second Amendment not use that language to state this principle "unequivocally"? Further, if the specific language of the Second Amendment was clearly understood to protect the right to bear arms for self-defense purposes, why did the drafters of "right to bear arms" provisions in seven of nine subsequent state constitutions fail to utilize the Second Amendment's language and, instead, add explicit references to self-defense purposes?

If we juxtapose the clarity of so many state constitutional provisions regarding the right to bear arms for self-defense purposes with the language of the Second Amendment, which does not mention self-defense but rather emphasizes the importance of state militias, we are left with an unsettling inference from the Heller analysis. We simply cannot count on the language in the text of the Constitution to tell us what its provisions mean and, accordingly, courts are not bound to focus on textual language in interpreting the document.

C. THE USE OF HANDGUNS FOR THE IMMEDIATE DEFENSE OF ONE'S HOME IN COLONIAL AMERICA

For all of the language in Heller about the popularity and utility of handguns for self-defense purposes in American history, the Court says

99. Id. at 2802 (quoting Pa. Declaration of Rights § XIII, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS 3082, 3083 (Francis Newton Thorpe ed., 1909) (emphasis added)).
100. Id. at 2793.
101. Id. at 2803.
102. Id. at 2793.
surprisingly little about handgun usage or laws regulating handguns at the time the Constitution was drafted and ratified and the Bill of Rights adopted. Two questions come to mind. First, were handguns a commonly accepted weapon of choice for the defense of one's home in 1789? Second, just how useful and available were eighteenth century handguns for defending one's home against assailants?

As to the first question, I have not researched the issue, but just skimming a few sources raises several points that merit further inquiry. The primary and most common weapon used by American soldiers during the Revolutionary War was the flintlock musket. Officers, cavalrymen, and sailors may have had pistols, but infantry men did not. Perhaps more importantly, guns were expensive. Since a pistol would be of virtually no use for military or hunting purposes, one may wonder just how common handgun ownership was in 1789. Perhaps more relevant for an original-understanding analysis of the Second Amendment, is it significant that the "arms" most people in the country thought they were being granted the right to keep and bear may have been muskets that served both militia, hunting, and home protection purposes? What if the basic understanding of this right emphasized the possession of weapons capable of serving multiple purposes and the right to own a handgun was of secondary importance because of its limited utility?

With regard to the second question, I wonder just how available and useful a flintlock pistol would be for immediate self-defense. Consider the process for loading one of these weapons:

[Steps One, Two, & Three:] Shooter pours desired quantity of relatively coarse-grained propellant powder into muzzle from large main flask. Then he starts patched ball (patch of thin cloth makes for tight fit, accurate shot), and rams it down until it is seated atop the powder firmly but without crushing grains.

[Step Four:] The charge loaded, he returns the ramrod, opens the flashpan and half-cocks the gun.

....

[Step Six:] Then he primes with fine powder from his priming flask, not too much nor too little.

103. Nelson Lund argues that the Heller majority's discussion of a ban on handguns "does not even purport to be an historical analysis," Lund, supra note 18, at 1355.
105. WARREN MOORE, WEAPONS OF THE AMERICAN REVOLUTION, at viii (1967) ("During the Revolutionary War military pistols and infantry swords were rare and somewhat ineffective."); PETERSON, supra note 104, at 208.
106. MOORE, supra note 105, at 59 ("The colonist usually had only one gun which he used for hunting, protection, and militia duty."); PETERSON, supra note 104, at 179 ("The average colonist could not afford to own a selection of guns, and so he normally chose one which could serve him well in hunting and also pass inspection on muster days.").
[Step Seven:] Lastly he snaps the pan cover shut, tilts the gun to the left for a second and taps it lightly to ensure that a few grains of priming have entered the touchhole, and when ready to shoot, cocks to full-cock.107

Paper cartridges containing both powder and ball were used during the Revolutionary War and their use probably made loading a pistol more efficient.108 The majority of colonists, however, probably used powder from a powder horn rather than cartridges at home because "[a] man could make a powder horn himself without much difficulty, and it was also more universally useful around the home than the strictly military cartridge box."109

I am not sure how the time to load a flintlock pistol compares to the time it takes to unlock a trigger lock on a modern handgun or rifle, but I think it is an interesting question to ask and one that deserves an answer. Perhaps the use of handguns for immediate self-defense could not have been the purpose of the Second Amendment because the possibility of such a use did not exist.

Alternatively, Americans may have kept their flintlock pistols loaded in their homes. But the effectiveness of gunpowder may decline quickly over time, particularly in damp environments or humid climates.110 At least one expert on flintlocks suggests that colonial Americans kept loaded guns in their homes, discharged the weapon each week, and reloaded it to make sure that the powder in the pistol remained viable for use.111 That practice seems more likely to have occurred in a rural area than an urban one—but again, I claim no expertise on this subject. I think the Heller opinion may have been more persuasive, however, if it had examined and discussed whether Americans during the founding period would have associated handguns for the immediate defense of the home as a central purpose of the right to keep and bear arms.

107. Moore, supra note 105, at 5–6 (diagram entitled "How to Load and Fire a Flintlock").
109. Id. at 242. Peterson also notes that "officers were apt to use small horns or flasks to load their personal pistols, particularly those with screw barrels." Id.
110. E-mail from Toby Bridges, author and expert on muzzle loading firearms, to Sarah Scott, research assistant to Author (Nov. 8, 2008) (on file with the Hastings Law Journal) (noting that "[m]oisture of any kind is the number one enemy of the black powder" used in colonial times).
111. Id.
III. CONSTITUTIONALIZING TORT AND CRIMINAL LAW RELATING TO THE POSSESSION AND USE OF FIREARMS

A. CONSTITUTIONALIZING CIVIL LIABILITY BASED ON THE POSSESSION AND STORAGE OF FIREARMS

One of the reasons the government may require firearms kept in one's home to be unloaded, disassembled, or subject to a trigger lock is to reduce the risk that inappropriate third parties will gain access to the weapons and use them to cause serious injury or death to others. Such constraints make it less likely, for example, that a child will be able to injure himself or his playmates with a firearm kept in the home. They also delay, if not fully prevent, an enraged, intoxicated, or mentally disturbed individual from making immediate use of the firearm. *Heller* clearly invalidates direct constraints on firearms, such as trigger locks, to avoid these risks because they interfere with the utility of the firearm for immediate self-defense.112

But what about indirect constraints imposed by conventional negligence law? Does the Second Amendment also prohibit holding a gun owner liable if one of these risks is actualized and the victim of a shooting files a negligence claim against him or her?113 Let us suppose a child living with or invited to the home of the gun owner gains access to a handgun and shoots and kills a playmate. The decedent child's parents bring a negligence action against the owner, arguing that the handgun should have been placed in a locked location inaccessible to children. The defendant owner answers that the constraints required to prevent children from gaining access to the handgun, such as disassembling it or storing it in a locked gun cabinet, would render the weapon less available for immediate self-defense.

