SAFE STORAGE AND SELF-DEFENSE FROM *HELLER* TO *BRUEN*[*]

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This short Essay, written for a symposium honoring Walter Dellinger, explores one of the most underappreciated—and indefensible—holdings of District of Columbia v. Heller*, the landmark Second Amendment case that Walter ably argued for the District. Most scholars have focused on* Heller*'s announcement of an "individual" right to keep and bear arms for private purposes and its invalidation of the District's prohibition on handguns. But along the way, almost in passing, the Court also struck down the District's requirement that firearms be kept "unloaded and dissembled or bound by a trigger lock or similar device." It did this not by asking whether such a requirement would make it too hard to use a gun in self-defense, but rather by insisting that the safe storage requirement—unlike most generally applicable rules and also unlike Founding-era laws—did not contain a self-defense exception.*

The first part of the Essay unpacks the Justices' treatment of the safe storage requirement in Heller*, first at oral argument and then in the opinions. The second part explains why the refusal to recognize a self-defense exception was so significant and what that refusal illustrates about the Court's recent approaches to constitutional doctrine more broadly. The Court dodged an important and genuinely hard question—whether safe storage requirements impermissibly burden armed self-defense—by manufacturing an easier one: whether a city can ban "functional firearms." This move exemplifies both the Court's failure to grapple with the relationship between the Second Amendment and self-defense, and its broader tendency to defer to what it sees as the wisdom of the past (when safe storage laws all had implied self-defense exceptions) but not of today. The final part shows how* New York State Rifle & Pistol Ass'n *has transformed that tendency into a constitutional rule, effectively codifying the doctrinal trend that* Heller*'s worst holding exemplified. If only Walter were still here to lawyer a way out of the mess.*

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INTRODUCTION

The Supreme Court's landmark decision in *District of Columbia v. Heller*[1] ushered in a new era of Second Amendment jurisprudence and represented what was at the time a high-water mark of originalism.[2] The decision has spawned close to two thousand Second Amendment challenges, given rise to a burgeoning field of scholarly inquiry, and is often presented as one of the first cases students encounter in constitutional law casebooks—sometimes even before *Marbury v. Madison*[3] or *McCulloch v. Maryland*.[4]

Heller was a harbinger both of a strengthened right to keep and bear arms and of shifts in constitutional method more broadly. Especially after *New York State Rifle & Pistol Ass'n v. Bruen*,[5] Second Amendment claims are governed by a historical-analogical framework that gives gun rights a unique form (and perhaps degree) of constitutional protection.[6] The *Heller*/*Bruen* embrace of

1. 554 U.S. 570 (2008).

2. Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 333 (2009); Randy E. Barnett, *News Flash: The Constitution Means What It Says*, CATO INST. (June 27, 2008), https://www.cato.org/publications/commentary/news-flash-constitution-means-what-it-says [https://perma.cc/C8P7-AEFN] (calling *Heller* "the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court").

3. 5 U.S. 137 (1803).

4. 17 U.S. 316 (1819); *see, e.g.*, ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTION 24 (2d ed. 2017) (presenting *Heller* as first case).

5. 142 S. Ct. 2111 (2022).

6. *Id.* at 2126 (holding that modern gun laws must be "consistent with this Nation's historical tradition"). For a more thorough analysis of *Bruen*'s method, see Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 111–37 (2023) [hereinafter Blocher & Ruben, *Originalism-by-Analogy*].

originalism—and apparent neglect of means-ends analysis[7]—has spread through a range of other constitutional rights.[8]

It would be an understatement to say that *Heller* has been the subject of substantial scholarly commentary—some celebratory, some witheringly critical. Even those who applaud the ultimate result and the Court's expansion of gun rights have raised questions about its interpretive method.[9] These questions are all the more pressing in light of *Bruen*'s radical reshaping of Second Amendment doctrine[10] and the Court's recent decision to hear argument in *United States v. Rahimi*[11]—a case in which the Fifth Circuit struck down for purported lack of historical support the federal law prohibiting gun possession by persons subject to certain domestic violence restraining orders.[12]

In short, questions of firearms law and the Second Amendment have never been more important. And it is hard to imagine a better setting in which to address them than at a symposium dedicated to Walter Dellinger, who ably argued *Heller* on behalf of the District and who thought, spoke, wrote, taught, and argued about constitutional law so powerfully and beautifully.

As a junior associate at O'Melveny & Myers LLP, I had the incredible good fortune to work with Walter on the briefing of *Heller*—a literally life-changing assignment. Soon after, I became his colleague at Duke Law School and have spent much of my career working on firearms law. Though I have serious doubts about portions of Justice Scalia's majority opinion, in my own

7. To be clear, I think that both *Heller* and *Bruen* ultimately not only license but require some form of means-end scrutiny, despite their protestations to the contrary. *See* Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 6, at 123–25.

8. *See, e.g.*, Michael C. Dorf, *The Injustice, Insincerity, and Destabilizing Impact of the SCOTUS Turn to History*, VERDICT (Oct. 26, 2022), https://verdict.justia.com/2022/10/26/the-injustice-insincerity-and-destabilizing-impact-of-the-scotus-turn-to-history [https://perma.cc/CH9C-UQM9]; Adam Liptak, *A Transformative Term at the Most Conservative Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/AQ58-Y2MD (staff-uploaded, dark archive)] ("The term was a triumph for the theory of constitutional interpretation known as originalism, which seeks to identify the original meaning of constitutional provisions using the tools of historians."); Nicholas Tomaino, Opinion, *The Conservative Supreme Court Has Arrived*, WALL ST. J. (July 1, 2022, 4:28 PM), https://www.wsj.com/articles/the-conservative-court-has-arrived-paul-clement-dobbs-bruen-religion-administrative-state-justice-roberts-alito-thomas-11656692402 [https://perma.cc/X39L-SWA4 (staff-uploaded, dark archive)].

9. *See, e.g.*, Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1357–58 (2009).

10. Randy E. Barnett & Nelson Lund, *Implementing* Bruen, L. & LIBERTY (Feb. 6, 2023), https://lawliberty.org/implementing-bruen [https://perma.cc/DB67-PMST]; Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. 79, 107 (2023) ("Given the number of questions about the analogical process left open in *Bruen*, we think you might (if somewhat uncharitably) say that the three phases of Second Amendment analysis post-*Bruen* are: (1) Consult text, history, and tradition; (2) ?; (3) Decision.").

11. 143 S. Ct. 2688, 2688–89 (2023) (mem.).

12. United States v. Rahimi, 61 F.4th 443, 460–61 (5th Cir. 2023).

scholarship on *Heller*—including a book with my colleague Darrell Miller—I have tried to work within its parameters by discerning and applying the Court's guidance rather than relitigating whether it was correct.[13]

But there are holdings in *Heller* that I find especially hard to defend, and one in particular has largely avoided the scorn it deserves: the majority's indefensible treatment of the District's safe storage requirement.[14] Understandably, most scholars focus on *Heller*'s announcement of an "individual" right to keep and bear arms for private purposes and its invalidation of the District's prohibition on handguns.

But along the way, almost in passing, the Court *also* struck down the District's requirement that firearms be kept "unloaded and dissembled or bound by a trigger lock or similar device."[15] It did this not by asking whether such a requirement would make it too hard to use a gun in self-defense, but rather by insisting that the safe storage requirement—unlike most generally applicable rules[16] and also unlike Founding-era laws[17]—did *not* contain a self-defense exception. In effect, the Court selectively attributed wisdom to the past while denying the same respect to contemporary lawmakers[18]—a tendency that would reach a bizarre crescendo in *Bruen*.

13. JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 9–12 (2018). Indeed, Darrell and I earned ourselves a gentle chiding from Justice Stevens—author of the lead dissent in *Heller*—for our positive treatment of the case. *See* Joseph Blocher & Darrell A.H. Miller, *Stevens, J., Dissenting: The Legacy of* Heller, JUDICATURE, Fall 2019, at 9, 12–13 (reproducing letter from the Justice).

14. For simplicity's sake, I will use "safe storage requirement" to refer to the category of laws requiring that guns be kept in ways that lessen the chances of their misuse—bound by a trigger lock or stored in a safe, for example. The *Heller* majority's flawed treatment of self-defense doctrine would apply equally to all such laws.

