

## CONSTRUCTING A CONSTITUTIONAL RIGHT: BORROWING AND SECOND AMENDMENT DESIGN CHOICES\*

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*In fleshing out the contours of the nascent Second Amendment, both courts and commentators have looked to established constitutional rights for guidance. Many, for example, have imported the analytical scaffolding of the First Amendment, including its heightened protection for “core” constitutional conduct and measured review for regulations akin to “time, place, and manner” restrictions. Others have lifted the “undue burden” test from its context in reproductive-autonomy jurisprudence to assess the burden a law imposes on the right to keep and carry firearms. Still others have found a parallel in the historical inquiry required to evaluate claims under the Seventh Amendment.*

*Drawing on the concept of constitutional borrowing, this Article is the first to systematically trace these links between the Second Amendment and other constitutional rights. It explores the sources from which Second Amendment cases and scholarship borrow, and why that borrowing occurs. And, after tracing these links, this Article explains how we should evaluate these instances of borrowing the same way we evaluate other types of analogical reasoning in law: by whether they are grounded in relevant similarities. Finally, this Article argues that current borrowing in Second Amendment jurisprudence falls short in two ways and then sketches a path forward. First, Second Amendment borrowing ought to pay more attention to the theoretical underpinnings for the right to keep and bear arms; and second, the practice ought to pay more attention to the reasons why some elements should be borrowed from one rights domain while others should be rejected.*

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## INTRODUCTION

Imagine that tomorrow researchers discovered an additional constitutional amendment that had in fact been duly ratified in 1791: “The full and equal rights of conscience shall not be in any manner, or on any pretext infringed.”<sup>1</sup> How would judges deal with claims brought under this newly discovered amendment? The phrasing is enigmatic, the founding era debates about its scope are minimal or nonexistent (let us assume), and no prior Supreme Court precedent sheds light on its scope.

Something almost like that happened with the Second Amendment. “For more than two centuries,” Judge Posner observed, “the ‘right’ to private possession of guns . . . had lain dormant,” a mere “spectral subject[] of theoretical speculation.”<sup>2</sup> It was not until 2008, in *District of Columbia v. Heller (Heller I)*,<sup>3</sup> that the Supreme Court first construed the Second Amendment to protect a legally enforceable right to keep and bear arms for self-defense.<sup>4</sup> Since then, judges, advocates, and scholars have been confronted with almost as much uncertainty as those faced with the hypothetical equal-conscience amendment.

1. Colleen A. Sheehan, *The Measure and Elegance of Freedom: James Madison and the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 513, 523 (2017) (quoting James Madison, *Amendments to the Constitution*, (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson & Robert A. Rutland eds., 1979)). This “equal-conscience amendment” was part of James Madison’s original proposal for inclusion in the Bill of Rights. See *id.* (describing how Madison saw the right of conscience as foundational for all other rights).

2. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [https://perma.cc/XFL8-3XE3 (dark archive)].

3. 554 U.S. 570 (2008).

4. *Id.* at 635.

One predominant way they have dealt with the uncertainty is by looking to familiar tools to operationalize the provision's guarantee.<sup>5</sup>

By and large, courts and commentators have relied heavily on the doctrinal scaffolding built around more established constitutional rights.<sup>6</sup> They have, in short, engaged in constitutional borrowing. Constitutional borrowing is “the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another.”<sup>7</sup> In some ways, this borrowing is unavoidable. Constitutional rights are fundamentally “relational.”<sup>8</sup> Over time, they “interact, associate, converse, and conflict with one another.”<sup>9</sup> The story of the post-*Heller* Second Amendment is about how constitutional rights building unfolds in the twenty-first century. It is a story about methodological and jurisprudential design choices that shape doctrinal development in fundamental ways.

Borrowing, and similar concepts that describe aspects of this phenomenon,<sup>10</sup> “augment[] formal modalities of interpretation, such as those arising from text, history, structure, precedent, or animating principles.”<sup>11</sup> Borrowing occurs whenever constitutional actors argue for importing elements from one constitutional domain to another to justify a certain outcome or treatment—“for example, appropriating notions of equality from equal protection doctrine and applying them in a proceeding involving due process.”<sup>12</sup>

Despite its ubiquity in Second Amendment doctrine and scholarship—and its sometimes-decisive effect on individual cases—the scope of this borrowing remains largely unexplored in the literature. Its role is especially important in this context because the Second Amendment has come of age in an era where constitutional rights and theorizing have garnered sustained academic, popular, and judicial attention.<sup>13</sup> Doctrines for many other rights are already well

5. See, e.g., Glenn Harlan Reynolds, *Foreword: The Second Amendment as Ordinary Constitutional Law*, 81 TENN. L. REV. 407, 407 (2014) (“Now that the Supreme Court has nailed down the old question of whether the Second Amendment protected any sort of right at all, the questions that arise seem a lot like those addressed by courts in other constitutional contexts.”).

6. See *infra* Section I.B.

7. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010).

8. TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE* 17 (2018).

9. *Id.*

10. See, e.g., Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1313 (2017) (providing “a framework that courts can use to analyze claims involving cumulative constitutional rights”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (articulating a theory of interpretation in which “the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase”).

11. Tebbe & Tsai, *supra* note 7, at 466.

12. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 466 (2012); see also Tebbe & Tsai, *supra* note 7, at 462–63 (defining borrowing).

13. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192–93 (2008) (describing the cultural and legal milieu in which *Heller* arose and arguing

established and robust.<sup>14</sup> Conceptual work on constitutional theory and interpretive methodology is widespread and flourishing.<sup>15</sup> And, unlike the gradual jurisprudential development of other fundamental rights, the Second Amendment's ascent has been quick and steep.<sup>16</sup>

Borrowing in this space is not only important but also easily understandable. Because the Second Amendment has only been recently recognized as creating an enforceable individual right, there is a dearth of federal legal precedent to rely on when fashioning rules to implement it.<sup>17</sup> Courts have turned, rather naturally, to how they understand and implement other rights for guidance.<sup>18</sup> In fact, “the very structure of a common law tradition dictates that, particularly where novel legal issues are raised, borrowing will be a frequent feature of judicial reasoning.”<sup>19</sup>

This Article is the first to systematically scrutinize, categorize, and assess how Second Amendment borrowing works to build a constitutional right from the ground up. It adds not just to the descriptive literature about what is borrowed and when, but also to the normative discussion of how to understand and assess the practice of borrowing. It traces both the sources from which courts and commenters borrow and the ways in which they do so. It also

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that the decision “respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown v. Board of Education*”).

14. See, e.g., Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 81 (2020) (noting that borrowing occurs so prolifically “in part ‘to take advantage of accumulated wisdom’ from better-developed areas of law” (quoting Tebbe & Tsai, *supra* note 7, at 467)).

15. See, e.g., Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30 (2018) (discussing the competing frames of rights jurisprudence that have emerged over the last several decades); see generally William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) (discussing originalism's answer to questions of constitutional interpretation).

16. See, e.g., Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right To Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1439 (2017) (“[T]he right to keep and bear arms is beginning to take shape—the decade since *Heller* has seen more than one thousand lower court challenges testing the boundaries and strength of the right.”).

17. See, e.g., Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 FORDHAM URB. L.J. 1617, 1623 (2012) (“Faced with harder cases, and with the fogginess of the *Heller* opinion, these courts understandably have reached for a framework resembling the familiar ‘baggage’ picked up by the First Amendment.”).

18. Of course, courts could have instead looked to how *states* interpreted their (sometimes very similar) constitutional right-to-arms provisions. See, e.g., Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CALIF. L. REV. 323, 384 (2011) (“Because the *McDonald* court declined to establish a standard of review for Second Amendment claims, it is not too late for the Supreme Court—and other federal courts now faced with the daunting task of evaluating Second Amendment claims with little guidance from the Court—to effectuate respect for state constitutional practice by adopting something like a reasonableness standard.”); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007) (proposing a reasonableness review standard that is “informed by the example of state constitutional law, where the individual right to bear arms is already well established”). That is not, however, a direction courts have pursued.

19. Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 673 (2011).

sketches a paradigm to assess constitutional borrowing as an act of analogical reasoning dependent both on relevant similarities and the underlying value theories of a constitutional entitlement. After all, as Robert Tsai observes, “we can only truly understand the practice of borrowing from within a tradition, as constitutional actors acting within a particular legal system and political culture.”<sup>20</sup>

In Second Amendment borrowing, the sources are many and varied. First Amendment elements, for example, have frequently been imported into Second Amendment analysis.<sup>21</sup> Justice Scalia invited this application in *Heller* when he expressly drew on First Amendment principles to, among other things, reject a free-standing “interest-balancing” approach to the Second Amendment.<sup>22</sup> Most recently in oral arguments during *New York State Rifle & Pistol Ass’n v. City of New York*,<sup>23</sup> Justice Sotomayor suggested that *Heller* directed courts to “analogize this [gun regulation] to the First Amendment.”<sup>24</sup> Yet the sources also extend well beyond that. Judges and scholars have linked the Second

20. Robert L. Tsai, *Considerations of History and Purpose in Constitutional Borrowing*, 28 WM. & MARY BILL RTS. J. 517, 520 (2019).

21. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009) [Blocher, *Categoricalism and Balancing*] (remarking that “the First and Second Amendments have often been considered close cousins”); see also Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1278 (2009) [hereinafter Miller, *Guns as Smut*] (“The Court in *Heller* sent unmistakable signals that the First and Second Amendments are cousins and may be subject to similar limitations.”).

22. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 635 (2008) (“The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views.”).

23. 140 S. Ct. 1525 (2020).

24. Transcript of Oral Argument at 32, *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. 1525 (No. 18-280).

Amendment not only with the First<sup>25</sup> but also with the Fifth,<sup>26</sup> Seventh,<sup>27</sup> and Fourteenth Amendments,<sup>28</sup> among others.<sup>29</sup>

How Second Amendment borrowing works is more prosaic. In broad contours, courts borrow either at the level of methodological framework or at the level of substantive rules.<sup>30</sup> Many courts, for example, have relied on the First Amendment's coverage-protection framework in announcing a similar two-step approach to Second Amendment cases.<sup>31</sup> This framework asks first whether the conduct falls within the scope of the right and then applies a means-end test, like intermediate scrutiny, to see whether the conduct is protected. On the level of substantive rules, some advocates have tried to convince judges to borrow prior-restraint rules or restrictions on content-based regulations.<sup>32</sup> Some courts have employed other First Amendment rules, like the adequate

25. See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) (noting that courts have “begun to adapt First Amendment doctrine to the Second Amendment context”); Miller, *Guns as Smut*, *supra* note 21, at 1278 (proposing that courts “[t]reat the Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity under the First Amendment”); Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings”*, 92 NEB. L. REV. 537, 542 (2014) (“[T]his Article concludes that lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller’s* schools and government buildings.”); see generally Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429 (2014) (discussing the application of First Amendment framework to Second Amendment issues); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014) (documenting the use of First Amendment case law as a guide for Second Amendment jurisprudence).

26. See, e.g., Joseph Blocher, *Bans*, 129 YALE L.J. 308, 317–18 (2019) [hereinafter Blocher, *Bans*] (describing a similar type of inquiry in takings cases as the Court undertook in *Heller*).

27. See, e.g., Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 852 (2013) [hereinafter Miller, *Text, History, and Tradition*] (arguing that “courts could look to the Supreme Court’s Seventh Amendment jurisprudence, and in particular the Seventh Amendment’s ‘historical test,’ to help them devise a test for the Second”).

28. See, e.g., Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 99 (1997) [hereinafter Johnson, *Principles and Passions*] (arguing that there exists a conceptual and analytical connection between the Second Amendment right to keep and bear arms and the Fourteenth Amendment right to reproductive autonomy); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court To Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 489 (2012) (“[T]his Article proposes that Second Amendment cases should be reviewed under the test utilized in abortion cases: the undue burden test.”); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 248 (2008) (predicting that the development of Second Amendment jurisprudence “will have close parallels to the development of the privacy right”).

29. The Third Amendment has even made a recent appearance. See Mark E. Coon, *Penumbrae Reconsidered: Interpreting the Bill of Rights Through Intratextual Analysis with the Third Amendment*, 43 OKLA. CITY U. L. REV. 45, 48 (2019) (using intratextual analysis to “interpret[] the Second and Fourth Amendments in light of the Third Amendment”). Scholars argue that even nonconstitutional common law and statutory principles should be borrowed to flesh out the Second Amendment. See Ruben, *supra* note 14, at 81 (advocating borrowing from common-law self-defense principles).

30. See *infra* Section I.B.

31. See *infra* Section I.B.1.

32. See *infra* Section I.B.2.

alternatives analysis.<sup>33</sup> The Second Circuit, for example, has held that, “[b]y analogy” to free-speech doctrine, a “law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.”<sup>34</sup>

As well as identifying these sources and types of borrowing, this Article examines the ways in which courts and scholars seek to justify the practice. This Article contends that borrowing is fundamentally a form of analogical reasoning.<sup>35</sup> Just like in applying precedent, an act of borrowing is justified when the target and the source share relevant similarities that warrant applying a characteristic from the source to the target.<sup>36</sup> When the similarities are superficial or nonexistent, an act of borrowing is not justified.<sup>37</sup> This Article provokes the discussion of which features are most relevant to the Second Amendment by isolating the (sometimes implicit) justifications for how courts and commentators have sought to justify borrowing.

The importance of this question—and the confusion about when to borrow and when to resist—is illustrated in Chief Justice Roberts’s own ambivalence about the relevance of the First Amendment to the Second. During oral argument in *Heller*, he asked Walter Dellinger, the District’s lawyer, how the city’s ban on handgun possession could be considered reasonable.<sup>38</sup> When Dellinger replied that the ban covered only one type of firearm, Roberts had a quick retort: “So if you have a law that prohibits the possession of books, it’s all right if you allow the possession of newspapers?”<sup>39</sup> If it was more than just

33. The adequate alternatives test looks to whether a regulation leaves open sufficient alternative avenues for a person to still exercise the right at issue. Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 291 (2016). As discussed below, *Heller* has been read by some courts and scholars to reject this type of test. See *infra* notes 120–21 and accompanying text.