Under conventional negligence rules, the plaintiff ought to have a strong claim in this kind of a case.114 Leaving dangerous objects in places where children can gain access to them may certainly be viewed as unreasonable conduct. The probability and magnitude of harm resulting from the risk that a child may obtain access to the firearm and cause serious injuries to himself or others may outweigh the probability and magnitude of harm resulting from the risk that the firearm will not be immediately available for use if the owner is attacked and needs the


113. Some proponents of a vigorously enforced Second Amendment support the use of tort liability to control the behavior of gun owners "who are prone to carelessness or fits of temper that result in unplanned injuries to innocent persons." Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 A.L.A. L. REV. 103, 127 (1987).

114. See, e.g., Restatement (Second) of Torts § 308 cmt. b (1965) ("[I]t is negligent to place loaded firearms . . . within reach of young children or feeble-minded adults."); see also sources cited infra notes 128–30 and accompanying text.
handgun to defend himself. The open question after _Heller_ is whether the Second Amendment has to be taken into account in adjudicating these negligence lawsuits by adding constitutional weight to the gun owner's interest and limiting the jury's discretion to find the owner liable.

It is easy to imagine how the Second Amendment could be employed to influence the results in a case like this. The defendant might argue that it is unconstitutional to require him to store or disable the handgun in a way that limits its effectiveness for self-defense purposes. Plaintiff might reply that even if this is so, it does not relieve the defendant of the responsibility of watching over and protecting children who are visiting his home. Plaintiff might argue that the defendant should have locked the guns up while children were in the house or supervised the children to make sure that they did not gain access to the firearms.

Defendant could respond, however, that as every parent knows, it is impossible to monitor the activities of children every minute that they are in one's home. Reasonably prudent persons do not do that. Moreover, locking up the handgun while children are in the house would deny him the right to keep and bear arms for immediate self-defense during the period the children were in his home. Defendant may have children of his own who spend a good part of the day and all of the night at home. His children may often have friends over in the afternoon and sometimes for sleepovers. The burden of locking up his firearms whenever children were in the vicinity, and unlocking them when children were absent, would be substantial. Liability rules like this chill gun ownership so severely that, in effect, they require the gun owner to lock up his weapons all the time—the very result that _Heller_ declares to be unconstitutional.

These are not hypothetical cases and arguments. Consider the events and legal arguments discussed in _Kuhns v. Brugger_, a Pennsylvania Supreme Court decision dealing with exactly this issue. Defendant, an elderly man, lived at least part of each year in an isolated cottage on the shores of Lake Erie. Because of thefts and burglaries that had occurred to neighboring properties, he kept a loaded .22 caliber automatic pistol in an unlocked dresser drawer in his bedroom. Defendant's twelve-year-old grandsons were frequent visitors to his cottage. They had the run of the house and were not prohibited from visiting the bedroom, and they knew where the pistol was stored. One day while the defendant was
away, one grandson went to the dresser, picked up the pistol, and accidentally fired it at the other child. The victim of the shooting was severely injured. He sued his grandfather for damages based on the defendant's failure to exercise reasonable care with regard to his possession and storage of the firearm.

Counsel for the defendant argued that the defendant "had a perfect right to keep this pistol in his home if only to protect himself against nocturnal prowlers." Counsel asked, "Where else should [the defendant]... have kept a gun for protection against unexpected midnight intrusion, except in the dresser drawer of his private bedroom where it would be readily available in case of need?"

The Pennsylvania Supreme Court was not persuaded. It explained that while it might have been reasonable for the defendant to keep the loaded pistol at his bedside "for immediate use at night," reasonable care required that it be kept "under lock and key" during daylight hours when young children were known to be frequent visitors—particularly when the defendant might not be present.

One justice dissented from the majority's analysis. He argued that it was not negligent for an elderly man to keep "in his top bureau drawer a loaded pistol in order to protect himself from burglars, robbers and prowlers." The majority decision would require parents and grandparents who owned firearms to keep them "under lock and key" in order to avoid exposure to lawsuits. That result was unacceptable because it unreasonably burdened an individual's ability to protect himself and his family:

If, for example, a burglar or robber entered a man's home at night and he awoke, he would have to try to recall where he had hidden the key, get up in the dark, find it, unlock the drawer and finally get out the pistol, in order to defend himself or his property.

The case law in this area is mixed depending on the facts and the jurisdiction. Courts take several factors into account, including the

---

120. Id. at 399-400.
121. Id. at 400.
122. Id. at 398, 403.
123. Id. at 404.
124. Id.
125. Id.
126. Id. at 410 (Bell, J., dissenting).
127. Id. at 414.
128. See, e.g., Hall v. McBryde, 919 P.2d 910, 911, 913 (Colo. App. 1996) (affirming finding that father was not negligent when his son found firearm, that father attempted to conceal, and fired it injuring neighbor); Cathey v. Bernard, 467 So. 2d 9, 10-11 (La. Ct. App. 1985) (holding that foster parents were negligent in storing pistol, that was kept loaded for protection on high shelf in closet, where child obtained access to it by climbing over bed and onto dresser to reach it and accidentally discharged firearm which resulted in death of another child); Valence v. State, 280 So. 2d 651, 653, 655 (La. Ct. App. 1973) (finding that state police officer was negligent in leaving loaded pistol in glove...
extent to which the gun owner took precautions to limit children's access to the firearm. In many cases, the issue is left to the jury. At least one decision, however, noted the constitutional implications raised by these cases. In *Lopez v. Chewiewie*, defendants kept a high-powered rifle in their residence. When they left their thirteen-year-old son home alone, he gained access to the firearm and killed the plaintiff's son with it. Plaintiff brought suit and claimed the parents were negligent in leaving a firearm in their home without taking any precautions to prevent their minor son from obtaining and discharging it. The New Mexico Supreme Court affirmed the dismissal of plaintiff's claim. In doing so, it noted that loaded firearms are kept in many homes in the state. More pointedly, it cited the state constitutional provision guaranteeing the people "the right to bear arms for their security and defense."