15. District of Columbia v. Heller, 128 S. Ct. 2783, 2787 (2008) (quoting D.C. CODE § 7-2507.02 (2001)). I have resisted the inclusion of a "*sic*" above the line, but it is worth noting that a mysterious typo sometimes appears in the first paragraph of the first section of the majority opinion: the substitution of "dissembled" for "disassembled" (which is what the law actually said). To *disassemble* is to take something apart; to *dissemble* is to conceal one's true self or intentions.

I noticed the error in the copy of *Heller* I printed the day it was decided, but many later versions have corrected it. It still appears in the Supreme Court Reporter and Lawyers' Edition versions of the opinion, but not in the United States Reports version. Both versions on Westlaw (S. Ct.) and Lexis (L. Ed.) contain the typo, while the version pulled from the United States Supreme Court website (U.S.) does not. Many thanks to Duke Law librarian Julie Wooldridge for helping me track all this down.

16. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 225–56 (7th ed. 2015).

17. District of Columbia v. Heller, 554 U.S. 570, 632–33 (2008) (dismissing relevance of Founding-era laws that restricted guns in Boston, New York, and Philadelphia).

18. Historical arguments always involve choice about how to characterize past practices and whether and how to treat them as either binding or cautionary—this is one aspect of constitutional memory that Jack Balkin and Reva Siegel have been exploring in recent work. *See generally* Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307 (2022) (discussing how the collective memory of our people can affect modern constitutional interpretation); Reva B. Siegel, *The Politics of*

Despite my own prior defense of *Heller*, I am conscious that in criticizing the safe storage holding I might be giving in to sour grapes. I hope not. In any event, my primary motivation for this Essay is a bias I acknowledge: my admiration, gratitude, and continuing astonishment at the brilliance and fundamental human decency of Walter Dellinger—my boss, colleague, friend, mentor, and hero. John Hart Ely was right when he wrote of Earl Warren, "You don't need many heroes if you choose carefully,"[19] but not everyone gets to actually *know* their heroes. For many, that might be a good thing, given the oft-repeated chestnut: "Never meet your heroes." But whoever coined that phrase never met Walter. He was the same genial genius whether he was pulling up to One First Street on his bicycle the morning of *Heller*'s oral argument[20] (causing our client considerable consternation), or watching Carolina basketball, or giving an impromptu lecture on the Bo Diddley beat to a group of eager but astonished summer associates.

The organizers of this symposium have insisted on, and Walter would have wanted, contributions that substantively engage with constitutional law, so this Essay involves a fair bit of standard case-crunching and criticism. But my hope along the way is to illustrate Walter's consummate lawyerly skill as well as how *Heller*'s error illustrates the Court's misguided approach to Second Amendment doctrine—an error compounded in *Bruen*.

Part I unpacks the Justices' treatment of the safe storage requirement in *Heller*, first at oral argument and then in the opinions. Part II explains why the refusal to recognize a self-defense exception was so significant and what that refusal illustrates about the Court's recent approaches to constitutional doctrine more broadly. The Court dodged an important and genuinely hard question—whether safe storage requirements impermissibly *burden* armed self-defense—by manufacturing an easier one: whether a city can ban "functional firearms." This move exemplifies both the Court's failure to grapple with the relationship between the Second Amendment and self-defense, and—broader still—its tendency to defer to what it sees as the wisdom of the past (when safe storage laws all had implied self-defense exceptions) but not of today. Part III shows

Constitutional Memory, 20 GEO. J.L. & PUB. POL'Y 19 (2022) (exploring how the relationship between constitutional law and history shapes modern interpretations of the Constitution).

When it comes to gun rights and regulation, the *Heller* and *Bruen* majorities—as well as some lower courts—at times seem to treat history as a one-way ratchet in favor of expanding rights and limiting regulation. *See* Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795, 1796–1800 (2023). Such asymmetric updating is hard to defend. Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 240–45 (2021).

19. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, at v (1980).

20. *Biking to the Supreme Court*, DUKE TODAY (Mar. 19, 2008), https://today.duke.edu/2008/03/dellinger.html [https://perma.cc/ET3W-7XMD].

how *Bruen* has transformed that tendency into a constitutional rule, effectively codifying the doctrinal trend that *Heller*'s worst holding exemplified.

I. *HELLER*'S TREATMENT OF SAFE STORAGE

There were two primary issues before the Court in *Heller*: whether the Second Amendment encompasses a right to keep and bear arms for private purposes like self-defense, and—if it does—whether the District's gun law was nonetheless constitutional. That law contained multiple parts including (with minor exceptions) a general prohibition on the possession of handguns,[21] a licensing restriction,[22] and a requirement that all guns be kept "unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device" except when located in a place of business or being used for lawful recreational activities.[23] Most of the voluminous scholarly commentary has focused on the first of these requirements. In this part, I will focus on the Court's treatment—at oral argument and eventually in its opinions—of the third.[24]

A. *Oral Argument*

Though it is far beyond the scope of this Essay to address in any detail, *Heller*'s oral argument was by turns fascinating, frustrating, and a master class by the three advocates who argued. Walter for the District and Solicitor General Paul Clement for the United States were already legends of the Supreme Court bar, but Heller's counsel Alan Gura—making his first-ever appearance before the Court—did more than hold his own. As Adam Winkler notes in his wonderful book *Gunfight*, Walter walked over to shake Gura's hand just before the Justices entered: "There was nothing to fear, Dellinger told him. His own first argument at the high court had been, he said, his best. 'You'll do great.'"[25]

21. *See* D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (LEXIS through Dec. 7, 2023).

22. *See id.* §§ 22-4504(a), 22-4506.

23. *Id.* § 7-2507.02(a).

24. *See* James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 873–91 (2014); Sean Murphy, *Fostering Second Amendment Rights: An Evaluation of Foster Parents' Right To Bear Arms*, 96 U. DET. MERCY L. REV. 397, 407–18 (2019).

25. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 151 (2011) (internal citation omitted).

Walter's first argument was in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), for which he prepared with the help of his (and later my) Duke colleagues and good friends Jeff Powell and

All parties knew that Justice Kennedy's views would be pivotal.[26] He showed his hand relatively early, asking: "[D]o you think the clause, the second clause, the operative clause, is related to something other than the militia?"[27] Walter started to reply that "bear arms" was indeed a military term, when Justice Kennedy followed up: "It 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?"[28]

At that point, many of us in the courtroom assumed that the District would lose on the first major issue, since Justice Kennedy appeared to be signaling support for the idea that the Second Amendment right is predicated not on militia service but on personal safety against a cast of threats that he presumably considered to be the Founding-era equivalent of modern criminal home invaders.

Recognizing as much, Walter pirouetted within the span of two questions to defending the constitutionality of the District's law even under a private purposes-based reading of the right. Justice Scalia interjected to say that Blackstone "thought the right of self-defense was inherent, and the framers were

Lawrence Baxter, and which he argued against none other than then-Deputy Solicitor General John Roberts. As Walter later wrote:

> I still remember the phone call to my Duke office on the second Monday in June, 1990. It came from Roberts, as gracious an opposing counsel as he was a gifted advocate, calling to relay in person the news from the Supreme Court. "Congratulations," he said. "You won, five-to-four."

Walter Dellinger, *Why Me?*, 5 J. APP. PRAC. & PROCESS 95, 101 (2003).

26. Though he did not write an opinion in *Heller*, Justice Kennedy shaped it in important ways. In terms of future litigation, the most significant portion of *Heller* came near the end of the opinion, where the Court seemingly blessed as constitutional a potentially wide range of gun regulations, concluding *inter alia* that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

Justice Stevens later wrote that the paragraph was included as the price of Justice Kennedy's support. Adam Liptak, *'It's a Long Story': Justice John Paul Stevens, 98, Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html [https://perma.cc/976W-93GW (staff-uploaded, dark archive)].

In the aftermath of *Heller*, most Second Amendment cases—amounting to hundreds of decisions—cited this passage, sometimes called the "exceptions paragraph." 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, 1488 (2018) (noting, based on review of more than 1,000 Second Amendment challenges between 2008 and 2016, that "a majority of the challenges in our study (60 percent) explicitly cited those paragraphs, though the ratio trended downward over time, perhaps reflecting the fact that *Heller* itself has now been baked into circuit precedent").