34. *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012). The court upheld the conviction of a man who transported a firearm from Florida to his New York home in violation of 18 U.S.C. § 922(a)(3) because the man had “ample alternative means of acquiring firearms for self-defense purposes.” *Id.*

35. See Laurin, *supra* note 19, at 703–04 (“Principles of legal reasoning and jurisprudential legitimacy counsel that the use of analogy and precedent in judicial decisions be grounded in reasoning that is by some measure a ‘fit’ with the matter before the Court. This imperative . . . is only enhanced when a court draws from outside the immediate doctrinal domain in which a case dwells.” (footnotes omitted)); LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 4 (2005) (“There is something distinctive about legal reasoning, which is its reliance on analogy.”).

36. See *infra* Section II.A, Part III.

37. See *infra* Section II.A, Part III.

38. Transcript of Oral Argument at 18, *Heller I*, 554 U.S. 570 (2008) (No. 07-290).

39. *Id.* at 18–19. Chief Justice Roberts’s retort even made its way into the opinion, translated back into Second Amendment terms. See *Heller I*, 554 U.S. at 629 (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

rhetorical, the Chief Justice's question assumed that at least some principles from First Amendment law are applicable in considering the Second.<sup>40</sup>

But, just minutes later, Chief Justice Roberts seemed to reject the methodology of First Amendment cases: the "standards that apply in the First Amendment," he insisted, "just kind of developed over the years as sort of baggage that the First Amendment picked up."<sup>41</sup> Thus, he thought there were reasons to import First Amendment elements and, at the same time, reasons to decline. Exploring this tension, and teasing out the justification for importing some elements while rejecting others, is a central task of this Article.

This Article proceeds in three parts. Part I traces the Second Amendment's relationships among its constitutional counterparts. This Article is the first to undertake this critical taxonomical project for the Second Amendment. Though other articles have analyzed a single borrowing relationship,<sup>42</sup> none have surveyed the state of Second Amendment borrowing as a whole. This part underscores how scholars and courts have searched to find firm jurisprudential footholds as they navigate the development of a new and unfamiliar doctrinal terrain.<sup>43</sup> It focuses on *what* is borrowed in Second Amendment contexts and *how*.

Part II focuses on *why* that borrowing occurs, with implications for both Second Amendment borrowing and the practice in constitutional law at large. This part identifies the features of analogical reasoning that borrowing shares and then proceeds to identify and develop the ways that courts and commentators have sought to explain relevant similarities when borrowing. As this part shows, borrowers have typically appealed to one of four different types of similarities to justify the practice of borrowing: textual, historical, functional, and structural.<sup>44</sup>

Finally, Part III argues that current Second Amendment borrowing suffers from two flaws. On the one hand, borrowing is often justified by saying why the Second Amendment is similar to another right, but without specific attention to *which aspects* of the other right's jurisprudence warrant importing. As we might ask the Chief Justice, even assuming similarities between the First and Second Amendments, what supports rejecting tiers of scrutiny while borrowing other First Amendment principles? The current practice thus operates at too high a level.

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40. See Transcript of Oral Argument, *supra* note 38, at 18–19.

41. *Id.* at 44.

42. See generally, e.g., Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012) (chronicling how First Amendment elements get borrowed in Second Amendment analyses).

43. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (describing the task of applying and expanding *Heller* to other contexts as "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree").

44. See *infra* Section II.B.

On the other hand, despite attention to the comparison between two rights, focus on the broader theoretical rationales for the Second Amendment is often missing. Yet understanding the core values that a right serves is crucial for judging whether a particular act of borrowing is justified. Current practice thus also aims too low.

These twin pitfalls in current borrowing practice threaten to leave Second Amendment doctrine an untheorized collection of rules, standards, and frameworks—all detached from a deeper justification. Only by taking corrective steps to remedy these problems can Second Amendment borrowing achieve the goal of creating a rich, theoretically justified, and coherent constitutional jurisprudence.

### I. THE VARIETIES OF SECOND AMENDMENT BORROWING

The Second Amendment provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>45</sup> It is, in many respects, a brand-new fundamental right.<sup>46</sup> And for the past decade, this right has grown up in the shadow of its elders. Section I.A begins by laying out what the Supreme Court did in *Heller*, including how Justice Scalia’s majority opinion draws parallels with established constitutional doctrine. Next, Section I.B traces the ways in which courts and scholars have used other constitutional rights to answer the questions *Heller* left open about the Second Amendment’s scope and strength.

#### A. *The (Re)Birth of a Right in Heller*

Before *Heller*, the Supreme Court had not decided a Second Amendment case since *United States v. Miller*,<sup>47</sup> nearly seventy years prior.<sup>48</sup> In *Miller*, the Court upheld criminal indictments under the National Firearms Act of 1934 (“NFA”)<sup>49</sup> against a Second Amendment challenge.<sup>50</sup> In rejecting the challenge, the Court held that the Second Amendment did not protect the use or possession of a short-barrel shotgun because there was no evidence that that weapon had “some reasonable relationship to the preservation or efficiency of a

45. U.S. CONST. amend. II

46. See Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 171 (2008) (remarking that “*Heller* breathed new life into the Second Amendment”); see also Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 633–36 (2019) (cataloguing the ways the Second Amendment fits in the family of “fundamental rights”).

47. 307 U.S. 174 (1939).

48. *Id.* at 174.

49. Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended in scattered sections of 26 U.S.C.); *Miller*, 307 U.S. at 174.

50. *Miller*, 307 U.S. at 176.

well regulated militia.”<sup>51</sup> Beyond preserving the NFA and identifying some relation to the militia, the Court’s terse and opaque decision did not definitively establish how courts should consider other Second Amendment cases.<sup>52</sup>

In the ensuing decades, however, most lower courts read *Miller* to endorse a militia-oriented reading<sup>53</sup> of the Second Amendment and thus rejected arguments that the Constitution protects an individual right to keep and bear arms unconnected to service in a state-organized militia.<sup>54</sup> In fact, until 2007, no federal court had struck down state or federal legislation on Second Amendment grounds.<sup>55</sup> But in that year, the D.C. Circuit held that the District of Columbia’s ban on possession of functional handguns in the home violated the Second Amendment.<sup>56</sup>

When that case arrived at the Supreme Court, it had all the trappings of a blockbuster. At the time, public opinion was strongly in favor of the “individual

51. *Id.* at 178.

52. See, e.g., Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 49, 82 (2008) (discussing how *Miller*’s curious history may influence the debate over collective-right versus individual-right views); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 353 (2009) (commenting that *Miller* was seen as “an opaque and open-ended opinion that left a great deal of ambiguity concerning the nature of its holding and its conception of the Second Amendment right”).

53. Jason Racine, *What the Hell(er)? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 605 (2009) (“Up until 2001, all of the federal circuit courts that had ruled on the meaning interpreted the Second Amendment as protecting either a collective right that did not apply to individuals or a sophisticated collective right that only applied individually to people linked to state militias.”); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466 (1995) (contrasting a collective-rights reading of the Amendment that vests the right in the state militia with an individual-rights reading that protects a person’s right to keep and carry guns apart from militia service).

54. See, e.g., *Heller I*, 554 U.S. 570, 638 n.2 (2008) (Stevens, J., dissenting) (“Until the Fifth Circuit’s decision in *United States v. Emerson*, every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes.” (citation omitted)); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”); *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009) (“Before *Heller*, the scope of the Second Amendment was largely defined by the Supreme Court’s decision in *United States v. Miller*.” (citation omitted)). But see *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the Second Amendment “protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training” and distinguishing *Miller*); Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 971 (1996) (collecting and criticizing lower courts’ reading of *Miller* to deny an individual right to keep and bear arms).

55. In 1999, a federal district court in Texas struck down a federal prohibition, but the Fifth Circuit reversed on appeal in *Emerson*. 270 F.3d at 264–65. The trial court in *Miller* had likewise declared the NFA invalid, but the Supreme Court reversed that opinion too. See *Miller*, 307 U.S. at 174.

56. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007) (“[W]e conclude that the Second Amendment protects an individual right to keep and bear arms.”).

right” view,<sup>57</sup> and the District of Columbia’s effective ban on the possession of an operable handgun in the home was one of the most stringent gun regulations in the country.<sup>58</sup> In the course of striking down the District of Columbia’s ban, the Supreme Court invoked the Second Amendment’s constitutional relatives both to decipher the meaning of the provision and to sketch a framework for applying it.<sup>59</sup>

The Court first drew on other rights domains to draw out the meaning of the text. It invoked the First, Fourth, and Ninth Amendments when considering how “the people” should be construed in the Second Amendment, opting for a consistent, individual-focused usage across amendments.<sup>60</sup> The majority then relied on its general rights jurisprudence to reject the notion that only those “arms” that existed in 1791 are protected: “[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms . . . .”<sup>61</sup>

With that interpretive task complete, the Court used its construction of other constitutional rights to determine how to apply the Second Amendment.<sup>62</sup> The Court was quick, for instance, to note that the individual right it recognized “was not unlimited, just as the First Amendment’s right of free speech was not.”<sup>63</sup> Emphasizing that connection, the Court reiterated that all rights have limits: “[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not

57. Before *Heller*, the competing views were the “collective rights” view that saw the Second Amendment as protecting the rights of states or the right to form a militia and the “individual rights” view that saw the right as a personal one. See Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406, 406 (2008) (“What *Heller* is most notable for is its complete and unanimous rejection of the ‘collective rights’ interpretation that for nearly seventy years held sway with pundits, academics, and—most significantly—lower courts.”); see also *id.* at 411 n.28 (citing a study that seventy-three percent of the American public believes the Constitution guarantees the rights of Americans to own guns).

58. *Heller I*, 554 U.S. at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”); Linda Greenhouse, *Justices To Decide on Right To Keep Handgun*, N.Y. TIMES (Nov. 21, 2007), <https://www.nytimes.com/2007/11/21/us/21scotus.html> [<https://perma.cc/E5KM-8NXQ> (dark archive)] (“Of the hundreds of gun regulations on the books in states and localities around the country, the district’s ordinance is generally regarded as the strictest.”).

59. Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3 (2004) (discussing the difference between discerning meaning and creating a doctrinal framework for a constitutional provision).

60. *Heller I*, 554 U.S. at 579.

61. *Id.* at 582 (citations omitted); see also *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring) (“Electronic stun guns are no more exempt from the Second Amendment’s protections, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.”).

62. *Heller I*, 554 U.S. at 595.

63. *Id.*

read the First Amendment to protect the right of citizens to speak for *any purpose*.<sup>64</sup> The Court, however, rejected the invitation to pick from “any of the standards of scrutiny that we have applied to enumerated constitutional rights,” though it clarified that rational-basis review was off the table.<sup>65</sup>

As well as rejecting rational basis, the Court also suggested that the government may not ban a weapon if it is in common use for lawful purposes, no matter whether other weapons remain available for self-defense.<sup>66</sup> The Court also rejected Justice Breyer’s call for an interest-balancing approach.<sup>67</sup> In doing so, Justice Scalia specifically invoked the Court’s historic treatment of “other enumerated constitutional right[s],”<sup>68</sup> including the First Amendment:

We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people.<sup>69</sup>

And, finally, in defending its refusal to adopt or apply any particular standard for adjudicating Second Amendment claims, the Court relied again on how it treated other rights: “[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.”<sup>70</sup>

64. *Id.*

65. *Id.* at 628–29. The Court noted that rational basis is the bare proscription of irrational laws and “[o]bviously” cannot be “the same test . . . used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” *Id.* at 628 n.27; *see also* *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context.”).

66. *Heller I*, 554 U.S. at 629 (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.”). It is not entirely clear why this was “enough to note.” Handguns, after all, were not the quintessential self-defense weapon chosen by the Founders Jacob D. Charles, *Heller and the Vagaries of History*, SECOND THOUGHTS (Sept. 16, 2019), <https://sites.law.duke.edu/secondthoughts/2019/09/16/heller-and-the-vagaries-of-history/> [<https://perma.cc/3YZM-VLYD>] (suggesting that the quintessential self-defense weapon should receive greater protection than other common-use weapons).

67. *Heller I*, 554 U.S. at 634–35.

68. *Id.* at 634.

69. *Id.* at 635 (citation omitted).

70. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145 (1879)).

*Heller* thus teemed with comparisons to the other protections in the Bill of Rights. It relied on the First, Fourth, and Ninth Amendments to decipher meaning, again on free-speech principles to set up (and reject) decisional rules, and on the free-exercise clause to justify a refusal to settle all (or, indeed, many) debates about the Amendment.<sup>71</sup> *Heller*, in short, invited the doctrinal borrowing that courts and scholars set out to develop.<sup>72</sup> At the same time, *Heller* left gaping holes in the fabric of the constitutional right, forcing courts to quickly find ways to deal with the litigation deluge.<sup>73</sup> The next section catalogues the approaches these courts and commentators have taken.

#### B. *The Types and Sources of Second Amendment Borrowing*

Though it announced an individual right with some broad qualifications, *Heller* did not give judges much help as the next round of challenges bubbled up through the lower courts.<sup>74</sup> This lack of guidance frustrated judges charged with implementing the right<sup>75</sup>—and simultaneously invigorated scholarship.<sup>76</sup> Both courts and commentators, however, understood they were not painting on a blank canvas.<sup>77</sup> Though no Second Amendment guideposts existed, the

71. *Id.* at 579.

72. *See id.*

73. *See* Ruben & Blocher, *supra* note 16, at 1435 (noting that there have been more than one thousand Second Amendment challenges arising in the decade after *Heller*).