Typically, tort suits based on a defendant's alleged negligence do not raise federal constitutional issues. But *Heller* may change that conventional state of affairs for some tort suits involving the accidental discharge of firearms. It may be necessary for state courts to look for constitutional guidance as to how these negligence lawsuits should be

129. See, e.g., *Hall*, 919 P.2d at 913 (noting that defendant attempted to conceal existence of firearm from child and hid firearm in location seldom visited by child); *Thomas*, 578 P.2d at 404 (focusing on fact that father "attempted to conceal shotgun from his children" and forbid them to enter the room where firearm was stored).

130. See, e.g., *Glean v. Smith*, 156 S.E.2d 507, 509 (Ga. Ct. App. 1967) (holding that jury should decide whether defendant was negligent in storing loaded gun in top drawer of child-size bureau where child obtained access to it and discharged weapon injuring another child); *Thomas*, 578 P.2d at 401, 405 (upholding jury's verdict that father who kept a shotgun under his bed to protect his home against intruders was not negligent when his eleven-year-old son accidentally fired the weapon and killed a playmate); Stanley v. Joslin, 757 S.W.2d 328, 329-30, 333 (Tenn. Ct. App. 1987) (reversing grant of summary judgment so that jury could decide whether grandmother and half brother of fourteen-year-old boy were negligent in storing firearms and ammunition in unlocked gun rack in their home when the youth accidentally shot a friend with one of the guns).

132. *Id.*
133. *Id.*
134. *Id.* at 514.
135. *Id.* at 513
136. *Id.* (quoting N.M. Const. art. II, § 6).
resolved in order to avoid the substantial burdening of a gun owner's Second Amendment rights.\textsuperscript{137}

\section*{B. CONSTITUTIONALIZING THE PRIVILEGE AND EXCUSE OF SELF-DEFENSE}

\subsection*{1. The Elements of Self-Defense that Are Susceptible to Constitutional Scrutiny}

An even more interesting question is whether \textit{Heller} requires the constitutionalization of self-defense decisions in tort and criminal law. The \textit{Heller} opinion declares that the Second Amendment protects the individual right to \textit{keep and bear} arms for the purpose of immediate self-defense.\textsuperscript{138} That raises the question of whether the Second Amendment extends its coverage to the right to \textit{use} arms, such as handguns, for self-defense purposes. Surely, it would make no sense to hold that Americans have the right to possess handguns in their homes for self-defense purposes, but that they could be subject to severe criminal and civil penalties if they ever employed those firearms in defense of their persons or property.\textsuperscript{139} It would seem that the Second Amendment must protect \textit{some} use of firearms in self-defense to avoid being an empty and meaningless right of no use to those who exercise it.\textsuperscript{140} But just how much of a right to use firearms for self-defense purposes is protected by this constitutional provision?\textsuperscript{141}

The Second Amendment is something of an anomaly here. In protecting the right to speak, for example, the First Amendment requires the review of regulations that limit the use of the instruments that people employ to express their messages. Restrictions on loud speakers, signs,
and leaflets are subject to constitutional challenge if they impede people's ability to communicate.\textsuperscript{142}

The Court's Second Amendment analysis reverses that relationship. \textit{Heller} focuses constitutional protection on the possession of the instruments (firearms) that people may need to defend themselves and their homes.\textsuperscript{143} Notwithstanding that reversal of means and ends, it is hard to understand how the Court could provide constitutional protection to the means to exercise self-defense without extending some protection to the act of self-defense itself. If that turns out to be the case, the scope of \textit{Heller} may extend far beyond the review of allegedly excessive gun control laws.

There are hundreds of state and federal tort and criminal law cases in which defendants seek to avoid civil or criminal liability by asserting the privilege or justification of self-defense.\textsuperscript{144} Federal cases rarely suggest that this affirmative defense is grounded in a constitutional foundation,\textsuperscript{145} and a few cases explicitly reject the idea.\textsuperscript{146} In the few cases where a constitutional foundation for the defense is mentioned, it is virtually never invoked to require the invalidation of a statute or to reverse a lower court or jury's decision as to the applicability of the defense.\textsuperscript{147}

Many state cases, however, recognize that there is a natural or constitutional right to defend oneself against attack and to keep and bear arms for self-defense purposes.\textsuperscript{148} There is also general agreement that

\textsuperscript{143} \textit{Heller}, 128 S. Ct. at 2821-22.
\textsuperscript{144} See generally John F. Wagner, Jr., Annotation, Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-defense Claim, that Physical Force is Necessary, 73 A.L.R. 4th 993 (1989) (surveying state and federal self-defense cases).
\textsuperscript{145} See Nicholas J. Johnson, Self-Defense?, 2 J.L. ECON. & POL'Y 187, 203-06 (2006) (describing Supreme Court cases that uphold the right to self-defense but do not acknowledge a constitutional foundation for the right).
\textsuperscript{146} See, e.g., Rowe v. DeBruyn, 17 F.3d 1047, 1052 (7th Cir. 1994) (concluding that there is no fundamental constitutional right to self-defense in the Due Process Clause); Fields v. Harris, 675 F.2d 219, 220 (8th Cir. 1982) (rejecting argument that the Second, Fifth, or Eighth Amendments create a substantive constitutional right to self-defense).
\textsuperscript{147} Rare opinions suggest that the right to self-defense is constitutionally grounded. See, e.g., Griffin v. Martin, 785 F.2d 1172, 1186 n.37 (4th Cir. 1986) ("It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether . . ."); Isaac v. Engle, 646 F.2d 1129, 1140 (6th Cir. 1980) (Merritt, J., dissenting) ("I believe that the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law . . ."). This is really the exception rather than the rule, however. See Volokh, supra note 140, at 1818 ("Lethal self-defense is so broadly accepted that courts have rarely encountered grave restrictions on it, and thus haven't squarely decided whether the federal Constitution protects it.").
\textsuperscript{148} See, e.g., Trinen v. City & County of Denver, 53 P.3d 754, 760-61 (Colo. App. 2002) (Roy, J., concurring in part and dissenting in part) (stating that state constitution recognizes, and does not create, a "natural and inalienable right" to defend and protect life, liberty, and property); People v. Burns, 133 N.E. 263, 265 (Ill. 1921) (explaining that the law recognizes and protects a natural right to
the scope and applicability of the right is subject to regulation by the legislature at least to some extent. Some courts emphasize that the regulation cannot abrogate the right entirely or undermine its essential meaning. Others take a more expansive view of the state's police power prerogatives in identifying the circumstances in which the right may be asserted. More state courts than federal courts have actually based