27. Transcript of Oral Argument at 8, *Heller*, 554 U.S. 570 (No. 07-290).

28. *Id.*

devoted to Blackstone."[29] (This was one of many conflations between the right of self-defense and the right to have guns for that purpose; a point to which I'll return below.[30]) Walter responded, "[I]f we're constitutionalizing the Blackstonian common law right, he speaks of a right that is subject to due restrictions and applies to, quote 'such weapons, such as are allowed by law.' So Blackstone builds in the kind of reasonableness of the regulation that the District of Columbia has."[31]

Though Walter would continue to defend the militia-based reading—especially after Justice Stevens, who would go on to author the lead dissent, chimed in—the bulk of the oral argument from that point on was dedicated to what kinds of gun laws are consistent with an individual right to keep and bear arms for private purposes like self-defense. This was, notably, the essence of the position that General Clement took on behalf of the United States, arguing that the Amendment protected an individual right but that the right was subject to reasonable regulations like those represented in federal statutes.[32]

It was here that the safe storage requirement took center stage. When Gura began his own oral argument, correctly perceiving that the private purposes issue was already in his pocket,[33] he opened by going after the safe storage requirement—what he called the District's "functional firearms" ban.[34] This was perhaps a bit of a surprise to many, given the momentousness of the debate about the Second Amendment's core meaning and the practical significance of the handgun ban. But rather than focusing on those broad issues, Gura started with a seemingly picayune point, citing specific pages in the trial court record for the proposition that "[t]he defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law."[35] Gura argued that this purported prohibition on unlocking a gun for use in self-defense was the problem, not the general idea of a safe storage provision. Indeed, in his brief he had said that: "Respondent would not quarrel with a true 'safe storage' law, properly crafted to address Petitioners' stated concerns."[36]

29. *Id.*

30. *See infra* Section II.A.

31. Transcript of Oral Argument, *supra* note 27, at 9.

32. Brief for the United States as Amicus Curiae Supporting Defendant-Appellee at 20–21, *Heller*, 554 U.S. 570 (No. 07-290) [hereinafter Brief for the United States].

33. *See* WINKLER, *supra* note 25, at 227.

34. Transcript of Oral Argument, *supra* note 27, at 48–49.

35. *Id.* at 49.

36. Respondent's Brief at 54, *Heller*, 554 U.S. 570 (No. 07-290). Gura repeated this at oral argument, casting it as a matter of satisfying heightened scrutiny:

> [The] better safe storage approach is the one used by the majority of jurisdictions, I believe, that do have such laws, which is to require safe storage, for example, in a safe. And that is a

Of course the District (joined by the United States on this point) insisted otherwise, arguing that its safe storage requirement—like other general prohibitions, from assault to homicide—*was* subject to a self-defense exception, and emphasizing that no one had ever been prosecuted in the District for unlocking a gun to use in self-defense.[37] In other words, no one defended the position that the District *could* prohibit unlocking a gun for self-defense; the only question was whether it *did*. As Walter put it:

> If you strike down the trigger lock law, you're throwing us in the briar patch where . . . we're happy to be if all we have to do is to make clear in the trigger lock law what we have said here today, that it's . . . available for self-defense.[38]

There was, however, another possible objection to the safe storage requirement: not that it criminalized acts of armed self-defense, but that it impermissibly *burdened* armed self-defense by making it too hard to use a gun in a moment of need. This was the thrust of a series of questions from Chief Justice Roberts and Justice Scalia:

> CHIEF JUSTICE ROBERTS: So how long does it take? If your interpretation is correct, how long does it take to remove the trigger lock and make the gun operable.
>
> MR. DELLINGER: You—you place a trigger lock on and it has—the version I have, a few—you can buy them at 17th Street Hardware—has a code, like a three-digit code. You turn to the code and you pull it apart. That's all it takes. Even—it took me 3 seconds.
>
> JUSTICE SCALIA: You turn on, you turn on the lamp next to your bed so you can—you can turn the knob at 3-22-95,[39] and so somebody—

reasonable limitation. It's a strict scrutiny limitation. Whatever standard of view we may wish to apply, I think, would encompass a safe storage provision.

Transcript of Oral Argument, *supra* note 27, at 72.

37. *See* Brief for Petitioners at 56, *Heller*, 554 U.S. 570 (No. 07-290) (arguing that a self-defense exception is fairly implied in the trigger lock requirement); Brief for the United States, *supra* note 32, at 30–31 (same).

38. Transcript of Oral Argument, *supra* note 27, at 86.

39. Perhaps this was just a random assortment of numbers, but it looks to be a date—March 22, 1995—which would be consistent with the common practice of using birthdays and other significant dates as passwords. John Rohland, *Happy Password Day!*, EDCi (May 4, 2022), https://edci.com/2022/05/happy-world-password-day/ [https://perma.cc/39GF-S7H6] ("59% of Americans use a person's name or a family member's birthday as a password.").

I have no idea what significance, if any, the date held for the Justice, but interestingly it was a day on which then-attorney John Roberts argued before the Court—facing a series of pointed questions from Justice Scalia. *See* Oral Argument at 31:01, 32:05, 33:50, 34:15, 34:29, 50:32, 50:56,

> MR. DELLINGER: Well—
>
> CHIEF JUSTICE ROBERTS: Is it like that? Is it a numerical code?
>
> MR. DELLINGER: Yes, you can have one with a numerical code.
>
> CHIEF JUSTICE ROBERTS: So then you turn on the lamp, you pick up your reading glasses—
>
> (Laughter.)
>
> MR. DELLINGER: Let me tell you. That's right. Let me tell you why at the end of the day this doesn't—this doesn't matter, for two reasons. The lesson—
>
> CHIEF JUSTICE ROBERTS: It may not matter, but I'd like some idea about how long it takes.
>
> MR. DELLINGER: It took me 3 seconds. I'm not kidding. It's—it's not that difficult to do it. That was in daylight.
>
> The other version is just a loop that goes through the chamber with a simple key. You have the key and put it together. Now, of course if you're going—if you want to have your weapon loaded and assembled, that's a different matter.[40]

This was a fascinating exchange for many reasons, including not only the dark visions of home intrusion that would eventually make their way into the majority opinion,[41] but as a reflection of Walter's approach. It reveals his storyteller's instinct for detail and place (17th Street Hardware was in fact his local hardware store in D.C. and sold trigger locks by special order[42]) as well as an apparently self-deprecating account of his own mechanical ability ("Even—it took me 3 seconds.").[43] The three-second claim also happens to be true. As

51:13, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (No. 94-560), https://www.oyez.org/cases/1994/94-560 [https://perma.cc/2F46-UHT8 (staff-uploaded archive)]. The Court ruled unanimously in favor of Roberts' client. *Kaplan*, 514 U.S. at 949.

40. Transcript of Oral Argument, *supra* note 27, at 83–84.

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

42. Erik Wemple, *What Do 17th Street Hardware and John Roberts Have in Common?*, WASH. CITY PAPER: CITY DESK (Mar. 19, 2008), https://washingtoncitypaper.com/article/492862/what-do-17th-street-hardware-and-john-roberts-have-in-common [https://perma.cc/LC39-3RWC].

43. Transcript of Oral Argument, *supra* note 27, at 83. I don't mean this as a knock on Walter's dexterity or comfort with technology, so much as a nod to his occasional tendency to get distracted or lost in thought while involved in a mechanical task. Anyone who rode with him in a car will be familiar with this, and even those who did not had to be vigilant: I have it on good authority that on multiple

part of preparation for oral argument in *Heller*—one of three major cases Walter argued that term, and probably the least important from the firm's perspective[44]—we provided Walter not only with the usual binders of cases and supporting materials but an array of trigger locks so that he could practice (as a responsible gun owner would) and provide an honest answer to a question we anticipated might be coming.[45]

The point here is that the two lines of objection are quite different and lend themselves to different forms of doctrine. If the District's law could be characterized as criminalizing the act of armed self-defense in the home, then it would be straightforward enough to strike it down without the need to articulate any real doctrinal test. But if the constitutional infirmity were rooted in the *burden* that the requirement imposed upon self-defense—a kind of functional analysis—then the Court might have to say more about what kinds of burdens are and are not permissible under the Second Amendment.

This choice of doctrinal roads—the former rooted in rules and categories; the latter in standards and balancing—was perhaps *Heller*'s most significant contribution to constitutional doctrine more broadly.[46] And in that regard, one of the most significant moments at oral argument was the Chief Justice's apparent dismissal (in response to an argument by General Clement about how scrutiny might apply) of the whole apparatus of scrutiny as being ungrounded in the Constitution: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution" and "these standards that

occasions Walter left his car running in the Duke Law parking lot while going to teach class—once starting a small fire.

