

SYMPOSIUM ARTICLE

LETHALITY, PUBLIC CARRY, AND ADEQUATE ALTERNATIVES

JOSEPH BLOCHER* & DARRELL A.H. MILLER**

TABLE OF CONTENTS

I. INTRODUCTION	279
II. ANALYZING THE HYPOTHETICAL ORDINANCE UNDER EXISTING DOCTRINE	283
A. <i>The Historical Test</i>	284
B. <i>The Common Use Test</i>	288
C. <i>Adequate Alternatives Analysis and the Inevitability of Value Judgments</i>	291
III. WHY LETHAL FORCE? THREE POSSIBILITIES	293
A. <i>Personal Autonomy: Bearing “Arms” Includes Bearing Any Weapon a Person Wants to Possess—the Lethality of the Weapon is Incidental</i>	294
B. <i>Personal Safety: Bearing “Arms” Includes Bearing Deadly Force, Because It Is Necessary for Safety</i>	295
C. <i>Detering Tyranny: Bearing “Arms” Includes Bearing Everything That Deters Governmental Tyranny, Which Must Include Lethal Force</i>	299
IV. CONCLUSION	300

This Article explores the relationship between lethality and the right to bear arms, and considers how that relationship might be shaped by the availability of non-lethal alternative weapons. Prior scholarship has asked whether the Second Amendment includes a right to carry non-lethal “Arms.” An important set of related questions remains: does the Second Amendment necessarily include a right to arm oneself publicly with lethal force, if non-lethal alternatives are available? And how should one evaluate the adequacy of those alternatives?

I. INTRODUCTION

Imagine a city passes a weapons ordinance that forbids the public carrying of lethal weapons, but permits otherwise identical non-lethal substitutes. Specifically, the ordinance permits any law-abiding citizen to publicly bear non-lethal weapons. It also permits any law-abiding citizen to carry lethal

* Professor of Law, Duke Law School.

** Professor of Law, Duke Law School. Many thanks to the editors of the *Harvard Journal on Legislation* for organizing the 2015 Guns in America Symposium and inviting us to participate, and to Jennifer Kendrex and Lauren Sampson for research assistance.

weapons, but only to and from the place of purchase or repair, within the person's own home or private property, or in an emergency to prevent imminent injury or death. Any other carrying of a weapon specifically designed to inflict lethal injury, except by law enforcement or active duty military or militia members, is prohibited. Imagine further that the available non-lethal weapons are identical in every way to lethal weapons except that, when properly used, they are incapable of killing. Would this hypothetical ordinance violate the Second Amendment?¹ Does the Second Amendment necessarily include a right to arm oneself publicly with lethal force, if non-lethal alternatives are available?²

The answer must begin with *District of Columbia v. Heller*, in which the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms independent of militia service.³ Although the precise boundaries of *Heller* remain unclear, the case unquestionably stands for the proposition that some lethal weapons are protected in some places—handguns in the home, for example.⁴ The point of the hypothetical ordinance is not to suggest that lethal weapons are not “Arms,” nor that currently available non-lethal weapons are adequate substitutes for firearms, but rather to isolate a single variable—lethality—in order to test its constitutional salience. Clearly the Second Amendment right can expand to cover new forms of “Arms.”⁵ But does the constitutional protection for technological change create a one-way ratchet? Or can the scope of the right also contract if the

¹ This Article does not address the question of whether the hypothetical ordinance would comply with state constitutional guarantees regarding the right to keep and bear arms. Some states have recently passed constitutional amendments that would subject gun control laws to strict scrutiny. See, e.g., MO. CONST. art. I, § 23 (amended 2014); ALA. CONST. art. I, § 26, cl. a (amended 2014).

² This Article is not the first to raise this issue. Paul Robinson asked a similar question in 2009, but dealt with it in the context of common law rules governing self-defense. See generally Paul H. Robinson, *A Right to Bear Firearms But Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-Lethal Weapons*, 89 B.U. L. REV. 251 (2009). Others have acknowledged the issue, but have not pursued it in detail. See, e.g., Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 43 (2012) (“[I]f the arms are non-lethal, there may be a plausible argument that their inability to harm the community or breach the peace permits their use as a reasonable means to exercise an individual’s right to self-defense.”). See generally Andrew J. Peterman, Comment, *Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense*, 97 MARQ. L. REV. 853 (2014). Other scholarship has addressed the question of whether the Second Amendment covers non-lethal weapons. See, e.g., Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387 (2009); 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).

³ 554 U.S. 570, 598–600 (2008).

⁴ *Id.* at 635 (“[W]hatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

⁵ *Id.* at 582 (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. . . . [T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” (citations omitted)).

“Arms” people seek to bear are rendered obsolete by new alternatives that can effectuate the right with less potential harm to others?

Although the hypothetical is extreme, these are not purely academic questions. They are embedded within one of the most important Second Amendment issues currently percolating in the lower courts: whether the Amendment includes some right to carry firearms in public. Some lower courts have held that the Second Amendment does not protect the public carry of firearms;⁶ others have held that it does.⁷ Still others have assumed that the right extends outside the home but have nonetheless upheld the state’s authority to regulate.⁸ And most courts have held that the government has more leeway to regulate arms in public than in people’s homes.⁹ The Supreme Court has repeatedly declined opportunities to provide further guidance.¹⁰

That is not to say, of course, that lower courts have no doctrinal guidance at all. A two-part approach to Second Amendment questions has emerged in the lower courts. Under this approach, a court “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, [it applies] an appropriate level of scrutiny.”¹¹ The appropriate level of scrutiny, in turn, depends on “(1) ‘how close the law comes to the core of the Second Amendment right,’ and (2) ‘the severity of the law’s burden on the right.’”¹² A court confronted with the question of whether the Second Amendment includes a right to publicly carry lethal force would probably employ one of two existing tests typically used in the first part of the two-part approach, both of which trace their origins to *Heller*. The first

⁶ See, e.g., *Jennings v. McCraw*, No. 10-00141, ECF No. 82, at 9 (N.D. Tex. Jan. 19, 2012); *In re Patano*, 60 A.3d 507, 514 (N.J. Super. Ct. App. Div. 2013), cert. dismissed as improvidently granted, A-72-12, No. 072329, 2014 N.J. LEXIS 904 (N.J. May 22, 2014); *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011), rev’d sub nom. *Richards v. Prieto*, 560 F. App’x 681 (9th Cir. 2014) (unpublished), reh’g en banc granted, 782 F.3d 417 (9th Cir. 2015).

⁷ See, e.g., *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012).

⁸ See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 89, 101 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (4th Cir. 2013), cert. denied, 134 S. Ct. 422 (2013); *Drake v. Filko*, 724 F.3d 426, 430–32 (3d Cir. 2013), cert. denied, 134 S. Ct. 2134 (2014).

⁹ See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (“[W]e conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.”).

¹⁰ *Jackson v. City & Cty. of S.F.*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from the denial of certiorari); see also Lyle Denniston, *New Doubts on Second Amendment Rights*, SCOTUSBLOG (June 8, 2015, 12:24 PM), <http://www.scotusblog.com/2015/06/new-doubts-on-second-amendment-rights/> [<http://perma.cc/P6M7-UGLB>] (“[*Jackson* is] the latest in a string of such orders, declining to clarify the personal right to have a gun, first established seven years ago and extended nationwide five years ago, but not explained further in the years since.”).

