

# ARTICLES

## THE RIGHT NOT TO KEEP OR BEAR ARMS

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*Sometimes a constitutional right to do a particular thing is accompanied by a right not to do that thing. The First Amendment, for example, guarantees both the right to speak and the right not to speak. This Article asks whether the Second Amendment should likewise be read to encompass both the right to keep or bear arms for self-defense and the inverse right to protect oneself by avoiding arms, and what practical implications, if any, the latter right would have. The Article concludes—albeit with some important qualifications—that a right not to keep or bear arms is implied by what the Supreme Court has called the “core” and “central component” of the Second Amendment: self-defense, especially in the home. Recognizing such a right might call into question the constitutionality of the growing number of “anti-gun control” laws that make it difficult or illegal for private individuals to avoid having guns in their actual or constructive possession.*

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## INTRODUCTION

In *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms for purposes of self-defense.<sup>2</sup> In doing so, the Court rejected the idea that the amendment’s function is to protect the state militias from disarmament by the federal government, finding instead that the original public understanding of the Second Amendment gives individuals the right to keep and bear arms disconnected from military service, and that it “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>3</sup> The Court went on to conclude that “keeping” a gun means having it in one’s constructive possession—in the home, for example—and that “bearing” a gun means carrying it on one’s person.<sup>4</sup> These actions are constitutionally protected because they advance the “central component” or “core lawful purpose” of the Second Amendment: freedom of self-defense,<sup>5</sup> particularly in the home.<sup>6</sup>

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

2. *Id.* at 598-600; see also Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1523 (2010) (concluding that *Heller* “constitutionalizes self-defense”); 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, 1285 (2009) (“*Heller* established that citizens have a constitutional right to possess guns that are in common use for ordinary purposes like self-defense.”); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 351 (2009) (“Finally, at the heart of *Heller* is the purpose of self-defense against criminal violence, which Justice Antonin Scalia’s opinion for the Court ringingly endorses as ‘the core lawful purpose’ served by the Second Amendment right to arms.” (footnote omitted)); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1413 (2009) (“The majority . . . read the Second Amendment to preserve the militia by codifying the common law right of self-defense, and declared that the Amendment ‘elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”).

3. *Heller*, 554 U.S. at 635.

4. See *infra* Part I.B.

5. *Heller*, 554 U.S. at 599, 630 (emphasis omitted); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.” (footnote omitted)); *infra* Part I.B.

For the purposes of this Article I take the individual self-defense rationale as a given. Elsewhere I have questioned its coherence as stated in *Heller*. See Joseph Blocher, *Categoricism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 426-29 (2009).

6. The majority noted that “the need for defense of self, family, and property is most acute” in one’s home, and emphasized “the right of law-abiding, responsible citizens to use

But what if a person believes that the best way to defend himself against violence in his home is to keep guns out of it? After all, despite the undoubted importance of the right to self-defense and the political popularity of the Supreme Court's "individual rights" reading of the Second Amendment,<sup>7</sup> a majority of Americans choose not to keep guns in their homes.<sup>8</sup> Many if not most make that decision for personal safety reasons,<sup>9</sup> and even among gun owners, only a minority say that their primary motivation for having a gun is self-protection against crime.<sup>10</sup> Empirical data regarding self-defense and gun ownership are notoriously contested,<sup>11</sup> and often unpersuasive,<sup>12</sup> so it may be im-

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arms in defense of hearth and home." *Heller*, 554 U.S. at 628, 635; see also Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1282 (2009) (arguing that *Heller*, read alongside other doctrinal sources, establishes that "[t]he individual right to keep and bear arms should extend no further than the front porch").

7. Nearly three in four Americans believe that the Second Amendment protects an "individual" (i.e., non-militia-related) right to bear arms. See Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns: Nearly Three in Four Say Second Amendment Guarantees This Right*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx>.

8. Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1045 (2009) ("[A]bout 75 percent of all adults do not own any guns.").

9. PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 3 (Nat'l Inst. of Justice, Research in Brief, NCJ 165476, 1997), available at <http://www.ncjrs.gov/pdffiles/165476.pdf> ("In 1994, about two-thirds of gunless adults were actively opposed to having guns in their homes because they viewed guns as dangerous, 'immoral,' or otherwise objectionable.").

10. Cook et al., *supra* note 8, at 1047 ("Less than 50 percent of gun owners say that their primary motivation for having a gun is self-protection against crime.").

11. Compare JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 165 (3d ed. 2010) (arguing that although "a few people do and will use permitted concealed handguns improperly, . . . the gains completely overwhelm these concerns"), and Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 151-52 (1995) (concluding that victims who resist with a gun or other weapon are less likely to lose their property in robberies and burglaries and less likely to be injured compared to those that do not resist or resist without a weapon), with Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003) ("While we do not want to overstate the strength of the conclusions that can be drawn from the extremely variable results emerging from the statistical analysis, if anything, there is stronger evidence for the conclusion that these [shall-issue] laws increase crime than there is for the conclusion that they decrease it."), and Philip J. Cook, *The Technology of Personal Violence*, 14 CRIME & JUST. 1, 4-5 (1991) (pointing out that although guns are "surely" useful in self-defense, "[o]ne survey found that as many handgun owners reported being involved in a gun accident as reported using the gun in self-defense").

12. Arguably, this is because people simply do not care about the numbers—their views on guns are shaped by cultural frameworks rather than statistics. See MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS, at xiv (2007); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1293-94 (2003).

possible to say whether avoiding guns is, statistically speaking, the “right” safety decision. But since *Heller* entrusts that decision to the individual, the statistics should be largely irrelevant as a constitutional matter.<sup>13</sup> A person who believes her home to be safer without a gun is attempting to protect herself from a risk of future violence, just like a person who chooses to keep a handgun on her bedside table. If self-defense is the “core” of the Second Amendment, why should only one of these decisions be constitutionally protected? Shouldn’t the interests giving rise to the affirmative right also protect a person’s freedom not to exercise it?

The central idea explored in this Article is that the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all. Though such a “negative” Second Amendment self-defense right has never been recognized, nor even thoroughly discussed,<sup>14</sup> rights not to engage in constitutionally protected activities are well established in other areas of law.<sup>15</sup> This is especially but not uniquely true in First Amendment doctrine, which in turn has often been used as a guidepost for the Second Amendment.<sup>16</sup> Indeed, the freedom not to speak has famously been called a “fixed star in our constitutional constellation,”<sup>17</sup> precisely because it serves the same First Amendment values as speech itself: individual autonomy, the marketplace of ideas, and so on. As Chief Justice Burger wrote in *Wooley v. Maynard*, “[t]he right to speak and the right to refrain

13. See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”).

14. The closest analogues are the “conscientious objector” provisions found in the gun-rights guarantees of many state constitutions and in an early draft of the Second Amendment itself. These are addressed in more detail below, see *infra* Part III.B, but are not analogous to the “negative” right described here, because they apply to military service, not bearing arms in self-defense.

15. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 17 (1996) (“[T]he idea that freedoms are bilateral” means “that the freedom to do *x* entails the freedom not to do *x*.”); *id.* at 39 (“It is axiomatic in modern constitutional law that freedoms are bilateral rights.”).

As noted in the Conclusion of this Article, having a right not to engage in particular constitutionally salient activities such as speech, religious practice, or association is not the same thing as having a generalized right against coercion. Some constitutional challenges to the individual mandate provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (Supp. IV 2010), have relied on something like the latter. This Article has nothing to offer them. I attempt a broader account and explanation in Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. (forthcoming 2012).

16. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 97 (2009), <http://www.columbialawreview.org/articles/the-first-and-second-amendments> (“Analogies between the First Amendment and the Second (and comparable state constitutional protections) are over 200 years old.”); see, e.g., *Heller*, 554 U.S. at 582, 595, 635; Miller, *supra* note 6; L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

17. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>18</sup> Justice Brennan emphasized that symmetry in *Riley v. National Federation of the Blind of North Carolina*: “[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>19</sup> Following the same logic, one might say that after *Heller* the Second Amendment guarantees freedom of armed self-protection, a concept necessarily comprising the decision of both what arms to keep and what arms *not* to keep.

But what would it mean to have a right not to keep or bear arms, and what relevance would that right have in practice? Traditionally, gun regulations have limited citizens’ ability to have or carry guns. The usual Second Amendment question, therefore, has been whether such limitations are constitutional. But some legislatures are now contemplating or doing something quite different: pursuing “anti-gun control” laws that supersede private ordering by making it difficult or illegal for private parties to keep guns out of their homes, off their property, and otherwise out of their actual or constructive possession. Perhaps most radically, some have proposed or enacted laws requiring citizens to keep guns in their homes.<sup>20</sup> Many others have adopted “forced entry” or “take your gun to work” laws, which require private parties—usually businesses—to allow guns on their property.<sup>21</sup> And even concealed carry rules arguably burden the ability not to keep arms, because they make it substantially more difficult for people to monitor whether unwanted guns are being brought onto their property or into their homes.<sup>22</sup>

Parts I and II of this Article argue that the new self-defense-based reading of the Second Amendment suggests recognition of a right not to keep or bear arms; Part III explores that right’s practical significance. Part I begins by describing how the terms “keep” and “bear” were redefined through changing interpretations of the Second Amendment’s core purpose. Though those words were long understood to have a military connotation, scholars, advocates, and courts in recent decades have come to see them as referring to private, individual possession and use of guns. This new understanding, which broadly equates “keeping” a gun with “having” it in one’s possession and “bearing” a gun with “carrying” it, is intertwined with the new view of the Second Amendment as grounded in self-protection.

Part II explores the constitutional protection of rights not to engage in activities which would, if undertaken voluntarily, be constitutionally protected. Not every constitutional right carries with it such an inverse right. There is no

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18. 430 U.S. 705, 714 (1977).

19. 487 U.S. 781, 796-97 (1988).

20. See *infra* Part III.A.1.

21. See *infra* Part III.A.2.

22. See *infra* Part III.A.3.

Thirteenth Amendment right to sell oneself into slavery, for example.<sup>23</sup> But others do—people have constitutional rights to decide whether to speak,<sup>24</sup> whether to associate,<sup>25</sup> “whether to bear or beget a child,”<sup>26</sup> and whether to accept the assistance of counsel.<sup>27</sup> Such rights often exist where the underlying reasons for protecting the “affirmative” right are also furthered by the “negative” right. Thus the First Amendment protects speech and silence because they both serve core First Amendment purposes like the protection of individual autonomy and the preservation of the marketplace of ideas. By contrast, the Thirteenth Amendment’s abolitionist purpose would be hindered, not helped, if people were permitted to sell themselves into slavery.

Extending this approach to the Second Amendment context, it would seem that the decision not to have or carry arms should be constitutionally protected if it serves the amendment’s core purpose—individual self-defense, according to *Heller* and *McDonald v. City of Chicago*.<sup>28</sup> That is, if the “core” and “central component” of the Second Amendment is a right to make decisions about armed self-defense in the home, and if not possessing guns is one such decision, then forcing someone to possess a gun amounts to compelled keeping and violates the amendment’s core purpose.

Part III describes the contours and possible practical import of a right not to keep or bear arms. Subpart A explores the right not to keep, which, like the right to keep, would be roughly coextensive with a person’s property rights. Thus if voluntarily having a gun in one’s home constitutes “keeping” within the scope of the Second Amendment, then being forced to have a gun in one’s home constitutes compelled keeping. The latter implicates precisely the same constitutional interests as the former, because it limits the homeowner’s ability to make decisions about how best to protect herself using guns and thereby to prevent violence in her home. This potentially calls into question the constitutionality of laws compelling private owners or businesses to permit guns on their property. Whether such laws are actually unconstitutional is difficult to say—the answer depends among other things on the still-undefined standard of review for Second Amendment claims—but at the very least they help illustrate the potential significance of the right not to keep arms.

Subpart B briefly evaluates the right not to bear, which would protect an individual from being forced to “carry” arms. The practical scope of this right is limited, if only because the government rarely compels citizens to carry arms or burdens their ability not to. A right not to bear arms could give rise to

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23. *Bailey v. Alabama*, 219 U.S. 219 (1911) (holding that Thirteenth Amendment rights cannot be waived).

24. *See infra* Part II.A.

25. *See infra* notes 134 through 137 and accompanying text.

26. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

27. *Faretta v. California*, 422 U.S. 806 (1975).

28. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

Second Amendment arguments—albeit weak and unsuccessful ones—against compulsory military service. But just as the First Amendment’s right not to speak does not include an absolute right to refuse to salute one’s commanding officer, the right not to keep or bear arms would not give soldiers a constitutional right not to carry weapons.

The purpose of this Article is to test the strengths and weaknesses of an idea, not to advocate without qualification for the recognition of a new constitutional right. The idea itself is deeply counterintuitive, and there are serious objections to it.<sup>29</sup> It is not necessarily true that the decision not to keep guns is the equivalent of self-defense, for example, nor is it obviously correct that being denied the right to exclude guns from one’s property is the equivalent of being forced to “keep” them. The Article attempts to address those and other objections, and by doing so to cast light not only on the idea of a negative Second Amendment right, but also on the affirmative right of which it may or may not be a reflection.

The Article takes *Heller* and *McDonald* as given, and uses them as departure points for analysis rather than targets of criticism. The goal here, as in other post-*Heller* scholarship,<sup>30</sup> is to flesh out the new Second Amendment, and to determine the implications of a right whose central component and core is self-defense. The Article therefore focuses not on the question of whether *Heller* and *McDonald* were rightly decided but rather on the question of their implementation, a question the Court itself has recognized as largely unanswered.<sup>31</sup>

The discussion also seeks to highlight a simple but often underappreciated fact, one that helps explain the bitterness of the political and scholarly debate over the Second Amendment: both sides are invoking self-defense and personal safety interests.<sup>32</sup> In *Heller*, the Supreme Court attempted to short-circuit the

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29. One overarching methodological point is worth addressing at the outset. The approach here is decidedly not originalist, at least inasmuch as it does not rely on historical evidence that the Framers did or would have specifically rejected laws requiring people to keep or bear arms in self-defense. (I do, of course, address the conscientious objector exemptions and the Militia Acts, see *infra* notes 201, 232-39, and accompanying text, though admittedly I find it hard to square them with *Heller* itself, let alone the self-defense framework explored here.) Those who hope to find originalist evidence as to whether particular contemporary gun control laws are constitutional may therefore be disappointed, though it should be noted that *Heller* itself did not provide any originalist evidence for the gun control measures it approved. See *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Even so, the analysis here makes every effort to stay within *Heller*’s framework and to tease out the possible logical implications of the “central component” of the right the Court found to be rooted in original understandings.

30. See, e.g., Volokh, *supra* note 16.

31. See *Heller*, 554 U.S. at 635 (“But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . . And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

32. Cf. *McDonald*, 130 S. Ct. at 3108 (Stevens, J., dissenting) (“Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of

conflict by saying that one side's policy preferences were irrelevant because the other had a constitutional right to defend itself with guns. But that did not resolve the underlying tension, and the growing number of laws that limit private gun control demonstrate with increasing clarity that if the Second Amendment is, at its core, a guarantee of self-defense interests, then it may speak to those who do not want to keep guns as well as those who do. This is *not* an argument for gun control, but rather a suggestion that if gun control laws are to be subject to constitutional scrutiny on the basis that they infringe self-defense interests, then anti-gun control laws should be as well. Arming one side of the debate with a constitutional sword means arming the other with a constitutional shield.