44. The other two were *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008), involving long-term energy contracts, and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), involving the largest tort judgment ever affirmed by a federal court of appeals. Walter prevailed in both cases.

45. My memory is that the trigger locks were provided by the local police department and were piled one morning on the table of a glass-walled conference room facing the main lobby of O'Melveny's Washington office. It is my fervent hope that actual or prospective clients visited the office that morning and had to process that bizarre scene.

46. Or, at least, that's what I argued at the time in an article that became my job talk when I went on the teaching market. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 437–39 (2009).

Continuing with the theme of this Essay, though, I cannot help but emphasize Walter's influence: He and I were planning to write a coauthored piece for a prominent post-*Heller* symposium until he rightly insisted I should do something solo, even if it would mean sacrificing the certainty of a fancy law review placement. My reading on balancing and categorical approaches to constitutional rights of course led me to the debates between Justices Frankfurter and Black—the latter for whom Walter clerked, and who he described as an "elemental force." SCOTUSblog, *SCOTUSblog on Camera: Walter Dellinger (Part One) Elemental*, YOUTUBE (Aug. 4, 2015), https://www.youtube.com/watch?v=M4drZV3HO2A [https://perma.cc/LX3D-PQGP].

apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up."[47]

This comment would turn out to be a strong signal of the Court's ongoing project of reinventing decades of First Amendment doctrine (the "baggage") as being supposedly rooted in historical categories.[48] It also proved to be an accurate prediction of how the Court would handle the safe storage requirement.

B. *The Opinion*

As Justice Kennedy's first questions suggested it would, the Court embraced the private purposes reading of the Second Amendment and struck down the District's handgun law. But that was not all: "As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock *at all times*, rendering it inoperable."[49] Based on this description alone, it was clear that the Court had adopted Gura's characterization of the law as a functional firearms prohibition—a rule against unlocking a gun even in a moment of self-defense. From there, the conclusion was more or less foregone: "This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."[50]

As for the District's contention that the law should be interpreted to contain an exception for self-defense, the majority found this to be "precluded by the unequivocal text, and by the presence of certain other enumerated exceptions."[51] The emphasis on "unequivocal text" would seem to suggest that

47. Transcript of Oral Argument, *supra* note 27, at 44.

48. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–82 (2010) (holding that animal cruelty, as a class, is not categorically protected by the First Amendment). *See generally* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015) (criticizing *Stevens* and arguing that "eighteenth- and nineteenth-century courts did not in fact consider low-value speech to be categorically unworthy of constitutional protection"). For analysis of *Bruen*'s claims to be operating within the First Amendment's mold, see Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & POL'Y 59, 67–76 (2023); Chad Flanders, *Flag* Bruen*-ing:* Texas v. Johnson *in Light of the Supreme Court's 2021-22 Term*, 2022 U. ILL. L. REV. ONLINE 94, 105–108 (2022).

49. District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (emphasis added); *id.* at 630 ("We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable *at all times*." (emphasis added)).

50. *Id.* at 630; *see also* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1353 (2009) ("Because Justice Scalia successfully demonstrated that self defense was the purpose of the preexisting right, D.C.'s safe-storage regulation presented an easy case. A requirement that all firearms be disabled at all times constitutes an almost complete deprivation of the right to have firearms for self defense, and is therefore clearly unconstitutional."). Note, though, that the District's law did not apply to all firearms "at all times"—indeed, the exceptions for unlocking weapons at businesses or during recreation were among the reasons the majority found that the law prohibited acts of armed self-defense. *Heller*, 554 U.S. at 630.

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

any safe storage requirement—or, for that matter, any generally applicable law that might cover an act of armed self-defense (assault, homicide, etc.)—lacking a textual exception for self-defense would violate the Second Amendment. As to the "certain other enumerated exceptions," that appeared to be a kind of *expressio unius* argument: the fact that the lock requirement specified that it did *not* apply to firearms "kept at [a] place of business" or "being used for lawful recreational purposes" suggested that it *did* apply to armed self-defense in other places.[52]

From the Court's perspective, then, the District had adopted a law that specifically prohibited armed self-defense in the home—the place where self-defense interests have traditionally been regarded as being at their apex—but permitted it in businesses and while engaged in recreation. One might ask what sense it would make to write a law that permitted people to own guns but never to unlock them even in a moment of acute need, especially in the home. But, as Part II will explore in more detail, the Court's characterization was emblematic of two broad themes in *Heller*: a failure to actually engage with principles of self-defense, and a tendency to ascribe wisdom to the past while denying it to the present.

This bizarre reading was, in the Court's view, "also suggested by the D.C. Court of Appeals' statement that the statute forbids residents to use firearms to stop intruders."[53] The D.C. decision, *McIntosh v. Washington*,[54] did indeed

52. The District's safe storage requirement provided that

> [e]xcept for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device *unless* such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

D.C. CODE § 7-2507.02 (emphasis added) (amended 2009).

This language set up a general rule (registrants shall keep their guns unloaded and disassembled or locked) with two enumerated exceptions: the law *did not* apply to firearms "kept at [a] place of business" or "being used for lawful recreational purposes." *Id.* Gura argued, and the Court later agreed, that these two exceptions comprised the exclusive list of exceptions, such that a person *not* at their place of business or engaged in lawful recreation *could not* have a loaded, assembled, and unlocked gun *for any purpose*, including self-defense. As a result, a person who assembled or unlocked a firearm for use in self-defense in their home would be violating the District's safe storage requirement, even if the self-defense, itself, was justified. *See* Respondent's Brief at 54, *Heller*, 554 U.S. 570 (No. 07-290) ("[T]he city said what it meant and meant what it said in prohibiting armed self-defense inside private homes."); *Heller*, 554 U.S. at 635 (holding that the District's "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" was unconstitutional).

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

54. 395 A.2d 744 (1978).

uphold the safe storage requirement,[55] but *Heller*'s characterization of its holding is questionable at best. According to the Supreme Court:

> *McIntosh* upheld the law against a claim that it violated the Equal Protection Clause by arbitrarily distinguishing between residences and businesses. One of the rational bases listed for that distinction was the legislative finding "that for each intruder stopped by a firearm there are four gun-related accidents within the home." That tradeoff would not bear mention if the statute did not prevent stopping intruders by firearms.[56]

The more straightforward reading of that line from *McIntosh* (which, being a federal case, was not binding on the Supreme Court in any event) is an explanation of the policy determination underlying the requirement: to prevent gun-related accidents in the home, which the District found to be far more common than incidents of gun-related self-defense.[57] It emphatically need not mean that the latter are forbidden. But that kind of distortion is unfortunately emblematic of the Court's odd treatment of the very concept it said was the "core" of the Second Amendment right—self-defense—as the following part shows in more detail.

II. WHY *HELLER*'S SAFE STORAGE HOLDING MATTERS

Doctrinally, *Heller*'s central holding is its most important: the Second Amendment is not limited to people, arms, and activities having some connection to the organized militia, but instead encompasses private purposes like self-defense. Methodologically, the Court's embrace of originalism—both in Justice Scalia's majority opinion (arguably the most significant one he ever wrote in a constitutional case) and in Justice Stevens' dissent—is enormously significant as well, and helps explain *Heller*'s prominence in constitutional law courses.

And yet the safe storage holding, while less significant as a matter of immediate practical impact, provides an especially clear lens into two broadly important trends in the Court's approach to the Second Amendment and constitutional reasoning more broadly. The first is the Court's willingness to attribute wisdom to an often-imagined version of the past while denying it to modern lawmakers. The second is that despite identifying self-defense as the "core" of the Second Amendment right, the Court—along with many judges

55. *Id.* at 758.

56. *Heller*, 554 U.S. at 630 n.28 (internal citations omitted).

57. *Id.* at 692–93 (Breyer, J., dissenting) ("[*McIntosh*] merely concludes that the District Legislature had a rational basis for applying the trigger-lock law in homes but not in places of business. Nowhere does that case say that the statute precludes a self-defense exception of the sort that I have just described. And even if it did, we are not bound by a lower court's interpretation of federal law.").

and scholars—has failed meaningfully to grapple with the relationship between the act of self-defense and the keeping and bearing of arms.[58]

A. *Creating Conflict Between a Wise Past and an Irrational Present*

Recall that the District's central argument with regard to the safe storage requirement was that it included an exception for self-defense. This should not have been surprising, because that is how self-defense generally works: as an affirmative defense—an exception—to an otherwise generally applicable law.[59]

Such an approach would not only vindicate the valid self-defense interests of individuals, but also avoid attributing irrational motives to government actors whose priority is clearly not to punish valid exercises of self-defense as such, but rather to limit the harms associated with related activities: false positive defensive gun uses,[60] weapons owned for self-defense being misused for other purposes,[61] and so on.