¹¹ E.g., *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), cert. denied, 135 S. Ct. 187 (2014); *Ezell v. City of Chi.*, 651 F.3d 684, 701–03 (7th Cir. 2011). But see *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271–75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing for a categorical test based on text and history).

¹² *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d at 703).

test focuses on history and tradition and excludes from Second Amendment coverage those activities and arms that have long been forbidden.¹³ Concealed carry is a prominent example,¹⁴ as is bearing “dangerous and unusual” weapons.¹⁵ The second test, which seems to rely on contemporary practice, excludes arms that are not in “common use.”¹⁶

But these two tools are blunt instruments at best. Historical tests do not specify whose history to use, how far back to go, nor the level of generality at which to define the relevant tradition.¹⁷ Nor is “common use” a simple matter of empirics—one must decide what “common” entails, what kinds of “use” should be counted, and how to deal with the circularity of establishing constitutional protection based on how heavily something has been regulated in the past.¹⁸

Faced with these complications, a court considering our hypothetical ordinance might well take a third route and base its decision on the significance of the burden on the prospective arms-bearer. Such an analysis is embedded in the second part of the two-part approach to Second Amendment questions: whether a burden can be justified under the appropriate level of scrutiny.

Courts that use this test inevitably must consider the adequacy of alternative modes of conduct left open to the individual, because the significance of a burden on protected activity typically depends on what types of related activity remain available.¹⁹ Such adequate alternatives analysis is familiar in First Amendment doctrine, where it is used to evaluate time, place, and manner restrictions on speech,²⁰ and might be deployed in Second Amendment cases as well. The hypothetical ordinance described above can, in fact, be thought of as a time, place, and manner restriction on the right to keep and bear arms—it prohibits the carrying of a certain kind of weapon in public. But if it is a time, place, and manner restriction, then how should a court go about evaluating whether the stipulated alternatives are actually “adequate”?

Attempts to answer this question with the standard doctrinal tests quickly lead to further questions. Historical or longstanding along what di-

¹³ *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.”).

¹⁴ See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (“In light of our nation’s extensive practice of restricting citizens’ freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment’s protections.”).

¹⁵ *Heller*, 554 U.S. at 627.

¹⁶ See *infra* Part II.B.

¹⁷ See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 *YALE L.J.* 852, 907–15 (2013) [hereinafter Miller, *Text, History, and Tradition*].

¹⁸ See *infra* notes 59–60 and sources cited therein.

¹⁹ *Infra* Part II.C.

²⁰ See *infra* notes 73–75 and accompanying text.

mension? Common use by whom and for what purpose? Adequate with regard to what? To even ask those questions, let alone answer them, one must have some idea of what values underlie the Second Amendment. Perhaps the relevant consideration is autonomy,²¹ or personal safety,²² or the prevention of tyranny.²³ Each of these values leads to a different conclusion regarding whether, to what degree, and why public carry of lethal “Arms” is protected by the Second Amendment.

This short Article cannot fully map out these three different normative visions of the Second Amendment.²⁴ Its more limited goal is to suggest that even a seemingly straightforward question like whether the Second Amendment protects a right to publicly carry lethal force requires engagement with the norms that animate the right to keep and bear arms. Part II of the Article evaluates the issue through the lens of existing doctrine, with special focus on the historical regulation, common use, and adequate alternatives tests. Part III directly asks the underlying question of how lethality is related to the scope of the Second Amendment right. Part IV concludes.

II. ANALYZING THE HYPOTHETICAL ORDINANCE UNDER EXISTING DOCTRINE

How can one analyze the constitutionality of a law that restricts lethal weapons in public, but permits non-lethal weapons? And of what relevance is the availability of non-lethal alternatives?

In light of *Heller*, it is tempting to dismiss these questions as either easy or irrelevant. *Heller* clearly establishes that the right to private possession of some kinds of guns, in some kinds of places, is constitutionally guaranteed.²⁵ A simple syllogism emerges: the Second Amendment covers “Arms.” Some “Arms” are guns. And, since all guns are lethal, some “Arms” must be lethal. Q.E.D.

Even assuming that the premises of the syllogism are correct, it does not answer the question raised by the hypothetical statute, which is not a total ban on “Arms,” but a regulation on a particular kind of carrying: that of lethal weapons in public, in a non-emergency situation, in a world where non-lethal alternatives are assumed to be available. Not all activities involving constitutionally protected “Arms” are covered by the Second Amendment. Some, such as concealed carrying, fall entirely outside the

²¹ *Infra* Part III.A.

²² *Infra* Part III.B.

²³ *Infra* Part III.C.

²⁴ A bit more progress is made in Joseph Blocher & Darrell A.H. Miller, *What is Gun Control?: Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 82 U. CHI. L. REV. (forthcoming 2016) [hereinafter Blocher & Miller, *What is Gun Control?*].

²⁵ *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

Constitution's reach.²⁶ Others, such as public carrying, may be subject to increased government regulation precisely because of their public nature.²⁷

The threshold question regarding the hypothetical ordinance would be whether carrying lethal weapons in public places, when non-lethal alternatives are available, is the kind of activity that falls within the scope of the Second Amendment.²⁸ To answer that question, a court would probably try to employ three doctrinal tools: the historical test, the common use test, and some version of an adequate alternatives analysis. The first two tools, history and common use, are explicit in nascent Second Amendment doctrine, and tend to be applied to the first part of the two-part inquiry: that is, whether the Second Amendment applies at all. The third tool, adequate alternatives, is implicit, and would more likely be relevant to the second part of the two-part inquiry: whether a burden can be justified under the appropriate level of scrutiny.

A. *The Historical Test*

A judge confronted with the kind of statute described in the Introduction would likely first ask whether the law is “longstanding.”²⁹ Such an historical inquiry is the threshold step of what has quickly become the dominant two-part analysis employed by most courts of appeals in Second Amendment cases.³⁰ Under this approach, “longstanding” restrictions—bans on possession by felons,³¹ for example, or on concealed carrying³²—are pre-

²⁶ *Id.* at 626 (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”); see also *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).

²⁷ *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011).

²⁸ Put another way, the hypothetical law regulates both the “what” and the “where.” 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, 1515 (2009) [hereinafter Volokh, *Framework*].

²⁹ It is possible that the historical test and the test for “longstanding” regulations ask slightly different questions, but for present purposes they can be treated as essentially identical. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 715 n.64 (2012) (considering the nature of the “longstanding” inquiry).

³⁰ *Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir. 2013) (collecting cases employing the two-pronged approach), *cert. denied*, 134 S. Ct. 422 (2013); see also Lawrence Rosenthal & Adam Winkler, *The Scope of Regulatory Authority Under the Second Amendment 2* (Chapman U. Sch. of L. Legal Stud. Research Paper Series, Paper No. 13-1, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205520 [https://perma.cc/E9DB-JRDK].