self-defense); Thorton v. Taylor, 39 S.W. 830, 831 (Ky. 1897) (recognizing that self-defense is natural right and codified in law); Stanley v. Commonwealth, 6 S.W. 155, 156 (Ky. 1887) (explaining that self-defense is a natural, and not a social, right); Town of Canton v. Madden, 96 S.W. 699, 700 (Mo. Ct. App. 1906) (reasoning that self-defense is a natural right under organic law, reflected in spirit and word of state constitution); State v. Kerner, 107 S.E. 222, 223 (N.C. 1921) (explaining that the state constitution protects the sacred right to keep and bear arms "based upon the experience of the ages"); State v. Hirsch, 114 P.3d 1104, 1106-07 (Or. 2005) (stating that state constitutional right is grounded upon English and Colonial American understanding of right to bear arms); State v. Fouth, 34 S.W. 1, 2 (Tenn. 1896) (stating that state constitutional right confers right to defend one's self, home, and family); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177-80 (Tenn. 1871) (construing state constitutional right to extend to individuals for self-defense and defense of state). See generally Eugene Volokh, State Constitutional Rights of Self-Defense and Defense of Property, 11 Tex. Rev. L. & Pol. Sci. 399 (2007) (describing cases in which courts apply state constitutional provisions guaranteeing the right to self-defense).

149. See, e.g., Benjamin v. Bailey, 662 A.2d 1226, 1233 (Conn. 1995) (listing numerous state decisions supporting its conclusion that "[S]tate courts that have addressed the question under their respective constitutions overwhelmingly have recognized that the right [to keep and bear arms] is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry" (footnote omitted)); State v. Comeau, 448 N.W.2d 595, 597 (Neb. 1989) ("Our research has revealed that courts throughout the country have... uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens.").

150. See, e.g., Trinen, 53 P.3d at 757 (upholding statute prohibiting carrying of concealed weapons because while legislation may not "render[] constitutional provisions nugatory," the right to bear arms is not absolute and may be subject to reasonable regulations); Posey v. Commonwealth, 185 S.W.3d 170, 181 (Ky. 2006) (upholding prohibition against felons possessing firearms as reasonable against constitutional challenge, while insisting that regulations may not "unduly infringe upon the general exercise of [the right to keep and bear arms for self-defense] as it was envisioned and preserved" in state constitution); Comeau, 448 N.W.2d at 598 (upholding reasonable regulations limiting possession of firearms, but insisting "that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved"); Ohio v. Martin, No. 48067, 1984 WL 3623, at *3 (Ohio Ct. App. Nov. 21, 1984) (Jackson, J., concurring in part and dissenting in part) ("If the State were to attempt to make an act of self-defense a crime, it would violate... the Ohio Constitution as well as the Second, Fourth, Ninth and Fourteenth Amendments to the United States Constitution."); Andrews, 50 Tenn. (3 Heisk.) at 177-80 (stating that state constitutional right to keep arms may be regulated for public good, as long as the restriction does not infringe upon "necessary incidents" to exercise right). See generally State v. Buzzard, 4 Ark. 18, 37-39 (Ark. 1842) (Lacy, J., dissenting) (arguing that no law punishing exercise of self-defense could ever be upheld); Kerner, 107 S.E. at 225 (explaining that a law prohibiting the possession of a pistol of very short length might be reasonable and constitutional, but "[t]o exclude all pistols, however, is not a regulation, but a prohibition, of arms... which the people are entitled to bear").

151. See, e.g., Isaiah v. State, 58 So. 53, 55 (Ala. 1911) (McClellan, J., concurring) (stating that the right may be reasonably regulated in exercise of police power and does not confer absolute right to bear arms "upon all occasions and in all places"); Dano v. Collins, 802 P.2d 1021, 1022-23 (Ariz. Ct. App. 1990) (subjecting ban on firearms in public parks to rational-basis review and upholding restriction as reasonable regulation); People v. Camperlingo, 231 P. 601, 604 (Cal. Dist. Ct. App. 1924)
their decisions to invalidate a statute as applied, or reverse a judicial decision, on the constitutional right to possess a firearm for self-defense.\(^5\) Thus the United States Supreme Court would be breaking relatively new ground if it decided to constitutionalize the right of self-defense under the Second Amendment.

Should the Court proceed in this direction, it might begin by identifying the elements or criteria, in criminal law and tort law, that courts employ in determining the validity of a claim of self-defense. For each element, it could ask whether the state may exercise discretion in requiring and defining that element or whether it is bound by constitutional parameters when it decides what constitutes self-defense. Since discharging a firearm at a person typically constitutes the use of deadly force, the rules relating to the use of deadly force should be the focus of this inquiry.

(upholding statute prohibiting a felon from possessing a firearm against challenge that it abridges right to bear arms because "[i]t is clear that, in the exercise of the police power of the state ... such rights may be either regulated or, in proper cases, entirely destroyed"); State v. Keet, 190 S.W. 573, 575 (Mo. 1916) (stating that the legislature may regulate right in interest of public safety and morals); Heidbrink v. Swope, 170 S.W.3d 13, 15 (Mo. Ct. App. 2005) (stating that state constitutional right to keep and bear arms can be regulated through time, place, and manner restrictions); State v. Dees, 669 P.2d 261, 263-64 (N.M. Ct. App. 1983) (stating that state constitutional right to bear arms is not unfettered and conditioned upon circumstances in which the government seeks to regulate it to prevent crime); State v. Ricehill, 415 N.W.2d 481, 483 (N.D. 1987) (rejecting argument that state constitutional right to bear arms is absolute and upholding reasonable regulations under police power); State v. Johnson, 56 S.E. 544, 545 (S.C. 1907) (upholding statute prohibiting firing of firearms within city limits as reasonable exercise of police power).