58. By far the most powerful counterexample is the work of Eric Ruben. *See generally* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020) (noting divergence between the law of self-defense and the law of the Second Amendment).

59. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 869 (10th ed. 2017). Courts have recognized as much for centuries, including in the context of gun-related charges. *See, e.g.*, Waters v. Brown, 10 Ky. (3 A.K. Marsh.) 557, 560–61 (1821) ("[W]e conceive that the previous declarations of the appellee, which explained his object in carrying, drawing and presenting his pistol, were admissible, not to be used as mitigating the appellant's case as a previous offence; but as conducing to shew the appellee's illegal design, and also as measurably excusing the appellant in taking his gun, and then using it, when he saw the weapon by which his own death had been predicted.").

60. *See* D. Hemenway, D. Azrael & M. Miller, *Gun Use in the United States: Results from Two National Surveys*, 6 INJ. PREVENTION 263, 264–65 (2000); *see also* Otis Dudley Duncan, *Gun Use Surveys: In Numbers We Trust?*, CRIMINOLOGIST, Jan./Feb. 2000, at 1, 1, 3; Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 HEALTH & SOC. WORK 241, 242, 245–46 (2019) (reporting research findings indicating that gun owners are more vigilant in responding to perceived threats and more likely to direct their vigilance at racial and ethnic minorities); Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 152 (2008) ("One will always be safer compared to a fixed population if one is armed. But even if arms possession is attractive for this reason, it still might be the case that when we all choose to arm ourselves, the mutually imposed risks of harm make us collectively worse off. Since a primary purpose of a government's authority is overcoming prisoner's dilemmas, the fact that we desire arms is no reason to think that disarmament is beyond the government's authority.").

61. In 2021, guns were the leading cause of death for children and teens between one and nineteen and young adults under twenty-five. ARI DAVIS, ROSE KIM & CASSANDRA CRIFASI, JOHNS HOPKINS CTR. FOR GUN VIOLENCE SOLS., U.S. GUN VIOLENCE IN 2021: AN ACCOUNTING OF A PUBLIC HEALTH CRISIS 12 (2023), https://publichealth.jhu.edu/sites/default/files/2023-06/2023-june-cgvs-u-s-gun-violence-in-2021.pdf [https://perma.cc/3365-5HRU]. Gun deaths among children and teens rose from 1,732 in 2019 to 2,590 in 2021. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR., https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/AAH5-6DR5] (last updated Apr. 26, 2023). Also in 2021, there were 10,325 firearms reported stolen or lost—likely only a small fraction of the total number.

The point here is not that safe storage laws are or are not good policy, but that *Heller*'s approach rendered the point irrelevant—and that this move portended a broader shift in the Court's approach to constitutional rights adjudication, one which hit its apex (at least for now) in *Bruen*, which the following part will discuss in more detail. *Heller* in general, and the safe storage holding in particular, show how the Court manufactures rule-like outcomes through its framing of arguments and background facts, setting up power grabs that masquerade as minimalism.

Many have criticized *Heller* itself on exactly these grounds.[62] Most of these critics have, understandably enough, focused on the Court's embrace of the private purposes theory of the Amendment or its invalidation of the District's handgun law. But the majority's treatment of the safe storage requirement was, if anything, even more striking. After all, the path of constitutional avoidance was simple: read the safe storage requirement to contain an exception for self-defense—as with other generally applicable laws,[63] as the District itself urged, as the law had always been applied, and as common sense would dictate. By imposing an implausible alternative reading, the Court was able to strike down the safe storage requirement without actually considering what the law of self-defense would require.

Moreover, as Justice Breyer pointed out in dissent, the Court's refusal to read a self-defense exception into the District's law stood in stark contrast to its willingness to do so for historical safe storage laws.[64] Boston, for example, forbade the storage of gunpowder in city limits; New York and Philadelphia imposed similar requirements.[65] According to the majority, however, it was "implausible that [the Boston law] would have been enforced against a citizen acting in self-defense," "inconceivable that [the New York law] would have been enforced against a person exercising his right to self-defense," and "unlikely that [the Pennsylvania law] would have been enforced against a person who used firearms for self-defense."[66] As Justice Breyer observed, the majority "readily read[] unspoken self-defense exceptions into every colonial law, but it refuse[d] to accept the District's concession that this law has one."[67]

Federal Firearms Licensee Theft/Loss Report - 2021, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/resource-center/federal-firearms-licensee-theftloss-report-2021 [https://perma.cc/BQ2T-897P] (last updated Jan. 18, 2022).

62. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 296–301 (2009).

63. KADISH ET AL., *supra* note 59, at 873–74.

64. District of Columbia v. Heller, 554 U.S. 570, 692 (2008) (Breyer, J., dissenting).

65. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 511 (2004).

66. *Heller*, 554 U.S. at 632–33.

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

It is hard to see this as anything other than the majority projecting its own views of reasonableness back onto the historical record and then using that reconstructed record to support the contemporary result. As Reva Siegel has observed, "Originalist judges ventriloquize historical sources."[68] This can happen in myriad ways, and it is far beyond the scope of this short piece to attempt a broad catalogue.

The safe storage discussion does highlight one particularly interesting version of the move, however: burden-shifting with regard to enforcement (or nonenforcement) of historical laws. In *Dobbs v. Jackson Women's Health Organization*,[69] the Court treated the existence of historical restrictions on abortion[70] as dispelling the case for an abortion right without additional proof that those laws were enforced.[71] By contrast, in *Heller*—as it would later do in *Bruen*[72]—the Court discounted the relevance of various historical regulations by essentially putting the burden on the government to not only show the existence of historical laws but also that they were enforced.[73] The former is a difficult task, as serious historians know. The latter is even more so—especially on a briefing schedule—and may require combing through historical records that are incomplete or inaccessible.[74] Treating the resulting lack of enforcement evidence as evidence that enforcement would have violated the Constitution is overreading a silence.[75]

68. Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1134 (2023).

69. 142 S. Ct. 2228 (2022).

70. Or, at least, what the majority regarded as historical restrictions on abortion. *See History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the American Historical Association and the Organization of American Historians*, AM. HIST. ASS'N (July 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) [https://perma.cc/C4HR-9MC3] (criticizing *Dobbs* for its "misrepresentation" and "mischaracterization" of the historical record, and concluding that it "inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime").

71. *Dobbs*, 142 S. Ct. at 2248–54.

72. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct 2111, 2141 (2022).

73. *See* District of Columbia v. Heller, 554 U.S. 570, 631–32 (2008).

74. *See* Declaration of Zachary Schrag ¶ 6, Angelo v. District of Columbia, 648 F. Supp. 3d 116 (D.D.C. Sept. 16, 2022) (No. 22-cv-01878) ("[T]he District has asked whether I or a team of historians could adequately research the 'Nation's historical tradition' of firearm regulation on mass transit within 60 days. The answer is 'no[]' . . . ."). For good examples of the painstaking historical work it takes to study enforcement, see Brennan Gardner Rivas, The Deadly Weapon Laws of Texas: Regulating Guns, Knives, and Knuckles in the Lone Star State, 1836-1930, at 68–73 (May 2019) (Ph.D. dissertation, Texas Christian University) (on file with the North Carolina Law Review); Andrew Willinger, Bruen*'s Enforcement Puzzle: Unearthing and Adjudicating the Historical Enforcement Record in Second Amendment Cases*, NOTRE DAME L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4612870 [https://perma.cc/AAK4-HH4U].

75. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 108 (2023).

The majority also suggested that the District's law differed from its historical predecessors because of the punishment for violation:

> [The historical restrictions] are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. . . . [W]e do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.[76]

Of course, it seems unlikely that the remote prospect of punishment—even a prison term—would deter a modern homeowner from unlocking a gun "to protect himself or his family from violence"[77] any more than it would deter a homeowner in the eighteenth century from using a gun, and thus gunpowder, for self-defense within the city limits (unless gun owners today are, like legislatures, simply less rational). Either way, what is notable is that the *Heller* majority appeared to be performing a relatively straightforward self-defense analysis of the historical laws, considering whether they practically would have prevented people from engaging in acts of self-defense. That is, however, emphatically *not* how the majority treated the District's law.