74. *See, e.g.*, Sobel, *supra* note 28, at 523 (noting that the Supreme Court “fail[ed] to provide any real guidance to the lower courts”).

75. *See, e.g.*, United States v. Chester, 628 F.3d 673, 676 (4th Cir. 2010) (noting that although *Heller* staked out presumptively lawful regulations, it “did not explain *why* the listed regulations are presumptively lawful”).

76. *See, e.g.*, Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1263–64 (2010) (providing a framework for reviewing Second Amendment challenges); Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1445 (2009) (offering an approach for “how should courts translate this right into workable constitutional doctrine”); *cf. also* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 133 (2008) (discussing “the most plausible interests in private arms possession that might stand behind the Second Amendment”).

77. *See, e.g.*, Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1286 (2009) [hereinafter Johnson, *Supply Restrictions*] (“We are not working on a blank slate. It is a common problem that protected rights are exercised in a variety of ways, employing different methodologies and technologies that raise distinct constitutional questions.”); Miller, *Guns as Smut*, *supra* note 21, at 1303 (seeking to “locate[] the Second Amendment within an existing individual rights architecture”); Reynolds & Denning, *supra* note 57, at 406 (“Given the fact that the *Heller* majority declined to give a detailed accounting of the proper standard of review to be used in subsequent Second Amendment cases, litigants have a rare opportunity to write on a *tabula* much more *rasa* than is ordinarily the case in constitutional litigation, making use of recent scholarship on the crafting of constitutional decision rules that implement constitutional provisions.”); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 97 (2009) (“Analogies between the First Amendment and the Second (and comparable state constitutional protections) are over 200 years old.”).

modern era of rights jurisprudence provides a rich array of interpretive tools with which to approach the question.<sup>78</sup> Scholars and judges imported these tools into Second Amendment analysis, adapting them to fit the circumstances. This section explores what sources these actors used to operationalize the right to keep and bear arms and under which theories they did so. It starts by looking at borrowing at the methodological level before turning to the borrowing of substantive rules.<sup>79</sup>

### 1. Borrowing a Methodological Framework

There are at least three sources from which judges and academics have borrowed to build a structure within which to assess Second Amendment claims: (1) the First Amendment's free-speech framework,<sup>80</sup> (2) the Seventh Amendment's historical test,<sup>81</sup> and (3) abortion jurisprudence's undue-burden standard.<sup>82</sup>

By far the most frequent loaner in the Second Amendment context is First Amendment analysis.<sup>83</sup> Right after *Heller*, courts and commentators quickly began applying a two-step framework that was explicitly borrowed from the Court's First Amendment law.<sup>84</sup> First, courts consider whether a type of conduct falls within the scope of the Second Amendment. Second, assuming it does, courts apply a type of means-end scrutiny drawn from the traditional tiers

78. Of course, turning to borrowing from other federal constitutional rights domains was not inevitable. See *supra* note 18 and accompanying text (describing state constitutional practice).

79. One point of clarification: this section uses a distinction between methodological borrowing and substantive borrowing simply for organizational simplicity—the difference is less a dichotomy than a continuum. See Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 351 (1998) (explaining, in the context of constitutional borrowing across countries, that the object of borrowing “could be any part, large or small, of the constitutional regime”—from a single sentence to an entire article); Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM & MARY BILL RTS J. 319, 323–24 (2020) (discussing how borrowing within U.S. constitutional law can occur with “both the more specific rules and the broader methodologies” of constitutional doctrine). Some elements fall clearly on the methodological side, like using one of the tiers of scrutiny to assess the right; others are clearly on the substantive side, like urging adoption of the prior-restraint doctrine. But many are in between. Nothing hinges on where these elements are classified in the following sections, and the reader is free to disagree with some of these choices without upsetting the broader project.

80. See *infra* notes 83–88 and accompanying text.

81. See *infra* notes 91–98 and accompanying text.

82. See *infra* notes 99–110 and accompanying text.

83. Magarian, *supra* note 42, at 61 (“The most common sort of doctrinal analogy from the First Amendment to the Second seeks to import a First Amendment standard of review into Second Amendment law.”).

84. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (relying on First Amendment precedent to announce the framework).

of scrutiny that are ordinarily used in First Amendment analysis to determine constitutionality.<sup>85</sup>

Courts emphasize that this two-step coverage-protection inquiry is drawn from longstanding First Amendment jurisprudence.<sup>86</sup> As the Third Circuit said when adopting the framework, “*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment. We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment.”<sup>87</sup> Other courts and commentators have been just as explicit that the connection between the Amendments leads to borrowing. The Fifth Circuit said, after surveying other circuit-court practice, that it was “persuaded to adopt the two-step framework outlined above *because* First Amendment doctrine informs it.”<sup>88</sup>

Others, however, have sought to import the analytical framework from different rights. For example, soon after *Heller*, and despite the avalanche of circuit courts adopting the First Amendment-inspired two-step framework, a set of judges and scholars began arguing for a textual-historical approach.<sup>89</sup> No circuit court has yet adopted this test, and every circuit court to consider the question has instead adopted the two-part test.<sup>90</sup> But, should courts incorporate such an inquiry, Darrell Miller has argued that this decision can be grounded in

85. Means-end scrutiny requires the government to prove that the law serves the interests the government seeks to advance. How substantially the law has to serve those interests, and how important those interests must be, is a function of whichever tier of scrutiny—rational basis, intermediate scrutiny, or strict scrutiny—the court selects. *See id.* (explaining means-end scrutiny framework).

86. *See* Blocher, *Bans*, *supra* note 26, at 319–20 (discussing the coverage-protection framework).

87. *Marzzarella*, 614 F.3d at 89 n.4 (citations omitted); *see also* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1376 (2009) (arguing that “[t]he case law dealing with free speech and the free exercise of religion provides a particularly good analogue” for determining how to review Second Amendment challenges); Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1426 (2009) (predicting, correctly, that “the lower courts will deal with gun regulation by subjecting it to a standard-of-review analysis rather than an originalist, or traditionalist, analysis[ and] that they will circle around a standard of review akin to either rational basis with bite or intermediate scrutiny”).

88. *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 197 (5th Cir. 2012) (emphasis added).

89. *See* *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from the denial of rehearing en banc) (advocating for a text, history, and tradition approach); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012), *opinion withdrawn and superseded on reh’g*, 682 F.3d 361 (5th Cir. 2012) (Elrod, J., dissenting) (“As several of our sister circuits have recognized, *Heller* and *McDonald* dictate that the scope of the Second Amendment be defined solely by reference to its text, history, and tradition.”); *Mai v. United States*, 974 F.3d 1082, 1087 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (“If operating on a clean slate, I would hew to *Heller*’s and *McDonald*’s fidelity to the Second Amendment’s history, tradition, and text.”); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (advocating for the text, history, and tradition approach).

90. *See* *Mance*, 896 F.3d at 391 (Higginson, J., concurring in the denial of rehearing en banc) (explaining that “the panel applied the two-step analytic framework adopted by our circuit and all nine other circuits to have considered the issue”).

Seventh Amendment jurisprudence.<sup>91</sup> He is explicit in his aim: “[t]o the extent that the [*Heller*] Court is serious about rejecting balancing and embracing history, ‘borrowing’ from the Court’s Seventh Amendment jurisprudence can provide clues about how courts may craft a history-centered test for the Second Amendment.”<sup>92</sup> Taking seriously *Heller*’s demand, Miller describes the Court’s Seventh Amendment historical test as an apt framework.<sup>93</sup> That historical test works in a two-step fashion, where history serves first as “a familiar boundary-setting device” and then “serves a tailoring function,” in which it “dictates the extent to which legislatures or courts may alter both the form and the function of the jury that the Seventh Amendment guarantees.”<sup>94</sup>

Justice Kavanaugh and the other circuit dissenters take a different approach to the historical test they propose. In their view, a historical analogue to some regulation is not only sufficient but also necessary to uphold the law, not—à la *Miller*—merely sufficient.<sup>95</sup> As then-Judge Kavanaugh explained: “Gun bans and gun regulations that are longstanding—or, put another way, sufficiently rooted in text, history, and tradition—are consistent with the Second Amendment individual right.”<sup>96</sup> But those “that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right.”<sup>97</sup> The other dissenters agree that, without historical precedent, novel or innovative regulations fail.<sup>98</sup>

91. See generally Miller, *Text, History, and Tradition*, supra note 27 (advocating a historical approach).

92. *Id.* at 858 (footnote omitted); *id.* at 888 (remarking that “the Seventh Amendment test may serve as a model from which to construct a durable but flexible Second Amendment test reliant on text, history, tradition, and the common law”); see also *id.* at 907 (“The Second Amendment right to keep and bear arms could be implemented through a historical test based on historical materials and common law reasoning and sources, just as the Seventh Amendment right has been.”).

93. *Id.* at 875.

94. *Id.* at 887. For example, Miller applies the test to a ban on high-capacity magazines. First, the challenger would have to show that such magazines are a protected arm, which they might do by arguing that it “is sufficiently analogous to such a weapon that a reasonable person would have understood it to be” one at the Founding. If she did this at step one, the government would have to show that the law is not a complete destruction of the right. It could do so by resorting to historical, precedential, or functional considerations. *Id.* at 926–28.

95. *Heller II*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

96. *Id.*

97. *Id.*

98. *Mance v. Sessions*, 896 F.3d 390, 395–96 n.3 (5th Cir. 2018) (Elrod, J., dissenting from the denial of rehearing en banc) (stating that if the regulations are not longstanding or sufficiently rooted in history then, “under a proper text-and-history-based approach, such regulations would be inconsistent with the Second Amendment’s individual right”). Not all those opposed to stricter gun regulation, however, are in favor of a text, history, and tradition approach. See, e.g., Nelson R. Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL’Y 171, 174 (2020) (arguing that “then-Judge Kavanaugh misinterpreted *Heller*” and contending neither Justice Kavanaugh “nor other members of the Supreme Court should adopt the approach that he mistakenly imputed to *Heller*”).

In addition to First and Seventh Amendment borrowing, scholars have also sought to import the methodology of the Court's reproductive-autonomy jurisprudence into the developing right to keep and bear arms.<sup>99</sup> Stacey Sobel, for example, argues that the undue-burden test—which forbids laws that have the purpose or effect of placing a substantial obstacle in the way of an abortion—best implements the *Heller* right because it “protects the core right, while acknowledging that some regulation is necessary.”<sup>100</sup> Just as government regulations that pose a “substantial obstacle” to a woman's reproductive decisions are unconstitutional, so too would be government regulations that “impose[] a substantial obstacle on an individual's core Second Amendment right” to self-defense.<sup>101</sup> Melanie Kalmanson also argues that “borrowing” from the Court's abortion jurisprudence “will provide uniformity and consistency within the case law.”<sup>102</sup> Jessica Lujan applies the undue-burden test to hypothetical smart gun regulations, contending that “a ‘smart gun’ mandate would likely fail to pass constitutional muster under a *Casey*-like ‘undue burden’ analysis” because of the expense and unreliability of current technology.<sup>103</sup>

For the most part, courts have declined the invitation to import the undue-burden test into the Second Amendment. For example, in assessing a challenge to a Chicago ordinance that prohibited gun ranges within city limits, the Seventh Circuit stated that although “[t]he City urges us to import the ‘undue burden’ test from the Court's abortion cases,”<sup>104</sup> “[b]oth *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate.”<sup>105</sup> A federal

99. Sobel, *supra* note 28, at 491 (proposing that courts use the undue-burden standard); *see also* Johnson, *Supply Restrictions*, *supra* note 77, at 1286 (arguing that the Court's abortion jurisprudence is “uniquely-suited for building foundation on which to build a standard for resolving the assault weapons question” because it balances rights and harm in the appropriate way). *See generally* Johnson, *Principles and Passions*, *supra* note 28 (arguing that the right to an abortion and the right to bear arms share similar theoretical foundations). Others have drawn another analogy between abortion and gun rights, though not in the mold of a borrowing methodology. Judge Wilkinson has argued that the Court's decisions in *Roe* and *Heller* both amount to judicial activism that overturns the will of the electorate on the basis of vague or unclear constitutional text. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (arguing that *Heller* is inconsistent with conservative judicial philosophy).

100. Sobel, *supra* note 28, at 517. Alan Brownstein argues that the undue-burden framework is actually more deeply entrenched in how courts determine whether a right has been infringed more broadly. Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867–72 (1994). As he argues, “the ‘undue burden’ standard of the *Casey* plurality is reflected in one form or another throughout the fundamental rights case law of the past forty years.” *Id.* at 872.

101. Sobel, *supra* note 28, at 522.

102. Melanie Kalmanson, *The Second Amendment Burden: Arming Courts with a Workable Standard for Reviewing Gun Safety Legislation*, 44 FLA. ST. U. L. REV. 347, 374–75 (2016).

103. Jessica M. Lujan, *Half-Cocked: “Smart Gun” Mandates Are Premature and Unconstitutional Under the Prevailing “Undue Burden” Test*, 24 B.U. J. SCI. & TECH. L. 500, 520 (2018).

104. *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011).

105. *Id.*

district court in Atlanta similarly rejected the use of the undue-burden standard, remarking that it “is best left to the abortion cases from which it stemmed.”<sup>106</sup> The district court in a later challenge to a District of Columbia law followed suit: “[T]his court strongly doubts that the *Heller* majority envisioned the undue burden standard when it left for another day a determination of the level of scrutiny to be applied to firearms laws.”<sup>107</sup>

The Ninth Circuit, on the other hand, has suggested that just as the undue-burden test permits a ban on one type of abortion procedure because others are available,<sup>108</sup> so also “when deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes.”<sup>109</sup> But the Ninth Circuit has not imported the undue-burden framework wholesale and appears to have consistently applied the two-step framework borrowed from the First Amendment instead.<sup>110</sup>

## 2. Borrowing Substantive Law

Methodological borrowing is not all that controversial.<sup>111</sup> But some courts, scholars, and advocates have also sought to import *substantive* rules of law—most notably from the First Amendment—into the Second Amendment as well. Many of these attempts have been met with skepticism. In the course of commenting on the prevalence of borrowing from the First Amendment, one federal court expressed a characteristic sentiment: “While these cases borrow an *analytical framework*, they do not apply *substantive* First Amendment rules in the

106. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng’rs*, 212 F. Supp. 3d 1348, 1367 n.16 (N.D. Ga. 2016).