³¹ *Heller*, 554 U.S. at 626–27. The actual historical record is perhaps less robust than *Heller* suggests. *United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon-in-possession rules are “longstanding”).

³² See *Heller*, 554 U.S. at 626; *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).

sumptively constitutional, and the activities subject to those regulations simply fall outside the scope of the Second Amendment.³³

The roots of this approach lie in *Heller*. There, the Supreme Court blessed as constitutional a wide array of gun control laws, not because of their effectiveness, but because of their historical lineage.³⁴ The majority specifically rejected what it called a “freestanding ‘interest-balancing’ approach,”³⁵ instead using historical practice to identify the permissible scope of firearm regulations. In a passage that has inspired a fair bit of confusion and criticism,³⁶ the majority wrote:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.³⁷

For similar tradition-based reasons, the Court held that the Amendment permits the prohibition of “dangerous and unusual weapons.”³⁸ In *McDonald*, which incorporated the Second Amendment against the states, the Court reaffirmed its approval of these forms of gun control,³⁹ and of the historical-categorical approach as well.⁴⁰

What implications does this historical focus have for the hypothetical ordinance? One can quickly dispense with the proposition that the ordinance violates the Second Amendment because it was not enacted until the twenty-first century. It is implausible that *Heller* and *McDonald* froze the regulatory apparatus for lethal weapons exactly as it stood in 1791—in effect, holding that all modern regulations are infringements except those specific regula-

³³ See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–11 (2009) [hereinafter Blocher, *Categoricalism*].

³⁴ *Heller*, 554 U.S. at 626–27.

³⁵ *Id.* at 634.

³⁶ See, e.g., *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (concluding that it would be “weird” if a gun control law were to become constitutional simply as a function of its age); Blocher, *Categoricalism*, *supra* note 33, at 413 (“[T]he majority’s attempt to create categories neither reflects nor enables a coherent account of the Second Amendment’s core values, whatever they may be.”); *Civil Rights: The Heller Case: Minutes from a Convention of The Federalist Society*, 4 N.Y.U. J.L. & LIBERTY 293, 301–05 (2009) (remarks of Prof. Nelson R. Lund, George Mason University School of Law).

³⁷ *Heller*, 554 U.S. at 626–27.

³⁸ *Id.* at 627 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (1769)).

³⁹ *McDonald v. City of Chi.*, 561 U.S. 742, 786 (2010) (plurality opinion) (“We made it clear in *Heller* that our holding did not cast doubt on . . . longstanding regulatory measures We repeat those assurances here.” (citation omitted)).

⁴⁰ *Id.* Allen Rostron notes that the wording of *Heller* leaves it a bit unclear as to whether “longstanding” refers only to laws about felons and the mentally ill, or to all the listed gun control laws, but that “Justice Alito’s opinion in *McDonald* seems to assume that ‘longstanding’ describes every category of laws on the list, not just prohibitions on guns for felons and the mentally ill.” Rostron, *supra* note 29, at 715 n.64.

tions, covering the exact weapons, carried in the precise places, that existed in 1791. This argument would be the equivalent of the near-“frivolous” argument that only weapons that existed in 1791 are protected as Second Amendment “Arms.”⁴¹ If technological change has placed more items within the constitutional category of “Arms,” including weapons such as semiautomatic pistols, it seems clear that the regulations of “Arms” were not frozen in 1791 either.⁴² Not even the civil jury—a right far more historically “frozen” than the right to keep and bear arms—enjoys that degree of insulation from regulatory innovation.⁴³

Nor do *Heller* or *McDonald* support such a view. Both said that it is “presumptively lawful” for government to prevent felons or the mentally ill from owning (and presumably carrying) firearms, to regulate the commercial sale of firearms, and to prevent people from carrying lethal weapons in “sensitive places.”⁴⁴ The Court offered these regulations only by way of example, suggesting other types of regulations could also be lawful.⁴⁵ It seems apparent that the types of regulations that are “presumptively lawful” do not have to be exact replicas of historical regulations.⁴⁶

Further, lethal weapons have often been regulated more stringently in the public square than at home. Prohibitions on the carrying of certain types of weapons (especially those that are both lethal and concealable) and even blanket prohibitions on the casual public possession of deadly weapons all are part of the historical record.⁴⁷ One might distinguish these laws on the

⁴¹ See *Heller*, 554 U.S. at 582.

⁴² See *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

⁴³ Miller, *Text, History, and Tradition*, *supra* note 17, at 877–84; see also *Colgrove v. Battin*, 413 U.S. 149 (1973) (reducing civil jury to six members rather than the traditional twelve is constitutional).

⁴⁴ *Heller*, 554 U.S. at 626–27; *McDonald*, 561 U.S. at 786 (2010) (plurality opinion) (citing *Heller*, 554 U.S. at 626–27).

⁴⁵ *Heller*, 554 U.S. at 626 (noting that “the right secured by the Second Amendment is not unlimited” but that “we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment”); see also *id.* at 635 (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”).

⁴⁶ See, e.g., *United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon-in-possession rules are “longstanding”); 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, 1374–76 (2009) (same); Rostron, *supra* note 29, at 731–32 (“Although Justice Scalia’s opinion in *Heller* characterized disarming felons as a long-standing tradition, federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961.” (citation omitted)).

⁴⁷ See, e.g., An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, ch. 52, § 1, 1876 Wyo. Sess. Laws 352, 352 (codified in Carrying Concealed Weapons, Wyo. STAT. ANN. § 980 (1887)) (“[H]ereafter it shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.”); An Act Defining And Punishing Certain Offenses Against The Public Peace, no. 13, § 1, 1889 Ariz. Sess. Laws 30, 30; An Act Regulating The Use and Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23, 23. Many of these historical sources can be found in an invaluable compilation created by Mark Frassetto. See generally Mark Frassetto, *Firearms and Weapons Legislation*

basis that they were seldom or weakly enforced,⁴⁸ that they were superseded by later statutes,⁴⁹ or that a given modern regulation is not truly analogous to the old regulation.⁵⁰ Such is always the case with historical examples. At the very least, there are good reasons to think that longstanding tradition, like current practice, treats lethal weapons differently in public than in the home.

Another way of understanding the scope of the “Arms” that may be carried is by reference to those that existed in 1791. Both the lower court in *Heller*, and the Chief Justice in oral argument, spoke of the “lineal descendants” of “Arms” in common use in 1791 as one way to understand the coverage of that term.⁵¹ In this formulation, so long as the arm the person wants to bear has an historical analogue, it is presumptively protected.⁵²

This approach might be helpful in identifying some core set of weapons, but it also raises difficult questions. What makes a firearm a constitutionally protected “lineal descendant” as opposed to an unprotected “dangerous and unusual” weapon? Is it some cosmetic feature, like a collapsible stock? Is it some functional feature, like the muzzle velocity? If the latter, what functions are constitutionally salient?⁵³ At what point should a court decide that something, although appearing in all other respects like an “arm,” is no longer a Second Amendment “Arm”?⁵⁴ Analogy alone seems

Up To The Early Twentieth Century (Jan. 15, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2200991> [<http://perma.cc/K4JN-TFZE>].