### I. THE MEANINGS OF "KEEP" AND "BEAR"

The Second Amendment protects a range of individual activity, and yet the verbs that define that activity—"keep" and "bear"—rarely figure prominently in legal and popular debates about the amendment's meaning. Instead, other words in the amendment—"well-regulated," "militia," "the people," and even "arms"—generally drive the discussion, with the definitions of "keep" and "bear" shifting to accommodate them. In *Heller*, for example, the Court began its textual analysis with "right of the people,"<sup>33</sup> then moved on to "arms,"<sup>34</sup> and only then to the phrases "keep arms" and "bear arms."<sup>35</sup> This relative neglect of the Second Amendment's major verbs must be remedied, for in order to understand the scope of the right protected by the amendment, one must know what actions it covers. Is a person "keeping" a gun when it is stored in a locked safe in a toolshed? Is he "bearing" it if the gun is in the glove compartment of his car?<sup>36</sup> Understanding the scope of these "affirmative" rights is also necessary for analyzing the right *not* to keep or bear. If keeping and bearing are interpreted broadly, then not-keeping and not-bearing should be as well. If the right to keep extends to guns that are not in one's immediate possession, then the right not to keep should have a similar reach.

These understandings of the Second Amendment's verbs depend on how one interprets the amendment as a whole, but it is not the purpose of this Article to revisit the debate over whether the Second Amendment is solely concerned with militias, nor even to suggest that one or the other reading of "keep

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the equation. . . . *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.").

33. 554 U.S. at 579-81.

34. *Id.* at 581-82.

35. *Id.* at 582. Those phrases do not appear in the Second Amendment, of course, but the majority concluded that the phrase "keep and bear arms" should be considered in two parts, *id.* at 591, and I will do so here.

36. *Cf.* *Muscarello v. United States*, 524 U.S. 125 (1998) (considering whether driving a car with a gun in the glove compartment constitutes "carrying" it within the meaning of 18 U.S.C. § 924(c)(1)).



and bear” is preferable. The central holding of *Heller*, of course, was that the Second Amendment protects an individual right to keep and bear arms independent of militia service.<sup>37</sup> *McDonald* affirmed that holding and made it applicable against the states.<sup>38</sup> The argument here accepts *Heller* and *McDonald* as correct and controlling, and refers to the pre-*Heller* understanding of the Second Amendment only in order to demonstrate the changes that *Heller* brought about. The goal of this Part is to frame the rest of the Article’s argument by explaining how the central debate over the purpose of the Second Amendment impacts the meanings of the words “keep” and “bear.”

For present purposes, then, the relevant point is a descriptive one: When *Heller* and *McDonald* shifted the meaning of the Second Amendment away from militias and toward personal self-defense, they also altered the class of activities that constitute keeping and bearing. Those who understand the Second Amendment as protecting a militia-related right read the phrase “keep and bear arms” to connote the military use of weapons. But under *Heller*’s “individual right” reading of the amendment,<sup>39</sup> this military understanding is simply idiomatic. According to the Court’s view, the word “keep” broadly denotes “having” a gun in one’s home or otherwise constructively possessing it, while the word “bear” refers to carrying a gun on one’s person.

The new meanings of “keep” and “bear” are important because they indicate that a new class of individual activity is now protected by the Second Amendment, and for a different reason than before. It is this shift that makes the right not to keep or bear arms both constitutionally relevant and practically important. If the purpose of the Second Amendment were protecting state militias from disarmament by the federal government, then an individual’s decision not to keep or bear arms—not to use them in a military sense, that is—would probably have little constitutional relevance, at least as far as the Second Amendment is concerned.<sup>40</sup> Refusing to bear arms would probably do nothing to further the amendment’s purpose of protecting state militias from disarmament, and might even hinder it.

But if the purpose of the Second Amendment is to protect a right to self-defense, as *Heller* and *McDonald* indicate, then the decision not to keep or bear arms may have constitutional significance for the simple reason that such a decision can be, and often is, rooted in concerns about personal safety and self-defense—values the Court has now identified as the amendment’s central component. Since the self-defense reading of the Second Amendment creates expansive new definitions for the words “keep” and “bear,” it follows that a right

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37. 554 U.S. at 598-600.

38. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

39. It has become standard practice to refer to the non-militia-based reading of the Second Amendment as the “individual rights” view.

40. One might claim conscientious objection to military arms-bearing, but that is not an argument based on the Second Amendment itself.

not to keep or bear—the mirror image of the affirmative right—might have broad practical implications as well.

### A. *The Traditional Understanding: Military Terms*

*Heller*'s apparent protestations to the contrary,<sup>41</sup> the Second Amendment was long understood by many if not most courts and scholars to protect state militias from disarmament by the federal government.<sup>42</sup> Under this militia-based interpretation, the phrase “keep and bear arms” was read as referring to the possession and use of weapons in connection with militia service.

The word “bear” does the lion's share of the work in this regard. Adherents to the militia-based reading of the Second Amendment argue that the phrase's plain meaning is military: “The term ‘bear arms’ is a familiar idiom; when used unadorned by any additional words, its meaning is ‘to serve as a soldier, do military service, fight.’”<sup>43</sup> As historian Gary Wills put it, “To bear arms is, in itself, a military term. One does not bear arms against a rabbit.”<sup>44</sup> This basic conclusion is buttressed by the fact that “bear” was and is often used in conjunction with “arms,” creating a combination of words (“bear arms”) that derives from the Latin *arma ferre*, which translates directly as bear war equipment.<sup>45</sup> Bearing arms therefore had a different meaning from, for example, bearing guns.<sup>46</sup>

Supporters of this view point to historical evidence suggesting that the Framers used “bear arms” to refer to military activity. For example, scholars

41. See 554 U.S. at 622, 625 (concluding that “nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment” and that *United States v. Miller*, 307 U.S. 174 (1939), “is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms”).

42. That the militia-based approach was indeed the accepted (even if incorrect) view is demonstrated in part by the intensity of the reactions, both positive and negative, that *Heller* provoked. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32-35. In any event, the central argument of this Article does not depend on whether the militia view ever prevailed. If one believes that *Heller* was nothing but an affirmation of long-standing and well-recognized precedent, then this Subpart may be read as simply a description of what might have been.

43. *Heller*, 554 U.S. at 646 (Stevens, J., dissenting) (citing 1 OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989)).

44. Gary Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 64; see also *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 161 (1840) (“A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms . . .”).

45. *Heller*, 554 U.S. at 646-47 (Stevens, J., dissenting); Wills, *supra* note 44, at 64.

46. See, e.g., Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 579 (2006) (“The claim that bearing a gun and bearing arms were legally synonymous in the Founding era is simply false.”).

have demonstrated that in Founding-era congressional debates the term “bear arms” was used almost exclusively to denote military activity.<sup>47</sup> Debates over the wording of the Second Amendment included discussion of whether conscientious objectors should be exempted from “bearing arms”<sup>48</sup> or permitted to employ others to bear arms in their place.<sup>49</sup> Those exceptions make little sense except in the military context.<sup>50</sup> Others have argued that the general public shared the Framers’ view of the phrase “bear arms” as having a military meaning. An amicus brief filed by a group of linguists and English professors in *Heller* concluded that, out of 115 texts published between the Declaration of Independence and the adoption of the Second Amendment, the phrase “bear arms” was used 110 times in a clearly military context, four other times in contexts that were not clearly military but which included qualifying language conveying a different meaning, and only once, unadorned, in a nonmilitary context.<sup>51</sup>

Because it is broader, the meaning of the word “keep” does not support the militia reading as directly as the word “bear.” Even so, scholars have highlighted evidence suggesting that it could be, and often was, used to refer to the maintenance of militia stores. The Articles of Confederation, for example, required that “every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accounted, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.”<sup>52</sup> In his *Heller* dissent, Justice Stevens pointed to the fact that “a number of state militia laws in effect at the time of the Second Amendment’s drafting used the term ‘keep’ to describe the requirement that militia members store their arms at their homes,

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47. See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHL.-KENT L. REV. 291, 314 (2000) (“Overwhelmingly, the term had a military connotation. . . . Searching for the phrase ‘bear arms’ in the Library of Congress’s database of congressional and other documents from the founding era produces a great many references, nearly all of them in a military context.”).

48. Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413, 432 (2008) (“Madison reasoned that while ‘[i]t was possible to oppress their sect,’ no one had ever been able ‘to make [the Quakers] bear arms,’ and so Congress would be wise to ‘make a virtue of necessity, and grant them the privilege.’” (alteration in original) (quoting *Sketch of the Debates on Part of the Militia Bill*, GEN. ADVERTISER (Phila.), Dec. 27, 1790, at 2)).

49. *Id.* at 431.

50. *Heller*, 554 U.S. at 661 (Stevens, J., dissenting) (“There is no plausible argument that the use of ‘bear arms’ in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private ‘confrontation,’ or for self-defense.” (citation omitted)).

51. Brief for Professors of Linguistics & English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. & Jeffrey P. Kaplan, Ph.D. in Support of Petitioners at 23-25, *Heller*, 554 U.S. 570 (No. 07-290), 2008 WL 157194.

52. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 4.

ready to be used for service when necessary.”<sup>53</sup> Some scholars have bolstered this view with pre-Framing evidence.<sup>54</sup>

Finally, many have argued that the phrase “keep and bear arms” is effectively unitary, which in turn reinforces a militia-based reading of the Second Amendment. As Justice Stevens put it in his *Heller* dissent:

[T]he clause protects only one right, rather than two. It does not describe a right ‘to keep . . . Arms’ and a separate right ‘to bear . . . Arms.’ Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.<sup>55</sup>

The *Heller* majority rejected this argument, however, treating “keep” and “bear” as separate verbs protecting different kinds of action. The following Subpart describes that approach.

### B. *The New Understanding: Self-Defense Terms*

In *Heller*, the Court held that the Second Amendment protects an “individual” right to bear arms disconnected from militia service. The majority found that although “self-defense had little to do with the right’s *codification*[,] it was the *central component* of the right itself.”<sup>56</sup> Two Terms later, in *McDonald*, the Court reaffirmed this reading and held that the individual right to armed self-defense is “among those fundamental rights necessary to our system of ordered liberty” and is therefore applicable against the states.<sup>57</sup>

As a textual matter, *Heller*’s reading of the Second Amendment was based primarily on the words “right of the people,” which the Court interpreted as referring to all citizens, not just the select militia.<sup>58</sup> But the majority did not ignore the phrase “keep and bear arms.” Dismissing the traditional militia-related reading of that phrase as capturing only an “idiomatic” meaning,<sup>59</sup> the majority decoupled the words “keep” and “bear”<sup>60</sup> and gave them much broader definitions. “Keep,” the majority concluded, refers to the act of “possessing” or “having” a gun, for example, in one’s home.<sup>61</sup> “Bear,” meanwhile, means to “carry”

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53. 554 U.S. at 650 (Stevens, J., dissenting) (citing, inter alia, Militia Act of 1785, ch. 1, § 3, 1785 Va. Acts 1, 2).

54. See, e.g., Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 47, [http://www.cardozolawreview.com/content/denovo/CHARLES\\_2010\\_18.pdf](http://www.cardozolawreview.com/content/denovo/CHARLES_2010_18.pdf) (arguing that in seventeenth-century England “the allowance to ‘have arms’ was a preexisting customary right to defend the realm as a militia”).

55. 554 U.S. at 651 (Stevens, J., dissenting).

56. *Id.* at 599 (majority opinion).

57. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

58. See *Heller*, 554 U.S. at 579-81.

59. *Id.* at 586.

60. *Id.* at 591 (rejecting Justice Stevens’s “unitary” reading of the phrase).

61. *Id.* at 582.

a gun on one's person.<sup>62</sup> Compared to the earlier, militia-related understandings described above, these definitions extended constitutional protection to a vast range of private activity.

### 1. *Keeping as having*

Whereas supporters of the militia-based reading of the Second Amendment have traditionally focused on the word “bear,” the *Heller* majority drew its strongest support from the word “keep,” which it found to mean “have weapons”:

Johnson defined “keep” as, most relevantly, “[t]o retain; not to lose,” and “[t]o have in custody.” Webster defined it as “[t]o hold; to retain in one's power or possession.” No party has apprised us of an idiomatic meaning of “keep Arms.” Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.”<sup>63</sup>

The majority supported this conclusion by looking to “written documents of the founding period,” which it found to show that “[k]eep arms’ was simply a common way of referring to possessing arms, for militiamen *and everyone else*.”<sup>64</sup>

The majority's reading was in line with that of scholars who argue that “keep” means to possess. Glenn Harlan Reynolds and Don Kates, for example, conclude that “the term ‘keep’ refers to owning arms that are kept in one's household.”<sup>65</sup> Robert E. Shalhope points to the *Oxford English Dictionary's* treatment of the word “keep,” the twenty-ninth definition of which is “actively to hold in possession; to retain in one's power or control; to continue to have, hold, or possess.”<sup>66</sup> And Robert H. Churchill argues that “[t]he language of ‘keeping arms’ . . . had a colloquial meaning that applied to individuals outside of the context of militia service.”<sup>67</sup>

These scholars invoke historical evidence, often beginning with the 1689 English Bill of Rights, which states in part that “the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as al-

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62. *Id.* at 584.

63. *Id.* at 582 (alterations in original) (citation omitted).

64. *Id.* at 582-83.

65. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 482 (1995) (citing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983)).

66. Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 279 (1999) (quoting 8 OXFORD ENGLISH DICTIONARY, *supra* note 43, at 372).

67. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 148 (2007). Churchill nevertheless concludes that “the framers of the amendment were concerned primarily with the constitutional organization of political violence rather than individual rights.” *Id.* at 174.

lowed by Law.”<sup>68</sup> Some argue that the “have arms” language in the English Bill of Rights is the precursor to the “keep . . . arms” language in the Second Amendment, and that Blackstone interpreted the “have arms” protection in English law as ensuring the “natural right of resistance and self-preservation”<sup>69</sup>—a right to armed self-defense.<sup>70</sup> Joyce Lee Malcolm, in her influential review of the English background of the right to keep and bear arms, concludes that the English Bill of Rights “came down squarely, and exclusively, in favour of an individual right to *have* arms for self-defence.”<sup>71</sup>

This scholarship, like *Heller*’s own reasoning, ties the broad definition of “keep” to a view of the Second Amendment as protecting a right to possess arms for self-defense. If self-defense in the home is the essence of the right, then having a gun in one’s home (or in one’s garage, attic, or outdoor shed) must count as “keeping” it.<sup>72</sup>

## 2. *Bearing as carrying*

The *Heller* majority’s definition of “bear” was straightforward: “At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”<sup>73</sup> The majority acknowledged that “bear arms” had an idiomatic military meaning,<sup>74</sup> but found that it was not limited to military service. Instead, the majority concluded that “[w]hen used with ‘arms,’ . . . the term has a meaning that refers to carrying for a particular purpose—confrontation.”<sup>75</sup> The majority suggested that “confrontation” can be equated with “offensive or defensive action.”<sup>76</sup>

68. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).

69. 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

70. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 594-95 (2008).

71. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 120 (1994) (emphasis added). *But see* Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 28, 60 (2000) (criticizing elements of Malcolm’s analysis and concluding that “there was no unrestricted English right of the individual to possess guns for the colonists to inherit”).

72. *Cf.* State v. Hamdan, 665 N.W.2d 785, 808 (Wis. 2003) (“If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.”).

73. 554 U.S. at 584 (citing, inter alia, 2 OXFORD ENGLISH DICTIONARY, *supra* note 43, at 20; THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (John Andrews ed., 6th ed. 1796)).

74. Some gun-rights scholars have concluded that “bear” refers to possession in a military setting, while “keep” refers to individual possession in the home. *See, e.g.*, Kates, *supra* note 65, at 219 (concluding that “‘bear’ did generally refer to the carrying of arms by militiamen,” while “‘keep’ was commonly used in colonial and early state statutes to describe arms possession by individuals in all contexts, not just in relation to militia service”).