B. *Centering the Idea, Not the Law, of Self-Defense*

Popular, scholarly, and judicial discussions of the right to keep and bear arms frequently conflate it with the act of self-defense. Logically and legally, this is a mistake. Practically speaking, most self-defense actions don't involve guns,[78] and most guns are never used in self-defense.[79] For that matter, the post-*Heller* law of the Second Amendment has little in common with the law of self-defense—particularly the latter's focus on immediacy and proportionality.[80]

The best understanding of the relationship between the two is that the right to keep and bear arms protects the ability to have a particular kind of weapon ("Arms") on hand should the need for self-defense arise. This treats the right to keep and bear arms as *auxiliary* to the right to self-defense. That is perfectly consistent with both rights (self-defense and to keep and bear arms for that purpose) being fundamental. But it does mean there are two sets of operative legal principles at work, and they differ in significant ways.

76. *Heller*, 554 U.S. at 633–34.

77. *Id.*

78. David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 23, 27 (2015).

79. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. JUST. RSCH. BRIEF, May 1997, at 1, 10.

80. Ruben, *supra* note 58, at 81.

Under *Heller* and *Bruen*'s methodology, even accepting that the "core" interest is one of self-defense, it seems that the Second Amendment speaks *only* to preparations for self-defense and says nothing whatsoever about the action itself. *Bruen*, after all, counsels close attention to the "plain text" of the Second Amendment.[81] And even if one reads a self-defense core into that text (which, it should be noted, nowhere directly mentions such an interest), it seems "plain" that the act of self-defense does not fall within the Amendment's own verbs. To pull a trigger or brandish a weapon is not to "keep" or "bear" under the Court's own definitions of those terms as "to have" and "to carry."[82] Again, that does not mean that the act of armed self-defense is not itself a right, only that it is not a right derived from the Second Amendment—which extends only as far as possession of the implement.

It is, therefore, especially odd that *Heller*, even as it touted the "core" value of self-defense, did not take the opportunity to reaffirm that value. Had the Court accepted the District's argument that its law contained a self-defense exception, it could have vindicated and reinforced the breadth of such exceptions without the need to invoke the Second Amendment at all. Indeed, some pre-*Heller* cases recognized the need for a self-defense exception to gun laws. In *United States v. Gomez*,[83] for example, the Ninth Circuit held that a justification defense is available to a felon convicted for the possession of a gun when that felon was faced with an unlawful and imminent threat of death.[84] Instead, the majority in *Heller* avoided constitutional avoidance and created a problem where none needed to exist by saying that the law could *not* be read to have such an exception. Perversely, then, *Heller* might well be cited for the principle that self-defense exceptions cannot be read into generally applicable laws—making it a case that undermines the general right to self-defense even as it elevates the right to have guns for that purpose.

To be clear, the point is not that a self-defense exception to gun laws is a substitute for the Second Amendment. The right to keep and bear arms is *distinct* from the right to self-defense and, in light of *Heller*, can be invoked regardless of whether an immediate threat is present. The implement and the act are separate and governed by different rules. That is why the Second Amendment plays no role in resolving legal liability for shootings themselves. The Amendment speaks to the acquisition and possession of firearms—including, after *Bruen*, the ability to possess them in public (to carry, in other words, or "bear")—but it is silent about the legal standard that should apply when the firearm is brandished or a trigger is pulled.

81. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct 2111, 2126 (2022).
82. *Id.* at 2134–35 (quoting *Heller*, 554 U.S. at 576).
83. 92 F.3d 770 (9th Cir. 1996).
84. *Id.* at 778.

The question in *Heller*, then, should have been whether the District's safe storage restriction went too far in burdening the right of self-defense. Though self-defense is often regarded as a natural right, its contours are set by the common law.[85] As Eric Ruben observes,[86] that would be the natural implication of the majority's conclusion that the District's law made it impossible to possess operable handguns when they would be "necessary" for "immediate self-defense"—necessity and immediacy being foundational elements of modern self-defense analysis.[87]

Indeed, in a per curiam order denying en banc review of *Parker v. District of Columbia*[88] (the case that would become *Heller*) the D.C. Circuit noted that if the Supreme Court took certiorari, it "would necessarily be obliged to consider the impact of Section 7-2507.02 . . . since a disassembly or trigger lock requirement might render a shotgun or rifle virtually useless to face an unexpected threat."[89] That is also the kind of analysis suggested by Roberts's and Scalia's questions at oral argument: Practically speaking, what is the *burden* on self-defense—or, for that matter, armed self-defense—if a gun is required to be stored locked or disassembled? The D.C. Circuit's formulation suggests that such a requirement might render the arm "virtually useless"; Walter's answer at oral argument ("it took me three seconds") suggests otherwise.

Unsurprisingly, this kind of burden analysis is how most scholarly commentators have framed the constitutionality of safe storage requirements. Mark Tushnet argues that the constitutionality of safe storage depends on "how difficult the safe-storage requirement makes it to retrieve the weapon and render it useful for self-defense."[90] Eugene Volokh notes that "[e]ven if the gun can be unlocked in several seconds . . . , a defender might not have those seconds,"[91] and suggests that safe storage laws should be evaluated with attention to both the firearm-related accidents *and* the "life-saving defensive actions" such laws would prevent.[92]

85. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (1765); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 184–85 (1769).

86. *See generally* Ruben, *supra* note 58 (considering whether self-defense law can provide a basis for analyzing weapons' constitutional protection).

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

88. No. 04-7041, 2007 U.S. App. LEXIS 22872 (D.C. Cir. Sept. 25, 2007) (per curiam).

89. *Id.* at *5.

90. Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1438 (2009).

91. 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, 1534 (2009).

92. *Id.*

It is also how courts have dealt with challenges to safe storage laws that, in those courts' view, contained self-defense exceptions.[93] In the most prominent case, *Jackson v. City and County of San Francisco*,[94] the Ninth Circuit considered the constitutionality of two San Francisco ordinances.[95] The first required handguns in a person's home to be carried, stored in a locked container, or disabled by a trigger lock.[96] The second prohibited the sale of "hollow-point" bullets, which are designed without a "sporting purpose" to increase injury by "fragment[ing] on impact."[97] The court recognized that the laws "burden[] the core of the Second Amendment right" because "[h]aving to retrieve handguns from locked containers or removing trigger locks makes it more difficult 'for citizens to use them for the core lawful purpose of self-defense' in the home."[98] But it reasoned that this was not a "severe burden" justifying the application of strict scrutiny because "a modern gun safe may be opened quickly."[99] The court concluded that the law served "a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home" and was "substantially related" to that interest, given the "evidence that guns kept in the home are most often used in suicides and against family and friends rather than in self-defense and that children are particularly at risk of injury and death."[100]

Jackson's analysis is consistent with Alan Gura's argument in *Heller* that so long as there was a self-defense exception, the District could "require safe storage" of guns, "for example, in a safe."[101] And yet, as a practical matter, storage in a safe would presumably represent a much more significant practical imposition on a person's ability to unlock a gun in response to a midnight intruder—the scenario that Justice Scalia and Chief Justice Roberts emphasized in their questions to Walter. The majority went out of its way to say, "Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents."[102] But that is hard to understand or

93. In *Commonwealth v. McGowan*, 982 N.E.2d 495 (Mass. 2013), the Massachusetts Supreme Judicial Court upheld a state law requiring guns to be stored in a locked container or disabled by a safety device except when being carried by an authorized user. *Id.* at 496. The court held that the statute fell "outside the scope of the right to bear arms protected by the Second Amendment." *Id.*; *see also* Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 993–94 (2017) ("In both cases, the courts distinguished those laws from *Heller* on the grounds that they had an exception for when the firearm was in the owner's immediate control, and therefore allowed the owner to use guns for self-defense in the home.").

94. 746 F.3d 953 (9th Cir. 2014).

95. *Id.* at 957–58.

96. *Id.* at 958 (citing S.F., CAL., POLICE CODE art. 45, § 4512(a) (2014)).

97. *Id.* (quoting S.F., CAL., POLICE CODE art. 9, § 613.10(g) (2014)).

98. *Id.* at 964 (quoting District of Columbia v. Heller, 554 U.S. 570, 600 (2008)).