⁴⁸ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 13 (1994); see also *Heller*, 554 U.S. at 633–34.

⁴⁹ Cf. An Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, § 1 (1770), in 19 COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40 (1911) (requiring white males to bring weapons to church); An Act to Preserve the Peace and Harmony of the People of this State, and for Other Purposes, no. 285, § 1, 1870 Ga. Laws 421, 421 (forbidding same).

⁵⁰ See *Heller*, 554 U.S. at 632 (distinguishing historical regulations that applied to the firing of weapons).

⁵¹ *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting Transcript of Oral Argument at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (question of Roberts, C.J.)); see also *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (referring to “lineal descendant[s]” of firearms), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵² See Miller, *Text, History, and Tradition*, *supra* note 17, at 917; Volokh, *Framework*, *supra* note 28, at 1477 (discussing but rejecting this test).

⁵³ See Joseph Blocher, *Second Things First: What Free Speech Can and Can’t Say About Guns*, 91 TEX. L. REV. 37, 43 (2012) (noting the problems of analogy that arise when applying the “lineal descendant” approach).

⁵⁴ The word “Arms” in the Second Amendment is an example of a term with “open texture.” In J.L. Austin’s example, a goldfinch that suddenly exploded would raise questions about what society had always understood the word “goldfinch” to mean. See Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1127 (2008) (citing J.L. Austin, *Other Minds*, in *PHILOSOPHICAL PAPERS* 76, 88 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979)). Though perhaps not as dramatic as an exploding goldfinch, the massive changes in “Arms” in the past 225 years call into question the boundaries of what might once have been a clear term. In 1791, a musket could typically fire three rounds in a minute. *THE GREENWOOD ENCYCLOPEDIA OF DAILY LIFE IN AMERICA* 117 (Jolyon P. Girard & Randall M. Miller eds., 2009). Today, even some non-military weapons can fire nine hundred rounds in the same amount of time. See Justin Peters, *This Simple, Legal Add-On Lets an AR-15 Rifle Fire 900 Rounds Per Minute*, SLATE (Jan. 27, 2009, 4:33 PM), <http://www.slate.com/blogs/>

unable to provide solid answers to these questions;⁵⁵ to even call something analogous is to presume a relevant similarity, which presupposes some metric of relevance.

If the Second Amendment does not freeze the boundaries of constitutional legislation where they stood in 1791, and if the level of abstraction is indeterminate, then how is an historical analysis supposed to work? One argument may be that many kinds of regulatory innovations are possible, but any regulation that destroys the Second Amendment right in its fundamentals is unconstitutional.⁵⁶ This argument leads directly to the question of whether lethality is fundamental to the Second Amendment right. The answer to that question, in turn, depends on what one understands the animating value of the Second Amendment to be, as discussed in more detail below.⁵⁷

B. *The Common Use Test*

A second way to evaluate the hypothetical ordinance would be through the common use test. *Heller* suggests that the Constitution protects arms that are in “common use.”⁵⁸ Under this approach, a weapon’s lethality would be largely beside the point.

Common use remains a perplexing formulation.⁵⁹ The definition is plagued by a central circularity—what is common depends largely on what is, and has been, subject to regulation. If heavy regulation can prevent a weapon from becoming a constitutionally protected “Arm,” then the Second Amendment right seems hollow indeed.⁶⁰ Conversely, what is the sense in

crime/2013/01/07/slide_fire_this_simple_legal_add_on_lets_an_ar_15_fire_900_rounds_per_minute.html [http://perma.cc/XK7L-G9BJ].

⁵⁵ See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 758–59 (1993) (noting that analogical reasoning is not particularly good at evaluating consequences, and is not always well-suited for more theory-driven types of decision-making).

⁵⁶ See *Peruta v. County of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014) (holding that those “rare” laws that “destro[y] (rather than merely burde[n]) a right central to the Second Amendment must be struck down” without any form of means-end scrutiny); *reh’g en banc granted*, 781 F.3d 1106 (9th Cir. 2015); Miller, *Text, History, and Tradition*, *supra* note 17, at 929.

⁵⁷ See *infra* Part III.

⁵⁸ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

⁵⁹ See Proposals to Reduce Gun Violence: Protecting our Communities While Respecting the *Second Amendment*: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary, 113th Cong. 13–14 (2013) (statement of Laurence H. Tribe, Carl M. Loeb University Professor, Harvard Law School); Lerner & Lund, *supra* note 2, at 1411; Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 137, 142 n.28 (2013); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 384–86 (2009); Volokh, *Framework*, *supra* note 28, at 1479.

⁶⁰ See *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (“On the majority’s reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so.”); Lerner & Lund, *supra* note 2, at

extending constitutional protection only to those guns that the government has not gotten around to regulating?

Even if one could muddle through the circularity problem,⁶¹ puzzling questions remain. Common use by whom? Criminals, in particular, commonly use weapons that the law forbids, including weapons specifically designed to be both lethal and indiscriminate. Establishing constitutional protection based on the total range of weapons in circulation—including those used by criminals—would potentially lead to a one-way ratchet. Because the bad guys carry pistols, civilians need pistols; because the bad guys carry AR-15s (to counter the pistols), civilians need AR-15s; and so on. The argument that civilians have a right to “keep up” in an arms race with the bad guys is commonly deployed in both political and legal settings,⁶² but it seems imprudent (although not impossible) that Second Amendment doctrine depends on what weapons criminals are able to acquire or invent.

Some have suggested that “common use” should be determined not by reference to criminals, but by reference to the professional police force. According to this version of the test, a person should be able to have the same type of weapon as an officer of the law.⁶³ This version of the test at least solves one aspect of the circularity problem, since the metric is the expressed needs of the government to protect its own agents.⁶⁴ But, of course, police

1394 (“*Heller* invites the government itself to diminish the scope of a constitutional right by preventing certain arms from being in common use by civilians.”).

⁶¹ Cf. Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 61 (2001) (noting that the long-established “reasonable expectation of privacy” test for the Fourth Amendment “is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable”).

⁶² CLAYTON E. CRAMER & DAVID BURNETT, *TOUGH TARGETS: WHEN CRIMINALS FACE ARMED RESISTANCE FROM CITIZENS* 20 (2012) (“Self-defense is one of our most basic rights. Strict gun control regulations interfere with that right because ordinary citizens abide by the regulations while criminals acquire guns from underground markets. That leaves honest, law-abiding people at a distinct disadvantage because it is not possible for the police to be at every scene where they are desperately needed.”); *Ten Reasons Why States Should Reject “Assault Weapons” and “Large” Magazine Bans*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION (June 17, 2014), <https://www.nraila.org/articles/20140617/ten-reasons-why-states-should-reject-assault-weapon-and-large-magazine-bans> [<https://perma.cc/YPG7-HTCC>] (“Criminals could easily get around a limit on newly-manufactured magazines.”); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 473 (1999) (“[A] national policy that encourages and implements weapons ownership as a recognized means of self-defense invites a domestic arms race.” (quoting ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 192 (1995))); see also Amber Phillips, *Gun Control? Americans Increasingly See More Guns as the Solution, not the Problem*, WASH. POST: THE FIX (July 27, 2015), <http://www.washingtonpost.com/news/the-fix/wp/2015/07/27/gun-control-americans-increasingly-see-more-guns-as-the-solution-not-the-problem/> [<http://perma.cc/96G3-E2QF>].