75. 554 U.S. at 584.

76. *Id.*

Justice Scalia's opinion for the Court conducted a "review of founding-era sources," from which it "conclude[d] that this natural meaning was also the meaning that 'bear arms' had in the 18th century. In numerous instances, 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia."<sup>77</sup> The Court discounted the evidence, presented in amicus briefs by linguists and historians, that "bear arms" was most often used in the military context: "[T]he fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts."<sup>78</sup> In his opinion below for the D.C. Circuit Court of Appeals striking down the District of Columbia's gun regulations, Judge Silberman reached a similar conclusion, writing that "the public understanding of 'bear Arms' also encompassed the carrying of arms for private purposes such as self-defense."<sup>79</sup> Many gun-rights scholars agree, pointing to Patrick Henry's statement that "[t]he great object is that every man be armed. . . . Every one who is able may have a gun," and arguing that Henry's statement equates bearing arms with having guns, rather than with military service.<sup>80</sup>

The examples and citations could be multiplied, but already two elements of *Heller*'s rationale are apparent: first, that the core of the Second Amendment right is self-defense; and second, that the words "keep" and "bear" must be interpreted with that central purpose in mind. The former principle stands out not only through the Court's general framework of analysis, but through its explicit holding that the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>81</sup> Indeed, despite noting that "self-defense had little to do with the [arms-bearing] right's

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77. *Id.* at 584; *see also id.* at 584-85 (noting that nine state constitutional provisions written in the late eighteenth and early nineteenth centuries protected the right to "bear arms in defense of themselves and the state").

78. *Id.* at 588. Justice Stevens strongly criticized this reading of "bear arms," quoting one of Justice Scalia's own dissenting opinions: "The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily* is used." *Id.* at 649 n.11 (Stevens, J., dissenting) (quoting *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting)); *see also* Akhil Reed Amar, *Heller*, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173 (2008) ("Justice Scalia had no knock-down response to himself, for Justice Stevens scored a direct hit when he quoted the language of [Scalia's dissent in *Smith*] . . .").

79. *Parker v. District of Columbia*, 478 F.3d 370, 384 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also id.* ("[I]t would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them 'bearing arms.'). Some historians have disputed Judge Silberman's conclusion, saying that it is "demonstrably false." *See, e.g.*, Kozuskanich, *supra* note 48, at 415.

80. *See, e.g.*, Reynolds, *supra* note 65, at 466-69 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 384 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1891) (1836) [hereinafter DEBATES] (omission in original)).

81. *Heller*, 554 U.S. at 635.

*codification*,” the majority concluded that self-defense was “the *central component* of the right itself” because the Second Amendment was “widely understood to codify a pre-existing right, rather than to fashion a new one.”<sup>82</sup> That preexisting right, deriving from Blackstone’s “natural right of resistance and self-preservation,”<sup>83</sup> amounted to an “individual right to use arms for self-defense.”<sup>84</sup>

But *Heller* does not simply reaffirm the traditional right to act in self-defense when threatened. Rather, it recognizes a right to have and carry guns in case the need for such an action should arise. In other words, the activity protected by *Heller*—the possession and carrying of guns—is not itself an act of self-defense, but a means of enabling such acts. Accordingly, the “self-defense” constitutionalized in *Heller* is not simply the traditional conception of resisting an attack, but something more like a right to make self-defense-related decisions regarding guns. Because this right can be exercised even when no personal threat is imminent, it is in many ways broader than the traditional conception of self-defense.<sup>85</sup> But as with traditional acts of self-defense, the Court emphasized that the right to arm oneself against potential future threats has special salience within the home.<sup>86</sup> Of course, the precise implications of that reading remain murky. Is the Second Amendment’s self-defense right limited to guns and other “arms,” or does it constitutionalize the entire common law right to self-defense?<sup>87</sup> Are all personal safety decisions now protected by the Second Amendment?<sup>88</sup> The answer to the latter question, at least, must surely be no. Rather than reading *Heller* to stand for a broad right to make personal safety

82. *Id.* at 599, 603.

83. *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*139).

84. *Id.* at 603.

85. See Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1207 (2009) (“The majority opinion describes the right to keep and bear arms as essentially the right to have a firearm available for immediate self-defense purposes.”).

86. See Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1371 (2009) (“Justice Scalia’s opinion for the Court suggested that the right was primarily about individual self-defense, particularly in ‘the home, where the need for defense of self, family, and property is most acute.’”); see also *supra* note 6 and sources cited therein.

87. See, e.g., David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008) (“It is now beyond dispute in an American court that self-defense is an inherent right, and that it is protected by the United States Constitution.”); David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 641 (2008) (“The Court held that the Second Amendment gives individuals a right not only to get a gun but also to use it for certain purposes, especially self-defense. And if the Constitution protects the right to use a gun for self-defense, then it follows that the Constitution must also protect the underlying right to self-defense itself.”).

88. See *infra* Part III (discussing the distinction between self-defense and personal safety rationales).



decisions, this Article limits it to the decision of whether to keep or bear a gun in self-defense.

The second notable element of *Heller*'s rationale is the idea that "keep" and "bear" must be interpreted in line with this self-defense purpose. Since *Heller* and *McDonald* reinterpreted the Second Amendment as protecting a right of the people to keep and bear arms in self-defense, courts and scholars have begun the difficult task of defining which guns count as "arms,"<sup>89</sup> which people count as "the people,"<sup>90</sup> and what kinds of regulations of each are permissible.<sup>91</sup> They have often done so by referring to the self-defense values underlying the amendment. For example, the *Heller* majority held that the Second Amendment protects only the types of "arms" that are commonly used for "lawful purposes like self-defense."<sup>92</sup> Handguns, the Court found, fall within this definition because they are the "most popular weapon chosen by Americans for self-defense in the home."<sup>93</sup>

It stands to reason that courts and scholars will take a similar approach when defining "keep" and "bear." *Heller* indicates that the words should be interpreted broadly, but how much so? If a person has a pistol in her office, or locked in a safe, or stored in a toolshed, is she "keeping" it even though it is not immediately available for self-defense? If she places a gun in the glove box of her car, is she "bearing" it?<sup>94</sup> What is clear is that the words "keep" and "bear" no longer refer to the possession and use of weapons in connection with military service. Instead, they refer to broad rights of personal possession for purposes of self-defense.

Although many important questions remain to be answered, the debates described above demonstrate a changing trajectory of meaning, one that points in the direction of private self-defense uses but whose precise implications remain unclear. Those uses, in turn, are rooted in and defined by the core and central component of the Second Amendment: self-defense. Knowing that, one can be-

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89. *See, e.g.,* *United States v. Fincher*, 538 F.3d 868, 873-74 (8th Cir. 2008) (rejecting challenge to ban on possession of machine guns and sawed-off shotguns).

90. The majority gestured towards an all-expansive definition of "the people," but also denied the right to certain groups of people, including felons and the mentally ill. *See* *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008); *see also* *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (denying Second Amendment coverage to undocumented immigrants), *petition for cert. filed*, No. 11-7200 (U.S. Nov. 2, 2011); *United States v. Chester*, 628 F.3d 673, 690 (4th Cir. 2010) (finding intermediate scrutiny applicable to bans on firearm possession by those convicted of a misdemeanor crime of domestic violence); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (rejecting Second Amendment challenge to ban on possession of firearms by those convicted of a misdemeanor crime of domestic violence), *cert. denied*, 131 S. Ct. 1674 (2011).

91. *See* 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, 1475-515 (2009).

92. 554 U.S. at 624.

93. *Id.* at 629.

94. *See* *Muscarello v. United States*, 524 U.S. 125, 126 (1998).

gin to determine what kinds of actions and decisions the amendment protects from governmental interference.

## II. RIGHTS NOT TO

Sometimes, but not always, a constitutional right to do something is accompanied by a right not to do that thing. This Article refers to these rights—which guarantee both *X* and not-*X*—as “choice rights.”<sup>95</sup> The purpose of this Part is not to give a complete account of and justification for these rights, but rather to make some observations about how they might be separated from other, take-it-or-leave-it rights—those that constitutionally guarantee a right to engage in a particular activity, without a corresponding right not to do so. This initial foray suggests that choice rights arise where the constitutional values underlying the right are furthered by protecting the decision *whether* to engage in the enumerated activity, and not simply by protecting the activity itself. In other words, a right to do *X* encompasses a right not to do *X* where the principles justifying the right to do *X* also justify the right not to do *X*.<sup>96</sup>

### A. *The Right Not to Speak*

In order to provide a useful comparator for the right not to keep or bear arms, this Subpart first explores the right not to speak, the closest and most familiar cousin of the right not to keep or bear arms.<sup>97</sup> Because it permits individuals to decide *whether* to speak, the First Amendment creates what this Article calls a choice right. The existence and contours of that right are tied directly to underlying First Amendment values like individual autonomy and the marketplace of ideas. This suggests that not-*X* rights can spring from the rationales and purposes of *X* rights.

In *West Virginia State Board of Education v. Barnette*, the Supreme Court found that schoolchildren have a First Amendment right not to salute the flag or say the Pledge of Allegiance.<sup>98</sup> Justice Jackson gave a characteristically quotable justification for this right: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>99</sup> That basic idea—indeed

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95. In *Rights To and Not To*, I explore the concept of choice rights in more detail, along with their counterparts “option rights” (rights to *X*, but not not-*X*) and “protection rights” (rights to not-*X*, but not *X*). See Blocher, *supra* note 15.

96. I argue in *Rights To and Not To* that this is not the *only* way that choice rights come about. See *id.*

97. Courts and scholars have often looked to the First Amendment for guidance in evaluating the Second Amendment. See sources cited *supra* note 16.

98. 319 U.S. 624, 642 (1943).

99. *Id.*

that very passage—has been a pillar of First Amendment jurisprudence for almost seventy years,<sup>100</sup> despite the fact that the amendment’s text says nothing specifically about a right or freedom not to speak.

The other leading case in the compelled speech canon arose more than thirty years later. In *Wooley v. Maynard*,<sup>101</sup> two Jehovah’s Witnesses objected to having the New Hampshire state motto (“Live Free or Die”) emblazoned on their cars’ license plates. Prosecuted for covering the motto with tape, they argued that requiring them to display it violated their First Amendment rights by compelling them to endorse a message they did not support. The Supreme Court agreed, finding that the state law impermissibly required individuals to “use their private property as a ‘mobile billboard’ for the State’s ideological message.”<sup>102</sup>

In both *Barnette* and *Wooley*, the Court held that private parties were shielded by the First Amendment from being required to engage in activities—expressive conduct—that undoubtedly would have been constitutionally protected had they been done voluntarily. The Court has taken a similar approach in cases involving what is often called “compelled subsidization.”<sup>103</sup> In *Abood v. Detroit Board of Education*,<sup>104</sup> for example, teachers argued that they had a First Amendment right not to have their legally required union fees spent on various union activities they did not support. Such an arrangement, they claimed, violated their right to free speech by forcing them to pay for speech they did not support.<sup>105</sup> The Supreme Court agreed, holding that “in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”<sup>106</sup> Had the teachers paid dues for the union’s political activities voluntarily, they surely would have been engaged in protected speech. That the dues were required did not change the nature of the activity as speech; it simply made it compelled rather than free.

The existence of the right not to speak raises an obvious but difficult question: why protect such a right? The reasons for prohibiting compelled speech

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100. See, e.g., RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 76-77 (1992) (calling *Barnette* “among the most eloquent pronouncements ever on First Amendment freedoms”); Bruce Ackerman, *Liberating Abstraction*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 317, 320 (Geoffrey R. Stone et al. eds., 1992) (referring to *Barnette* as a “great opinion”).

101. 430 U.S. 705 (1977).

102. *Id.* at 715.

103. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005) (“We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true ‘compelled-speech’ cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and ‘compelled-subsidy’ cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity.”).

104. 431 U.S. 209 (1977).

105. *Id.* at 213.

106. *Id.* at 235.

are diverse and contested, but no more or less so than those for protecting speech itself. In fact, they mirror each other, for the simple reason that the freedom to speak and the freedom not to speak protect the same constitutional values, whether those are thought to derive from autonomy, the marketplace of ideas, or something else entirely. The reasons for banning compelled speech therefore track the reasons for protecting speech itself. First and perhaps most prominently, the right not to speak has been conceptualized as a means of protecting individual autonomy or self-realization, which in turn has long been considered a core component of the “affirmative” right to speak.<sup>107</sup> In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, Justice Souter’s opinion for the Court made this connection, concluding that compelled speech “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”<sup>108</sup> Similarly, in *Wooley*, the Court emphasized that the state’s interests did not outweigh “the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”<sup>109</sup> As in *Barnette*, the emphasis was on the individual’s right to refuse, not necessarily on how the marketplace of ideas would or would not be impacted by compelled expression.<sup>110</sup>

The individual autonomy rationale has also found favor in scholarly efforts to identify and explain the harms caused by compelled speech. Thomas Emerson, for example, wrote that “[t]he full protection extended to the right of belief in the *Barnette* case is essential to an effective system of freedom of expression. Forcing public expression of a belief is an affront to personal integrity.”<sup>111</sup> Seana Shiffrin argues that the result in *Barnette* “does not depend on any external effect,” but rather on “the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker.”<sup>112</sup> Others conclude that compelled expression “infringe[s] upon what may be called the individual’s interest in selfhood”<sup>113</sup> and that “[t]he protection against compelled expression is grounded primarily in concerns for individual liberty underlying freedom of speech.”<sup>114</sup> The examples could be multiplied,<sup>115</sup>

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107. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94 (1982) (arguing that the primary interest served by free speech is “individual self-realization,” which includes but is not limited to “liberty” and “autonomy”).

108. 515 U.S. 557, 573 (1995).

109. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

110. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

111. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 30 (1970).

112. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840 (2005).

113. David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1004 (1982).

114. Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 190 (2002).

but their import is clear—the autonomy rationale has been a dominant theme of compelled speech theory and doctrine.

Another way to conceptualize the doctrine is by considering how compelled speech harms not just the individual who is forced to speak, but the marketplace of ideas as a whole.<sup>116</sup> The marketplace, after all, has been a guiding metaphor of First Amendment jurisprudence for almost a century now,<sup>117</sup> despite heavy criticism.<sup>118</sup> The metaphor is generally traced to Justice Holmes's famous statement that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>119</sup> This suggests that speech has instrumental value because it is the best available mechanism for sorting good ideas from bad. Compelled speech threatens to distort that marketplace in a variety of ways. By forcing people to say things they do not believe, it gives prominence to ideas based not on how well they are “accepted in the competition of the market”<sup>120</sup> but on whether they are favored by the relevant government officials.<sup>121</sup> That is, the basic principle of the marketplace of ideas is that people's individual, autonomous decisions will eventually sort good ideas from bad. When people are not free to make those decisions, the marketplace itself malfunctions.<sup>122</sup>

The marketplace argument against compelled speech has made occasional appearances in the Court's free speech decisions. Justice Black wrote in dissent in *Barenblatt v. United States*, “It is this right, the right to err politically, which keeps us strong as a Nation. . . . It is these interests of society, rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be

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115. See, e.g., Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 978 (2009) (“Nor can the capacity for self-realization and self-determination, both central to our notion of human autonomy, flourish if the state injects itself into our thought processes.”).

116. See, e.g., *id.* at 979 (“Compelled speech also distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own.”).

117. See William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence, . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

118. See, e.g., Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673-96 (2006); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962-63 (1997).

119. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

120. *Id.*

121. *Cf.* HAIG BOSMAJIAN, *THE FREEDOM NOT TO SPEAK* 197 (1999) (citing THOMAS JEFFERSON, *Notes on the State of Virginia*, in *BASIC WRITINGS OF THOMAS JEFFERSON* 51, 157-58 (Philip S. Foner ed., 1944)).