99. *Id.*

100. *Id.* at 965–66 (alterations omitted).

101. Transcript of Oral Argument, *supra* note 27, at 72.

102. *Heller*, 554 U.S. at 632.

credit, as Judge J. Harvie Wilkinson of the United States Court of Appeals for the Fourth Circuit noted in his critique of *Heller*: "The Court never explains why exactly safe storage laws are constitutional, or how they intrude less on Second Amendment rights than trigger locks do."[103]

Interestingly, however, two Justices in the *Heller* majority later called into question the opinion's own reassurance about "laws regulating the storage of firearms to prevent accidents."[104] In 2015, Justice Thomas—joined by Justice Scalia—dissented from the Court's denial of certiorari in *Jackson*. Though acknowledging that the law in that case "allows residents to *use* their handguns for the purpose of self-defense," they concluded that "it prohibits them from *keeping* those handguns 'operable for the purpose of *immediate* self-defense' when not carried on their person."[105] Accordingly, the law "burdens their *right to self-defense* at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed. There is consequently no question that San Francisco's law burdens the core of the Second Amendment right."[106] (Note that the reference here is to the "right to self-defense.")

To show that the "burden is significant," the dissent pointed not to broad data, but to the stories of three petitioners as evidence that "[i]n an emergency situation, the delay imposed by this law could prevent San Francisco residents from using their handguns for the lawful purpose of self-defense. And that delay could easily be the difference between life and death."[107] The dissenters called the Ninth Circuit's conclusion "questionable" and "in serious tension with *Heller*," since "[t]he Court of Appeals in this case recognized that San Francisco's law burdened the core component of the Second Amendment guarantee, yet upheld the law."[108]

Whatever the ultimate result—Thomas and Scalia were clearly signaling skepticism—this is the right *kind* of analysis if "the right to self-defense" is at issue. The underlying question is one of burden and benefit. On the one hand, Justice Thomas is undoubtedly right that—as the Chief Justice and Justice Scalia had suggested at oral argument in *Heller*[109]—a safe storage requirement will make it at least somewhat harder for people to use guns in self-defense. That burden might vary based on the precise type of storage requirement: trigger locks, gun safes, or user authentication technology, for example. On the other hand, states with safe storage laws appear to have reduced rates of firearm

103. Wilkinson, *supra* note 62, at 297.

104. *Heller*, 554 U.S. at 632.

105. Jackson v. City and County of San Francisco, 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting).

106. *Id.* (emphasis added).

107. *Id.* at 1015–16.

108. *Id.* at 1015–17.

109. Transcript of Oral Argument, *supra* note 27, at 82–84.

suicide.[110] There is lower risk of self-inflicted firearm injuries and deaths in households that practice safe storage compared to those in which guns are stored unlocked and/or loaded,[111] and this trend holds true among adults and children even after controlling for factors like psychiatric illness.[112] A recent study-of-studies by RAND found that child access prevention laws (a kind of safe storage requirement) "are likely to reduce suicide, unintentional injuries, and violent crime, but their influence on gun owners' storage practices specifically might depend on the other firearm-related policies within individual states."[113]

The point here is not that safe storage requirements are or are not good policy, but that these are the right *factors* to consider if the goal is to take both self-defense and public safety seriously. Another possibility is to remit the question to politics, as Justice Breyer suggested in a question to Walter after his exchange about trigger locks with Justice Scalia and Chief Justice Roberts:

> Thinking of your exchange with the Chief Justice and think of the trigger lock in your view and what the question was, do you want—I don't know how well trigger locks work or not—but do you want thousands of judges all over the United States to be deciding that kind of question rather than the city councils and the legislatures that have decided it in the context of passing laws? I mean, isn't there an issue here and a problem with respect to having courts make the kinds of decisions about who is right or not in that trigger-lock argument?[114]

But even as the District reworked its laws in the aftermath of *Heller*, the litigation focus had shifted from safe storage requirements to public carry, eventually leading to *Bruen*.

III. *BRUEN* MAKES THINGS WORSE

Heller notoriously provided little explicit guidance to lower courts on how to resolve Second Amendment challenges. Municipal handgun prohibitions were off the table, but only one other notable city had one anyway: Chicago,

110. *See* Michael D. Anestis & Joye C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUB. HEALTH 2049, 2055 (2015).

111. Edmond D. Shenassa, Michelle L. Rogers, Kirsten L. Spalding & Mary B. Roberts, *Safer Storage of Firearms at Home and Risk of Suicide: A Study of Protective Factors in a Nationally Representative Sample*, 58 J. EPIDEMIOLOGY & CMTY. HEALTH 841, 841 (2004).

112. David A. Brent, Joshua Perper, Grace Moritz, Marianne Baugher & Chris Allman, *Suicide in Adolescents with No Apparent Psychopathology*, 32 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 494, 499 (1993); Yeates Conwell, Paul R. Duberstein, Kenneth Connor, Shirley Eberly, Christopher Cox & Eric D. Caine, *Access to Firearms and Risk for Suicide in Middle-Aged and Older Adults*, 10 AM. J. GERIATRIC PSYCHIATRY 407, 414 (2002).

113. Rajeev Ramchand, *Personal Firearm Storage in the United States: Recent Estimates, Patterns, and Effectiveness of Interventions*, RAND GUN POL'Y AM. (July 11, 2022), https://www.rand.org/research/gun-policy/analysis/essays/personal-firearm-storage.html [https://perma.cc/S46Y-VHMM].

114. Transcript of Oral Argument, *supra* note 27, at 73–74.

whose law the Court would strike down two years later in *McDonald v. City of Chicago*[115] in the course of incorporating the Second Amendment against state and local governments.[116] Both *Heller* and *McDonald* insisted that various forms of gun regulation were consistent with the Second Amendment, but they did not articulate anything like a traditional doctrinal test. Given that both cases involved stringent and unrepresentative laws, the Court could simply say, in essence, "These laws are out of bounds. Others might be as well, but we do not need to say which ones or even why."

In the wake of *Heller* and *McDonald*, lower courts resolving challenges to mainline gun regulation—prohibitions on possession of particular weapons, or in particular places, or by people with disqualifying criminal convictions or mental illness—developed a two-part doctrinal framework that combined historical analysis with some form of scrutiny.[117] Under this approach, courts would "ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they would] . . . apply the appropriate level of scrutiny."[118] The first part of this framework was a "threshold question [of] whether the regulated activity falls within the scope of the Second Amendment"[119] based on a "historical understanding of the scope of the . . . right."[120] "[I]f the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected[,] then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."[121] At this latter step, courts would "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve."[122]

This framework was adopted by every federal court of appeals to consider the question.[123] The courts, in other words, did what *Heller* had asked: they developed a doctrinal framework to implement what was, in effect, a new constitutional right, and used it to address the kinds of real world Second Amendment challenges that *Heller* and *McDonald* effectively avoided. As noted

115. 561 U.S. 742 (2010).

116. *Id.* at 750.

117. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022); *see also* Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 6, at 125.

118. United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017) (quoting GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012)).

119. Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017).

120. Jackson v. City and County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014) (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)).

121. Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019) (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)).

122. *Id.* (internal quotation marks omitted) (quoting *Ezell*, 651 F.3d at 703).

123. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2174 (2022) (Breyer, J., dissenting) ("[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.").

above,[124] courts used the framework to evaluate safe storage requirements by considering precisely the kinds of public and individual interests—including burdens on the right to self-defense—that *Heller* dodged through its interpretation of the District's statute. One might celebrate or condemn these outcomes, but it is hard to deny that the style of reasoning is far more transparent than the Court's.

The Supreme Court's next major pronouncement on Second Amendment methodology, *New York State Rifle & Pistol Ass'n v. Bruen*, removed any doubt about whether it was committed to judicial minimalism. There, the Court struck down New York's "may issue" regime for concealed carry permits, and also instituted a new methodology for Second Amendment challenges.[125] Despite explicitly recognizing that the federal courts of appeals had coalesced around the two-part framework[126]—that they had, in other words, done the work of doctrinal development that *Heller* invited—the majority announced that the two-part framework had "one [part] too many"[127] and that modern gun laws must instead be evaluated only based on whether they are consistent with this nation's historical tradition of gun regulation.[128] In one fell swoop, the Court cast doubt on basically all post-*Heller* caselaw.