152. See, e.g., People v. King, 582 P.2d 1000, 1007 (Cal. 1978) (en banc) (holding that the statutory right to self-defense allows felons to possess concealed firearms in an emergency); City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (holding that ordinance prohibiting the possession of firearms outside of the home is unconstitutional in part because it prohibits citizens from possessing firearm for self-defense in car or place of business); Rabbitt v. Leonard, 413 A.2d 489, 491 (Conn. Super. Ct. 1979) (holding that under state constitutional provision protecting citizen's right to bear arms for self-defense purposes, revocation of pistol permit deprives owner of liberty interest and must comply with procedural due process requirements); Smiley v. State, 966 So. 3d 330, 334-35 (Fla. 2007) (holding that the statutory right to self-defense abolishes common law duty to retreat); State v. Rathbone, 100 P.2d 86, 91 (Mont. 1940) (reversing conviction for killing elk out of season based on right to defend one's self and property); State v. Hardy, 397 N.E.2d 773, 777 (Ohio Ct. App. 1978) (holding that state constitutional guarantee of right to self-defense requires construing statute prohibiting felons from having firearms to permit such individuals to use a firearm in self-defense); State v. Rosenthal, 55 A. 610, 611 (Vt. 1903) (invalidating part of ordinance that prohibited person from carrying pistol without permission of mayor or chief of police because it was "repugnant to the Constitution and the laws of the state"); State ex rel. Princeton v. Buckner, 377 S.E.2d 139, 144 (W. Va. 1988) (finding proscription against carrying a dangerous or deadly weapon overbroad and in violation of state constitution). The overwhelming majority of decisions relating to the use of a firearm for self-defense purposes do not strike down laws or reverse lower court decisions on this basis. See, e.g., Stephen P. Halbrook, The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights, 41 BAYLOR L. REV. 629, 676 (1989) (noting that although there is a right to keep and bear arms in the state constitution, "the constitutional right to bear arms is perhaps the only Texas Bill of Rights provision that has never been relied on in any published opinion to invalidate a statute or to acquit a defendant").
The defendant asserting self-defense in a criminal case must establish the following: (1) he reasonably believes he is in danger of unlawful bodily harm from his adversary, (2) the attack he fears must be imminent, (3) the attack must threaten death or serious bodily harm, (4) he must reasonably believe that it is necessary to use force to avoid this danger, and (5) the amount of force used must be reasonable in the circumstances.¹⁵³

There are a variety of auxiliary rules. Some jurisdictions require an individual to retreat before using deadly force, although the majority rule does not require doing so.¹⁵⁴ Those jurisdictions requiring retreat do not apply this rule if a person is threatened in his home or place of business.¹⁵⁵ Aggressors who initiated the confrontation are limited in their ability to assert the defense.¹⁵⁶ Special circumstances, such as those involving the use of deadly force by battered women, will be taken into account in determining the validity of the defense.¹⁵⁷ An action taken in self-defense that causes injuries to an innocent third party is protected unless it is reckless.¹⁵⁸

Tort law requirements for successfully asserting the privilege of self-defense are similar to criminal law standards. The central issue in evaluating the defense is whether or not the defendant acted reasonably in the circumstances in protecting himself from harm.¹⁵⁹ This requires a determination of the reasonableness of the defendant’s belief that he is threatened by imminent harm and the reasonableness of his response.¹⁶⁰

¹⁵³. For a general summary of the elements of self-defense, see, for example, United States v. Peterson, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973); State v. Jenewicz, 940 A.2d 269, 274–75 (N.J. 2008); and WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 10.4(a) (2d ed. 1986).

¹⁵⁴. LAFAVE & SCOTT, supra note 153, §10.4(f).

¹⁵⁵. Id. The Model Penal Code provides that “[t]he use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating.” MODEL PENAL CODE § 3.04(2)(b)(ii) (1962). The explanatory note makes clear, however, that “an actor is not obliged to retreat from his dwelling or place of work.” Id. explanatory note.

¹⁵⁶. LAFAVE & SCOTT, supra note 153, §10.4(e).

¹⁵⁷. Id. §10.4(d).

¹⁵⁸. Id. §10.4(g); see also State v. Rodriguez, 949 A.2d 197, 202 (N.J. 2008). But see Commonwealth v. Fowlis, 710 A.2d 1130, 1132–35 (Pa. 1998) (holding that a defendant determined to have acted in self-defense cannot be held to have acted recklessly in injuring third party).

¹⁵⁹. Minowitz v. Failing, 123 P.2d 417, 419 (Colo. 1942) (stating that a defendant may use “no more force than is reasonably necessary for protection”); Coleman v. Strohman, 821 P.2d 88, 89 (Wyo. 1991) (evaluating self-defense claim and holding that “[t]he jury is . . . required to apply an objective standard in deciding whether an individual’s belief that it was necessary to defend himself was reasonable”); W. PAGE KEeton ET AL., PROSSER AND KEETON ON TORTS 126 (5th ed. 1984).

¹⁶⁰. The defendant’s “response must be reasonable not only in being grounded in a reasonable perception of imminent harm, but also in consisting of an appropriate or proportional response to the perceived threat.” JOHN C. GOLDBERG ET AL., TORT LAW RESPONSIBILITIES AND REDRESS 601 (2d ed. 2008); see also RESTATEMENT (SECOND) OF TORTS § 63(1) (1965) (“An actor is privileged to use reasonable force . . . to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.”).
When deadly force is used in self-defense, the defendant is privileged when he reasonably believes he is threatened by "death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force."\textsuperscript{161}

Tort law auxiliary rules parallel those of criminal law as well. A minority rule requires the actor to retreat if he can safely do so, but this requirement does not apply if a person is attacked in his home.\textsuperscript{162} If an innocent third party is injured by a person acting in self-defense, the defendant will be liable if he acted negligently in the circumstances.\textsuperscript{163}

If the Court is going to take seriously the right to use arms for self-defense purposes, it will have to determine just how much discretion legislatures, common law courts, and juries will be permitted in defining and applying this affirmative defense.\textsuperscript{164} That may require constitutional scrutiny of some of these auxiliary rules. For example, is the rule adopted by the majority of jurisdictions that there is no duty to retreat, and certainly no duty to retreat from one's own home, constitutionally mandated? Consider a hard case where both the defendant and the person injured in the act of self-defense live in the same house. Suppose a husband and wife argue bitterly in the house they share. The husband slaps the wife. She runs upstairs to obtain a handgun she keeps in a bedside bureau, yelling that she will kill her husband if he is still in the house when she comes back down. He can safely flee the house and drive away. If he waits until his wife returns to the living room, a pistol in her hand, is he justified in using deadly force to protect himself against her?\textsuperscript{165} Does the auxiliary rule providing that there is no duty to retreat in

\textsuperscript{161} RESTATEMENT (SECOND) OF TORTS § 65(1)(b). As the Restatement explains,

\textit{Since the means used must be proportionate to the danger threatened, it is obvious that one is not privileged to protect one's self even from a blow which is likely to cause some fairly substantial injury by means which are intended or likely to cause death or serious bodily harm.}

\textit{Id. § 63 cmt. j.}

\textsuperscript{162} DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 78–79 (2001); PROSSER, supra note 159, at 127–28;.