122. *Cf.* Wasserman, *supra* note 114, at 195 (noting the argument that “by restricting government's power to compel expression, the First Amendment prevents government from manipulating, skewing, and distorting the marketplace”).

tolerated.”<sup>123</sup> The marketplace distortion rationale takes on special weight in compelled subsidy cases like *Abood v. Detroit Board of Education*.<sup>124</sup> By requiring people to support speech with which they do not agree, compelled subsidies distort the marketplace of ideas just as surely as it would distort the real-world marketplace if businesses were required to financially subsidize their competitors.

The point of this short excursion into First Amendment theory and doctrine is simply to show that the right to avoid compelled speech has often been justified for the same reasons as the right to speak.<sup>125</sup> C. Edwin Baker, for example, argued that “respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”<sup>126</sup> He similarly concluded that “respect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use of her own body and, similarly, over her own speech.”<sup>127</sup> Martin Redish has argued that free speech should be protected in part because of individual autonomy interests,<sup>128</sup> and that compelled speech interferes with this autonomy by interfering with the capacity for critical analysis.<sup>129</sup> Similar symmetries emerge in the works of other scholars who have grappled with the problem of compelled speech.<sup>130</sup>

Because First Amendment jurisprudence and theory are relatively well-elaborated, they provide a useful illustrative example of how courts and scholars have derived negative rights from affirmative ones by looking to the rights’ underlying purposes. Free speech doctrine, in turn, has often served as a guide for Second Amendment questions. Indeed, “[a]nalogies between the First Amendment and the Second (and comparable state constitutional protections)

123. 360 U.S. 109, 144 (1959) (Black, J., dissenting).

124. 431 U.S. 209 (1977).

125. One can imagine First Amendment rationales that would not create a choice right with regard to speech. If the amendment’s purpose were simply to increase the sum total of “speech,” then compelled speech might not be a First Amendment problem (although it might still violate other constitutional provisions, like the “liberty” protected by the Fourteenth Amendment).

126. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989).

127. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 1000 (1978).

128. See Redish, *supra* note 107.

129. See Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 *NW. U. L. REV.* 1083, 1114-16 (1999).

130. Thomas Emerson, to take one more example, concluded that “freedom of expression is essential as a means of assuring individual self-fulfillment,” EMERSON, *supra* note 111, at 6, and that “[f]orcing public expression of a belief is an affront to personal integrity,” *id.* at 30.

are over 200 years old.”<sup>131</sup> In *Heller* itself, the Court invoked the analogy repeatedly and at some length.<sup>132</sup> There are undoubtedly many reasons why the comparison has proven so attractive. The amendments’ proximity in the Bill of Rights might be relevant, as is the fact that both seem to have special cachet in the American political and social imagination. Gun rights advocates in particular have long relied on free speech analogies in arguing that the Second Amendment, like the First, covers an “individual” right entitled to strong judicial protection. For this Article, the analogy 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.

But the argument here does not depend on whether the First and Second Amendments are comparable in all respects; it simply uses the First as an exemplar of how “rights not to” can be identified. This Subpart has tried to show that when the underlying constitutional values—whether derived from individual autonomy, marketplace of ideas, or some other principle—are furthered by both positive and negative invocations of the right, individuals have a constitutionally protected right to choose *whether* to speak. As the following Subpart explains, the same symmetries emerge in other areas of constitutional law, including the Second Amendment.

### B. *Other Rights Not To*

Free speech is not the only area of theory or doctrine to recognize choice rights. Religious practice provides a particularly interesting example, because the Court has held that the Free Exercise Clause, standing alone, prohibits the government from compelling individuals to engage in religious activity.<sup>133</sup> The First Amendment’s freedom of association provides another useful example, for as the Court has noted, “[f]reedom of association . . . plainly presupposes a

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131. Volokh, *supra* note 16, at 97; *see also* DAVID B. KOPEL, TRUST THE PEOPLE: THE CASE AGAINST GUN CONTROL 25 (Cato Inst., Policy Analysis No. 109, 1988) (arguing that the Second Amendment, like the First, should be read to prohibit registration requirements); sources cited *supra* note 16.

132. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”); *id.* at 582 (“Just as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

133. *See* *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (holding that the Free Exercise Clause prohibits the government from, among other things, “compel[ling] affirmation of religious beliefs”). Of course, the Establishment Clause may effectively do the same thing. *See* *Engel v. Vitale*, 370 U.S. 421, 433 (1962) (holding that compelled prayer in schools violates the Establishment Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (citing the Establishment Clause for the proposition that “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance”).

freedom not to associate.”<sup>134</sup> Were it otherwise, expressive and intimate associations could not manage their membership and would for that very reason cease to be expressive. A group with no control over its membership, after all, has little chance of effectively expressing its members’ views.<sup>135</sup> And once again, it emerges that the affirmative and negative versions of the activity—association and nonassociation—receive similar protection for the simple reason that they both advance the values of freedom of association: the ability of a group to control and express its message to the outside world,<sup>136</sup> and to control the values and ideals that it cultivates in its members.<sup>137</sup>

The association example also highlights an interesting difficulty with the very idea of “rights to” and “rights not to.” Given the intertwined relationship between association and nonassociation, perhaps there is no difference between the two. Perhaps refusal to associate is simply an exercise of the right to associate, rather than a derivative right not to. That is, if it is true that the right not to associate is necessary to a meaningful right of association, then it might make sense to collapse nonassociation back into the “affirmative” right. This is in large part an issue of semantics, and it might be a good thing to allow the merger for the sake of simplicity. One could read this Article as addressing a particular (negative) manner of arms-bearing, for example. And yet association and nonassociation are inextricably linked not because they are the same *action*—admitting and rejecting a member of a group are not the same thing, nor are speech and silence or carrying and not carrying a gun—but because they serve the same constitutional *values*.

But of course the Constitution does not protect a generalized right to “autonomy,” nor does it prohibit all government actions that limit people’s ability to do as they please or require them to do things they would rather not. More specifically, not all “rights to” have corresponding “rights not to,” even if the rights themselves can be waived. As the Court has noted, “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”<sup>138</sup> The right to a jury trial,<sup>139</sup> for example, is generally

134. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (noting that government actions that could potentially burden the freedom of association include “‘intrusion into the internal structure or affairs of an association’ like a ‘regulation that forces the group to accept members it does not desire.’” (citing *Roberts*, 468 U.S. at 623)).

135. *See, e.g., Boy Scouts*, 530 U.S. at 648 (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.”).

136. *See Roberts*, 468 U.S. at 623.

137. *See id.* at 618-19 (explaining that intimate associations are protected in part because “certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs”).

138. *Singer v. United States*, 380 U.S. 24, 34-35 (1965) (upholding federal rule of criminal procedure requiring government consent in order for criminal defendant to waive right to a jury trial).



waivable. But that does not mean that a person has a right to proceed without a jury.<sup>140</sup> Similarly, the right to a speedy trial does not protect a generalized freedom to determine the speed of one's trial,<sup>141</sup> nor does the right to a public trial "guarantee the right to compel a private trial."<sup>142</sup>

Most courts and scholars have given no sustained attention to the relationship between rights to and rights not to as a general matter, focusing instead on specific rights like speech and association. The notable exception is John Garvey, who has argued forcefully and at length that rights should usually be conceptualized as "one-way streets" rather than as "two-way streets":

Suppose that it is good to do *x*. That does not mean that it is good not to do *x*. If freedom follows the good, we should be free to do *x*. But that does not mean that we should be free not to do *x*. The goodness of religion (or childbearing) does not entail the goodness of atheism (or abortion).<sup>143</sup>

It follows, Garvey argues, that rights should generally be understood to operate in only one direction—the direction of "the good." But Garvey himself notes that this argument goes against the grain of current constitutional thinking, which tends to see rights as bilateral.<sup>144</sup>

Perhaps more importantly, even Garvey's skeptical approach to two-way rights turns on whether the values or purposes underlying the right suggest the existence of a right not to.<sup>145</sup> Under this approach, whether the right to keep and bear arms encompasses a right not to keep and bear arms depends on what values, purposes, "core,"<sup>146</sup> or "central component"<sup>147</sup> one attributes to the right. This is why the free speech right includes a right not to speak, as Part II.A explains, but the right to a speedy trial does not include a right to a slow one. The key question, then, is whether and how the purpose of the Second Amendment implies a negative right. The next Part addresses that question in detail.

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139. U.S. CONST. amend. VI.

140. *Singer*, 380 U.S. at 34-35.

141. *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979) ("[A] defendant cannot convert his right to a speedy trial into a right to compel an indefinite postponement . . .").

142. *Id.* at 382.

143. GARVEY, *supra* note 15, at 40.

144. *See id.* at 39.

145. *See id.* at 18 ("[F]reedoms are not necessarily bilateral. Whether they are or not depends on the principles they revolve around.").

146. *District of Columbia v. Heller*, 554 U.S. 570, 630, 634 (2008).

147. *Id.* at 599 (emphasis omitted).

## III. THE RIGHT NOT TO KEEP OR BEAR ARMS

As Part I explained, *Heller* holds that the central component and core of the Second Amendment right is self-defense,<sup>148</sup> suggests that the right is especially strong in the home, and interprets the words “keep” and “bear” with an aim toward enabling self-defense.<sup>149</sup> Part II then set up a question: is that core value—like the First Amendment values discussed above—furthered by the recognition of a right not to keep or bear arms? This final Part attempts to provide an answer. It first sketches the outlines of a right not to keep or bear arms and considers a few of the strongest arguments against it. Parts III.A and III.B consider in more detail the rights not to keep and not to bear, along with some examples of current laws for which they might be relevant. Part III.C takes a broad view of the competing interests at stake.

A person who keeps a gun in her home for self-defense does so in order to enable self-protection against certain kinds of threats to personal safety: criminals, for example. She has presumably concluded that her home is safer with a gun than without one. But many people who refuse to keep guns have come to the opposite conclusion based on their assessment of other possible threats to personal safety such as misuse, accidental or otherwise, of the gun. Insofar as both of these are covered by the broad concept of “self-defense” employed in *Heller*—a contestable proposition, to be sure—both seem to fall within the core of the Second Amendment. And if self-defense is the “central component” of the Second Amendment right, it seems odd that self-defense decisions should only be constitutionally protected when they are effectuated with a gun, rather than threatened by one. In either case, the goal of the person making the decision is to limit a risk of future harm. Indeed, even the affirmative Second Amendment right does not directly involve acts of self-defense, but rather the freedom to have certain means available to protect oneself against certain kinds of harm. Laws that compel people to have guns in their homes simply interfere with that decision in a different direction.

This sketch of the right not to keep or bear arms is subject to a wide range of criticisms. The most serious objection is that the decision not to possess guns, while perhaps a safety decision, is not an exercise of the right to self-defense. Traditionally, self-defense generally refers to the use of force in response to an immediate threat to personal safety,<sup>150</sup> and avoiding the remote possibility of a gun’s misuse is not the same kind of “self-defense” as brandishing a weapon against an intruder. This is a strong and deceptively complex objection, but not necessarily a fatal one.

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148. *Id.* at 599, 630; *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 599).

149. *See supra* note 6 and sources cited therein.

150. *See, e.g.*, 6 AM. JUR. 2D *Assault and Battery* § 50 (West 2011) (“As a general rule, only a present or imminent danger justifies resort to self defense.” (footnote omitted)).

It is true that declining to possess a gun is not a traditional act of self-defense, unless perhaps it is done under the apprehension of immediate harm—if a person were to refuse to brandish a gun while visiting the White House, for example, on the grounds that doing so might provoke the Secret Service to shoot him. Rather, the decision not to keep a gun is a kind of preventative act, one intended to lessen the risk of future harm. But in this respect, it is not so different from gun ownership itself, which falls within *Heller*'s “core” even though it is not in and of itself an ongoing act of self-defense. In either case, a person has made a decision to protect himself against the possibility of future harm, whether it be crime or misuse of a gun. The gun owner has determined that his chances of safety are maximized if he keeps a gun. His neighbor without a gun has made a different calculation.

And yet it is possible that having a gun in order to defend oneself against burglars should count as self-defense, while the prevention of other forms of violence by not keeping or having a gun should not. That is, one must ask whether the core purpose of the Second Amendment protects efforts to avoid violence by keeping a gun, but does not protect efforts to avoid other forms of (perhaps accidental) violence through *not* having a gun. The answer is not obvious. On the one hand, it cannot be the case that the Second Amendment includes a generalized right to “personal safety,” which individuals can invoke against any government action that makes them feel unsafe. On the other hand, subjecting another person to a risk of future violence or other harm—brandishing a weapon at him or planting potential explosives in his home, for example—can give rise to tort or criminal liability.<sup>151</sup> Why, then, should efforts to *avoid* such risks and harms not count as self-defense?

Second Amendment self-defense is not coextensive with “self-defense” as that term is used in other areas of law. Its “core” includes actions—keeping a gun, for example—that are not themselves acts of self-defense and might never even lead to acts of self-defense. Similarly, the Second Amendment has been read to extend protection against threats that fall outside the traditional conception of self-defense. Many scholars believe that Second Amendment self-defense should include self-defense against not only criminals, but the government itself,<sup>152</sup> and perhaps even nonhuman threats. At oral argument in *Heller*, Justice Kennedy referred to “the concern of the remote settler to defend himself

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151. *See id.* § 21 (“The crime of reckless endangerment is committed when a defendant commits an act that places another in imminent danger of death or serious bodily injury . . . .”); *id.* § 39 (“If pointing a firearm places the victim in reasonable apprehension of receiving bodily injury, the crime of aggravated assault has been committed, regardless of whether the gun was loaded.”).

152. *See Williams, supra* note 87, at 641 (“It is . . . crystal clear that the Amendment was meant to protect the right to keep and bear arms to resist tyranny—as the *Heller* Court itself concedes.”).

and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.”<sup>153</sup>

Since the concept of self-defense lying at the heart of the Second Amendment encompasses decisions about whether arms-bearing will be useful in responding to threats that are neither present nor imminent, it seems plausible that the concept would also cover those risks arising from gun ownership itself. The exact scope of these risks is debatable, but not negligible. Some studies show that “[a] gun in the home is more likely to be used in a homicide, suicide, or unintentional shooting than to be used in self-defense.”<sup>154</sup> Others have found that “about eight hundred people per year die from unintentional gunshot injuries.”<sup>155</sup> According to a 1991 General Accounting Office study, “[f]irearms are the fourth leading cause of accidental deaths among children 5 to 14 years old and the third leading cause of accidental deaths among 15- to 24-year-olds. Across all age groups, accidental shootings are the sixth leading cause of potential years of life lost because of accidents.”<sup>156</sup> And some homeowners might believe that keeping guns will make them a target for criminals—half a million guns are stolen every year<sup>157</sup>—or increase the chances that any crime they suffer will turn violent.

The accuracy and significance of these figures are deeply disputed,<sup>158</sup> and it is not the purpose of this Article to suggest that they are correct or should be persuasive. But as far as the Constitution is concerned, whether a person believes them or not should presumably be irrelevant—“the Second Amendment

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

154. See, e.g., *Guns in the Home*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/facts/gunviolence/gunsinthehome> (click “Overview”) (last visited Jan. 14, 2012).

155. Cook et al., *supra* note 8, at 1048. The study notes that “this figure is heavily influenced by coroners’ standards concerning what constitutes an accident as opposed to a homicide or suicide.” *Id.*

156. U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-91-9, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 2 (1991), available at <http://161.203.16.4/d20t9/143619.pdf>.