107. *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010), *aff’d in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

108. *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (“The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure.”).

109. *Nordyke v. King*, 644 F.3d 776, 787 (9th Cir. 2011), *on reh’g en banc*, 681 F.3d 1041 (9th Cir. 2012). A few other California courts have hinted in this direction. *See, e.g., Teixeira v. County of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) (stating that “gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained” and citing privacy-based undue-burden case law to bolster the point); *People v. Flores*, 86 Cal. Rptr. 3d 804, 809 n.5 (2008) (upholding conviction for carrying a concealed firearm in public and noting that “it appears that a mid-level standard of scrutiny analogous to the ‘undue burden’ standard will ultimately prevail in this context” (citation omitted)).

110. *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019) (describing the circuit’s use of the “two-step inquiry to analyze claims that a law violates the Second Amendment”).

111. *But see Magarian, supra* note 42, at 61 (arguing that the First Amendment is not a proper analogue for importing the tiers of scrutiny); *Heller II*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing for a text, history, and tradition approach).

Second Amendment context.”<sup>112</sup> The Third Circuit even explained its prior reference to importing the First Amendment’s “structure” as merely “reflect[ing] this Court’s willingness to consider the varying levels of means-end scrutiny applied to First Amendment challenges when determining what level of scrutiny to apply to a Second Amendment challenge.”<sup>113</sup> It did not demand that the court “import the prior restraint doctrine” or “the First Amendment overbreadth doctrine to the Second Amendment context.”<sup>114</sup>

Yet substantive rules have crept in, nonetheless. For example, the First Amendment generally permits reasonable time, place, and manner restrictions on protected speech, so long as those restrictions “leave open ample alternative channels for communication of the information.”<sup>115</sup> The Second Circuit was one of the first courts to employ in the Second Amendment context an alternatives analysis expressly borrowed from the First Amendment.<sup>116</sup> “By analogy” with free-speech doctrine, the Second Circuit said, “[A] law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.”<sup>117</sup> Other courts have used this same notion, often upholding bans on certain semi-automatic weapons or high-capacity magazines in part by appeal to this principle.<sup>118</sup>

But despite its prevalence among courts and commentators, *Heller* itself arguably made this connection tenuous when it rejected the argument that the

112. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 267 n.32 (S.D.N.Y. 2011), *aff’d sub nom.* *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

113. *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013).

114. *Id.*

115. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

116. *See United States v. Decastro*, 682 F.3d 160, 167–68 (2d Cir. 2012); *see also Nordyke v. King*, 644 F.3d 776, 787 (9th Cir. 2011) (analogizing from the First Amendment and concluding that “when deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes”), *aff’d en banc*, 681 F.3d 1041 (9th Cir. 2012).

117. *Decastro*, 682 F.3d at 168. The court upheld the conviction of a man who transported a firearm from Florida to his New York home in violation of 18 U.S.C. § 922(a)(3) because the man had “ample alternative means of acquiring firearms for self-defense purposes.” *Id.*

118. *Heller II*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (applying intermediate scrutiny to a “prohibition of semi-automatic rifles and large-capacity magazines” because it “does not effectively disarm individuals or substantially affect their ability to defend themselves” but leaves open adequate alternatives for self-defense); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) (“[C]itizens may continue to arm themselves with non-semiautomatic weapons *or* with any semiautomatic gun that does not contain any of the enumerated military-style features. Similarly, while citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds.”); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (concluding that rather than tiers of scrutiny, “we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense” (citations and quotation marks omitted)).

District of Columbia's ban left open adequate alternative weapons to use for self-defense.<sup>119</sup> Some judges<sup>120</sup> and scholars<sup>121</sup> have indeed read *Heller* to foreclose an alternatives analysis akin to that employed in First Amendment cases.<sup>122</sup> This is likely one battlefield on which future Second Amendment challenges will take place, though there is a strong argument that *Heller* only foreclosed an alternatives analysis in the context of a handgun ban.

Similarly, scholars and advocates have invoked a large variety of substantive First Amendment doctrines in an attempt to import these ideas into the Second, but they have not always been successful in persuading courts. These include

- prior-restraint principles,<sup>123</sup>
- overbreadth doctrine,<sup>124</sup>
- forum analysis,<sup>125</sup>

119. See *Heller I*, 554 U.S. 570, 629 (2008) (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.”).

120. See, e.g., *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) (“The question under *Heller* is not whether citizens have adequate alternatives available for self-defense.”); *Ass’n of N.J. Rifle and Pistol Clubs, Inc. v. Att’y Gen. of N.J.*, 910 F.3d 106, 129 (3d Cir. 2018) (Bibas, J., dissenting) (“[L]ooking to smaller magazines and other options is the same argument, adapted to magazines, that the Court dismissed in *Heller*.”); *Kolbe v. Hogan*, 849 F.3d 114, 161–62 (4th Cir. 2017) (Traxler, J., dissenting) (arguing that an alternatives analysis was “expressly rejected” by *Heller* (emphasis omitted)).

121. See, e.g., Blocher, *Categoricalism and Balancing*, *supra* note 21, at 407 (stating that “the majority in *Heller* disclaimed any Second Amendment version of the First Amendment’s time, place, and manner test” that assesses whether alternatives are left open to accomplish the constitutionally protected aim).

122. But see *Ass’n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 118 n.20 (distinguishing *Heller*’s discussion of this point on the ground that “the handgun ban at issue in *Heller*, which forbade an entire class of firearms, differs from the [large-capacity magazine] ban here, which does not prevent law-abiding citizens from using any type of firearm”); *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 260 n.98 (giving the same reasoning and concluding that “[o]ur consideration of available alternatives for self-defense thus squares with *Heller*’s focus on protecting that ‘core lawful purpose’ of the Second Amendment right”).

123. *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) (“[W]e reject Appellants’ invitation to apply First Amendment prior restraint doctrine rather than traditional means-end scrutiny.”); *Bolton v. Bryant*, 71 F. Supp. 3d 802, 817 (N.D. Ill. 2014) (“Analogizing to the First Amendment for the purposes of determining the level of scrutiny required to review Second Amendment challenges is not nearly enough to suggest that the prior restraint doctrine should be wholly imported into the Second Amendment.”).

124. *United States v. Chester*, 514 F. App’x 393, 395 (4th Cir. 2013) (“[N]o circuit has accepted an overbreadth challenge in the Second Amendment context.”); *United States v. Decastro* 682 F.3d 160, 169 (2d Cir. 2012) (“There is no overbreadth argument that Decastro can make in the Second Amendment context.”).

125. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1135 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (pointing to First Amendment forum analysis in observing “[t]hat location matters to a scrutiny analysis is a familiar part of other areas of constitutional analysis”); *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng’rs*, 212 F. Supp. 3d 1348, 1369 n.17 (N.D. Ga.

- fee jurisprudence,<sup>126</sup> and
- retaliation doctrine.<sup>127</sup>

Drawing even more deeply on First Amendment analogies, some scholars have argued that courts should treat guns (or certain types of gun) like obscenity and restrict their use to the home.<sup>128</sup> Or that courts should at least “rely on local standards to make that distinction [between protected and unprotected arms], just as First Amendment doctrine does when separating obscenity from protected speech.”<sup>129</sup> Or, further still, that “courts should decide which gun regulations deserve constitutional protection by adopting the high-, low-, and no-value framework from the First Amendment’s free speech doctrine.”<sup>130</sup> The examples could be multiplied.

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2016) (“The Court is aware of no authority incorporating the First Amendment’s ‘public forum’ doctrine into Second Amendment jurisprudence, and declines to be the first court to make that leap.”); *see also* Klukowski, *supra* note 25, at 462 (arguing for a Second Amendment forum analysis); Pratt, *supra* note 25, at 574 (arguing “that lessons from First Amendment student-speech jurisprudence and public-forum doctrine caution against expansive interpretations of *Heller*’s listed sensitive places”).

126. *Bauer v. Becerra*, 858 F.3d 1216, 1224 (9th Cir. 2017) (noting that the plaintiff “urges us to apply the line of ‘fee jurisprudence’ that was developed by the Supreme Court in the First Amendment context to assess the constitutionality of fees imposed on the exercise of” his Second Amendment rights) *cert. denied*, 138 S. Ct. 982 (2018); *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013) (“We agree that the Supreme Court’s First Amendment fee jurisprudence provides the appropriate foundation for addressing plaintiffs’ fee claims under the Second Amendment.”); *see also* Hannah E. Shearer & Allison S. Anderman, *Analyzing Gun-Violence-Prevention Taxes Under Emerging Firearm Fee Jurisprudence*, 43 S. ILL. U. L.J. 157, 160 (2018) (arguing that “it is misguided to import First Amendment fee jurisprudence without modification into the very different context of gun-violence-prevention taxes”).

127. *See, e.g.*, *Thomas v. Cassia County*, No. 17-CV-00256, 2019 WL 938385, at \*8 (D. Idaho Feb. 26, 2019) (stating, in the context of a Second Amendment retaliation claim, “[T]he Court finds that drawing from, and adapting, the Ninth Circuit’s approach to First Amendment retaliation claims is appropriate here”), *adhered to on reconsideration*, 2019 WL 5270200 (D. Idaho Oct. 17, 2019).

128. *See, e.g.*, Michael C. Dorf, *Does Heller Protect a Right To Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231 (2008) (“Like the Second Amendment, nothing in the text of the First Amendment suggests that its protections would have any greater force in the home than outside it. Nonetheless, in *Stanley* the Court held that home possession of obscene materials could not be criminalized, even as it assumed arguing that public display and distribution of obscenity were unprotected.” (footnote omitted)). *See generally* Miller, *Guns as Smut*, *supra* note 21, at 1280 (arguing that the Second Amendment can be construed similarly as the First in some respects); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. 633, 640 (2014) (“[T]his Article proposes that obscenity law, in particular, can offer important insights for mapping out the general constitutional boundaries of the modern debate over gun-type restrictions.”).

129. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 90 (2013).

130. Joseph E. Sitzmann, *High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment*, 86 U. CHI. L. REV. 1981, 1985 (2019); *see also id.* at 1993–94 (“Drawing on the theme of comparing Second Amendment cases to First Amendment doctrine, the sections that follow expand one plausible and useful analogy: like obscene ‘speech,’ which garners no constitutional protection, certain guns—no-value guns—deserve no constitutional protection. By contrast, so-called low-value guns merit some constitutional protection, while high-value guns deserve the most rigorous constitutional protection.” (footnote omitted)).

Although many of these courts and scholars have provided justifications for the borrowing they propose, one judge put the criticism spurred by these innovations succinctly:

[*Heller*'s] limited references are hardly an invitation to import the First Amendment's idiosyncratic doctrines wholesale into a Second Amendment context, where, without a link to expressive conduct, they will often appear unjustified. To the extent some commentators and courts, frustrated with *Heller*'s lack of guidance, have clung to these references and attempted to force unwieldy First Amendment analogies, they muddle, rather than clarify, analysis.<sup>131</sup>

As these examples show, the First Amendment is a major source for borrowing doctrine. But other rights have also provided doctrine to Second Amendment cases. For instance, some courts have adopted the Fourth Amendment's definition of "the people" protected from unreasonable searches and seizures to understand the scope of Second Amendment protections.<sup>132</sup> *Heller* itself hinted at that conclusion,<sup>133</sup> though other courts have resisted it.<sup>134</sup> Some scholars have even suggested that the Third Amendment's ban on quartering soldiers can be used to show why the Second Amendment's right must be individual and not collective.<sup>135</sup>

\* \* \*

As this part showed, borrowing is pervasive and wide-ranging. Those courts and commentators trying to make sense of the Second Amendment have, since the beginning, turned to methodological and doctrinal elements from established constitutional domains. The next part analyzes what they have said to justify the practice.

131. *United States v. Chester*, 628 F.3d 673, 687 (4th Cir. 2010) (Davis, J., concurring in the judgment).

132. *United States v. Meza-Rodriguez*, 798 F.3d 664, 669–70 (7th Cir. 2015) ("*Heller* noted the similarities between the Second Amendment and the First and Fourth Amendments, implying that the phrase 'the people' (which occurs in all three) has the same meaning in all three provisions. . . . An interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.").

133. *See Heller I*, 554 U.S. 570, 579 (2008) ("The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause.").

134. *United States v. Portillo-Munoz*, 643 F.3d 437, 440–41 (5th Cir. 2011) ("[W]e do not find that the use of 'the people' in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people. The purposes of the Second and the Fourth Amendment are different.").

135. Coon, *supra* note 29, at 66 (arguing that "if the Third Amendment protects individual citizens from oppression at the hands of all *Soldiers*, including those in the *Militia*, it is nonsensical to conclude the Second Amendment serves to arm the very organization that the Third Amendment protects against").

## II. JUSTIFYING BORROWING

Part I described the content of borrowing: *what* gets borrowed and *how*. This part focuses on *why*. Why does a court think it justifiable to borrow the First Amendment's tiers-of-scrutiny analysis<sup>136</sup> and reject the Fourteenth Amendment's undue-burden standard?<sup>137</sup> How can one critique an effort to import the First Amendment's ban on content-based regulations<sup>138</sup> or prior restraints<sup>139</sup> and justify importing the First Amendment's tolerance for restrictive regulations so long as they leave open ample alternative means for exercising the right?<sup>140</sup>

This part develops a framework for understanding and evaluating such acts of borrowing. Section II.A explains how borrowing is a type of analogical reasoning and what that means for how we analyze its use. Section II.B then describes four types of reasons courts and commentators use to justify acts of borrowing in the Second Amendment context: textual, historical, functional, and structural.