The kinds of doctrinal rules that the Court announces are mechanisms for allocation of power and responsibility, not just vis-à-vis the other branches, but also within the judiciary. Much current criticism of the Court has focused on its lack of respect for coordinate branches of government. But it is important, too, to recognize the ways in which it has consolidated power even within the judiciary, sometimes with little apparent regard for the way that lower courts—especially trial courts—do their jobs. The past few years have seen increased use of—and increased concern with—procedures like the "shadow docket," wherein the Court sometimes decides cases without full briefing or oral argument, and sometimes without any written opinion.[129]

Cases like *Bruen* represent a different kind of power grab and a different kind of disregard for the lower courts. *Bruen*'s purportedly historical test, combined with the current Court's tendency to treat every issue—factual or legal—as subject to *de novo* review and perhaps doctrinal reinvention, augurs a new world of Second Amendment adjudication in which lower courts are tasked with historical fact-finding that is impossible to do responsibly on a litigation

124. *See supra* text accompanying notes 109–14.

125. *Bruen*, 142 S. Ct. at 2126.

126. *Id.* at 2125.

127. *Id.* at 2127.

128. *Id.* at 2127–30.

129. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (describing the rise of the Court's shadow docket use and normative concerns resulting from it).

schedule, and then having that work disregarded on appeal. As one district judge recently observed:

> The trial record can be nonexistent. None of the history is "tested in an adversarial proceeding," and there may be no factual findings that ordinarily would receive some form of deference. The appellate courts do the best with the briefs they have, but all that matters is the Supreme Court's historical review, conducted de novo as a legal rather than a factual question, with dozens of amicus briefs never before seen by another court. Is this the best way of doing justice?[130]

Such disregard of lower court fact-finding appears in other areas of law as well.[131] In *Kennedy v. Bremerton School District*,[132] the Court found that a high school football coach was not acting "ordinarily within the scope" of his duties as coach while engaged in "quiet" private prayer after games,[133] and that there was no "evidence . . . in this record" that players would feel any coercion to participate.[134] One leading scholar of religious rights called this a "systematic gerrymander" of the factual record,[135] and Justice Sonia Sotomayor included photographs in her dissent that called the majority's representation of the facts into question.[136]

Bruen itself came up on a motion to dismiss, so there was no factual record with which to evaluate the claim that New York's law made it effectively impossible for the average law-abiding person to get a public carry permit. Building the factual record is the kind of thing a trial could do—though whether it would have mattered to the majority is of course a separate question (to which *Bremerton* suggests a negative answer).

These two practices—lower court historical fact-finding and the importance of deference on appeal—are deeply interconnected. As Brandon Garrett and I have explored elsewhere, a central claim of many forms of originalism is that it is a method rooted in empirical claims about historical

130. United States v. Bullock, No. 18-CR-165, 2023 WL 4232309, at *17 (S.D. Miss. June 28, 2023) (quoting Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting)).

131. *See* Joseph Blocher & Brandon L. Garrett, *Fact-Stripping*, 73 DUKE L.J. 1, 1 (2023).

132. 142 S. Ct. 2407 (2022).

133. *Id.* at 2424.

134. *Id.* at 2430.

135. Mike Fox, *Faculty Available for Comment on 2021 Supreme Court Term:* Kennedy v. Bremerton School District, UNIV. VA. SCH. L. (June 30, 2022), https://www.law.virginia.edu/news/202206/faculty-available-comment-2021-supreme-court-term [https://perma.cc/N8TX-4V6E] (quoting UVA Law professor, and religious rights expert, Douglas Laycock).

136. *Bremerton*, 142 S. Ct. at 2436 (Sotomayor, J., dissenting); *see also* Aaron Blake, *Gorsuch and Sotomayor's Extraordinary Factual Dispute*, WASH. POST, https://www.washingtonpost.com/politics/2022/06/29/gorsuch-sotomayor-praying-coach/ [https://perma.cc/KJA9-YVJY (dark archive)] (last updated June 29, 2022, 9:39 AM).

facts.[137] In Justice Scalia's famous characterization, "Texts and traditions are facts to study, not convictions to demonstrate about."[138] To the degree that this is so,[139] it would seem that originalist judges need to grapple more with whether and how those facts should be subject to the usual rules of the legal system such as introduction at trial, adversarial testing, and deference on appeal. In many ways, the current approach is predicated on historical "facts" but does not treat them as such. The Court's disregard of lower courts' fact-finding, in favor of its own historical "fact" constructions, is another way in which the Court attributes wisdom to the past while denying it to modern lawmakers.

Many have argued that despite its purportedly exclusive reliance on history, *Bruen*'s test will inevitably involve some consideration of contemporary means and ends. Indeed, the plain text of *Bruen*'s test requires contemporary evidence to play an essential role in Second Amendment doctrine, despite the opinion's own suggestion that its test is purely historical.[140] Quite simply, there is no way to compare modern and historical burdens on armed self-defense without evidence to illustrate the former side of the comparison. History cannot show the "burden" that modern gun laws place on "armed self-defense." Some of the Justices seemed to be taking this presentist approach in making claims about the strictness of New York's law[141] and the commonality of armed self-defense.[142]

Substantively, New York's law might not seem to have much in common with the District's safe storage requirement, considering that the former permitted guns to be unlocked not only in the home, but in public, so long as the person carrying the gun had the proper permit to do so. Undoubtedly, the holding in *Bruen* is more expansive in the right it confers. But in other ways, there is a deep and interesting conceptual similarity between licensing laws and safe storage requirements as they relate to the "core" Second Amendment interest of self-defense. For all the reasons discussed above, it seems unlikely

137. *See* Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, GEO. L.J. (forthcoming 2024).

138. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); *see also* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not normative.").

139. Some argue that originalism is about legal questions all the way down. *See, e.g.*, William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 814 (2019). Whether such approaches can completely avoid fact-finding and, more broadly, which is the best approach to originalism are questions far, far beyond the scope of this Essay. *See* Charles Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1328–29, 1341 (2017).

140. Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 6, at 170.

141. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2123, 2145 (2022) (describing the standard as "demanding" and "restrictive").

142. *Id.* at 2159 (Alito, J., concurring).

that the Second Amendment speaks directly to the *act* of armed self-defense—the firing or even brandishing of a gun does not fall within the meaning of the Amendment's verbs as the Court itself has defined them.[143] Perhaps the act of carrying a gun in public deters would-be attackers; perhaps not. Either way, the act itself is not one of self-defense as the law defines it.

These gun laws and many others exist to govern the space—literal, temporal, and legal—surrounding the act of self-defense. A safe storage law might do so by requiring that guns be locked unless and until the need for self-defense arises. A permit law does so by requiring that a person show a heightened need for self-defense—effectively building a bridge between gun carrying and the likelihood of legitimate defensive gun use. Neither leaves it to a gun owner to decide for himself, but the same of course is true of self-defense. The structure of the laws is designed to limit deadly violence, without legally or practically forbidding it, to when necessary and proportionate to a threat. By wielding the Second Amendment as such a blunt instrument, the Court has effectively severed that link.

One answer might be that "self-defense" in the Second Amendment context does not mean the act of self-defense, but something more like "personal safety." And certainly, those two are conceptually separable; one can take actions to improve one's safety without engaging in self-defense. But defining the "core" interest in such broad terms cuts *Heller* and *Bruen* off from the historical tradition they invoke. There surely is a common law right to self-defense. But it would be something else entirely to find in our historical tradition a right to personal safety—or even a right to take actions in the interests of personal safety. Particularly at a time when the Court has professed fealty to textual and historical analysis and has expressed skepticism about supposedly unenumerated rights, it is striking to contemplate such easy acceptance of a "right to armed self-defense" that itself is unenumerated.

None of this is to deny that there is a right to self-defense, including armed self-defense, nor the Second Amendment right to have certain weapons on hand should that need arise. But the act of violence itself should be governed by self-defense law, which to this point, the Justices have basically ignored even as they claim it to be the "core" interest of the right to keep and bear arms.

As we were preparing for oral argument in *Heller* and wondering how to answer the argument that a militia-based reading would render the Second Amendment a nullity, Walter tossed off a line that I wish had made it into argument: "Constitutional interpretation is not a jobs act for out-of-work amendments." The Second Amendment need not and should not do self-defense law's work. One hopes that *Rahimi* will deliver a course correction. If only Walter were still here to lawyer a way out of the mess.

143. *See supra* notes 78–82 and accompanying text.