In addition, suicides account for approximately half of all firearm-related deaths, although they often are not central to the gun control debate. Limiting access to guns can arguably reduce the number of impulse suicide attempts, and reduce the fatality of those suicide attempts that do occur (thus saving lives, since only ten percent of people who survive a first suicide attempt eventually die of suicide). See Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 989-91 (2008), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp0805923>.

157. Cook et al., *supra* note 8, at 1047.

158. See, e.g., GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 149 tbl.4.4 (1991) (presenting evidence suggesting that people who use guns to resist criminals are less likely to be attacked, injured, or robbed); LOTT, *supra* note 11, at 165. Lott’s conclusions have been heavily criticized. See Ayres & Donohue, *supra* note 11, at 1202. But for the purposes of this Article, it does not matter which side of the debate has the better of the evidence—I take for granted the implication of *Heller* that individuals can decide that question for themselves.

is meant to constitutionally mandate skepticism about public safety arguments,<sup>159</sup> whether in support of gun ownership or against it. This is precisely why the *Heller* majority explicitly rejected Justice Breyer's invocation of statistics regarding accidental shootings.<sup>160</sup> If the freedom to keep and bear arms protects a person's decision to discount those statistics and conclude that he is safer with a gun in the home than without one, then it stands to reason that another person should be equally free to believe the statistics and make the opposite choice. After all, only a quarter of the adult population owns guns,<sup>161</sup> and only a minority of those who do own guns say they do so for the primary purpose of self-defense.<sup>162</sup> There are therefore tens and perhaps even hundreds of millions of Americans who do *not* own guns, and according to at least one group of scholars, "about two-thirds of gunless adults were actively opposed to having guns in their homes because they viewed guns as dangerous, 'immoral,' or otherwise objectionable."<sup>163</sup> If, as *Heller* suggests, the "reliance of millions of Americans" on the individual rights reading of the Second Amendment is relevant to the amendment's interpretation,<sup>164</sup> then it stands to reason that the reliance of millions more Americans on the freedom not to keep arms should be as well.

The relationship between self-defense and personal safety in the context of the Second Amendment is therefore extremely complicated. If the former is defined at too high a level of generality, then it could encompass all decisions regarding personal safety or well-being. The argument here attempts to avoid that problem by focusing, as the Second Amendment does, on safety decisions regarding "arms," and by tying the right not to bear arms to the same reasons that underlie the affirmative right. That mitigates the problem, but admittedly does not address it fully. Rights, after all, are not necessarily coextensive with their background justifications. *Heller* itself found that although "self-defense had little to do with the right's *codification*[,] it was the *central component* of the right itself."<sup>165</sup> Defining precisely which activities are tied to the background justification is no easy task, and it is surely not fully accomplished here. But that is a difficulty common to many constitutional rights. Courts and scholars

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159. Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 147 (2008).

160. See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

161. Cook et al., *supra* note 8, at 1045 ("[A]bout 75 percent of all adults do not own any guns.").

162. *Id.* at 1047. The most popular reason for gun ownership is recreation. COOK & LUDWIG, *supra* note 9, at 2-3. That purpose fits somewhat awkwardly with the Second Amendment right recognized in *Heller*.

163. COOK & LUDWIG, *supra* note 9, at 3.

164. 554 U.S. at 624 n.24.

165. *Id.* at 599.

often confront the question of what counts as speech, for example, and they continue to explore the ramifications of *Heller*'s self-defense rationale for affirmative Second Amendment rights.<sup>166</sup>

A second objection would reject the very notion of a Second Amendment autonomy right by saying that even if a right to *X* includes a right to not-*X* where the principles justifying the former also justify the latter, the Second Amendment's own principles do no such thing. One might argue that the purpose of the Second Amendment is to ensure military readiness, or to deter tyranny and crime through the maintenance of an armed citizenry. All of these readings would suggest that the Second Amendment right—like that to a jury trial—serves a public interest as well as a private one,<sup>167</sup> and therefore that its value goes beyond its utility for individuals. If that is so, then it might follow that the amendment does not include a negative right (and perhaps should not even be waivable).

But this objection is hard to square with *Heller* and *McDonald*. As explained at length in Part I, the Court identified personal self-defense as the core and central component of the Second Amendment,<sup>168</sup> and defined the terms of the amendment in accordance with that interpretation. It seems to follow that whatever value arms-bearing has for public purposes like militia service must be subordinate to that self-defense purpose. And it is hard to imagine how self-defense, particularly in the home, serves public values that would override individual decisionmaking, particularly in light of the Court's apparent rejection of public safety rationales in *Heller*.<sup>169</sup> If public safety is not a sufficient basis for limiting the affirmative right, then neither should it be a basis for rejecting the negative right. In short, whatever the plausibility of a public value interpretation of personal self-defense, it does not seem consistent with *Heller* itself. The objection does highlight, however, the dependence of the negative right on the purpose of its affirmative cousin. If the militia-based reading of the Second Amendment had prevailed, no negative right would be apparent, because the refusal to keep or bear arms hinders, rather than helps, the purpose of protecting the militia from disarmament.

A third objection might take a textualist approach, arguing that the Second Amendment's phrasing creates a one-way right: after all, "the First Amendment

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166. See, e.g., Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009).

167. Cf. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387 (1984).

168. *Heller*, 554 U.S. at 599, 630; see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 599).

169. See, e.g., 554 U.S. at 634 ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."); Blocher, *supra* note 5, at 404-11 (describing the *Heller* majority's seeming rejection of interest-balancing approach).

guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say,<sup>170</sup> while the Second Amendment refers only to “the right *to* keep and bear arms.” It arguably follows that a person can defend himself with a gun and gain the Second Amendment’s protection, or else defend himself by some other means (by not having a gun, for example) and forfeit that constitutional protection.

This textualist argument has some appeal, but it does not square particularly well with existing constitutional doctrine, which does not determine the existence of rights to and not to based solely or even primarily on the text alone. The Free Exercise Clause, for example, provides that “Congress shall make no law . . . prohibiting the free exercise” of religion.<sup>171</sup> That phrasing, like the Second Amendment’s, seems to point in only one direction—that of exercise.<sup>172</sup> And yet the Court has held that the Free Exercise Clause prohibits compelled religious activity.<sup>173</sup> Without more, it seems difficult to draw a bright line between enumerated “freedoms” and “rights.”

#### A. *The Right Not to “Keep” Arms*

Even if one accepts that the Second Amendment theoretically protects a right not to keep arms, it remains to be shown what scope that right should have in practice. Because of the symmetry of the constitutional interests involved in keeping and not keeping, it makes sense that the right not to keep should, *prima facie*, extend as far as the right to keep. Thus if a particular act of “keeping” is constitutionally protected when done voluntarily, it should be constitutionally suspect when it is compelled. Having a gun on one’s bedside table, for example, would be a constitutionally protected act of “keeping” when done voluntarily, and a constitutionally prohibited violation of the right not to keep when it is compelled.

To put it more precisely, the Second Amendment right not to keep guns should be coextensive with one’s property-based right to exclude them. Indeed, it is that very property right that is limited or taken away by the anti-gun control laws described in the following Subparts. Were it not for those laws, private parties would be free to reach their own arrangements regarding the keeping or bearing of arms. The right to keep guns or not would encompass a zone of autonomy in which individuals are free to make either decision, for both involve the same self-defense interests. The Second Amendment would be impli-

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170. *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988).

171. U.S. CONST. amend. I.

172. *See* GARVEY, *supra* note 15, at 42-44.

173. *See* *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (holding that the Free Exercise Clause protects the right to engage in religious activity and also prohibits the government from “compel[ling] affirmation of religious belief[s]”).

cated only when the government forbids people from keeping or bearing arms or forces them to do so.

Perhaps a hypothetical will be illustrative.<sup>174</sup> A handgun is lying on an end table in Jon's living room. Does its presence represent an exercise of Second Amendment rights? If Jon owns the gun and placed it there so that it would be easily accessible in case of a home invasion, then it is covered by the *Heller*-recognized right to armed self-defense in the home. This is true whether or not the gun is in Jon's immediate vicinity at any given time. If he leaves the gun on the end table while he goes to the kitchen to make dinner, he is still "keeping" it as far as the Second Amendment is concerned.

Now alter the scenario. The gun on the end table belongs to Jon's friend Brad, who carries it for self-defense and left it on Jon's living room table while the two are eating dinner in Jon's kitchen. In this scenario, Jon believes that guns are dangerous, and that having them in his home imperils his personal safety. Holding aside for the moment Jon's property-based right to exclude Brad and his gun,<sup>175</sup> what self-defense rights are at work? On the one hand, Brad may argue that he is exercising his own Second Amendment rights, and that the gun is a mechanism of self-defense for him even when he is "keeping" it on Jon's end table rather than on his own person. That is, after all, the same argument that Jon made in the first scenario, and the gun in the second scenario is just as accessible to Brad as it is to Jon. But what about Jon? If having a gun on his end table counts as "keeping" when he does it voluntarily, why should it be anything else when he is forced to do so? The very things that make the gun a useful mechanism of self-defense when it is lying on the end table also make it the kind of dangerous implement that Jon wants to keep out of his home. Jon's ability to keep himself safe, in other words, is imperiled by the presence of the gun in this scenario, just as it was protected in the first one. Why shouldn't he have precisely the same self-defense rights in each scenario?

There are many ways to distinguish the former scenario from the latter, but none is very satisfying. An obvious move is to challenge the very idea of compelled keeping. One might say, for example, that the concept of keeping implies voluntariness, and that it is therefore impossible for a person to be compelled to keep a weapon. Under this approach, Jon is not keeping a gun in the second scenario for the simple reason that he has not chosen to do so. But this argument is unsatisfactory, just as it would have been unsatisfactory for the Supreme Court to have told the *Barnette* children that speaking is a voluntary act, and that they therefore need not worry about their First Amendment rights being violated by an obligatory pledge. In either situation, the essence of the

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174. Because my goal here is simply to illustrate the meanings of keeping and not-keeping, the hypothetical involves no state action. But as Parts III.A, III.B, and III.C demonstrate, some incidents of state action implicate the same issues.

175. This is, of course, the very right limited by the anti-gun control laws discussed below, which is why it must be held aside for now.



claim is that individuals have a constitutionally protected right to choose whether to engage in the action. It is not enough to define the action in such a way as to avoid that claim.

A more fundamental objection would challenge the concept of compelled constructive keeping. In criminal law, constructive possession usually requires presence of an object, knowledge of that object, and ability and intent to exercise control over it.<sup>176</sup> It is effectively “a legal fiction used by courts to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor.”<sup>177</sup> These elements are interrelated—some courts (though by no means a majority) have recognized that “proximity of the defendant to a firearm may be a basis for conviction of the ‘use’ prong so long as there is some active employment of the firearm,”<sup>178</sup> and “[w]hen a defendant has exclusive possession of the premises on which a firearm is found, knowledge, dominion, and control can be properly inferred because of the exclusive possession alone.”<sup>179</sup> Questions of constructive possession have already arisen in post-*Heller* cases, most often where a gun owner shares a home with someone who is barred from having a gun—a felon, for example. In such cases, the gun owner who is not a felon may be wary about being prosecuted for aiding and abetting a felon in possession on the theory that the felon with whom he shares a home constructively possesses the weapons inside it.<sup>180</sup> But one might nonetheless argue that the scenarios suggested here involve only the unwanted presence of a gun, not necessarily the knowledge of the homeowner who wants to exclude it, and certainly no ability to exercise control over it. Therefore, if anything, Jon has suffered a trespass, rather than compelled possession.<sup>181</sup>

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176. See *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001) (referring to drugs).

177. Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 761-62 (1972).

178. *United States v. Canady*, 126 F.3d 352, 358 (2d Cir. 1997). Some courts have suggested that proximity, accessibility, or control over the relevant area is sufficient to show constructive possession. See Kimberly J. Winbush, *What Constitutes “Constructive Possession” of Unregistered or Otherwise Prohibited Weapon Under State Law*, 88 A.L.R.5th 121, 181-84 (2001) (collecting cases).

179. *United States v. Jameson*, 478 F.3d 1204, 1209 (10th Cir. 2007).

180. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 733-34 (2009) (noting that the felon-in-possession ban “goes beyond even stripping the convict of the entire core of the right, by pressuring those who share his household to disarm themselves as well, to avoid the risk of the convict’s being prosecuted for unlawful possession based on theories of joint or constructive possession”).

181. Trespass and compelled possession are not necessarily distinct. After all, “the legal directive underlying the tort of trespass enjoins persons from interfering with a possessor’s right to exclusive possession,” John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945-46 (2010) (emphasis omitted), and some trespasses can effectively transform into lawful possession, Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1038 (2006) (“[A]dverse possession can best be understood as a doctrine of efficient trespass.”). To the degree that

Certainly, it may be counterintuitive that being denied the right to exclude guns from one's property is the equivalent of being forced to "keep" them. But that concern implicates the reach of the right, not its fundamental soundness. It seems intuitively correct, for example, that being specifically required to have a gun on one's bedside table constitutes compelled keeping, while living in the same apartment building with a gun owner does not. The issue, then, is how broadly "not keeping" and "not bearing" should be interpreted, a question tied to the Supreme Court's apparently broad reading of "keep" as "have." If the affirmative Second Amendment right extends to closets, safes, attics, and other incidents of nonimmediate possession, then it is not clear why the negative right should have a narrower reach, particularly when the right to self-defense in the home is implicated either way. After all, if a gun is accessible enough to be useful for self-defense, it is almost inevitably accessible enough to pose safety risks. The right to determine whether the benefits outweigh the risks is the freedom protected by the constitutionalized right to self-defense.<sup>182</sup>

Even so, the argument against the concept of compelled constructive keeping is a strong one. And since the intent and knowledge of the gun-opposing homeowner both seem relevant (intent and knowledge being elements of constructive possession, as noted above), it may be useful to consider them separately and in turn. The role of intent is counterintuitive, but not particularly complicated. If intent is relevant to compelled constructive possession, what should matter is an intent *not* to keep.<sup>183</sup> Although Jon has not demonstrated an intent to exercise control over Brad's gun specifically, he has demonstrated an intent (and ability, assuming he knows of the gun and is not legally prohibited from removing it) to exclude all guns from his home. Brad's gun falls within that class, and therefore Jon has essentially demonstrated his intent with regard to it as well. And even if Jon has not directly manifested an intent not to have Brad's or any other gun in his home—for example, because he does not know that a gun has been brought to his home—that does not mean that his possession, constructive or not, is intentional. Intent, after all, generally requires some element of knowledge and willfulness. At best, Jon's possession is unintentional and involuntary, just as it would be if someone slipped a pistol into his coat pocket without his knowledge.

The issue of unknowing possession requires a bit more work. Of course, it is worth noting many if not most incidents of compelled keeping are knowing.

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trespass and compelled possession shade into one another, the argument here is obviously stronger.

182. *Cf.* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3104 (2010) (Stevens, J., dissenting) ("In considering whether to keep a handgun, heads of households must ask themselves whether the desired safety benefits outweigh the risks of deliberate or accidental misuse that may result in death or serious injury, not only to residents of the home but to others as well.")

183. Otherwise, a person could only prove that he was being compelled to possess something by demonstrating an intent to possess that thing.

The mandatory possession laws described in Subpart A.1 are known, or at least easily knowable (constructively known, that is), to homeowners. And the “forced entry” parking lot laws described in Subpart A.2 are no secret; businesses know they are being forced to accept guns on their premises, even if they do not know which guns and when.