### A. *Borrowing and Analogical Reasoning*

The great variety of borrowing chronicled in Part I is understandable. When grappling with a new right, courts look to familiar jurisprudence for help. In doing so, they turn not only to familiar rights but also to familiar ways of reasoning. They reason analogically. As David Strauss has persuasively argued, constitutional interpretation in the American tradition takes place through an evolutionary, common law method.<sup>141</sup> Borrowing is a part of the broader interpretive methodology through which the law gradually develops as courts and commentators draw analogies with existing legal doctrine.

This section explains how constitutional actors are reasoning analogically when they borrow, just as when they argue that *Case A* does or does not support a certain outcome in *Case B*. If that is right, then we should be able to assess borrowing using the same tools that we use to justify and critique the claim that a certain case stands as precedent for the one under consideration. This section lays out the argument for treating borrowing as a type of analogical reasoning,

136. See *supra* notes 83–88 and accompanying text.

137. See *supra* notes 99–110 and accompanying text.

138. See, e.g., *GeorgiaCarry.org Inc. v. U.S. Army Corps of Eng'rs*, 212 F. Supp. 3d 1348, 1368 (N.D. Ga. 2016) (“The Court also rejects Plaintiffs’ contention that strict scrutiny should apply because the Firearms Regulation is a ‘content-based’ regulation.”).

139. See, e.g., *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) (“Appellants contend that we should apply the First Amendment prior restraint doctrine because application of the Handgun Permit Law’s ‘justifiable need’ standard vests licensing officials with ‘unbridled discretion.’”).

140. See *supra* note 33–34 and accompanying text.

141. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) (arguing that American constitutional development occurs through a gradual, common-law-like process).

and the next section fleshes out what that looks like in the Second Amendment context.

Analogical reasoning is often described as a uniquely pervasive form of legal reasoning,<sup>142</sup> if not the very embodiment of legal reasoning itself.<sup>143</sup> Its use is most often associated with the identification and application of precedent to a new case. Martin Golding explains the essential form of an argument by analogy:

- (i)  $x$  has characteristics  $F, G, \dots$
- (ii)  $y$  has characteristics  $F, G, \dots$
- (iii)  $x$  also has characteristic  $H, \dots$
- (iv)  $F, G, \dots$ , are  $H$ -relevant characteristics.
- (v) Therefore, unless there are countervailing considerations,  $y$  has characteristic  $H$ .<sup>144</sup>

We reason like this naturally in everyday life. I let my lawn mower sit for a while after multiple attempts to start it fail because I know that tactic has worked in the past when I have flooded the engine trying to start my car.<sup>145</sup> As is often the case, the identification of similarities is implicit. A person “need not know why flooding the engine prevents a car or, as he speculates, a lawn mower, from starting.”<sup>146</sup> Instead, “it is enough to know that the engines of a car and a lawn mower are more or less similar.”<sup>147</sup>

In the real-life example, the analogy is vindicated or discredited by whether it works. If the lawnmower starts after a few minutes of rest, I can assume that I was right in considering it analogous to my car; if it does not, I was wrong. In law, however, the conclusion of an analogical argument is typically normative, not probabilistic.<sup>148</sup> “We are not making a prediction about likely facts in an unknown case but are instead making claims about how an as-yet undecided case *should* be resolved in light of its similarity to a decided or

142. See WEINREB, *supra* note 35, at 4 (“There is something distinctive about legal reasoning, which is its reliance on analogy.”).

143. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1948) (“The finding of similarity or difference is the key step in the legal process.”).

144. Martin Golding, *Argument by Analogy in the Law*, in ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE 123, 131 (Hendrik Kapein & Bastiaan van der Velden eds., 2018).

145. The example is Weinreb’s, which he describes as a type of practical analogical reasoning. See WEINREB, *supra* note 35, at 68–69.

146. *Id.* at 70.

147. *Id.*

148. Of course, one could reason analogically in law for consequentialist reasons that are grounded in empirical predictions. For example, I might argue for borrowing from First Amendment principles because I think that doing so will create a more robust Second Amendment right. That could be a type of borrowing that, like everyday analogical reasoning, turns on whether it works. I am grateful to Darrell Miller for this point.

clear case.”<sup>149</sup> The conclusion of an analogical argument in law is typically that cases X and Y *ought* to be treated the same. The stakes are thus higher in evaluating claimed similarities that purport to justify legal analogies.

This type of reasoning typifies the common law. Frederick Schauer explains with the example of “*Donogue v. Stevenson*,”<sup>150</sup> in which the House of Lords ruled . . . that the bottler of a bottle of ginger beer would be liable to the ultimate consumer of that product where the product was defective, in this case for containing the remains of a decomposed snail.”<sup>151</sup> The question in a future case is what characteristics of this situation were relevant for the *Donogue* court to rule the way it did. “Suppose,” Schauer continues, “[that] a subsequent case presented the question of liability in the context of a decomposed *spider* in a bottle of sparkling *water*. Because spiders are not snails, because sparkling water is not beer, and because the decision in *Donogue v. Stevenson* was only about a particular event,” the answer does not follow automatically.<sup>152</sup>

This example illustrates why, “[i]n order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between the two events.”<sup>153</sup> Is the spider-in-the-water scenario relevantly similar to the snail-in-the-beer one? The task of finding that similarity is not internal to the events but must instead be extracted “from some other organizing standard specifying which similarities are important and which we can safely ignore.”<sup>154</sup> Or, as Cass Sunstein puts it, “one needs a theory of relevant similarities and differences.”<sup>155</sup> In the ginger beer example, most of us will think the two situations should come out the same. But to justify that conclusion, we must articulate why the similarities are relevant and the differences are not.

Constitutional borrowing is a type of analogical reasoning akin to precedent in this same way.<sup>156</sup> Just as courts reason by analogy when applying precedent to new situations, so too constitutional borrowing works through a process of determining relevant similarities between constitutional rights.<sup>157</sup> As

149. Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 744 n.17 (1993) (emphasis added).

150. *Donoghue v. Stevenson* [1932] AC 562 (HL) (appeal taken from Scot.).

151. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 183 (Tony Honoré & Joseph Raz eds., 1991).

152. *Id.*

153. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987).

154. *Id.*

155. Sunstein, *supra* note 149, at 774.

156. Laurin, *supra* note 19, at 722 (“Borrowing ‘works’ in the first instance only where there is some plausible resonance or fit between the source and target doctrines . . .” (emphasis omitted)).

157. To be sure, borrowing is different than precedent applying in the sense that when borrowing, there is no generalization from a particular application. But finding the relevant similarities between rights requires the same type of normative evaluation—what counts as relevant and why—as finding the relevant factual predicates from which to generalize a rule from a prior case.

Golding writes about analogies, “[t]he crucial question is whether the compared objects resemble (and differ from) one another in *relevant* respects, that is, respects that are relevant to possession of the inferred resemblance.”<sup>158</sup>

The same is true for borrowing. No one argues that the government must allow consenting adults to have sex in public just because those adults may carry guns in public.<sup>159</sup> Both sexual intimacy and the right to bear arms are fundamental rights, true, but that similarity alone does not justify importing the entire doctrine from one context to another.<sup>160</sup>

There are, then, at least two reasons to think that constitutional borrowing involves analogical reasoning in the same way as applying precedent does. The first involves the similar argument form. Using an example from how courts borrow from the First Amendment, the argument works as follows:

- (i) The Second Amendment protects a fundamental, preconstitutional “right of the people.”
- (ii) The First Amendment protects a fundamental, preconstitutional “right of the people.”
- (iii) First Amendment claims are generally resolved using strict scrutiny.
- (iv) Being a fundamental, preconstitutional, individual right is relevant to receiving strict-scrutiny analysis.
- (vi) Therefore, unless there are countervailing considerations, Second Amendment claims should also be resolved using strict scrutiny.<sup>161</sup>

158. Golding, *supra* note 144, at 124.

159. This analogy has remarkable staying power in Second Amendment reasoning. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012) (discussing the analogy); Nordyke v. King, 563 F.3d 439, 458 (9th Cir. 2009) (“The Nordykes counter that the Ordinance indirectly burdens effective, armed self-defense because it makes it more difficult to purchase guns. They point to case law on the right to sexual privacy as an analog.”) *vacated*, 611 F.3d 1015 (9th Cir. 2010). Dorf, *supra* note 128, at 232–33; (discussing the analogy); Volokh, *supra* note 77, at 100 (same).

160. *See* Volokh, *supra* note 77, at 100 (arguing that the example “illustrates why analogies between constitutional rights, while often helpful, are often limited”). As Volokh explains:

A ban on public sexual activity is, for nearly all people, a modest burden on the right, because it leaves people free to shift to a private place. At most, it makes sex slightly less convenient and less spontaneous. . . . But self-defense can’t be shifted to a more convenient time or location. You can’t invite a robber back to your place, where you might have a gun available to defend against him, the way you can invite a lover to your place to have sex.

*Id.*

161. Timothy Zick highlights this “logic” of borrowing, though in a slightly different form. ZICK, *supra* note 8, at 10. As he describes the argument form in the First Amendment context,

- (1) Right X is similar to freedom of speech—in the sense that it is a “fundamental” right worthy of heightened protection, or bears some other general resemblance to freedom of speech.

Judging this argument—and specifically the persuasiveness of Premise (iv)—requires us to assess whether the characteristics specified actually are relevant in a meaningful sense to whether Second Amendment claims ought to be resolved using strict scrutiny. For now, the form is enough to give us one reason to conclude that borrowing is a type of analogical reasoning.

Second, in both applying precedent and constitutional borrowing, there is a perceived need to justify the source one picks to borrow from. Courts and commentators do not typically import doctrine from another area of constitutional law without explaining *why* that choice is appropriate.<sup>162</sup> In other words, they recognize that some justificatory work is required. And, more importantly, the reasons they give to justify the choice in both situations are typically reasons of similarities. Just like when applying precedent, courts and scholars pick doctrines to import by explaining the relevant similarities between the Second Amendment and the domain borrowed from.

Furthermore, courts and commentators also *say* they are engaging in analogical reasoning when they make the decision about whether to borrow. Nelson Lund, for example, argues that “[t]he case law dealing with free speech and the free exercise of religion provides a particularly good analogue” for Second Amendment cases.<sup>163</sup> The Second Circuit similarly imports specific ideas into Second Amendment cases “[b]y analogy” with the First Amendment.<sup>164</sup> Even when courts decline to borrow, the analogical nature of the inquiry is clear: “The Court sees no reason to analogize rights under the Second Amendment to those under the First, as plenty of case authority exists to provide a clear framework of analysis to facial challenges, without poaching precedent from another Amendment’s framework.”<sup>165</sup>

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(2) As a result of two-plus centuries of adjudicating free speech claims, there is a well-developed doctrinal framework to draw upon.

(3) Therefore, we ought to utilize the doctrines and principles developed to define free speech rights to determine the proper meaning, scope, and enforcement of Right X.

*Id.*

162. Sometimes, however, there is no explanation for an act of borrowing. But, as Schauer argues, that may in some cases be more strategic than shoddy. Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach*, 2013 SUP. CT. REV. 405, 424 (2013). “[I]t should be recognized that leaving an analogy unjustified may facilitate a strategy of leaving options open and retaining flexibility to deal with a rapidly changing world, a strategy that may underlie, contingently and controversially, the very idea of the common law itself.” *Id.*

163. Lund, *supra* note 87, at 1376.

164. *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012).

165. *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1176 (E.D. Cal. 2011), *rev’d sub nom.* *Richards v. Prieto*, 560 F. App’x 681 (9th Cir. 2014); *see also* *Hightower v. City of Boston*, 693 F.3d 61, 80 (1st Cir. 2012) (“Hightower argues that her facial challenge should succeed under particular doctrines that were developed under the First Amendment: the prior restraint and overbreadth doctrines. We disagree and find these First Amendment doctrines a *poor analogy* for purposes of facial challenges under the Second Amendment.” (emphasis added)).

This section establishes that constitutional borrowing is a form of analogical reasoning that can be evaluated using the tools developed to assess that practice more broadly. In the Second Amendment context, we can see how these concepts play out by analyzing which justifications for borrowing arise in this domain. The next section describes four types of similarities that courts and commentators point to when explaining an act of Second Amendment borrowing.

#### B. *Relevant Similarities in the Second Amendment*

Second Amendment borrowing is a type of common law constitutionalism guided by analogical reasoning. As such, identification of similarities and differences plays a key role.<sup>166</sup> This section surveys the existing landscape. It details four types of relevant similarities that courts and commentators use to justify borrowing in Second Amendment contexts: (1) textual, (2) functional, (3) historical, and (4) structural.<sup>167</sup> This overview is meant to be illustrative and not exhaustive. Courts and commentators may provide other reasons to justify an act of borrowing, but these are some of most prevalent ones in the case reporters and law journals.

One note at the outset: these types of similarity justifications map reasonably well onto Philip Bobbitt's modalities of constitutional argument, and this Article draws on his descriptions of some of the relevant categories.<sup>168</sup> One reason for the overlap here is that precisely *because* Bobbitt's modalities are recognized forms of constitutional argument, similarities hinging on them would be relevant when trying to justify borrowing from one rights domain to another. For example, because textual arguments are an important modality in constitutional law, textual similarities between two rights provide some reason for thinking the rights ought to share doctrinal or methodological elements.