⁶³ See, e.g., Lerner & Lund, *supra* note 2, at 1411 (“[T]he courts should adopt a presumption that civilians may employ self-defense technologies in widespread use by the police.” (emphasis omitted)); O’Shea, *supra* note 59, at 391–93; *People v. Yanna*, 824 N.W.2d 241, 245–46 (Mich. Ct. App. 2012) (holding that a state ban on stun guns violated the Second Amendment and noting that stun guns are commonly used by law enforcement).

⁶⁴ See O’Shea, *supra* note 59, at 391.

officers are “subject to government control,”⁶⁵ and receive their firearms only after having been selected, trained, and subject to stringent regulations on their use. This approach also potentially creates an even more troublesome one-way ratchet. If civilians must have the weapons available to the professional police, and the professional police must have arms sufficient to protect them against criminals, and criminals have no regard for any restrictions on weapons, again an arms race occurs in which bad guys define the scope of the Second Amendment. The apparent “militarization” of many police departments suggests that there may be no clear stopping point.⁶⁶

Some might call this ratcheting up of firepower a feature of the Second Amendment, rather than a bug. But again, it is difficult to make that kind of value judgment without some conception of the Amendment’s purpose. If one believes that the Second Amendment exists to prevent government tyranny, then keeping pace with armed government agents could be an essential function of the right. If one believes that the point is to achieve optimal public safety, then widespread possession of increasingly lethal weapons is less an unalloyed good.

A final formulation could be that “common use” means weapons commonly carried among law-abiding citizens for lawful purposes.⁶⁷ But, as others have noted, this formulation is subject to serious problems of evidence and characterization.⁶⁸ What laws must a person “abide” by in order to gain Second Amendment protection?⁶⁹ Do lawful recreational purposes count? Perhaps people might commonly carry bows for hunting—a lawful purpose whose Second Amendment salience is uncertain at best.⁷⁰ Does that mean that bows must be considered “Arms”?

Perhaps more seriously, the common use test does not necessarily answer the question presented by our hypothetical, which, after all, is not a ban on any particular “Arm” but on a particular form of public carry. Even if lethal weapons are “Arms” under the common use test, that does not necessarily mean that the Second Amendment treats them equally wherever they happen to be. Second Amendment coverage might depend on a separate set of considerations, or even on a geographically-sensitive version of the common use test. Put in terms of the test itself: common use where? Some weapons commonly seen on the plains of Montana are rarely if ever seen in the

⁶⁵ *Id.* at 392.

⁶⁶ See generally Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282 (2014).

⁶⁷ Volokh, *Framework*, *supra* note 28, at 1479.

⁶⁸ *Id.*

⁶⁹ See Blocher & Miller, *What is Gun Control?*, *supra* note 24 (manuscript at 40–42) (on file with authors).

⁷⁰ See Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. (forthcoming 2015) (manuscript at 123–43) (on file with author).

streets of Manhattan.⁷¹ Some weapons may be commonly used to protect the home, but not commonly used in public places.

It seems, then, the common use test is not a straightforward head count of weapons in circulation among the entire population (even if that count were empirically possible⁷²), among police officers, or among law-abiding citizens. “Common use” may have an important empirical component, but framing the question depends on a judgment about the purpose of the right to keep and bear arms.

C. *Adequate Alternatives Analysis and the Inevitability of Value Judgments*

Neither an historical nor a common use test seems sufficient to evaluate the hypothetical ordinance described in the Introduction. Where, then, is a court to turn?

A third approach would consider not only what is prohibited by the ordinance, but what is permitted. In other words, what alternatives remain open to a would-be arm-carrier? After all, the basic question presented by the hypothetical ordinance is whether publicly carried lethal force is a necessary element of the Second Amendment right. Strictly speaking, to say that something is necessary is to say that there is no alternative for it. The question of necessity can therefore be evaluated through an analysis of adequate alternatives.

Adequate alternatives analysis is a familiar part of First Amendment doctrine. The Supreme Court has long treated time, place, and manner restrictions as constitutional provided that “they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that, in doing so, they leave open ample alternative channels for communication of the information.”⁷³ For example, the Court famously upheld a prohibition on mobile loudspeakers in public streets, because their use caused a nuisance to others, and because various other avenues—“voice,” “pamphlets,” “newspapers”—were adequate to communicate the message.⁷⁴ This kind of doctrinal analysis presupposes some theory of free speech, because it inevitably depends on some notion of what the alternative must be adequate for. If conveying ideas is the point (as opposed, say, to exercising autonomous choice), then the question is whether there are adequate alternatives available for that purpose. If the point of free

⁷¹ See generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

⁷² See Volokh, *Framework*, *supra* note 28, at 1480 (discussing the empirical and definitional challenges of such a test).

⁷³ *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

⁷⁴ *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (plurality decision).

speech is to further individual choice and autonomy, then it is harder to imagine how alternatives could be “adequate.”⁷⁵

The analogy to Second Amendment cases is straightforward enough. A court employing an adequate alternatives approach would ask whether a person asserting a right to carry a particular weapon (a lethal one, in this scenario) in a particular place (public, for these purposes) can use other means to effectuate the relevant Second Amendment values, whatever they might be.

Elements of this approach already seem to be emerging in Second Amendment doctrine.⁷⁶ The second part of the two-part test described in the Introduction evaluates the significance of the burden on the core of the right—the larger the burden, the stricter the scrutiny.⁷⁷ From the perspective of the individual, the significance of the “burden” imposed by a particular regulation almost inevitably depends on whether the regulation prevents that person from satisfying a constitutionally salient goal. And that, in turn, depends on whether other means are available to reach the same end. For example, one might plausibly conclude that requiring serial numbers on firearms does not significantly burden the right to keep and bear arms for self-defense against criminals, because a weapon with serial numbers is perfectly adequate for that purpose.

Heller is not to the contrary. There, the Court said that having access to a shotgun does not preclude a person from also claiming a right to a handgun.⁷⁸ This might be true, given the particular alternatives at issue—many amicus briefs argued that long guns are not an adequate substitute for handguns when it comes to self-defense in the home.⁷⁹ But that is simply a function of the alternatives proposed. If *other* weapons had been available—or if

⁷⁵ See Enrique Armijo, *The ‘Ample Alternative Channels’ Flaw in First Amendment Doctrine* 1 (Elon Univ. Sch. of Law, Legal Studies Research Paper 2015-04, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595188 [<http://perma.cc/7WSM-7NXX>].

⁷⁶ *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014) (“[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.”), *cert. denied*, 135 S. Ct. 2799 (2015).