It is also easy to imagine laws or even particular cases involving parties who have been forced to keep a gun without their knowledge. But even in those cases, it seems that the constitutional interests at stake—self-defense in the home, primarily—are just as relevant, if not more so, than when the compelled possession is knowing. Consider one final variation of the scenario: Jon does not know that Brad has brought the gun into his home, perhaps because it was concealed in Brad’s coat until he placed it on the end table out of Jon’s sight. Are Jon’s self-defense interests any less implicated if he does not know about the presence of the gun? It is hard to see how. A person who believes that his home is less safe with a gun in it is not likely to be reassured if he is told that people are bringing guns into his house without his knowledge. Indeed, inasmuch as the right not to keep or bear is premised on self-defense interests, involuntary and unknowing possession may be an even more serious infringement of those interests. At least if a person knows that a gun is in his house against his wishes, he can take some precautions—sending his children outside, for example, or simply confronting the person who brought in the gun and telling him or her to remove it (assuming, of course, that laws do not forbid him from doing the latter).

In sum, constitutional self-defense interests are implicated whether compelled keeping is actual or constructive, and might actually be heightened when the possession is unknowing and involuntary. The idea of compelled keeping therefore may not be quite as counterintuitive as it seems. Stated simply: if denying people the ability to bring guns into their homes violates the right to keep them, then forcing them to permit guns into their homes violates the right not to keep them. In either case, what counts as “keeping” is defined by whether the action in question implicates self-protection. If a gun on an end table is accessible enough to be a useful weapon for self-defense, then it is also accessible enough to be used in other ways as well—accidentally, impulsively, unsafely, or for any of the other reasons that may have inspired Jon not to voluntarily “keep” his own gun. The same conclusion follows for guns stored in basements, attics, outdoor sheds, and the like. The symmetry seems inevitable.<sup>184</sup>

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184. For the sake of that symmetry, I should note that I also believe that knowledge should not necessarily be a required element of “affirmative” Second Amendment claims. The issue would almost never arise, for the simple reason that—as explained above—constructive possession convictions typically require knowledge as an essential element. But if there were such a thing as a strict liability constructive possession statute, then a person prosecuted for possessing a gun she did not know was in her home should be able to challenge the law on Second Amendment grounds.

There is at least one more potential qualification to the idea of compelled keeping, one that draws on the difference between keeping and bearing. Put simply, how can Jon be “keeping” a gun so long as Brad is actively “bearing” it? So long as it remains in Brad’s pocket, how can it ever enter Jon’s possession? This is a strong argument, but it goes to the reach of the right not to keep arms, not its existence. That is, one can recognize Jon’s right not to keep a gun and still say that the right is not violated where Brad maintains immediate control of the gun. Such qualifications would undoubtedly need to be worked out in the context of particular cases—does the scenario change when Brad puts down the gun? when he leaves it at Jon’s house?—and their resolution will depend largely on how courts define the terms “keep” and “bear.” As noted in Part I, that is a task courts and scholars have yet to undertake.

Undoubtedly, the simplest and most appealing answer to the string of hypotheticals above is simply to say that even if Jon has been forced to keep Brad’s gun, his constitutional rights have not been violated because there has been no state action.<sup>185</sup> For precisely the same reason, Jon can tell Brad to keep the gun out of his house, and Brad will be without constitutional recourse. This is worth emphasizing. Even if one accepts the existence of a right not to keep or bear arms, it does not follow that one private party can use that right to force another person not to bear arms in her presence, at least not without some background right of exclusion. The question in all cases is whether the *government* has infringed the right to avoid having or carrying guns.

But as it turns out, a growing number of laws limit and in some cases simply forbid private parties from exercising the right to exclude, and thereby impair the right not to keep arms. In communities where these laws exist, the pendulum of gun control has effectively swung away from where one might expect to find it. Rather than limiting people’s ability to have guns, these laws limit their ability not to. The government is thus not neutral with regard to gun control, allowing individuals to decide for themselves whether to have guns. Instead, it has intervened against people who seek to avoid them.

The following Subparts consider how Second Amendment doctrine might evaluate the constitutionality of those burdens in three specific circumstances: mandatory possession requirements, “take your gun to work” laws, and concealed carry rights. Together, these laws show a useful spectrum of potential infringements on the right not to keep or bear arms. Mandatory possession laws infringe the right directly. Laws requiring businesses to allow guns on their

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185. I am of course assuming that the Second Amendment, like most constitutional guarantees, has a state action requirement. I am also assuming that if a property owner were to call on the state’s authority to exclude a gun owner, doing so would not amount to state action. *But cf.* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that federal court enforcement of racially restrictive covenants constituted state action in violation of the Equal Protection Clause). To the extent that the Second Amendment has no state action requirement, the argument of this Article would be that much more relevant, for it would raise the constitutional stakes of private parties’ efforts to keep guns out of their possession.

premises do so indirectly, by stripping private businesses and their owners of the right to exclude guns and thereby forcing them to constructively “keep” or “have” weapons on their property. And concealed carry laws potentially burden (though do not directly infringe) people’s ability to avoid having arms by making it harder to know when arms are being brought onto their property in the first place.

Of course, even if these laws or others burden the Second Amendment right not to keep or bear arms, it does not necessarily follow that they are unconstitutional. After all, like the right to speak, the right not to speak has limits;<sup>186</sup> it does not give people a First Amendment right not to testify in court, for example.<sup>187</sup> And just as the affirmative right recognized in *Heller* and *McDonald* has limits,<sup>188</sup> the right not to keep and bear arms would be subject to regulations, limitations, and exceptions as well. The argument here is that laws burdening the ability to avoid gun possession could give rise to Second Amendment claims, not that those claims should necessarily succeed.

### 1. *Mandatory possession laws*

It may be useful to begin with a set of laws that directly implicate the right not to bear arms: those requiring citizens to keep arms. Such mandatory possession laws are rare, but because they create a straightforward burden on the ability not to keep arms, they present a particularly useful illustrative example. If the right not to keep arms means anything, surely it must be implicated in cases where the government directly requires citizens to keep guns and ammunition in their homes.

Mandatory gun possession is not widespread, but some communities have either proposed or passed laws embracing it. Kennesaw, Georgia, is the most famous example—it requires all citizens to keep guns and ammunition in their homes.<sup>189</sup> Similar laws have been passed in towns in Idaho, Kansas, Pennsyl-

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186. See Wasserman, *supra* note 114, at 200. Indeed, some have criticized First Amendment doctrine for failing sufficiently to protect the right not to speak. See, e.g., BOSMAJIAN, *supra* note 121, at 14.

187. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“Where First Amendment rights are asserted to bar governmental interrogation[,] resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”).

188. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (“As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, ‘[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.’” (alteration in original)); *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (“[N]othing 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.”).

189. KENNESAW, GA., CODE OF ORDINANCES § 34-21 (2011), available at [http://library.municode.com/HTML/12813/level3/PTIICOOR\\_CH34CIEM\\_ARTIIFI.html](http://library.municode.com/HTML/12813/level3/PTIICOOR_CH34CIEM_ARTIIFI.html);

vania, and Utah.<sup>190</sup> Supporters of these laws sometimes say that they are “designed to prevent gun control.”<sup>191</sup> Recently, mandatory possession laws have played a different political purpose, such as a South Dakota law that would force every household in South Dakota to arm itself—an unsubtle jab at the recent health insurance mandate.<sup>192</sup>

A supporter of mandatory possession laws might respond that such laws do not threaten self-defense or personal safety—in fact, they promote it, since widespread gun possession arguably deters crime.<sup>193</sup> On this theory, gun ownership creates positive externalities for the community. If criminals know that many people in an area are armed, they will avoid it altogether, since their chances of encountering armed self-defense are that much higher.<sup>194</sup> Holding aside the accuracy and relevance of the assumptions underlying this argument, mandatory possession laws raise constitutional difficulties for precisely the same reason as compelled subsidization in First Amendment doctrine. “The basic idea of the compelled subsidization doctrine,” after all, “is that the First Amendment prohibits the government from requiring some individuals to subsidize the First Amendment activities of others.”<sup>195</sup> If I have a right not to bear arms, why should I be forced to subsidize others’ self-defense interests at the expense of my own? If the government can infringe the right not to bear arms by deciding that the community is safer with universal gun ownership, then why can’t it infringe the right to bear arms by deciding the opposite and ab-

Anna Fifield, *Kennesaw, Where Everyone is Armed by Law*, FIN. TIMES (Sept. 24, 2010), <http://www.ft.com/cms/s/2/5c1b6a72-c5eb-11df-b53e-00144feab49a.html#axzz16d4dQ5T3>.

190. See *Kansas Community Requires Households to Have Guns*, USA TODAY (Nov. 23, 2003), [http://www.usatoday.com/news/nation/2003-11-23-kansas-guns\\_x.htm](http://www.usatoday.com/news/nation/2003-11-23-kansas-guns_x.htm); Glenn Reynolds, *A Rifle in Every Pot*, N.Y. TIMES, Jan. 16, 2007, at A21; *Town in Utah Requires Owning Guns*, ABC NEWS (Nov. 5, 1994), <http://abcnews.go.com/US/story?id=95092&page=1>; see also Joanna Mareth, *Vermont’s Right Not to Bear Arms*, AM. PROSPECT (Mar. 27, 2000), [http://www.prospect.org/cs/articles?article=vermonts\\_right\\_not\\_to\\_bear\\_arms](http://www.prospect.org/cs/articles?article=vermonts_right_not_to_bear_arms) (describing similar bill proposed in Vermont).

191. *Town Considering Repeal of Ordinance on Gun Ownership*, TIMES-UNION (Warsaw, Ind.), Mar. 1, 1994, at 7A, available at [http://news.google.com/newspapers?id=4Mk\\_AAAAIBAJ&sjid=FVgMAAAAIBAJ&pg=5663,57144&dq=mandatory+gun+ownership&hl=en](http://news.google.com/newspapers?id=4Mk_AAAAIBAJ&sjid=FVgMAAAAIBAJ&pg=5663,57144&dq=mandatory+gun+ownership&hl=en) (referring to law in Franklinton, Pennsylvania).

192. See Caitlin Dickson, *S. Dakota Proposes Mandatory Gun Ownership to Prove Point*, ATLANTIC WIRE (Feb. 1, 2011), <http://www.theatlanticwire.com/politics/2011/02/s-dakota-proposes-mandatory-gun-ownership-to-prove-point/17861>.

193. See generally LOTT, *supra* note 11.

194. For a similar argument, see Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43, 74-75 (1998), available at <http://pricetheory.uchicago.edu/levitt/Papers/LevittAyres1998.pdf> (arguing that private ownership of a “Lojack” tracking system not only protects individual cars from theft, but contributes to an overall lowering of the rate of car theft).

195. Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1089 (2005); see, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

olishing guns altogether? Either decision implicates Second Amendment rights—in the latter case, those of individuals who wish to own guns for self-defense; in the former, those of individuals who want to keep their homes safe by excluding guns.

Of course, none of this means that compelled keeping laws are per se unconstitutional, only that they raise Second Amendment problems. One might defend the laws on the ground that they are unlikely ever to be enforced. No one has ever been prosecuted for violating the Kennesaw law, for example.<sup>196</sup> So long as the laws are strictly symbolic and people are not actually threatened with punishment for failing to keep guns in their homes, one could argue that the right to defend oneself by not possessing weapons has not been infringed. The District of Columbia unsuccessfully made a similar argument in *Heller*, defending its safe storage requirement in part by arguing that it had never been enforced against a person unlocking his or her weapon for use in self-defense.<sup>197</sup> The District, joined by the U.S. Solicitor General, suggested that the law should be read—like other laws of general applicability—as having an implicit self-defense exception.<sup>198</sup> The Supreme Court, however, rejected this argument, striking down the law because it did not contain an explicit self-defense exception.<sup>199</sup> The same reasoning would seem to apply to compelled keeping laws. Following the *Heller* approach, such laws should be unconstitutional to the extent that they require people to “keep” arms against their own self-defense interests, even if the laws themselves are not enforced.

This leads to a second possible defense of the gun-keeping laws, which is that some of them—the Kennesaw law included<sup>200</sup>—contain a “conscientious objector” exception. If this exception is broad enough to exempt those who object to the law on self-defense grounds, then it may indeed head off Second Amendment objections. Of course, if the exception is read that broadly, then the law itself may be without much practical effect, since a large majority of Americans—though perhaps not a majority within the communities that pass compelled keeping laws—choose not to possess guns for self-defense. On the other hand, if the law exempts only those conscientious objectors who oppose gun ownership for religious or ethical reasons, then it is probably not broad

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196. Fifield, *supra* note 189.

197. See Brief for Petitioners at 8, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 102223.

198. See *id.* at 56; Brief for the United States as Amicus Curiae at 31 n.8, *Heller*, 554 U.S. 570 (No. 07-290), 2008 WL 157201.

199. *Heller*, 554 U.S. at 630 (2008); see also *id.* at 692 (Breyer, J., dissenting) (“I am puzzled by the majority’s unwillingness to adopt a similar approach [to that suggested by the District]. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses to accept the District’s concession that this law has one.”).

200. See Fifield, *supra* note 189. This exception seems to have been added in response to an ACLU lawsuit. See Michael Hirsley, *Kennesaw Wins First Gun-Law Shootout*, CHI. TRIB., Aug. 1, 1982, at B8.

enough to protect the constitutional self-defense rights of those whose opposition to gun ownership is grounded in safety concerns.

Finally, one might defend compelled keeping laws by appealing to historical precedent, especially the Militia Acts of 1792, which provided that “every citizen so enrolled [in the militia] and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt,” various other accoutrements, “or with a good rifle, knapsack,” and ammunition, “and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.”<sup>201</sup> If the Framers countenanced such a law, which effectively required people to keep arms, why should mandatory possession laws be unconstitutional today?

This is a strong argument, but there are a few ways to answer it. First, the Militia Acts only applied to people who were enrolled in the militia. It was more akin to a draft than to a general law requiring keeping of arms. As such, it arguably constituted a permissible regulation of the right not to keep or bear arms, rather than a refutation of its existence. As explained in more detail below, even a robust right not to keep or bear arms would not prevent compulsory military service any more than the right not to speak prohibits compelled speech in military contexts. Second, many constitutional rights are interpreted in ways that would be hard to square with the content of Founding-era legislative enactments. Modern First Amendment doctrine, for example, would of course not countenance a law banning criticism of the government, despite the fact that the Alien and Sedition Acts did exactly that in 1798.<sup>202</sup> Finally, the Militia Acts are somewhat hard to square with the holding of *Heller* itself. *Heller*, after all, concluded that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>203</sup> As their names imply, the Militia Acts focused on a different set of interests—the militias, rather than the self-defense interests that *Heller* and *McDonald* identified as the core and central component of the Second Amendment.<sup>204</sup> It would be unsatisfying, to say the least, if the government could infringe those self-defense rights in the name of an Act whose

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201. Militia Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act of 1903, ch. 196, § 25, 32 Stat. 775, 780.

202. *See* Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (“Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress’s political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.”).

203. 554 U.S. at 635.

204. *See id.* at 599, 630; *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 599).



very name invokes the Second Amendment interpretation the Court rejected in *Heller*.

## 2. *Laws forbidding the exclusion of guns from private property*

Not all infringements of the right not to keep arms are quite so direct as mandatory possession laws. A growing number of states have passed what are variously referred to as “take your gun to work,” “parking lot,” or “forced entry” laws. These forbid businesses and occasionally other private entities from banning guns on their premises, or at least require them to permit guns to be stored in cars in their parking lots. Though this imposition may not be as direct as the mandatory possession laws discussed above, it does burden the ability of private parties not to keep arms, and thereby implicates the Second Amendment rights described here.