166. Golding, *supra* note 144, at 124.

167. Sometimes, however, the reason is purely precedential; other cases have borrowed from this context, so we do too. *See* United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (concluding without further explanation that “the First Amendment is the natural choice” to borrow from because “*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment”); Sitzmann, *supra* note 130, at 1992 (“Courts should borrow from the First Amendment when interpreting the Second Amendment not only because of their similarities, but also because courts routinely rely on such analogies.”). Borrowing for precedential reasons makes sense because “borrowing begets opportunities for its own enlargement.” Laurin, *supra* note 19, at 723. As Laurin notes:

A court's initial act of borrowing brings a new set of ideas and sources into play, not only in the case where borrowing occurs, but in subsequent cases as well. At least for some time period, advocates and judges (and their clerks) will be likely to return to the source doctrine in order to better inform their application of the new, borrowed principle.

*Id.*

168. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (outlining a typology of constitutional modalities, including structural, textual, ethical, prudential, historical and doctrinal arguments).

The following sections show how courts and commentators have used these characteristics as reasons to borrow methods of constitutional reasoning when similarities are present. However, courts also refuse to borrow when they perceive relevant *dissimilarities*, and in these instances, they engage in reasoning by “*disanalogy*.”<sup>169</sup> This section traces both types of reasoning.

### 1. Textual

Arguments that rely on textual similarities between the Second Amendment and another constitutional provision often presume that textual similarity is a sufficient reason to borrow some set of ideas from another constitutional context. For example, in *United States v. Meza-Rodriguez*,<sup>170</sup> the defendant was charged with violating 18 U.S.C. § 922(g)(5), which criminalizes the possession of firearms or ammunition by anyone not lawfully present in the United States.<sup>171</sup> The defendant argued that the statute could not constitutionally be applied to him because it violated his Second Amendment rights. The Seventh Circuit thus had to decide whether undocumented immigrants could ever be considered “the people” to whom the Second Amendment guarantees the right to keep and bear arms.<sup>172</sup> To answer that question, the court looked to how the Supreme Court had construed the scope of the Fourth Amendment’s protections for “the people.”<sup>173</sup> And it justified borrowing this same framework in the Second Amendment context because the “interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.”<sup>174</sup>

169. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1006 (1996).

170. 798 F.3d 664 (7th Cir. 2015).

171. *Id.* at 666.

172. *Id.* at 669.

173. *Id.* at 670.

174. *Id.*; *see also id.* (“Given our earlier conclusion that the Second and Fourth Amendments should be read consistently, we find it reasonable to look to *Verdugo-Urquidez* to determine whether *Meza-Rodriguez* is entitled to invoke the protections of the Second Amendment.”); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012) (noting that not adopting the analogy “would require us to hold that the same ‘people’ who receive Fourth Amendment protections are denied Second Amendment protections, even though both rights seem at root concerned with guarding the sanctity of the home against invasion”); Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right To Bear Arms*, 85 N.Y.U. L. REV. 1521, 1538 (2010) (“If ‘the people’ referenced in the Second Amendment meant citizens, while the same phrase in the Fourth Amendment meant a broader class of persons with substantial connections, then the Second Amendment is exceptional in requiring obligation and loyalty to—and recognition by—the state in order to seek its protection.”). Jack Rakove notes the oddity, however, of those who argue for a consistent usage of “the people” as a way to justify the individual-rights reading, and yet think the Second Amendment’s use of the term “militia” does not import the meaning from the other places in the Constitution. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 119–20 (2000).

Others have used textual arguments in a similar way. Some, for instance, have noted that the rights codified in the First and Second Amendments share a similar “textual breadth” that warrants treating them the same by “defining the scope of the rights . . . in a way that permits the government to advance legitimate public interests without unduly compromising the rights at issue or unduly trusting legislative wisdom.”<sup>175</sup>

Courts also sometimes use textual *dissimilarities* as a reason to resist borrowing. For example, in *Teixeira v. County of Alameda*,<sup>176</sup> the Ninth Circuit rejected a gun dealer’s argument that his business had its own Second Amendment rights.<sup>177</sup> In the course of doing so, the court noted that the plaintiff “invoke[d] an analogy to First Amendment jurisprudence for his contention that the Second Amendment independently protects commercial sellers of firearms, suggesting that gun stores are in the same position as bookstores, print shops, and newspapers.”<sup>178</sup> But the proposed analogy broke down at a number of points, including at the textual one:

[T]he language of the Second Amendment is specific as to whose rights are protected and what those rights are, while the First Amendment is not. Compared to the Second Amendment’s declaration, after an announcement of its purpose in the introductory clause, that a right of “the people” to “keep and bear Arms, shall not be infringed,” the First Amendment’s command that “Congress shall make no law . . . abridging the freedom of speech, or of the press” is far more abstract. And, whereas the Second Amendment identifies “the people” as the holder of the right that it guarantees, the First Amendment does not state who enjoys the “freedom of speech,” nor does it otherwise specify or narrow the right.<sup>179</sup>

One way that courts and commentators attempt to justify or resist borrowing, then, is by appeal to textual considerations.<sup>180</sup> These textual justifications do some real work in Second Amendment borrowing, but arguments from other types of relevant characteristics often do more.

175. Lund, *supra* note 87, at 1376.

176. 873 F.3d 670 (9th Cir. 2017), *cert. denied sub nom.* *Teixeira v. Alameda County*, 138 S. Ct. 1988 (2018).

177. *Id.* at 690.

178. *Id.* at 688.

179. *Id.*

180. Some commentators have even used the similar imprecision of the text as a reason to borrow. *See, e.g.,* Sitzmann, *supra* note 130, at 1991–92 (“The First Amendment, like the Second Amendment, confers fundamental, legally enforceable rights, but it does so with ‘plain text [that] is not really all that plain.’ Consequently, using the First Amendment to justify ‘extra-textual constraints’ on the Second Amendment serves to better define the law and make it work in practice. This Part therefore analogizes to the First Amendment to articulate an understanding of the Second Amendment that is practically (and theoretically) viable.” (alteration in original) (footnotes omitted)).

## 2. Historical

Along with textual similarities, many courts and scholars justify borrowing on the grounds of historical similarities. Arguments based on historical similarities point to either the similar provenance of the rights or their similar purpose, such as whether the rights guard against similar evils or predate their codification.<sup>181</sup> These types of analogies rest on the argument that the Second Amendment and the analogized right both arose from a similar setting or were meant to guard against similar harm.<sup>182</sup> In this sense, an argument that rights X and Y were both meant to guard against ill-effect A would be a type of historical argument grounded in (a kind of) original public meaning of the purpose for rights X and Y.<sup>183</sup> It would, of course, be possible to subdivide this category into arguments that point to similar original purposes and ones that point to similar historical settings. But for simplicity's sake, this section groups both these types of similarity arguments together under the "historical" heading.

Unsurprisingly, this argument often arises in areas where scholars have advocated for historical tests. Miller, for example, argues that the Seventh Amendment makes a good candidate from which to borrow because, among other reasons, both the Second and Seventh Amendment codify "a preconstitutional right whose scope is determined by extratextual historical sources."<sup>184</sup> In other words, the similar historical setting of the rights at codification warrants similar treatment.

Defenders of a broad reading of the Second Amendment often draw analogies with historical similarities to the First Amendment as well. The First Amendment, they claim, is absolute once the court decides what "the freedom of speech" encompasses using history and tradition. So too, say proponents of this view, "when the Second Amendment protects the person, the arm, the activity, and the location, it protects absolutely . . . ."<sup>185</sup> Both rights, in other words, are delimited by (and only by) an inquiry into their history and tradition.

Arguments based upon similar historical purposes also abound. Kenneth Klukowski, for example, argues that First Amendment doctrine should be

181. See BOBBITT, *supra* note 167, at 9–10.

182. Blocher and Morgan also suggest that this type of similarity may justify borrowing: "A particularly relevant similarity for the purposes of doctrinal borrowing may be whether the rights were designed to prevent similar constitutional problems." Blocher & Morgan, *supra* note 79, at 330.

183. See BOBBITT, *supra* note 167, at 9 ("Historical arguments depend on a determination of the original understanding of the constitutional provision to be construed.")

184. Miller, *Text, History, and Tradition*, *supra* note 27, at 896; see also *Heller I*, 554 U.S. 570, 592 (2008) (noting that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right"). Because these rights existed before the Constitution was drafted, sources outside the document shed light on what the rights were understood to include. In this sense, other legal sources, such as Blackstone's Commentaries or the English Bill of Rights, might be informative; so too might other sources of popular understanding, such as pamphlets and public speeches.

185. Cf. Brief Amicus Curiae of Gun Owners of America, Inc. in Support of Petitioners at 22, *N.Y. State Rifle & Pistol Ass'n Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280).

borrowed in Second Amendment cases because “[t]he conceptual foundation for the reach of both Amendments is coextensive and coterminous.”<sup>186</sup> In his view, the similar purposes of the rights means that “the rationales justifying various speech restrictions should be analogous to corresponding restrictions of the right to bear arms.”<sup>187</sup> Just as reasonable restrictions can limit First Amendment rights, so too can they limit Second Amendment ones. And just as First Amendment rights often prevail despite the potential for harm to ensue, so too Second Amendment rights can prevail even when harm occurs to third parties.<sup>188</sup>

Finally, just like textual dissimilarities, historical dissimilarities can also justify declining an invitation to borrow. Many courts use this rationale when confronted with arguments that seek to import the First Amendment’s prior-restraint doctrine. As one court said, “The prior restraint doctrine is applicable only in the First Amendment context. Its rationale is rooted in preventing risks specific to the First Amendment: self-censorship and the difficulty of detecting, reviewing, or correcting content-based censorship on an as-applied challenge. These rationales do not apply in the Second Amendment context.”<sup>189</sup> Thus, because the prior-restraint doctrine arose from a different set of purposes that are unique to the First Amendment, courts decline to import it to the Second.

In both borrowing and refusing to borrow, courts consider history to be a relevant consideration. Courts and commentators look to a shared historical provenance or similar historical rationales when deciding to borrow and distinguish away these grounds when declining to do so.

### 3. Functional

Another type of similarity that courts and commentators find relevant turns on functionality—on how the rights operate in the world. For example, one might argue that an analogy between the freedom of speech and the right to bear arms “is especially useful for the simple reason that the First and Second Amendments—unlike, say, the Equal Protection Clause—directly guarantee the right to engage in an activity.”<sup>190</sup> Although these claims can be like arguments from historical similarities that point to the purposes underlying a

186. Klukowski, *supra* note 25, at 442.

187. *Id.*

188. *See id.*

189. *Young v. Hawaii*, 911 F. Supp. 2d 972, 991 (D. Haw. 2012), *rev’d in part, appeal dismissed in part*, 896 F.3d 1044 (9th Cir. 2018); *see also Bolton v. Bryant*, 71 F. Supp. 3d 802, 817 (N.D. Ill. 2014) (“Although Bolton is correct that the First Amendment has served as an important interpretive guidepost in developing Second Amendment jurisprudence, the analogy does not extend so far as to import the entire prior restraint doctrine into the Second Amendment. The prior restraint doctrine embraces concepts unique to the First Amendment; the primary focus of the doctrine is preventing censorship and limiting the chilling effect of prior restraints on protected speech.”).

190. Joseph Blocher, *The Right Not To Keep or Bear Arms*, 64 STAN. L. REV. 1, 23 (2012).

right, they are different insofar as they focus on the right's *operation* more than its *design*. In other words, whereas arguments from historical similarities point backward toward what the right was meant to do, arguments from functional similarities point to how the right operates in a practical way.

Functional arguments to justify borrowing are common. For example, one of the more frequent arguments is the functional argument used to justify borrowing from abortion jurisprudence. Nicholas Johnson, for instance, underscores this connection: "The Court's abortion jurisprudence is uniquely-suited for building [a] foundation on which to build a standard for resolving the assault weapons question" because in the two contexts "both the right, and the restriction of it, put human life in play."<sup>191</sup> Stacey Sobel similarly argues that the undue burden test is the "the most legally appropriate because of the tripartite interests at stake in abortion and firearm regulation," including the right-bearer's liberty interest, the state's interest in protecting life, and the state's interest in maintaining health and safety standards.<sup>192</sup> In other words, how the right functions—it can both protect life and potentially threaten it—justifies importing doctrine from one arena to the other.

Similarly, commentators have pointed out that both the First and Second Amendments operate as positive legal entitlements and, unlike other constitutional rights, are not triggered only when the government undertakes coercive action.<sup>193</sup> In fact, unlike the right to vote or the right to trial by jury, these rights do not depend on the existence of the government at all.<sup>194</sup> "[T]he First and Second Amendments are exercised by many millions of Americans daily. People exercise free speech rights with many of the words they express on almost any subject matter. And the mere act of owning a firearm is an exercise of the Second Amendment, meaning almost 100 million Americans

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191. Johnson, *Supply Restrictions*, *supra* note 77, at 1286.

192. Sobel, *supra* note 28, at 521; *see also id.* ("The Second Amendment has more in common with the unenumerated right to abortion than with the other rights enumerated in the Bill of Rights because those other rights do not typically involve acts that have the potential for serious immediate harm to the individual exercising the right or to others.").

193. Klukowski, *supra* note 25, at 431 ("Americans only exercise many of their constitutional rights if they are suspected of running afoul of the law. However, since mere possession of a firearm is an exercise of the right to bear arms, Second Amendment rights are exercised daily by tens of millions of Americans, as are First Amendment rights. Parallels between free speech and gun rights suggest a common doctrinal framework could govern both.").