\textsuperscript{163} KEETON ET AL., supra note 159, at 128–29.

\textsuperscript{164} Of course, some courts define self-defense so expansively that it is unlikely that their holdings could ever be subject to constitutional challenge. In State v. Kerner, for example, the defendant was attacked while carrying some packages on a public street. 107 S.E. 222, 223 (N.C. 1921). He set down his packages, went to his place of business to pick up the pistol he kept there, and returned to the street with the gun in plain view, looking for his assailants. \textit{Id}. The court concluded: "On this occasion, the defendant threatened with violence was forced to abandon his property. He went to his place of business where he had the right to keep his pistol ... and returned with it unconcealed. He was acting in self-defense of his person and in defense of his property." \textit{Id}. at 225; see also Bray v. Isbell, 458 So. 2d 594, 595–97 (La. Ct. App. 1984) (upholding trial court's conclusion that defendant acted in self-defense when he shot at fleeing individuals seventy-five feet away who had broken into a vending machine in his motel).

\textsuperscript{165} For another hard case, consider the facts of Semaire v. State, 612 S.W.2d 528 (Tex. Crim. App. 1980). A husband and wife had been separated several times during a troubled marriage. \textit{Id}. at 530. The fact that each possessed property belonging to the other was apparently a point of contention. \textit{Id}.
one's own home apply in this case? If a court holds that it does not, should that decision be subject to constitutional review?

The key questions for constitutional purposes, however, focus on the core meaning of the defense as well as these auxiliary rules. Is it permissible for a state to limit the exercise of the right of self-defense to only those situations in which the defendant acts reasonably? If a reasonableness standard is constitutionally appropriate, does constitutional law impose constraints on the state's determination as to what constitutes reasonable conduct in the circumstances by a defendant who asserts the right of self-defense? Finally, should an appellate court make "an independent examination of the whole record" in reviewing the trial court's conclusion that a defendant acted unreasonably and therefore cannot justify his conduct as self-defense, or should appellate review be limited to correcting errors of law and deciding whether findings of fact are clearly unsupported by the evidence?

2. The Constitutionality of Evaluating Self-Defense Under a Reasonableness Standard

In considering these questions, it may be helpful to refer back to Justice Scalia's contention in *Heller* that the exercise of the right to keep and bear arms cannot be subject to review under an "interest-balancing" approach. Would that concern about the impropriety of "interest-balancing" apply as well to a citizen's right to use a firearm "in defense of hearth and home"?

The question is an important one because a reasonableness analysis intrinsically involves ad hoc interest-balancing to at least some extent. Evaluating the reasonableness of a defendant's belief that he is threatened and the reasonableness of his response requires some kind of a cost-benefit analysis. Courts and juries must determine the probability

The husband brought his wife's jacket over to the apartment where his wife was staying to exchange it for some of his property. *Id.* at 531. When he knocked on the door, she refused to open it and told him if he did not leave quickly, she would shoot him through the door. *Id.* The husband broke the door open and entered the apartment. *Id.* He saw his wife raise her hands and, thinking she was going to start shooting at him, he pulled out his own revolver and shot and killed her. *Id.* Can the husband claim self-defense under these circumstances? Should the case go to the jury with an instruction regarding self-defense? If the wife was justified in using deadly force in response to her husband's conduct, his claim that he was attempting to protect himself against her use of such force would not constitute self-defense, even if his testimony was credible. But did his busting through the door constitute a sufficient threat to justify his wife responding with deadly force? Even if the wife was not justified in using deadly force, was the husband justified in shooting her when he might have been able to safely retreat by immediately leaving the apartment? The court held, notwithstanding several dissents, that the issue of the husband's acting in self-defense should be submitted to the jury. *Id.* at 529, 531-32. If the dissenting justices had prevailed and the husband's self-defense claim had been rejected as a matter of law, would the husband be able to challenge his conviction on federal constitutional grounds?

that the alleged assailant will attempt to cause harm to the defendant. They must decide what the magnitude of that harm is likely to be. Finally, they must consider whether the defendant's response was commensurate to that threat or whether it involved excessive force or an unreasonable risk of injury to third parties.\(^{168}\)

Justice Scalia states in \textit{Heller} that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is \textit{really worth} insisting upon."\(^{169}\) Clearly, he is suggesting that statutes that abridge the right to keep and bear arms cannot be reviewed under a reasonableness standard. But surely Scalia would also contend that it is unconstitutional for the political branches of government, or the courts, to decide on a case-by-case basis whether or not it was reasonable, and therefore lawful, for an individual to keep and bear a handgun in his home.\(^{170}\) If the District of Columbia amended its law to permit residents to keep and bear arms in their homes for self-defense purposes only when it is reasonable for them to do so, I think that ordinance would be struck down as unconstitutional under the reasoning and authority of \textit{Heller}.\(^ {171}\) Accordingly, we can ask: if there is a constitutional right to use a firearm in self-defense, is it unconstitutional for the political branches of government, or the judicial branch, to decide on a case-by-case basis whether or not it is reasonable, and therefore lawful, for an individual to discharge a firearm to defend himself and his home?

As noted above, an analysis of the reasonableness of the defendant's belief and conduct is intrinsic to evaluating a self-defense claim in both tort and criminal law.\(^{172}\) In the words of one state court opinion in a criminal case, the "key to the defense of self-defense is reasonableness."\(^{173}\) Similarly, in tort law, "the self-defense analysis

\(^{168}\) As the Supreme Court of New Hampshire explained in evaluating a claim of self-defense, it is reasonable that the kind and amount of defensive force should be measurably proportioned to the kind and amount of danger, to the apparent consequences of using the force, and the apparent consequences of not using it. The probable consequences on both sides are to be considered and compared. \textit{Aldrich v. Wright}, 53 N.H. 398, 405 (1873).

\(^{169}\) \textit{Heller}, 128 S. Ct. at 2821.