⁷⁷ *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

⁷⁸ *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

⁷⁹ See, e.g., Brief for Southeastern Legal Found., Inc. et al. as Amici Curiae Supporting Respondent at 17–22, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (listing reasons why “[h]igh-powered rifles are not recommended for self-defense,” including (1) the fact that dialing 911 while aiming one is difficult, (2) they are awkward to get into action quickly, and (3) they are less useful in close quarters (quoting *id.*, Declaration of Massad F. Ayoub, at App. 4)); Brief for Disabled Veterans for Self-Defense & Kestra Childers as Amici Curiae Supporting Respondent at 29–30, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting that rifles are more dangerous to keep in the home because of their relative muzzle velocity); Brief for the Heartland Inst. as Amicus Curiae Supporting Respondent at 16–17, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting that “[t]he vast majority of American gun owners prefer handguns to other firearms for self-defense” and that “the FBI found that handguns accounted for over 83 percent of all firearms used in legally justified defensive homicides by private citizens, while shotguns and rifles together accounted for less than 7.5 percent of such”).

technology later makes other weapons available—then the calculation could have come out differently.

Moreover, the hypothetical ordinance is not a ban on any particular class of “Arms,” but a restriction on their use in public. And the Supreme Court’s free speech cases suggest, reasonably enough, that the adequate alternatives inquiry may be more searching when it comes to public activities. In the course of its “adequate alternatives” analysis in *City of Ladue v. Gilleo*, for example, the Court noted that “[w]hereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.”⁸⁰

It therefore appears that adequate alternatives analysis might offer a way to answer not only the degree-of-burden question for which it is currently employed, but also the threshold question of what kinds of arm-carrying is protected by the Second Amendment in the first place. And yet the question of values remains. In order to evaluate the adequacy of alternatives, one must be able to answer the predicate question: “Adequate with regard to what?” In speech cases, that might mean the availability of other methods for getting one’s voice heard in the “marketplace of ideas.”

In gun cases, the animating values are less clear. The Court has indicated that the “core” of the right is self-defense, but, as Justice Breyer noted in his *Heller* dissent, “to raise a self-defense question is not to answer it.”⁸¹ Self-defense might be a Second Amendment value for purposes of autonomy, for purposes of personal safety, for purposes of government deterrence, or some combination of all three. These theoretical questions demand more exploration than can be provided here.⁸² The chief aim of this Article is to examine their relevance through the lens of a particular question: what is the normative basis for concluding that the Second Amendment guarantees a right to publicly carry lethal force?

III. WHY LETHAL FORCE? THREE POSSIBILITIES

Does the Second Amendment necessarily include a right to publicly carry a lethal weapon when non-lethal alternatives are available? Why or why not? A complete answer must involve some understanding of how particular kinds of arms and arm-carrying gain “constitutional salience” for Second Amendment purposes.⁸³ Coming to this understanding demands some normative vision of the Amendment. The goal here is to identify a few

⁸⁰ 512 U.S. 43, 56, 58 (1994) (striking down ordinance as not providing adequate alternative channels to signs placed in private dwellings).

⁸¹ *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

⁸² For a more complete effort, see Blocher & Miller, *What is Gun Control?*, *supra* note 24.

⁸³ Cf. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–72 (2004).

of the most likely candidates, and to briefly identify some of their strengths and weaknesses.

A. *Personal Autonomy: Bearing “Arms” Includes Bearing Any Weapon a Person Wants to Possess—the Lethality of the Weapon is Incidental*

The first possibility is that the Second Amendment is primarily concerned with personal autonomy and dignity, rather than with guns as a means to an end, such as personal safety. The extreme version of this theory would suggest that public carrying of lethal weapons falls within the scope of the Amendment whenever a person believes it does. If autonomy or dignity is a trump in Second Amendment cases, then non-lethal alternatives are simply irrelevant.

Although the practical implications may be startling, the proposition is not inconceivable. Many constitutional rights can be defined, at least in part, by their relation to values of dignity or autonomy.⁸⁴ For example, autonomy theory has been particularly prominent in the area of free speech,⁸⁵ and typically lends itself to a broad view of which speech activities are protected by the First Amendment. For autonomy theorists, the harder questions are how to exclude activities that might be considered expression by the people engaged in them, but strain the classifications of constitutionally protected “speech.”⁸⁶

If a similar principle of autonomy animates the Second Amendment, then people should be able to decide for themselves what constitutes an “Arm” for Second Amendment purposes, and where and how they should be able to carry it. Under a strong version of the autonomy rationale, individual choices about safety trump every other consideration. Strapping on a dynamite vest no doubt makes some people feel very safe from attack, for example.⁸⁷

And yet, as the dynamite vest example suggests, it is implausible to suppose that autonomy is the sole or even principal value underlying the Second Amendment. It does not accord with current doctrine (nascent though it may be), let alone provide a desirable or even coherent way of

⁸⁴ See *Lawrence v. Texas*, 539 U.S. 558, 567, 574–75 (2003); *Stanley v. Georgia*, 394 U.S. 557 (1969); cf. *Burwell v. Hobby Lobby*, 134 S. Ct 2751 (2014). See generally Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

⁸⁵ See generally ED BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

⁸⁶ Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 173–74 (2012) (discussing ticket scalping).

⁸⁷ See JOSEPH CONRAD, *THE SECRET AGENT* 48–56 (John Lyon ed., Oxford Univ. Press 2004) (1907) (describing a character named “the Professor” who carries a similar device, and is never bothered).

defining “Arms” going forward. *Heller* itself stated that “Arms” do not include all firearms,⁸⁸ notwithstanding individual preferences, even well-reasoned ones. A person with a tremor, for example, may want to carry a short-barreled shotgun because it does not require careful aim. Yet, the Supreme Court said this kind of weapon may be outlawed altogether.⁸⁹ Clearly, some kinds of “dangerous and unusual” weapons can be banned even if a law-abiding citizen thinks the weapon is most likely to offer her protection.⁹⁰

Perhaps whatever autonomy value underlies the Second Amendment is subject to limitations or side constraints—individual choice within a limited set of arms, for example. Subscribing to an autonomy view of the Second Amendment does not necessarily mean all forms of gun control are unconstitutional, any more than an autonomy view of the First Amendment means that speakers determine for themselves what constitutes free speech.⁹¹ A person might prefer to kill his attacker rather than to wound him,⁹² but the Constitution does not have to protect that choice.

B. Personal Safety: Bearing “Arms” Includes Bearing Deadly Force, Because It Is Necessary for Safety

A second possibility is that a right to carry arms must necessarily mean a right to publicly carry deadly weapons, because only lethal force offers effective personal safety—either to the arms-bearing individual or to society as a whole.

One way to understand the personal safety theory is as constitutionalizing some version of a “marketplace of violence” rationale.⁹³ The gist of this theory is that the right to keep and bear arms contributes to personal safety by deterring and countering threats. This theory, in turn, has two variants, distinguished by their focus: one variant focuses on arms as a mechanism of

⁸⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

⁸⁹ *Id.* at 625 (“[*United States v. Miller*, 307 U.S. 174 (1939), said] only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.” (citation omitted)).

⁹⁰ *Id.* at 626–27; see also Volokh, *Framework*, *supra* note 28, at 1481–82.

⁹¹ Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1237 (1984) (“Although some people may be unable to express themselves in the exact physical manner, location, or time they find most satisfying, this inconvenience hardly seems a radical intrusion into individual autonomy.”).