194. *See* Jud Campbell, *Natural Rights, Positive Rights, and the Right To Keep and Bear Arms*, 83 L. & CONTEMP. PROBS. (forthcoming 2020) (manuscript at 35, 39) (on file with the North Carolina Law Review) (explaining that the use of technologies such as the printing press and firearms were viewed as natural rights while the right to a jury trial and right against prior restraints were viewed as positive rights).

exercise that right continually.”<sup>195</sup> This similarity in the operation of the rights, claim the proponents, justifies importing from one domain to the other.<sup>196</sup>

Relatedly, the Ninth Circuit has declared that gun sellers are functionally equivalent to medical providers in the abortion context, such that they can bring challenges only (if at all) for harm to their customers, not to their own Second Amendment rights.<sup>197</sup> “Never has it been suggested, for example, that if there were no burden on a woman’s right to obtain an abortion, medical providers could nonetheless assert an independent right to provide the service for pay.”<sup>198</sup> The right functions to protect the primary conduct in both circumstances, not to protect those providing the rights bearers the means to effectuate the substantive right.

Others have used functional dissimilarities to reject analogies. Michael O’Shea, for example, argues that the analogy between obscenity and firearms breaks down because “[t]he consumer of controversial written or filmed literature can derive the full value of the material, whatever that may be, while literally ‘sitting alone in his own house.’”<sup>199</sup> In other words, the full use of the right can be exhausted in that setting. But the function of “defensive firearms is to respond to external threats from others, collapsing the privacy analogy.”<sup>200</sup> Eric Ruben also argues for rejecting some First Amendment principles in the case of the Second Amendment because “Second Amendment values (to the extent they are clear from *Heller* and *McDonald*) and risks differ from First Amendment values and risks in ways that implicate the perception of safety.”<sup>201</sup>

The Third Circuit has likewise rejected importing some First Amendment doctrines by highlighting the functional differences between the two rights. In *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General of New Jersey*,<sup>202</sup> the court considered the constitutionality of a state ban on magazines that could hold more than ten rounds of ammunition.<sup>203</sup> The plaintiffs argued

195. Klukowski, *supra* note 25, at 440.

196. *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (identifying but rejecting the plaintiff’s argument for borrowing from the First Amendment based on functional similarities). The court found that plaintiffs “see the nature of the rights guaranteed by each amendment as identical in kind. One has a right to speak and a right to bear arms. Thus, just as the First Amendment permits everyone to speak without obtaining a license, New York cannot limit the right to bear arms to only some law-abiding citizens.” *Id.*

197. *Teixeira v. County of Alameda*, 873 F.3d 670, 689–90 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda County*, 138 S. Ct. 1988 (2018).

198. *Id.* at 690.

199. Michael P. O’Shea, *Modeling the Second Amendment Right To Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 668 (2012) (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

200. *Id.*

201. Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 L. & CONTEMP. PROBS. 149, 167 (2017).

202. 910 F.3d 106 (3d Cir. 2018).

203. *Id.* at 110.

that, like in the First Amendment, the state could not regulate the secondary effects of firearms by suppressing constitutionally protected activity.<sup>204</sup> The court rejected importing these standards: “While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment” because “[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights.”<sup>205</sup> The right to a gun, in other words, functions differently than the right to speak.

Conversely, courts use the positive rights distinction to decline to borrow from rights that are not positive legal entitlements. As the Fifth Circuit said in declining to treat “the people” of the Second Amendment the same as “the people” of the Fourth:

The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government. Attempts to *precisely* analogize the scope of these two amendments is misguided, and we find it reasonable that an affirmative right would be extended to fewer groups than would a protective right.<sup>206</sup>

This is the mirror image of the argument that the functional similarities between the First and Second Amendments—both government-independent affirmative rights—justifies borrowing there.

Judges and scholars thus view the functional characteristics of a right as relevant to the borrowing inquiry. They assess whether the rights are negative or affirmative, whether they create similar types of externalities, and whether they can be vindicated or not by the same litigants.

#### 4. Structural

Finally, some scholars justify borrowing based on the similarities in how the Second Amendment and another right structure the relationship between the citizen and the government. This type of reason could be seen as a subset of arguments based on the historical similarities grounded in the purposes of the right.<sup>207</sup> It is worth highlighting on its own, however, because it takes on a very specific tone in Second Amendment arguments. As one commentator said in justifying borrowing, “[T]he First and Second Amendment citizens are the ones who will restore constitutional order if the constitutional rule of law itself

204. *Id.* at 122 n.28.

205. *Id.* (citations and quotation marks omitted).

206. *United States v. Portillo-Munoz*, 643 F.3d 437, 440–41 (5th Cir. 2011) (declining to import Fourth Amendment precedent defining “the people” protected by the right).

207. One could, for instance, understand the nature of the structural check on governmental power as part of the purpose for protecting the Second Amendment, just as such concerns underlie other rights.

is usurped by a government.”<sup>208</sup> These arguments can sound apocalyptic and underscore a similarity in how the Second Amendment and another right orient the citizen in society.<sup>209</sup> As Sanford Levinson notes, “[O]ne aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen.”<sup>210</sup>

Mark Coon, for example, argues for using the Third Amendment to “support[] a reading that the Second and Fourth Amendments both provide very broad and very strong individual rights to the people designed to preserve their individual liberties and protect them from the threat of an oppressive and overbearing federal government.”<sup>211</sup> He sees in the Second, Third, and Fourth Amendments a similar type of bulwark set up against the state’s power, and particularly the state’s military power, that justifies treating each of these rights as particularly powerful.

Others have pointed to this similarity with other constitutional guarantees. Klukowski, for instance, argues that “[l]ike the Free Speech Clause, the Second Amendment is premised on mistrust of governmental power. Freedom to share information and opinions regarding the issues of the day, and regarding those who wield or seek power, is a condition precedent to enlightened democracy. *Heller* discussed the Second Amendment as a safeguard against government tyranny.”<sup>212</sup>

The structural arguments point to how a particular constitutional protection seeks to guard against specific types of governmental tyranny or oppression. Proponents of these analogies point out how the Second Amendment and other rights—typically those enshrined in the First or Third Amendments—are often key safeguards to maintaining a citizen’s liberty against the state.

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The task of finding similarities between the Second Amendment and other rights has occurred almost completely on an ad hoc basis. Courts and scholars confront a discrete borrowing relationship and work out (or not<sup>213</sup>) whether

208. Kopel, *supra* note 25, at 457.

209. *See, e.g.,* *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from the denial of rehearing en banc) (“The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.”).

210. Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 651 (1989).

211. Coon, *supra* note 29, at 70.

212. Klukowski, *supra* note 25, at 443 (footnotes and quotation marks omitted).

213. *See* *Rogers v. Grewal*, 140 S. Ct. 1865, 1865 (2020) (mem.) (Thomas, J., dissenting) (arguing that the Court would not tolerate “justifiable need” restrictions on speech or abortion rights like it

certain similarities justify that particular instance of borrowing. This part has surveyed the landscape as a whole, with an eye toward cataloguing the typical reasons invoked to borrow. The next part identifies the lingering problems in current borrowing that lead to an untheorized practice that fails to heed the different aspects of a right that can be borrowed.

### III. A PATH FORWARD FOR SECOND AMENDMENT BORROWING

The preceding parts analyze the sources of Second Amendment borrowing, unpack how borrowers seek to justify the practice, and explain how we can assess it like ordinary analogical reasoning. Extrapolating from that analysis, this part highlights two corrective steps necessary to make Second Amendment borrowing more rationally grounded and theoretically justified. First, borrowers need to identify and defend a value theory animating the right to keep and bear arms. Second, borrowers need to focus not just on what other rights are similar but on why that similarity justifies importing certain elements and not others. This part raises questions for future scholarship about the best ways to flesh out these two fixes.

#### A. *Taking Theory Seriously*

One central shortcoming in current borrowing practice is insufficient attention to the underlying rationale for the Second Amendment. For the most part, the endeavor remains detached from theorizing about the nature and purpose of the right to arms. Even when similarities are relevant (for example, text, function, and so on), they should be used in the context of protecting the guarantee the Framers crafted in the Constitution. And, in that respect, the Second Amendment needs more theoreticians. “[E]ven ten years after *Heller*,” note Blocher and Miller, “the Second Amendment has a surprisingly thin theoretical foundation.”<sup>214</sup>

Because the current practice is largely unconnected from this broader rights-building project, it risks creating an incoherent landscape. As Timothy Zick notes, First Amendment jurisprudence developed over decades,<sup>215</sup> with courts and commentators working their way through time to discern the values embodied in the right and the scope of protections afforded by its

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tacitly has with Second Amendment rights but without making any argument for why those analogies work).

214. JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 150 (2018).

215. ZICK, *supra* note 8, at 236–37 (“Although it is part of a system of rights, the Second Amendment will need breathing space to develop on its own, just as the Free Speech Clause has done for the past century.”).

codification.<sup>216</sup> Like the common law system that provides a model for constitutional decision-making, the superstructure of the Second Amendment can be “built out of precedents and traditions that accumulate over time.”<sup>217</sup> And that building requires attention to underlying values because “normative theory must be the centerpiece of any adequate account of legal reasoning, including reasoning from analogy.”<sup>218</sup>

This lack of theoretical grounding allows for a detrimental kind of instrumental, strategic cherry-picking in Second Amendment law and scholarship.<sup>219</sup> It allows analogies to become unmoored from the deeper theoretical justifications for the right. Take the oft-invoked First Amendment analogue, for example. It has been widely assumed that those advocating for a broader Second Amendment right would rely on a First Amendment comparison to press their point.<sup>220</sup> But the First Amendment can be used not only to justify *expanding* Second Amendment rights but also to justify *restricting* Second Amendment rights. Which of these competing arguments makes the most sense depends, in part, on the proper scope of the right to keep and bear arms.

In *Friedman v. City of Highland Park*,<sup>221</sup> for example, the Seventh Circuit used First Amendment analogies to restrict, rather than expand, the right. There, the court reviewed a city ordinance that banned certain kinds of semiautomatic firearms and large-capacity magazines.<sup>222</sup> In doing so, the court used a common First Amendment concept, “consider[ing] whether the ordinance leaves residents of Highland Park ample means to exercise the ‘inherent right of self-defense’ that the Second Amendment protects.”<sup>223</sup> Concluding that the ordinance left “residents with many self-defense options,” the court found no conflict with the Second Amendment.<sup>224</sup>

Without more attention to the rationales behind the Second Amendment, like the century of work that has been done exploring the First, uncritical

216. *See id.* at 236 (“Interpretations of the Free Speech Clause have changed in response to episodes of social upheaval, political realignments, academic discourse, and judicial dynamics.”).

217. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010).

218. Jefferson White, *Analogical Reasoning*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 571, 573 (Dennis Patterson ed., 2d ed. 2010).

219. *See Laurin, supra* note 19, at 674 (highlighting that “[d]octrine-makers might tolerate [a] more tenuous fit” between the source and the target “where the strategic interest in borrowing is strong”).

220. Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 137, 140 (2013) (“Pro-gun advocacy swarms thick with analogies between speech and firearms.”).

221. 784 F.3d 406 (7th Cir. 2015).

222. *Id.* at 407.

223. *Id.* at 411 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)). The Seventh Circuit’s formulation nearly mirrors that applied in the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (analyzing whether the challenged restriction “leave[s] open ample alternative channels of communication”).

224. *Friedman*, 784 F.3d at 411.

borrowing threatens to make the Second Amendment right into a less-than-coherent conglomeration of borrowed doctrines devoid of an underlying value theory. More theorizing should thus precede (or occur with) borrowing. Because the Second Amendment has been a live source of litigation for less than a dozen years, courts should leave at least some room to allow the doctrine to develop organically rather than squeezing established constitutional frameworks into Second Amendment cases in ways that may not always fit the context.<sup>225</sup>

It would, of course, be counterproductive to ignore the development of other constitutional rights in fashioning the scope of the Second Amendment. But borrowing without identifying *why* borrowing makes sense for some doctrines and not others just masks hidden value judgments about the merits of the Second Amendment. It also stunts the right's doctrinal development, leaving little room for Second Amendment jurisprudence to grow and adapt to new and changing circumstances.

The theorizing yet to be done is a key component of acquiring the ability to decipher between similarities that are relevant and those that are not. As Weinreb argues, “[t]he legal knowledge and experience that lawyers and judges bring to the facts of a case tell them . . . that some similarities count for the matter at hand and others do not.”<sup>226</sup> We need more experience with and debate over the values of the Second Amendment to formulate (and decipher) the best justifications for borrowing.

The primary rationales for the right to keep and bear arms include the self-defense, anti-tyranny, and autonomy views.<sup>227</sup> But it is not enough for proponents to invoke one of these values. To deploy it in a constitutional argument, they must also defend that underlying value theory. Using the self-defense view, for example, one could argue that it represents the best vision of the Second Amendment because it is the most comprehensive, philosophically defensible, and durable over time.<sup>228</sup> As such, borrowing relationships that support that core value are more justifiable than those that do not; similarities that further that core value are more relevant than those that do not. A defense of this theory would flesh out these arguments.

First, for example, one could argue that the self-defense view is the most comprehensive because it captures both current doctrine and the views of the majority of Americans. *Heller* said that “the inherent right of self-defense has

225. Tebbe & Tsai, *supra* note 7, at 469 (describing how errant borrowing can foster discordance because “[n]ot every legal idea is compatible with another—the relationships may not be intuitive, the union may seem forced, and the result may be a jumble rather than a useful harmonization of existing lines of thought”).

226. WEINREB, *supra* note 35, at 138.

227. BLOCHER & MILLER, *supra* note 213, at 151–52 (explaining the different views).

228. Cf. Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CALIF. L. REV. 945, 976–81 (2017) (describing competing views and arguing that the courts have settled on the self-defense view).

been central to the Second Amendment right.”<sup>229</sup> It is, according to the Court, the “central component”<sup>230</sup> and “core”<sup>231</sup> of the right: the right was designed to protect the liberty of individuals to use weapons to guard their lives, livelihoods, and loved ones.<sup>232</sup> And most people envision weapons—not just guns, but knives, pepper spray, stun guns, and other Second Amendment “arms”—as tools to defend against violent attack.<sup>233</sup> The combination of accounting for doctrinal reasoning and popular wisdom is a key benefit of this view.