\(^{170}\) Other courts have also suggested that "by requiring that restrictions on the right be only reasonable, rather than necessary," a court implicitly concludes that the right to keep and bear arms is not a fundamental right. \textit{Trinen v. City & County of Denver}, 53 P.3d 754, 757 (Colo. App. 2002).

\(^{171}\) At least one court has reversed this analysis. The Supreme Court of Connecticut argued that because the "common law principle permitting one to use deadly force in self-defense has long been restricted by the general rule of reason," the constitutional right to bear arms for self-defense purposes must be similarly limited by a rule of reason. \textit{Benjamin v. Bailey}, 662 A.2d 1226, 1232 (Conn. 1995).


\(^{173}\) \textit{Bechtel v. State}, 840 P.2d 1, 10 (Okla. Crim. App. 1992); \textit{see also} \textit{Sacrini v. United States}, 38 App. D.C. 371, 378 (D.C. Cir. 1912) (explaining that with regard to self-defense, "[t]he true test for the application of the jury is whether the circumstances presented to the mind of the defendant were such
incorporates negligence principles... [because] a party who overreacts to a perceived threat may be held liable in negligence if his actions are unreasonable in light of the circumstances. 7

On its face, one might argue that a reasonableness standard is intrinsically inconsistent with the idea that the right to use firearms for self-defense purposes is a fundamental, constitutionally protected right.

A reasonableness standard is intrinsically ad hoc and unpredictable in its application. Its use to evaluate the legality of an individual's conduct creates a daunting chilling effect that can easily discourage the exercise of a right. It also provides law enforcement agents, courts, and juries far too much discretion in deciding whether or not to subject the exercise of the right to sanction. Clearly, a law that only permitted reasonable speech in a public or nonpublic forum, or anywhere else, would be struck down summarily. Yet this is exactly the kind of a law that is routinely applied to the right to use a firearm for self-defense purposes.

Justice Scalia might reply that historically the right of self-defense has been understood under the common law to be limited to reasonable beliefs and conduct. But that response raises more questions than it answers. Common law decisions, and society's determination of what constitutes reasonable behavior, change over time. The common law system recognizes and anticipates doctrinal development and revision, and, of course, common law decisions may be modified and overridden by statutes. If the right to self-defense expands and contracts according to common law decisions in a jurisdiction, if its substance depends on the changing attitudes of the community with regard to what people consider to be reasonable, and if it can be substantially narrowed by legislation, then there seems little basis for characterizing this defense as a constitutional right.

Alternatively, one might argue that the right to self-defense is defined by the common law standards that were prevalent and accepted 200 years ago. At a minimum, judges and juries must interpret the right to provide at least as much protection as it did at the end of the eighteenth century. That approach, however, incorporates a particular understanding of what it means to act reasonably into constitutional doctrine. It would seem to require that every rejection of a claim of self-defense could be challenged on the constitutional ground that the court's

---


---
or jury's decision did not reflect the common understanding of what constituted reasonable self-defense in 1791. 175

For example, would the defendant be able to assert an infringement of his constitutional right to keep, bear, and use firearms to defend his home and property in the following case, which raises issues involving auxiliary rules and the reasonableness of the defendant's behavior? In United States v. Peterson, the deceased drove to the defendant's house with some friends to take the windshield wipers off of a wrecked car belonging to the defendant that was parked in an alley in back of defendant's house. 176 The defendant came out to his backyard and he and the deceased got into a verbal argument. 177 The defendant went back into his house and the deceased returned to his car and was about to leave when the defendant returned to his yard carrying a pistol. 178 He loaded the pistol and shouted to the deceased, "If you move, I will shoot," and "If you come in here I will kill you." 179 The deceased got out of his car and yelled at the defendant, "What the hell do you think you are going to

175. One possible analogy to basing the constitutionally protected right to use firearms for self-defense on the common law meaning and application of self-defense principles is the Court's decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In Lucas, the Court held that in order for legislation severely restricting an owner's use of his land to avoid being held to constitute a regulatory taking, the state must demonstrate that the limitation at issue "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Id. at 1029. While the Lucas opinion seems to clearly state that statutory overriding of common law nuisance principles will not be understood to change the "background principles" of property law on which takings decisions will be based, it is not nearly as careful in explaining the degree to which the evolution of common law nuisance principles will control the determination of whether a taking has occurred. The Court did note that the Restatement (Second) of Torts provides that "changed circumstances or new knowledge may make what was previously permissible no longer so." Id. at 1031. But what if developments in common law nuisance principles reflect nothing more than a new attitude in the community regarding the balance of property rights and public values?

Justice Blackmun's dissenting opinion in Lucas is also ambiguous on this point. One the one hand, he seems to suggest that the majority is trapping takings doctrine in the logic of centuries-old nuisance cases. Justice Blackmun complained,

There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?

Id. at 1055 (Blackmun, J., dissenting). On the other hand, Justice Blackmun also seemed to suggest that takings decisions can be based on new developments in nuisance law when he argues that "[t]here simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly 'objective' or 'value free.'" Id. While this language suggests that Blackmun sees no reason to believe that new judicial interpretations of nuisance law deserve any greater respect than legislative determinations that particular land uses are harmful, it also seems to acknowledge that under the majority's analysis judicial developments in the common law of nuisance would control the constitutional question of whether or not a taking occurs.

176. 483 F.2d 1222, 1225 (D.C. Cir. 1973).
177. Id.
178. Id.
179. Id.
do with that." Then the deceased got a lug wrench out of his car and advanced toward the defendant holding it in a raised position. The defendant warned the deceased not to come any closer and when the deceased continued to walk toward him, the defendant shot and killed him.

The jury convicted the defendant of manslaughter. He appealed and argued that the evidence demonstrated as a matter of law that he was justified in using deadly force in self-defense. In rejecting this argument, the appellate court relied on two doctrinal limits on the right of self-defense: the rule that a person whose affirmative conduct provokes or incites the altercation cannot assert self-defense to justify the use of deadly force, and the rule requiring the defendant to retreat if he can safely do so rather than using deadly force against his assailant. The court concluded that the first rule applied because the deceased was about to leave when the defendant came out of his house with a pistol and re-ignited the dispute. It also held that the defendant was obliged to retreat if he could safely do so, even though he was in the backyard of his home—a location in which the duty to retreat is not enforced. The principle that one need not retreat if he is attacked in and around his home may be asserted by innocent victims of assault, but not by those whose conduct instigated the altercation.