At least eleven states have passed laws limiting businesses’ authority to exclude guns from their premises.<sup>205</sup> Most of these laws focus on parking lots,<sup>206</sup> but their language is not always so limited. As the Tenth Circuit noted in a decision rejecting a constitutional challenge to Oklahoma’s law, such laws “hold employers criminally liable for prohibiting employees from storing firearms in locked vehicles on company property.”<sup>207</sup> Oklahoma’s law, generally recognized as a pioneer, makes it illegal for any “person, property owner, tenant, employer, or business entity” to bar any person besides a convicted felon from bringing a gun onto “property set aside for any motor vehicle.”<sup>208</sup> Florida’s law, later struck down in part on unrelated grounds, prohibited an employer from “discriminat[ing]” against a worker or customer “for exercising his or her constitutional right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes.”<sup>209</sup>

Since most of these laws apply to businesses, one important threshold question is whether businesses have Second Amendment rights. *Heller* and *McDonald* did not confront this question, but it is nonetheless possible to ex-

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205. See ALASKA STAT. § 18.65.800 (2011); ARIZ. REV. STAT. ANN. § 12-781 (2011); FLA. STAT. ANN. § 790.251 (West 2011), *invalidated in part by* Fla. Retail Fed’n, Inc. v. Attorney Gen., 576 F. Supp. 2d 1301, 1303 (N.D. Fla. 2008); GA. CODE ANN. § 16-11-135 (2011); IND. CODE ANN. § 34-28-7-2 (West 2011); KAN. STAT. ANN. § 75-7c11 (2009) (repealed 2010); KY. REV. STAT. ANN. § 237.106 (West 2011); LA. REV. STAT. ANN. § 32:292.1 (2011); MINN. STAT. ANN. § 624.714 (West 2011); MISS. CODE ANN. § 45-9-55 (2011); OKLA. STAT. tit. 21, § 1289.7a (2011). Some of these laws (for example, Florida’s and Kansas’s), however, are no longer valid.

206. See generally Stefanie L. Steines, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171 (2008).

207. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1202 (10th Cir. 2009) (rejecting challenges on takings, preemption, due process, and vagueness grounds).

208. OKLA. STAT. tit. 21, § 1289.7a.

209. FLA. STAT. ANN. § 790.251(4)(e).

plore the preliminary contours of an answer.<sup>210</sup> Sole proprietorships and the like presumably do, since they are effectively indistinguishable from the individuals who own them. For other business entities, the answer is less clear. Nevertheless, if a law were to ban guns at businesses, those businesses would likely have standing to raise a Second Amendment challenge based on the self-defense interests of their employees and customers. The reverse, then, should be equally true—businesses should be able to challenge laws requiring them to permit guns on their premises if they believe that guns imperil the safety of workers and customers. As a businessman in Florida put it, “Our company has the right to make the rules. Same as in your house. You may tell people that come to visit you they are not allowed to bring a firearm in the house.”<sup>211</sup> And just like homeowners, businesses face difficult problems of gun violence on their property. One recent study found that businesses that allow firearms on their premises are about five times more likely to be the site of a homicide.<sup>212</sup> Requiring guns to be stored in a parking lot may not be enough to prevent such violence.<sup>213</sup>

But even if the right not to keep arms exists and businesses can invoke it, that does not necessarily mean that laws requiring businesses to allow the possession of arms on their property violate the right. Arguably, such laws are necessary to protect the rights of individuals who wish to exercise a right to armed self-defense, and are thus in some sense grounded in the Second Amendment’s core value of self-defense. In order to keep themselves safe, perhaps people need to carry guns to or from the offices and businesses where they work and shop—to protect themselves in a dark parking lot, or from an abusive coworker, or from having a major purchase stolen before it can be transported

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210. The Second Amendment rights of corporations are addressed in greater detail in Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011).

211. Mark Strassmann, *Take Your Gun to Work? Two States Say Yes*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2008/07/27/eveningnews/main4297999.shtml>; see also Editorial, *Competing Rights*, VALLEY MORNING STAR, Aug. 23, 2005, available at 2005 WLNR 13266506 (“[I]t’s the company’s property, so it gets to set the rules.”); *The NRA Should Hold Its Fire*, BUSINESSWEEK, Aug. 15, 2005, at 102 (“[E]mployers . . . must also have the freedom to set rules to ensure their workers’ safety while on their premises.”).

212. Dana Loomis et al., *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH 830, 830 (2005); see also BRADY CTR. TO PREVENT GUN VIOLENCE, FORCED ENTRY 1, 6-8 (2005), available at <http://dev.bradycenter.org/xshare/pdf/reports/forced-entry-report.pdf> (noting other statistics on gun-related injuries and fatalities); Steines, *supra* note 206, at 1173 (same).

213. See, e.g., Wyatt Buchanan, *Man Sought in Fatal Shooting in Parking Lot*, S.F. CHRON., Nov. 6, 2004, at B2, available at [http://articles.sfgate.com/2004-11-06/bay-area/17453418\\_1\\_parking-lot-accidental-shooting-business-parking](http://articles.sfgate.com/2004-11-06/bay-area/17453418_1_parking-lot-accidental-shooting-business-parking) (describing fatal shooting in a business parking lot after work hours); Ryan Lenz, *Worker Kills 5, Himself After Fight with Boss*, DESERET NEWS (June 26, 2008), <http://www.deseretnews.com/article/700238000/Worker-kills-5-himself-after-fight-with-boss.html> (describing case in which an employee, after a dispute with his supervisor, retrieved a .45 caliber pistol from his car and killed five other employees and himself).

home. Threats to personal safety do not end—in fact, may begin—outside the home.

For this counterargument to succeed as a constitutional matter, however, it must be the case that businesses (some of them, anyway) are bound by the Second Amendment, just as the company town in *Marsh v. Alabama* was bound by the First Amendment.<sup>214</sup> In other words, perhaps the Second Amendment, standing alone, abridges private property rights in the name of the constitutional right to armed self-defense.<sup>215</sup> Such an argument—that the Second Amendment requires businesses to permit private possession—would be based implicitly on the notion that some businesses are effectively “public self-defense forums.”<sup>216</sup> Whether or not the analogy holds up is a question for another paper, though it is worth noting that the Court has progressively moved away from *Marsh* in its First Amendment jurisprudence.<sup>217</sup> And even assuming that the analogy does hold, it would not necessarily demonstrate the constitutionality of laws requiring businesses to permit guns on their premises. Such laws would be both unnecessary (because the Second Amendment itself would guarantee such rights) and overbroad (because they would sweep in many businesses that do not meet the “public self-defense forum” standard).

The First Amendment analogy is nonetheless useful, because the Court has often grappled with situations in which the free speech interests of individuals come into conflict with those of business owners—the same kind of conflict that arises with self-defense interests in the Second Amendment context. And where the Court has found that the First Amendment interests of the business (i.e., in avoiding misattributed speech) are not sufficiently implicated as a practical matter, it has rejected compelled speech claims and upheld government

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214. See *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946); see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (holding that private property owner could not bar individuals from his shopping center on the basis of their speech).

215. Cf. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1209 (10th Cir. 2009) (rejecting a constitutional challenge to Oklahoma’s parking lot law and holding that “[a]s in *PruneYard*, Plaintiffs have not suffered an unconstitutional infringement of their property rights, but rather are required by the Amendments to recognize a state-protected right of their employees”).

216. Some gun rights advocates have implicitly embraced this notion, accusing private actors of violating the Second Amendment by forbidding guns on their property. See, e.g., Jessica Marquez, *Employers Fire Back at Law Making It a Felony to Ban Guns on Company Premises*, WORKFORCE MGMT., Jan. 30, 2006, at 34 (quoting former NRA president Marion Hammer as saying, “We have employers violating the constitutional rights of their employees”); Louise Red Corn, *NRA to Boycott Companies*, TULSA WORLD, Aug. 2, 2005, at A9 (quoting NRA chief executive Wayne LaPierre as saying, “We’re going to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights”).

217. See Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1565 (2008) (noting that the Supreme Court “has sharply constrained the reach of the constitutional theory” underlying the *Marsh* line of cases).

interventions. In *PruneYard Shopping Center v. Robins*, for example, the Court distinguished *Wooley* and rejected a shopping mall owner's claim that a California law requiring him to permit protestors into the mall violated his own First Amendment right to avoid compelled speech:

The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. . . . [A]s far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.<sup>218</sup>

The Court reached a similar conclusion in *Turner Broadcasting System, Inc. v. FCC*, which upheld the FCC's "must-carry" provisions because "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."<sup>219</sup> In *PruneYard* and *Turner*, then, the Court rejected compelled speech claims because it found that, as a practical matter, no speech had been compelled.

But although the compulsion claims failed in *PruneYard* and *Turner*, similar claims should succeed in cases involving firearms for the simple reason that the latter cases implicate a relevant constitutional interest, while the former do not. In the free speech context, misattribution is the relevant harm, and thus constitutional concerns dissipate when no misattribution exists. In the Second Amendment context, however, involuntary possession of the weapon—not misattribution of possession—is the harm, because it raises the risk of an accidental or other unwanted shooting. Whether third parties would consider an employee's possession of a gun to be an exercise of his right to self-defense or that of the company is simply not relevant to that self-defense interest. And given that, in the First Amendment context, the Court has concluded that it must also "give deference to an association's view of what would impair its expression,"<sup>220</sup> it seems plausible that, in the Second Amendment context, courts should be deferential to businesses' and other private entities' conclusions about whether guns on their property promote or detract from safety.

But of course right-not-to-associate claims do not always succeed, and it might well be that by opening themselves up to the public, businesses lose their right to exclude gun carriers. I do not hazard a guess as to whether courts will find that forcing businesses to allow guns on their premises violates the businesses' Second Amendment self-defense rights. The point is simply that if a business or other private entity determines that its premises are safest when guns are excluded, then that decision should be entitled to the same degree of

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218. *PruneYard*, 447 U.S. at 87.

219. 512 U.S. 622, 655 (1994).

220. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

deference and Second Amendment protection as the decision to permit gun possession.

### 3. *Concealed carry laws*

The final category of laws that arguably infringe the right not to keep arms does so much less directly. This category consists of laws that permit the concealed carrying of firearms. To precisely the same degree that these laws make it possible for gun owners to hide their weapons, they also make it hard for other individuals to monitor whether guns are being brought onto their property or into their homes and thereby into their constructive possession. Accordingly, concealed carry laws burden—although do not forbid—the exercise of the right not to keep arms.<sup>221</sup> This of course does not make them unconstitutional; it simply shows that concealed carry laws affect the self-defense interests not only of those who wish to carry guns, but also of those who wish to avoid keeping them.

Whereas it was once considered “cowardly” to carry concealed weapons,<sup>222</sup> today mandatory (i.e., “shall-issue”) concealed carry permits are defended as being “based on a simple principle: the right of self-defense.”<sup>223</sup> As David Kopel notes, “In the nineteenth century, concealed carry was often considered outside the scope of the right to bear arms. Today, it is the most common way in which people exercise their right to bear arms.”<sup>224</sup> It is perhaps unsurprising, then, that legislatures have responded by passing concealed carry laws. Today most states have some version of a “shall-issue” statute, which are known as such because they require officials to issue a concealed carry permit to anyone who meets basic requirements such as not having a criminal record or mental illness.<sup>225</sup>

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221. Of course, the absence of a law permitting concealed carry does not necessarily mean that people will carry their arms openly. But the argument here is not that the government must ensure that people are able keep guns out of their homes, only that laws which make it even harder to do so may raise Second Amendment problems. Many thanks to Brannon Denning for pointing this out.

222. See Cornell, *supra* note 46, at 585 (quoting articles in the *Cleveland Morning Leader* and the *Cincinnati Daily Times* from April 1859, which applauded the Ohio General Assembly for “very properly pass[ing] a law to punish the carrying of concealed weapons in this State, a most cowardly as well as murderous practice”); see also *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (stating that the right to bear arms is “calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations”).

223. Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun*, CATO INST. (Oct. 22, 1997), [http://www.cato.org/pub\\_display.php?pub\\_id=1143](http://www.cato.org/pub_display.php?pub_id=1143).

224. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126, [cardozolawreview.com/Joomla1.5/content/denovo/kopel\\_2010\\_99.pdf](http://cardozolawreview.com/Joomla1.5/content/denovo/kopel_2010_99.pdf).

225. See Steven W. Kranz, *A Survey of State Conceal and Carry Statutes*, 29 HAMLINE L. REV. 638, 649-52 (2006) (describing typical elements of shall-issue statutes).

Whether or not such laws are wise policy is far beyond the scope and irrelevant to the thesis of this Article. For present purposes, what matters is that concealed carry laws make it more difficult for private parties to keep guns out of their homes and off their property. That this is so as a practical matter is not hard to discern. If a person shows up at my door bearing arms openly, I can decide whether to welcome him as he is, slam the door, offer him ammunition, tell him that he must leave his gun in his own home, or explain that he must unload and store it safely while he is in mine. All of these are perfectly constitutional exercises of my property rights. If, however, that same person shows up with a gun concealed inside his coat, I may never know that a gun has entered my home, and thus will not be able to exercise my right to exclude it and him. That does not make it impossible for me to keep guns out of my home—I can simply ask my guests whether they are bearing guns, and either trust their answers or pat them down—but it does make it more difficult. By practically limiting people’s ability to keep guns out of their homes, concealed carry laws thereby burden their right to do so.

Of course, this in and of itself is not enough to demonstrate that concealed carry laws are unconstitutional. First, it could be argued that concealed carry licenses are not even a true form of state action favoring gun owners. If such laws did not exist, then concealed carry would presumably be permissible by default. And yet this seems to go too far, since concealed carry licenses do have the effect of immunizing concealed carrying individuals from criminal or civil liability. In that sense, they constitute state action just like any other licensing system.<sup>226</sup> Moreover, the government’s explicit approval of concealed weapons may change social norms about when and where it is proper to carry them.<sup>227</sup> In that sense, the state action may have a direct impact on private ordering.

Second, concealed carry laws do not directly forbid homeowners from asking visitors whether they are armed or even frisking them prior to entry. The state’s allowance for concealed carry is therefore at most an incidental burden on the right not to keep or bear arms. As noted above, constitutional rights are

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226. This draws some indirect support from the fact that the Supreme Court has routinely held that licensing systems can be invalidated for impinging on constitutional rights. *See, e.g., Saia v. New York*, 334 U.S. 558, 560-61 (1948) (finding permit requirement unconstitutional because it imposed an “effective previous restraint” on liberty); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (finding license requirement amounted to censorship); *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940) (suggesting that license requirements place restraints on behavior and such restraints constitute state action).

227. *See, e.g.,* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397-98 (1997) (“[T]he law can strengthen a norm merely by ‘expressing’ it, without providing any enforcement.”); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 109-10 (1999) (explaining how expansion of intellectual property rights in law created new social norms in the scientific community).

subject to regulations,<sup>228</sup> particularly incidental ones,<sup>229</sup> and it may well be that concealed carry laws are just such a constitutionally permissible burden. Whether such laws should be upheld depends on what standard of review is applicable to the right not to bear arms. And that, in turn, will depend on what standard of review emerges for evaluating more traditional Second Amendment claims, a question left open by *Heller* and *McDonald*.<sup>230</sup> So, too, does it remain to be shown whether incidental burdens on Second Amendment rights, whether of the affirmative or negative variety, should be treated the same as direct regulations.