Second, the proponent could argue that this view is the most philosophically defensible. The right to defend oneself is deeply rooted in history, natural law, and domestic and international law.<sup>234</sup> To be sure, guns and other weapons are not necessary for self-defense. But placing self-defense at the core of a right to a weapon helps set the parameters around such a right.<sup>235</sup> And recognizing a right to defend oneself against violence helps maintain the dignity and autonomy of the person.<sup>236</sup> It also helps explain why courts permit even felons who are forbidden from possessing firearms to employ a necessity defense to escape punishment.<sup>237</sup> One should not be forced to choose between prison and death.<sup>238</sup>

Third, one could maintain that the self-defense view is the most durable over time; it makes adjudicating the constitutional right more administrable. A

229. *Heller I*, 554 U.S. 570, 628 (2008).

230. *Id.* at 599.

231. *Id.* at 630.

232. Transcript of Oral Argument, *supra* note 38, at 8, questioning, skeptically, that the Second Amendment “had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that”).

233. See, e.g., John Gramlich & Katherine Schaeffer, *7 Facts About Guns in the U.S.*, PEW RSCH. CTR. (Oct. 22, 2019), <https://pewrsr.ch/2T7hCNA> [<https://perma.cc/Y2QE-U9TR>] (noting that in recent surveys two-thirds of gun owners cite protection as a major reason they own a gun, compared to much smaller percentages identifying hunting, sport shooting, or collecting as a major reason).

234. See David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 177 (2007) (“The human right of self-defense is affirmed by the concurrence of many minds of different ages.”); THOMAS HOBBS, *LEVIATHAN* 116 (E.P. Dutton & Co. 1950) (1651) (“A Covenant not to defend my selfe from force, by force, is alwayes voyd. For (as I have shewed before) no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment . . . .”); see also generally JAN ARNO HESSBRUEGGE, *HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW* 18–21, 25 (2017) (describing the breadth and depth of the right to personal self-defense in international law).

235. See generally Ruben, *supra* note 14 (analyzing the notion of common-law self-defense in light of *Heller*’s pronouncement).

236. See David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFFS. 356, 361 (1987) (observing that “self-defense has one of the characteristic features of a right: it ‘trumps’ ordinary calculations of utility and social value”).

237. See *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990) (“[C]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life.”).

238. See BLOCHER & MILLER, *supra* note 213, at 152–53 (describing self-defense rights of felons and others).

right to violent revolution, as the anti-tyranny view imagines, is inherently unstable. Such a right could really and truly be exercised only once.<sup>239</sup> And it is hard to envision how it could be vindicated in a courtroom.<sup>240</sup> Nor, at the other extreme, is the autonomy view easy to maintain over time. It would require overturning restrictions when sufficient numbers of citizens want access to a certain type of firearm, without regard to the utility of that firearm in defending against harm (or its enhanced proclivity to inflict harm). But a defense-oriented right is stable and durable throughout changes in government and consumer preferences because it is tied to well-grounded legal notions of necessity, imminence, and proportionality.<sup>241</sup>

Of course, there are strong criticisms of equating the notion of self-defense with the constitutional right to keep and bear arms, many of which I share.<sup>242</sup> And, critics charge, the notion of self-defense is too abstract, having a legal value both broader and narrower than the Second Amendment right.<sup>243</sup> That can all be true at the same time one recognizes that self-defense values animate and undergird the right. In any event, more theoretical work ought to drive the goal of more fully grounding Second Amendment borrowing.

#### B. *Disaggregating Borrowing*

Not only does current borrowing often occur without larger attention to theoretical concerns, but it also has a tendency to treat source rights as monoliths and stop after justifying why another specific constitutional domain is similar in some respect to the Second Amendment to warrant borrowing. But

239. Glenn Harlan Reynolds, *Guns, Privacy, and Revolution*, 68 TENN. L. REV. 635, 639 (2001) (“The right of revolution exists as a final remedy for official tyranny.”); *cf. also* *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from the denial of rehearing en banc) (“The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed . . . . However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.”).

240. Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 676 (1995) (“No system of government can allow for its own demise by violent overthrow. . . . That right exists, if at all, only when the Constitution’s system for peaceful change ceases to function; it does not arise where a group—armed or otherwise—simply dislikes or disagrees with a particular government decision or policy.”); Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 940–41 (2011) (“*Heller’s* right of self-defense against tyranny suffers from a serious implementation problem. . . . If the Second Amendment protects an individual right to defend against tyranny, what does such a right look like? . . . Specifically, what does the Second Amendment say about retail forms of rebellion: threatening police officers, resisting arrest, cop killing?”).

241. Robert Leider, *Taming Self-Defense: Using Deadly Force To Prevent Escapes*, 70 FLA. L. REV. 971, 995 (2018) (“Necessity, imminence, and proportionality are the traditional limitations on the right of self-defense.”).

242. Ruben, *supra* note 14, at 104–05 (criticizing *Heller’s* failure to attend to the common-law requirements of self-defense law).

243. BLOCHER & MILLER, *supra* note 213, at 152–53 (explaining why self-defense is not enough).

this just helps to locate a suitable source to compare; it does not tell us which characteristics of that source we are warranted in appropriating.<sup>244</sup>

At this high level, the method would support importing *all* of the doctrines, tropes, rationales, et cetera from that other domain if the similarities are relevant. Or, if the arguments work by disanalogy, it would justify refusing to borrow *any* elements from this other context. But this high-level similarity justification is only the first step of reasoning by analogy. It tells us that a blue car is more like a red car than a blue tie.<sup>245</sup> Or at least it tells us that the red car *is like* the blue car in one relevant respect. To argue from that analogy, we must justify inferring the particular characteristic we want to use.

Consider which of the frames in Part II is most fully justified. Are the Second Amendment's textual, historical, functional, or structural features the most important? The answer has to be, at least in part, that most of the time these similarities operate at too general of a level. For example, they do not allow us to decipher which parts of the First Amendment warrant borrowing, even if we agree that the two provisions share relevant textual, historical, functional, or structural similarities. And so, just like with analogical reasoning in the case method, we need to uncover what similarities are relevant *for the characteristics* of the source from which we seek to borrow.<sup>246</sup>

A concrete example will help clarify the problem. The First and Second Amendments share some textual similarities; each guarantees a "right of the people."<sup>247</sup> That may indeed make the First Amendment a source for borrowing. But then we have to ask whether sharing that common language merits importing, say, the prior-restraint doctrine into the Second Amendment. It does not, as we have seen, because the similar text is not relevant to why the prior-restraint doctrine exists in free-speech jurisprudence.<sup>248</sup> In the terms of Golding's analogical-reasoning argument form, this textual similarity is not an "H-relevant characteristic[]" for the prior-restraint doctrine, though that

244. I use these terms in the way Scott Brewer defines them: the "source" is the basis of an analogical argument; it is the better-known item to which we compare the less known. Brewer, *supra* note 168, at 966–67. The "target" is what we are trying to figure out. *Id.* The characteristics that we know the source and target have in common are the "shared characteristics." *Id.* And "the additional characteristic that the source is known to possess and that the target is inferred to possess . . . [is] the 'inferred characteristic.'" *Id.* In the lawnmower example, for instance, the car is the source, the lawnmower is the target, the combustion engine is the shared characteristic, and "letting-it-sit-makes-it-work" is the inferred characteristic. *See supra* notes 145–47 and accompanying text.

245. Schauer, *supra* note 161, at 416 (using this analogy).

246. Brewer, *supra* note 168, at 965 ("[I]n order for an argument by analogy to be compelling . . . there must be sufficient warrant to believe that the presence in an 'analogized' item of some particular characteristic or characteristics allows one to infer the presence in that item of some particular other characteristic.").

247. U.S. CONST. amends. I, II.

248. *See supra* note 188 and accompanying text.

similarity might be relevant for importing other aspects of First Amendment doctrine.<sup>249</sup>

In short, constitutional borrowing needs to justify not just which other constitutional rights can stand as appropriate sources in a given context but also needs to pay attention to the more granular question of relevance for the particular characteristic. As Sunstein says, “For analogical reasoning to work well, we have to say that the relevant, known similarities give us good reason to believe that there are further similarities and thus help to answer an open question.”<sup>250</sup> Does the claimed functional similarity between reproductive autonomy and the right to keep and bear arms warrant adopting the undue burden test? If so, does that same similarity justify importing to the Second Amendment the guidelines on parental notification and consent for minors’ exercise of the right?

Because much of the current Second Amendment borrowing works by justifying the source domain and then assuming that that connection leads inexorably to the conclusion that some element or another can be grafted into the Second Amendment, it generates sometimes muddled and often inexplicable transplanted.<sup>251</sup> A justifiable practice of borrowing needs to pay more attention to how and whether the claimed similarities are relevant to the elements that one seeks to borrow.

Putting it all together, consider again the argument to import an “alternatives analysis” from First Amendment law, which looks to whether the law leaves open enough other channels to exercise the right. The First and Second Amendments share some functional similarities: both protect an affirmative right to engage in potentially harmful activity that everyone acknowledges the government has an interest in regulating in some manner and exercising the right creates externalities. Those very features of the First Amendment are relevant to the existence of the alternatives analysis.<sup>252</sup> And they are what make such an analysis a relevant characteristic to import into Second Amendment case law. Assessing whether a regulation leaves an individual ample means to exercise her right to self-defense vindicates a core interest of the Second Amendment.<sup>253</sup>

249. *Golding*, *supra* note 144, at 131.

250. Sunstein, *supra* note 149, at 744.

251. *Cf.* Tebbe & Tsai, *supra* note 7, at 472 (describing transplanted).

252. *See Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding regulation of sound trucks after describing the harms they can cause to neighborhood tranquility and recognizing that “[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers”).

253. As Blocher and Miller note, an alternatives analysis requires necessary attention to the underlying values. Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 293 (2016) (“In order to evaluate the adequacy of alternatives, one must be able to answer the predicate question: ‘Adequate with regard to what?’”).

Consider also an analogy to the special solicitude for the home in First and Fourth Amendment jurisprudence, among others.<sup>254</sup> These other rights share a historical similarity with the Second Amendment because they were designed to protect important interests from governmental intrusion into the home. *Heller*, for example, faulted the District of Columbia handgun ban for extending “to the home, where the need for defense of self, family, and property is most acute.”<sup>255</sup> Borrowing from these domains a distinction in the force of the right between public and private use fits both with the reasons they share the similarity and also with the broader interests in self-defense. The home is where the needs of self-defense are “most acute,”<sup>256</sup> and the common law has long recognized greater authority to use force in one’s own home against threats of violence.<sup>257</sup> It thus makes sense to borrow a rule that makes this distinction, such as one establishing that “[t]he state’s ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home.”<sup>258</sup>

These examples are not exhaustive or conclusive, but they exemplify the sort of work that needs to be done in Second Amendment borrowing writ large. By focusing greater attention on both the theoretical underpinnings for the right and the characteristics of appropriated elements, Second Amendment borrowing can be a more fully justified and coherent methodology.

#### CONCLUSION

Like a newly discovered amendment, the Second Amendment has been recently unearthed from the shelves of history. As one means of building a constitutional infrastructure around that right, courts and commentators have employed analogies to import the frameworks, methodologies, and substantive

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254. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”); *Miller, Guns as Smut*, *supra* note 21, at 1305 (“This privilege of the home works a kind of alchemy with the Constitution. Things of no constitutional value outside the home glisten with constitutional meaning within it.”).

255. *Heller I*, 554 U.S. 570, 628 (2008).

256. *Id.*

257. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 656–57 (2003) (“Generally, under the Castle Doctrine, those who are unlawfully attacked in their homes have no duty to retreat, because their homes offer them the safety and security that retreat is intended to provide.”).

258. *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012); *see also id.* (stating that “[t]reating the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence”); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”).

doctrines from other rights domains. But much of that analogical construction currently suffers from twin pitfalls that focus at once both too broadly and too narrowly. The practice currently misses attention to underlying value theory and to the characteristics of what is borrowed. Resolving these twin pathologies in current practice will help anchor Second Amendment borrowing. But this alone will not make the practice uniformly appealing or consistent across courts and commentators because borrowing itself is a theory-laden enterprise.

Borrowing cannot be divorced from broader debates about constitutional interpretation and methodology.<sup>259</sup> Some interpretive methodologies lend themselves more easily to borrowing than others. An originalist approach, for instance, tends to atomize constitutional rights and treat each one separately. What is appropriate for one right, with one set of specifically chosen words and particular historical setting, is not necessarily appropriate for another right. Originalism thus might seem to drive away from borrowing. But a model of constitutional interpretation in which a common law mode of adjudication prevails may be more receptive to the practice.<sup>260</sup> Under this theory, judges decide constitutional cases in the same way they reason in a traditional common law case: analogically.

In addition, the choice of an underlying theory of constitutional interpretation may itself drive decisions about when to borrow and how to justify it. To the extent originalists borrow, for example, they may be more inclined to privilege textual or historical similarities. They may disregard functional similarities; they may conclude that they must reject some types of borrowing, despite acknowledging relevant similarities in the source and target; they might be more inclined to borrow from a rights domain that has been interpreted using an originalist methodology than from one built upon a different methodology; and so on.

In short, there will always be disagreements about whether an act of borrowing is justified or warranted in a specific context. The debates about why run deep. But this Article puts forward two ways to more fully ground the practice of Second Amendment borrowing that ought to at least clarify the stakes of this bigger debate: (1) focus more narrowly on the borrowed characteristics and (2) attend more generally to the values underlying the Second Amendment right.

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259. Tsai, *supra* note 20, at 517 (“Differences in orientation and commitment, too, shape how one sees the practice of constitutional borrowing from one legal system to another, or even between jurisdictions or bodies of thought within a single legal system.”).

260. See Strauss, *supra* note 141, at 879 (describing and defending this model).