⁹² Such preferences might even be biologically hard-wired. See Theodore Y. Blumoff, *The Neuropsychology of Justifications and Excuses: Some Problematic Cases of Self-Defense, Duress, and Provocation*, 50 JURIMETRICS J. 391, 397 (2010) (discussing the neuroscience of threat and self-defense in the Bernard Goetz case).

⁹³ The rationale bears conceptual similarity to the “marketplace of ideas” model that is so central to the First Amendment. See Blocher & Miller, *What is Gun Control?*, *supra* note 24 (manuscript at 52–55) (on file with authors); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

self-defense that can ensure the safety of the gun-carrying individual; the other focuses on the benefits to society as a whole.

These two versions of the personal safety argument take different approaches to the potential externalities imposed by the public carrying of weapons. On a strong version of the individual-based view, one might argue that the externalities of guns are constitutionally irrelevant, in much the same way that free speech typically cannot be limited solely because of its actual or potential offensiveness.⁹⁴ The social-benefit approach, by contrast, does not ignore externalities—it is predicated on them. The central idea of this approach, after all, is that gun ownership produces positive externalities by deterring potential miscreants, thus benefitting even those who are not armed.⁹⁵

The primary assumption of the individual-based version of the personal safety argument—that externalities are entirely irrelevant—is difficult to sustain. As Justice Stevens pointed out in *McDonald*, “[y]our interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence.”⁹⁶ The latter might not automatically trump the former—at the very least, constitutional rights are insulated against unweighted interest-balancing⁹⁷—but that does not mean that they must be disregarded altogether. Why is the individual who fears criminals the only moral agent in an environment in which other moral agents fear being mistaken for criminals and shot, or caught in a cross-fire between people asserting a right to bear arms for self-defense?⁹⁸ And shouldn’t the fact that externalities are most apparent in public, especially in a city or other crowded area, count for something? This is not to suggest that arms-bearing should be constitutionally protected only where it is harmless, but rather that there may be constitutionally salient interests on both sides of the scale.

A proponent of the social benefit approach might acknowledge those negative externalities, and yet maintain that the basic cost-benefit analysis is fixed by the Second Amendment itself. As the *Heller* majority said, the Second Amendment “is the very *product* of an interest-balancing by the people” that occurred at the Founding.⁹⁹ On this view, the Framers determined

⁹⁴ *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1294 (9th Cir. 2015) (“The heckler’s veto doctrine is concerned with the possibility that particular speech will be wrongfully excluded from the marketplace of ideas merely because it is ‘offensive to some of [its] hearers.’” (quoting *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970))). See generally Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951 (2011).

⁹⁵ See generally JOHN LOTT, JR., *MORE GUNS LESS CRIME* (2010).

⁹⁶ *McDonald v. City of Chi.*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

⁹⁷ See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”)

⁹⁸ Cf. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

⁹⁹ *Heller*, 554 U.S. at 635.

that the positive externalities of a right to carry deadly weapons outweighed the negative externalities in 1791, and this weighing can never be done again.

Even if this is true, it raises difficult questions. Which weapons, and what kinds of arms-bearing, are included in the balance that the Framers struck? Perhaps the Second Amendment included public carry of lethal force in the late 1700s, on the theory that firearms were the only plausible way to achieve optimal safety for each individual and in the aggregate. But, just as technology expands the kinds of weapons useful for that purpose, so too might it limit the weapons necessary for it.¹⁰⁰ If the same optimal level of safety can be achieved through sub-lethal technology, and safety is the primary purpose of protecting arms-bearing, then there should not be any constitutional impediment to the hypothetical ordinance.

Moreover, the historically-defined category of “dangerous and unusual” weapons seems to contemplate a cost-benefit formula in which the inputs may well change. Weapons are dangerous by definition.¹⁰¹ It is the bearing of the unreasonably dangerous weapon that can be forbidden. To say something is unreasonably dangerous is to suggest that the costs of bearing it outweigh the benefits.¹⁰² This calculation might be different in the home, the street, the country, and the city, and it might also change as new and non-lethal alternatives become available.

Finally, as Professor Robinson has observed, the common law of self-defense, the very “core” of the Second Amendment,¹⁰³ itself contemplates certain public policy trade-offs, usually erring in favor of human life and public order. A person is only permitted to use force when necessary to prevent a harm, and then only proportional force, even if it could be shown that everyone would be better off if the person used disproportionate force whenever he felt like it.¹⁰⁴ For centuries, the common law of self-defense required a person in public to retreat before using deadly force, because the government’s interest in preserving life and order outweighed the individual or aggregate value of allowing a “true man” to defend himself without fleeing.¹⁰⁵ If technological advances can accomplish the goals of the common

¹⁰⁰ See Robinson, *supra* note 2, at 253.

¹⁰¹ See Michael S. Obermeier, Comment, *Scoping Out the Limits of “Arms” Under the Second Amendment*, 60 U. KAN. L. REV. 681, 701 (2012) (“All weapons are dangerous. If a particular weapon was not dangerous, then there would be little use for it in the first place.”).

¹⁰² Cf. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (basing tort liability on whether the burden of adequate precaution is less than the probability of injury multiplied by the gravity of injury).

¹⁰³ See *Heller*, 554 U.S. at 628 (“As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”)

¹⁰⁴ Robinson, *supra* note 2, at 253 (“The necessary force limitation provides that one may use no more force than is necessary for effective defense, nor use it before the time when it is necessary The proportionality limitation . . . authorizes only the use of force that is proportionate to the harm threatened.” (footnotes omitted)).

¹⁰⁵ Blackstone said that a person must retreat from an assault as far as he can safely do so before using violence because of “a real tenderness of shedding his brother’s blood” and be-

law of self-defense—the right to self-defense being embedded in the Second Amendment—with less error and loss, then it seems Second Amendment doctrine should incorporate those advances.

In the context of the hypothetical ordinance, the question would be whether the public carrying of nonlethal weapons can vindicate personal safety (individual or aggregate) to the same, or to a sufficiently similar, degree as the public carrying of lethal weapons. With regard to individual personal safety, there are various ways to frame this question.¹⁰⁶ If aggregate public safety matters, then the question would obviously need to be framed more broadly, but with a recognition that public carry makes the public effects all the more significant.

The relevant empirics are messy and contested. Some researchers find that a broad right to carry firearms has no effect on safety, some show a positive effect, some a negative effect.¹⁰⁷ Data on the effectiveness of non-lethal alternatives are largely impressionistic.¹⁰⁸ Police forces routinely use non-lethal weapons in their encounters with criminals, and there is some anecdotal evidence of the success of non-lethal weapons used in a military confrontation.¹⁰⁹ Again, it seems likely the calculus will differ based on geography, incorporating distinctions between the home and the public sphere, between the city and the country.¹¹⁰

In light of this empirical uncertainty, one important question is who is constitutionally empowered to make the decision about whether a particular form of arms-carrying effectuates public safety. As between the judiciary and the political branches, there may be particularly good reasons to defer to the latter's superior fact-finding ability. Deference seems especially appro-

cause the “sovereign and his courts are the *vindices injuriarum*.” 4 WILLIAM BLACKSTONE, COMMENTARIES *184–85; see also Benjamin Levin, Note, *A Defensible Defense? Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010) (noting, after examining Blackstone and history, that “[t]he duty to retreat can be seen as a statement of societal values that held the preservation of human life and the prevention of violence paramount”).