The court’s decision in this case may certainly be criticized as providing inadequate recognition of the defendant’s right to use firearms to defend himself and his property. The question raised by Heller is whether those criticisms raise constitutional questions that must be adjudicated in order to sustain the defendant’s conviction.

Finally, if a proper understanding of reasonableness constitutes the constitutional foundation of this defense, it is arguable that appellate courts should review decisions rejecting the defense by independently

180. Id.
181. Id. at 1225-26.
182. Id. at 1226.
183. Id.
184. Id. at 1224-25.
185. Id. at 1231-36.
186. Id. at 1231-34.
187. Id. at 1236-38.
188. Id. at 1231-38.
189. When courts review criminal convictions notwithstanding the defendant’s claim that he or she acted in self-defense, they focus on the lower court’s legal conclusions as well as determining whether the evidence supports the verdict. A range of issues may be raised, some of which, after Heller, may have constitutional implications. See, e.g., Aeers v. United States, 164 U.S. 388, 391–93 (1896) (reviewing jury instructions regarding what constitutes a deadly weapon and the degree and reasonableness of the perceived threat alleged to justify the defendant’s conduct); State v. Jenewicz, 940 A.2d 269, 279–83 (N.J. 2008) (discussing whether the “victim’s character trait for violence is an essential element of a claim of self-defense” for the purpose of admitting character evidence at trial).
examining the whole record of the trial proceedings below. *Bose Corp. v. Consumers Union of United States, Inc.* provides some support for this conclusion. In *Bose*, the plaintiff sued the defendant for product disparagement. The district court ruled in plaintiff's favor and found that it had demonstrated by clear and convincing evidence that defendant had acted with actual malice—that is, that defendant had published false and disparaging facts about plaintiff's products with reckless disregard for the truth or falsity of its statements.

The Supreme Court determined that it was obliged to conduct an independent review of the record to determine if the district court's finding of malice was supported by clear and convincing evidence. This obligation does not require appellate courts to independently review all findings of fact in First Amendment litigation, since many findings are largely irrelevant to the constitutional standard applied in a case. But a different rule applied to findings on the "dispositive constitutional issue" in the case. As the Court explained, "When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." Accordingly, when the constitutionally critical findings are at issue in a First Amendment case, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."

The Second Amendment is not the First Amendment. Nor is it clear that the Second Amendment subsumes the right to use a firearm for self-defense purposes. But if the use of a firearm in self-defense is to be protected as a right, and if an analysis of the reasonableness of defendant's conduct constitutes the core standard courts employ to determine the validity of a self-defense claim, then leaving that question to the discretion of trial judges and juries would seem to raise the same concerns as leaving the question of the publisher's actual malice to a trial judge or jury in a defamation case. Since independent review is

191. Id. at 488.
192. Id. at 490–91.
193. Id. at 511.
194. Id. at 508.
195. Id. at 503.
196. Id. at 501.
197. There had been some confusion about whether the trial court's determination that a defendant acted negligently in publishing defamatory statements (the minimum standard required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to hold a defendant liable for defaming a private figure) would also require independent review. Many courts initially concluded that independent review was not required. See, e.g., *Levine v. CMP Publ'ns, Inc.*, 738 F.2d 660, 673 n.19 (5th Cir. 1984);
required in the latter circumstance, it should be required in the former as well.

CONCLUSION

Whatever one thinks about the meaning of the Second Amendment, the Court's opinion in *Heller* is a disturbing one. *Heller* raises far too many questions to which the Court provides inadequate answers or no answer at all. Lower courts and legislatures are left with limited information about what constitutes a constitutionally cognizable burden on the right to keep and bear arms for self-defense purposes. They are provided no information at all about the standard of review that will be applied to gun control laws in future cases.

Also, *Heller* raises serious questions about the meaning and utility of originalist methodologies for interpreting the Constitution. The Court's emphasis on uncodified goals and purposes to determine the scope of rights, and its lack of regard for the reason that constitutional language is included in the text, suggests a lack of commitment to the text itself. The use of grammatical assumptions to subordinate what the Constitution actually says to justify textually unsupported conclusions about what the Constitution was understood to mean 200 years ago is unsettling. It is hard to escape the dissonance between this analysis and the reality that the Court is interpreting a document that controls the government of a nation with over 300 million people. Fundamental rights in our society, and public policy decisions about subjects as serious as gun control, should be grounded in something more than the alleged understanding of how prefatory and operative clauses were understood in 1789.

Finally, *Heller* raises unprecedented and difficult questions about the constitutionalization of tort and criminal law principles related to the use of firearms for self-defense. By insisting that the core meaning and purpose of the right to keep and bear arms derives from a pre-constitutional commitment to the right of self-defense, the Court seems to have inextricably joined the two rights together. It is hard to explain after *Heller* how the right to keep and bear firearms for self-defense

Landowne v. Beacon Publ’g Co., 512 N.E.2d 979, 985 (Ohio 1987); Gazette, Inc. v. Harris, 325 S.E.2d 713, 727–28 (Va. 1985). Other courts required independent review. See, e.g., Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 492 n.21 (Minn. 1985). In Milkovich v. Lorain Journal Co., the Supreme Court resolved the question by indicating that the trial court's determination that the defendant acted unreasonably in publishing defamatory material about a private figure on a matter of public concern would be subject to independent review. 497 U.S. 1, 20–21 (1990); see also Ledoux v. Nw. Publ’g, Inc., 521 N.W.2d 59, 69 (Minn. Ct. App. 1994); Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 423 (N.J. 1995). The growing realization by courts that conclusions regarding publisher negligence in private-figure defamation actions must be subject to independent review supports the argument that similar independent review may be required when courts decide whether the right to use arms (that a person keeps and bears) for self-defense purposes has been infringed.
purposes can be rigorously protected as a matter of constitutional law while the right to use a firearm to protect one's person, family, and home remains subject to the discretionary determination of common law courts and juries as to the reasonableness of a defendant's conduct. Similarly, if the Second Amendment precludes statutory mandates that limit the availability of firearms in the home for immediate self-defense, there is no obvious reason why the Amendment should not also be taken into account if negligence law seriously burdens firearm accessibility through the threat of civil liability.

That is one of the dangers of constitutional decisions like *Heller* that lack clarity and doctrinal rigor. Their potential reach may stretch much farther than is initially apparent.