Perhaps the right not to keep arms is not infringed even when a gun is brought onto a person's property, so long as that gun remains in the immediate possession of (i.e., is borne by) another person. So long as an armed visitor does not put her gun down or leave it lying around the house where someone could put it to bad use, the argument would go, the danger of an accidental or unwanted shooting is low and the homeowner's safety is not at risk. But this line of reasoning is unlikely to satisfy a homeowner who is wary of gun violence. After all, accidental shootings by or of children and other family members are not the only dangers a person may be seeking to prevent by keeping guns out of his home. Maybe even more dangerous—because less controllable—are the risks presented by armed visitors, even well-intentioned ones. If the visitor has brought a loaded gun, secured only by a holster or in a coat pocket, it may create an even more imminent danger than a gun kept unloaded, locked, or stored in a safe. If a person believes that a gun is too dangerous to have in the house even when he has control over its storage, he will almost certainly be just as strongly opposed to having others bear their weapons in his home.

Perhaps instead we must take into account the constitutional interests of the person doing the concealed carrying. It might be argued that concealed carry laws are simply a necessary part of protecting individuals' right to "bear." But it would be somewhat odd if the Second Amendment were to impose such affirmative burdens on the state. The heart of our constitutional rights tradition,

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228. See *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (holding that "[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights," embody principles which have "from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case"); see also *supra* notes 186-88 and accompanying text.

229. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179, 1181 (1996) (arguing that even "incidental burdens [should] be treated as real infringements of rights" and that a "substantiality threshold ought to apply to incidental and facilitative direct burdens, but not to purposeful ones").

230. See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85 (2010) (debating "the standard of scrutiny that the Supreme Court should apply to restrictions on the Second Amendment in the wake of its recent decision, *McDonald v. City of Chicago*").

after all, is the notion that the government must refrain from involvement in certain rights-related areas, not that it must involve itself. This is particularly salient in the context of concealed carry rules, since there is a long American tradition of regulating concealed weapons.<sup>231</sup> That does not mean that government must continue to do so, only that self-defense interests are implicated whether or not it does.

Concealed carry laws illustrate how a person's ability to exclude guns from his or her home can be burdened by state actions favoring gun owners. But as this discussion has attempted to demonstrate, that does not make them unconstitutional.

### B. *The Right Not to "Bear" Arms*

If the right to bear arms means, as *Heller* found, the right to "carry" them, then the right not to bear arms means the right not to carry them. That right is more intuitively robust than the right not to keep—compelled carry rules surely strike most people as unconstitutional, at least outside of military contexts—but would have fewer, if any, practical implications.

The right not to bear arms has something of a historical lineage: the "conscientious objector" exceptions to the Second Amendment proposed during the Founding era. The Virginia and North Carolina proposals, which are representative, provided that "any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead."<sup>232</sup> States frequently wrote such protections into their own constitutions. In 1868, seventeen states "had clauses that expressly prohibited compelling people who are conscientiously (or otherwise) opposed to bearing arms from being . . . drafted into militia duty."<sup>233</sup>

These conscientious objector exceptions have typically been presented as evidence that the Second Amendment is concerned with militias, since it would have made little sense to contemplate a constitutional exemption for people who did not wish to use arms for self-defense.<sup>234</sup> Of course, *Heller* rejected that argument and concluded instead that to "bear" a gun meant to carry it for pur-

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231. See Cornell, *supra* note 46, at 584-85.

232. Amendments Proposed by the Virginia Convention (June 27, 1788), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 17, 19 (Helen E. Veit et al. eds., 1991) (Virginia proposal); 4 *DEBATES, supra* note 80, at 244 (North Carolina proposal); see also *District of Columbia v. Heller*, 554 U.S. 570, 590 n.13 (2008) (citing both proposals).

233. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *TEX. L. REV.* 7, 54 (2008).

234. See *Heller*, 554 U.S. at 661 (Stevens, J., dissenting) ("There is no plausible argument that the use of 'bear arms' in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private 'confrontation' or for self-defense." (citation omitted)).



poses of “confrontation.”<sup>235</sup> And in finding that the core of the Second Amendment was the right to self-defense, the majority pointed to evidence arguably showing that the conscientious objector exemptions were in fact focused on self-defense, since “Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever.”<sup>236</sup> This might be read to suggest that the rejection of the conscientious objector exemptions indicates that people can be forced to carry guns for self-defense purposes. That is, if the Framers understood that Quakers were “religiously scrupulous of bearing arms” even in their own self-defense, and yet rejected a provision that would have exempted them from doing so, then perhaps the people can be compelled to bear arms for self-defense purposes.

But emphasizing the self-defense purposes of the Second Amendment gives “conscientious objectors”—those who refuse to carry guns, whether in a militia or, as *Heller* suggests, in self-defense—a stronger constitutional claim when it comes to not bearing arms. At the time of the Founding, exemptions were opposed most strenuously by those who claimed that people who refused to bear arms (in the militia context, of course) were falling short in their obligations to society. Representative William Giles of Virginia, for example, opposed the exemption for Quakers on the grounds that “[p]ersonal service . . . was a debt every member owed to the protection of government, a debt which it was immoral not to pay.”<sup>237</sup> Reviewing Founding-era materials, Nathan Kozuskanich concludes that “[b]earing arms for the state was an obligation for every man who enjoyed the protections of the state.”<sup>238</sup> Refusing to bear arms in service of the state, then, meant abdicating a duty and imposing costs on others.

Those who object to the use of arms in self-defense, by contrast, do not impose the same costs on the rest of society. Of course, one could argue that by bearing arms against criminals, each gun-bearing citizen helps to deter crime by raising the expected cost of crime for would-be criminals.<sup>239</sup> But whatever the policy considerations involved, surely the positive externalities of gun ownership are not sufficiently high to justify abrogation of the right not to bear, at least not any more so than negative externalities can justify prohibitions on bearing.

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235. *Id.* at 584 (majority opinion). It is slightly unclear what purposes are excluded by this definition, though it would seem that possession of guns for hunting and target shooting have no constitutional protection, since they do not involve “confrontation.” *Cf.* COOK & LUDWIG, *supra* note 9, at 2-3 (noting that “recreation” is the most common reason for gun ownership).

236. 554 U.S. at 590.

237. Kozuskanich, *supra* note 48, at 432 (alteration and omission in original) (quoting *Sketch of the Debates on Part of the Militia Bill*, *supra* note 48, at 2).

238. *Id.* at 428.

239. *Cf.* LOTT, *supra* note 11, at 5.

In any event, even if the right not to bear arms exists and extends beyond conscientious objection to military service, it has little practical importance, for the government rarely forces citizens to carry arms.<sup>240</sup> Today, the most likely incident of forced arms-bearing is the military draft. Citizens who are conscripted into military service are obligated by state action to “bear arms” at immense cost to their own safety. If the Second Amendment protects a constitutional right to defend one’s safety by not bearing arms, can these soldiers raise constitutional arguments and thereby avoid compulsory military service?

Yes, and no. The draft undoubtedly impinges on the right to defend one’s self by avoiding arms-bearing. But it does not follow that service members can refuse to carry guns by invoking the Second Amendment, any more than they can invoke their “affirmative” Second Amendment rights by bringing their own guns to war, or refuse to salute their commanders because doing so would amount to compelled speech. The draft implicates a wide array of constitutional rights, including free speech,<sup>241</sup> involuntary servitude,<sup>242</sup> and equal protection,<sup>243</sup> but the Supreme Court has rejected constitutional challenges on these and other grounds. The same result would—and should—obtain if someone were to assert his right not to bear arms.

### C. *Mediating Conflicting Rights*

Recognizing a Second Amendment right not to keep or bear arms would not create a constitutional trump card—it would not automatically invalidate all state actions that burden one’s ability to avoid guns. It would, however, mean recognizing that laws facilitating some people’s ability to bear arms may at times conflict with the right of others not to.

This might seem more troubling than illuminating. If I have a right not to keep arms, and that right can be violated when other people carry guns in my proximity (or at least on my property), what is to prevent the Second Amendment from being paralyzed by constant self-contradiction? Will the right not to keep be in continual conflict with the right to bear? But in fact there is no reason why this would be true, at least not any more so than the First Amendment’s rights to speak and not speak have cancelled each other out. The reason,

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240. This has not always been true. See Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1184 (2010) (citing, inter alia, Militia Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271, repealed by Dick Act of 1903, ch. 196, § 25, 32 Stat. 775, 780; Statute of Winchester, 1285, 13 Edw. 1, cc. 1, 4 (Eng.); Assize of Arms, 1181, 27 Hen. 2 (Eng.)).

241. See generally Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America’s Military Personnel*, 16 WM. & MARY BILL RTS. J. 315 (2007).

242. See *Selective Draft Law Cases*, 245 U.S. 366, 373 (1918) (rejecting a Thirteenth Amendment challenge to the conscription law).

243. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding gender discrimination in draft registration).

simply stated, is that constitutional rights generally run only against the government. As a result, no one could invoke the right not to keep or bear arms against a neighbor any more than he could claim First Amendment rights against him. For the same reason, no one could assert a Second Amendment right to bear arms on other people's private property.

It could nevertheless be argued that using one person's desire to avoid keeping arms as a justification for limiting another person's ability to bear them amounts to nothing more than the Second Amendment equivalent of a "heckler's veto." In First Amendment doctrine, after all, the government is not permitted to regulate speech based simply on the fact that the speech offends others.<sup>244</sup> If the right not to keep or bear arms prevents the government from passing concealed carry laws or requiring businesses to permit carrying arms on their premises, wouldn't that mean allowing some citizens' objections to trump others' rights? Not quite. The heckler's veto cases involve government action—the state-imposed limitation of one person's right to speak simply because others object. The argument here, by contrast, is that the government may not force objectors to engage in the constitutionally protected conduct they oppose, not that the government can use their opposition to prevent others from doing so. There is a difference between saying that the government has no constitutional authority to force people to "keep" guns in their home and saying that the government has authority to limit others' right to bear them as they please.

A third version of the argument would be that recognizing a right not to keep and bear arms would effectively nullify the right to keep and bear them, because the right to armed self-defense will be rendered ineffectual if people cannot bear their guns in public and even occasionally on private property. Without laws supporting concealed carry and requiring businesses or other establishments to permit guns on their premises, gun-rights supporters might argue, the right itself is worthless. The most obvious answer to this objection is "So what?" It would be a strange constitutional right that required the government to pass laws encouraging its effectuation, particularly at the expense of other private parties invoking the same right. The First Amendment, for example, places no obligations on the government to require one private party to help another speak. Indeed, it generally forbids as much.<sup>245</sup>

If private ordering makes it hard for individuals to do things protected from government interference—speaking, associating, keeping arms, and so on—that is generally no concern of the Constitution. And yet it does stand to reason that some private parties who have opened their property to the public or otherwise become entangled with the government might thereby lose, at least to some degree, their right not to keep or bear arms. This is, of course, the inevitable im-

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244. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

245. *See, e.g., Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

plication of those (few) cases that have extended equal protection and First Amendment rights onto nominally private property.<sup>246</sup>

Holding aside the state action exception, however, one might argue that the government has no affirmative duty to support arms-bearing or arms-keeping, but that it can do so if it so chooses. That is, the discussion here has shown only that the right to keep and bear arms may conflict with the right not to. It has not demonstrated that the latter should always trump the former. The First Amendment analogy is again relevant, since free speech doctrine must often grapple with problems involving government efforts to mediate the conflicting claims of private speakers. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, “When two people converse face to face, both should not speak at once if either is to be clearly understood.”<sup>247</sup> Similarly, the Court has recognized that “two parades cannot march on the same street simultaneously, and government may allow only one.”<sup>248</sup>

Extending the analogy to the Second Amendment context, it might be said that self-defense interests often come into conflict, and that the government must have the power to make one set of self-defense interests yield to another. In some situations or contexts, perhaps, the right to bear arms must trump the right not to keep them. If, for example, the right to armed self-defense can only be effectuated if people are able to bear guns concealed on their person, or in others’ private businesses, then courts will have to decide which invocation of the right should prevail: those of gun-bearers, or those of homeowners wishing to avoid them. The answer to this question is not obvious, but there is good reason to think that in some contexts, one person’s right not to “keep” should trump another’s right to “bear.” *Heller* itself provides strong support for this conclusion, by focusing on the importance of self-defense in the home.<sup>249</sup> If the self-defense right has special scope and power within the home, then it follows that the right to keep guns out of the home should be similarly privileged, even if that means that other private parties’ ability to take guns where they please is limited as a result.

It is also worth reemphasizing that the right not to keep or bear arms would not be any more immune to regulation than its affirmative cousin, and as with any constitutional right there are many scenarios in which it might be reasonably and permissibly infringed. Not all infringements of the right not to keep or bear are equally invasive, and not all are presumptively unconstitutional. But determining which are and which are not almost inevitably requires balancing, or otherwise measuring the degree to which the right not to keep or bear has been infringed. In *Wooley*, for example, the Court concluded that “[c]ompelling

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246. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Marsh v. Alabama*, 326 U.S. 501 (1946).

247. 395 U.S. 367, 387 (1969).

248. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

249. See *supra* note 6 and sources cited therein.

the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree.”<sup>250</sup> And of course parties can be compelled to give testimony in court, which is itself a form of compelled speech.<sup>251</sup> If courts develop a Second Amendment jurisprudence that relies on interest balancing—an approach apparently rejected in *Heller*<sup>252</sup>—then they may end up weighing the interests of gun owners against those of homeowners.

All of this leaves the state in something of a bind. If it passes a “take your gun to work” law, it might infringe the Second Amendment rights of people who want to protect themselves by not having guns on their property. If it does not pass such a law, then it might limit the ability of those who do wish to bear arms to carry those arms where they believe they need them. But unattractive as the latter result may seem to some, it is not necessarily a constitutional problem. If private parties wish to ban guns in their homes, on their property, or otherwise in their “possession,” the Second Amendment provides no recourse for those people who wish to carry guns there. Nor, as I have attempted to show here, does it permit the government to intervene on their behalf. This Article, in sum, is not an argument for the desirability or constitutionality of gun control. Quite to the contrary, it is an argument against certain kinds of government intervention with individuals’ freedom to make decisions about the keeping and bearing of arms.

#### CONCLUSION

Prior to *Heller*, it would have been difficult to argue that the Second Amendment included the right to keep guns out of one’s home. Such an argument would have failed for the same reason as a claim that the amendment protected a right to keep guns in one’s home: the amendment was understood to protect state militias, not individual self-defense rights. But by recasting the Second Amendment as a guarantee of self-defense, *Heller* suggests that the right not to keep or bear arms does exist for those people—apparently a majority of Americans—who believe their homes to be safer without guns than with them. Of course, that does not mean that the right will be invoked very often, because—even including the examples explored in Part III—the government rarely forces people to keep or bear arms.

One other limitation of the Article is worth emphasizing. Though the argument here builds on analogies to other constitutional provisions, the right not to keep or bear arms is wholly internal to the Second Amendment. It draws whatever strength it has from the purposes of that amendment alone, and there-

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250. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

251. *See Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

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

fore has nothing in particular to say about other arguments against coerced activity.<sup>253</sup> Most prominent among these, of course, is the current challenge to the Patient Protection and Affordable Care Act,<sup>254</sup> which has been described not only as exceeding Congress's Commerce Clause and taxation powers, but also as an infringement of the individual right not to engage in economic activity.<sup>255</sup> The Second Amendment—and therefore this Article—speaks only to the keeping and bearing of arms.

The logic of *Heller* indicates that just as the Constitution limits the government's power to burden citizens' ability to possess arms, so too should it limit the government's power to burden their ability not to. Laws that make it difficult or impossible to keep guns out of one's possession therefore raise Second Amendment problems. This may seem counterintuitive, but analytically it is a logical, doctrinal result of the newly constitutionalized right to choose whether to defend oneself with arms.

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253. I attempt to engage with broader and more conceptual questions in *Rights To and Not To*. See Blocher, *supra* note 15.

254. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

255. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 637 (2010) (arguing that the Act so tramples on individual rights that it "would truly turn citizens into subjects").