¹⁰⁶ See Lerner & Lund, *supra* note 2, at 1397 (suggesting four metrics: “(1) how easily the weapon can be used, especially by those not trained in self-defense; (2) how effectively the weapon deters would-be attackers; (3) how effectively, if used, the weapon stops an attacker; and (4) how effectively the weapon minimizes harm to the target”).

¹⁰⁷ Compare Abhay Aneja, John J. Donohue III & Alexandra Zhang, *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 80 (Nat’l Bureau of Econ. Research, Working Paper No. 18294, 2012) (negative effect on safety), <http://www.nber.org/papers/w18294.pdf> [<http://perma.cc/78SM-9SS5>], with LOTT, *supra* note 95 (positive effect on safety).

¹⁰⁸ See Robinson, *supra* note 2, at 257–58 (suggesting that non-lethal weapons are just as effective as lethal weapons). *But see* Lerner & Lund, *supra* note 2, at 1398 (suggesting opposite).

¹⁰⁹ See David A. Kaplow, *Tangled Up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT’L L. 703, 727–28 (2005); Lerner & Lund, *supra* note 2, at 1394–97.

¹¹⁰ See generally Blocher, *Firearm Localism*, *supra* note 71 (defending distinction between urban and rural regulation); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (defending distinction between regulation in the home and in public).

priate where, as here, technological change is rapid, consequences of error high, and the history and empirics sharply contested.¹¹¹

There is an even more fundamental challenge, however, which is that the choice should not be made by either courts or legislatures, but by individuals. On this view, people should be able to decide for themselves whether carrying lethal arms makes them—or society as a whole—safer. But it would be odd if it were solely up to individuals to decide what makes them safe. That would make the personal safety rationale collapse into the autonomy rationale, with all of its attendant problems.¹¹²

This Article cannot fully resolve these complications. Its more limited goal is to identify some of the questions that would need to be answered in order to evaluate the adequacy of alternatives if personal safety were thought to be the animating value of the Second Amendment.

*C. Detering Tyranny: Bearing “Arms” Includes Bearing Everything
That Deters Governmental Tyranny, Which Must
Include Lethal Force*

A third possibility is that people must be permitted to publicly carry lethal “Arms” because doing so is necessary to deter overbearing government. On this reading, carrying non-lethal “Arms” will never be an adequate alternative to effectively deter a potentially tyrannical government.

This view has intense popular currency.¹¹³ But conceptualizing the right as necessarily including the public carry of weapons capable of deterring a tyrannical government is difficult to square with Second Amendment doctrine, most of criminal law, and fundamental political theories of the state. *Heller* indicates that guns can be prohibited in “sensitive places,” including “government buildings,”¹¹⁴ the very locations a show of force would seem to be most useful if the ability to carry lethal weapons to deter government were a legal right. Similarly, in many states it is a crime to resist an arrest, even an unlawful one, by displaying a lethal weapon, even though such a display would deter lawless government agents.¹¹⁵ Treason, the act of bearing arms against the government, is one of the few crimes actually specified in the Constitution.¹¹⁶ Even *Heller* seems to minimize the anti-tyranny ratio-

¹¹¹ See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1522 (2007) (arguing that where change is rapid, political branches are more likely to fashion optimal rules).

¹¹² See *supra* Part III.A.

¹¹³ See Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 826–27 (2014).

¹¹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹¹⁵ Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 944 (2011).

¹¹⁶ U.S. CONST. art. III, § 3; see also JOSEPH STORY, CHARGE OF MR. JUSTICE STORY ON THE LAW OF TREASON, DELIVERED TO THE GRAND JURY OF THE CIRCUIT COURT OF THE UNITED STATES 7 (1842) (describing treason as bearing arms “for the express purpose of overawing or intimidating the public,” even where “no actual blow has been struck, or engagement has taken place”).

nales in favor of individual self-defense against ordinary criminals.¹¹⁷ Publicly bearing lethal arms to deter government officials may be connected to the Second Amendment, but it is probably best understood as a moral or political claim rather than a judicially administrable constitutional entitlement.

IV. CONCLUSION

In the course of evaluating the relationship between lethality and public carrying, this Article has tried to illuminate some underlying theories of the Second Amendment, identify their strengths and weaknesses, and suggest that these theories inevitably play some role in such basic questions as what “Arms” may be carried under the Second Amendment. What this Article has not done is establish how much weight these theories should have, as compared to other sources of constitutional doctrine. One can accept the relevance of these theories without thinking that the Amendment’s scope is directly or exclusively defined by its purposes.

Articulating a theory of Second Amendment interpretation is far beyond the scope of this Article. Doing so inevitably raises issues of constitutional method, such as the role of original understandings or expected applications and the relative institutional competences of the judicial and political branches. But no matter one’s approach to constitutional interpretation, the normative questions and theories discussed here will likely prove unavoidable.

Moreover, whatever one’s theory of the Amendment, it seems likely—and sensible—that there is a relationship (perhaps an inverse correlation) between the availability of adequate non-lethal weapons and the constitutional protection of carrying lethal weapons. The hypothetical ordinance illustrates that point by stipulating an extreme condition: that existing non-lethal weapons are a perfect substitute for lethal firearms. In such a world, a right to carry lethal force should have a weakened claim on Second Amendment coverage.

In the real world, non-lethal weapons remain imperfect substitutes. But, if the availability of a perfect substitute (however defined) would change the scope of the Amendment, what about a substitute that is ninety-nine percent perfect? Ninety percent?¹¹⁸ It seems plausible that even the availability of adequate alternatives could increase the permissible regulatory space, either

¹¹⁷ See David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641 (2009); cf. *Heller*, 554 U.S. at 627 (suggesting the weapons most effective against a national government, “M-16 rifles and the like,” can be banned, as opposed to weapons most effective against a common criminal).

¹¹⁸ See Lerner & Lund, *supra* note 2, at 1401–04 (discussing new non-lethal technologies and their effectiveness).

by limiting what counts as an “Arm” in the first place, or by giving the government greater leeway to regulate “Arms.”¹¹⁹

The two roads lead to basically the same result: if there are new technologies with which people can vindicate their Second Amendment rights, policy-makers should have expanded discretion to regulate the public carrying of deadly weapons.¹²⁰ One implication is that political battles over non-lethal, as well as less-lethal, and smart-gun technologies are constitutionally important. If and when non-lethal weapons become better able to achieve the constitutionally salient ends of firearms, the less justification there may be for the Second Amendment to cover the public bearing of lethal weapons.¹²¹

¹¹⁹ See generally Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (differentiating between coverage and protection).

¹²⁰ Whether policy-makers will or should exercise that discretion is of course an entirely different matter.

¹²¹ Lerner & Lund, *supra* note 2, at 1404 (“[Gun-rights organizations] might fear that the proliferation of Super-Tasers will undermine the case for gun rights. If one can defend oneself effectively with a nonlethal Super-Taser, what need is there to own a lethal gun?”).

