

SECOND AMENDMENT EQUILIBRIA

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ABSTRACT—Equilibrium-adjustment theory, first articulated by Professor Orin Kerr for Fourth Amendment cases, holds promise for rationalizing Second Amendment doctrine going forward. Like the Fourth Amendment, the Second Amendment suggests an initial equilibrium—or actually, multiple equilibria—between government power to possess, use, and control the implements of violence and private power to do the same. And, like Fourth Amendment doctrine, Second Amendment doctrine must contend with both technological and societal change. These changes—e.g., more deadly and accurate weapons, more public acceptance of concealed carry—can upset whatever initial balance of gun rights and regulation there may have been in the initial state. Although this Essay recognizes factors that make Second Amendment equilibrium-adjustment distinctive and challenging, the theory may nonetheless allow courts and scholars to get some purchase on the problem of change in Second Amendment adjudication and provide a vocabulary to explain the objectives of the emerging doctrine for the right to keep and bear arms.

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INTRODUCTION

Constitutional doctrines inevitably confront social and technological change.¹ A due process doctrine crafted to govern real property must answer questions about cryptocurrency.² A free expression jurisprudence developed to protect leafleteers must apply to sellers of violent video games.³ The Second Amendment is no different. Its text was ratified when trained marksmen fired four shots per minute.⁴ Today, the doctrine must address technology one hundred times as lethal.⁵

What is different about the Second Amendment challenge of change is that judges have at their disposal a century’s worth of theoretical tools to

¹ See, e.g., Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 99–100 (2014) (“Identifying legal change is an ordinary part of legal decision-making . . .”); Lee J. Strang, *Originalism and the “Challenge of Change”*: *Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 927–29 (2009) (“The challenge of change is especially pronounced in our society because we have both a written Constitution and a society that has undergone tremendous change in the period during which the Constitution has been in force.”).

² See *CFTC v. Reynolds*, No. 1:19-cv-05631-MKV, 2021 WL 796683, at *4 (S.D.N.Y. Mar. 2, 2021) (applying the minimal-contact due process test for jurisdiction to the alleged theft of cryptocurrency via a Ponzi scheme).

³ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 788 (2011) (“We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.”).

⁴ Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 47 n.249 (2012) (citing James E. Hicks, *United States Military Shoulder Arms, 1795-1935*, 1 J. AM. MIL. HIST. FOUND. 23, 30 (1937)).

⁵ *The “Bump Stocks” Used in the Las Vegas Shooting May Soon Be Banned*, ECONOMIST (Oct. 6, 2017), <https://www.economist.com/graphic-detail/2017/10/06/the-bump-stocks-used-in-the-las-vegas-shooting-may-soon-be-banned> [<https://perma.cc/G32P-7ZYU>] (noting that “bump stocks” can allow semiautomatic firearms to fire 400 to 800 rounds per minute).

shape the doctrine at precisely the moment there is deep disagreement as to the legitimacy of those tools. The conventional two-step framework applied by the appellate courts—a categorical approach largely based in text, history, and tradition at step one and a standard tailoring approach at step two⁶—is viewed with skepticism by gun-rights advocates⁷ and some judges and Justices.⁸ The only legitimate approach to Second Amendment doctrine, they argue, is to use text, history, and tradition, and analogies therefrom.⁹

In practice, the text, history, tradition, and analogy approach (whether exclusive or the first step of the two-step framework) relies more on history, tradition, and analogy than text. No judge uses the text alone to answer difficult Second Amendment questions. Examining the original public meaning of the Second Amendment term by term (hardly a universally accepted form of textualism¹⁰) would mean “keep” simply means “have,” “bear” simply means “carry,” and “Arms” simply means “weapons.”¹¹ I am aware of no judicial officer who has endorsed a constitutional right to own and carry a hand grenade (or similarly lethal device), no matter how literally one reads “to keep and bear Arms” to mean “to have and carry weapons.”¹²

Not that a phrase-oriented approach¹³ to the text works any better—if original public meaning is the only legitimate method of constitutional

⁶ See *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016) (“Our court, along with the majority of our sister circuits, has adopted a two-step inquiry in deciding Second Amendment cases [T]he court in the first step asks if the challenged law burdens conduct protected by the Second Amendment, based on a ‘historical understanding of the scope of the right’ [T]he second step of the inquiry . . . determine[s] the appropriate level of scrutiny to apply.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008))).

⁷ Brief of Amicus Curiae National Rifle Ass’n of America, Inc. in Support of Petitioners at 4, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) (“This Court should reaffirm that Second Amendment challenges are governed by *Heller*’s text-and-history standard, not the ‘tiers of scrutiny’ that are applied in the First Amendment and Equal Protection contexts.”).

⁸ *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“[T]he proper interpretive approach is to reason by analogy from history and tradition.”).

⁹ See *id.* at 1285.

¹⁰ Compare *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–43 (2020) (analyzing terms “discriminate,” “because of,” and “sex” and holding that the terms combined cover discrimination due to sexual orientation and transgender status), with *id.* at 1825 (Kavanaugh, J., dissenting) (“[C]ourts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”).

¹¹ See *Heller*, 554 U.S. at 581–84.

¹² See *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (stating that hand grenades and machine guns are unprotected “dangerous and unusual weapons for the purposes of the Second Amendment”); *Bezet v. United States*, 276 F. Supp. 3d 576, 603 (E.D. La. 2017) (reiterating that hand grenades are dangerous and “likely unprotected under the Second Amendment” even if available to criminals); see also *Friedman v. City of Highland Park*, 784 F.3d 406, 414 n.1 (7th Cir. 2015) (Manion, J., dissenting) (stating that hand grenades are categorically excluded from Second Amendment coverage).

¹³ See *Bostock*, 140 S. Ct. at 1826 (Kavanaugh, J., dissenting) (stating that ordinary meaning is the meaning of phrases, not just individual words).

interpretation.¹⁴ In *District of Columbia v. Heller*, the Court decided that speakers of English in 1791 used the term “bear arms” to mean “carry weapons” for confrontation.¹⁵ New linguistic research of eighteenth-century sources, using big-data techniques unavailable to the Court when it decided *Heller*, proves convincingly that the Founding generation did not ordinarily use the phrase “bear arms” to mean “carry weapons.”¹⁶ Even scholars sympathetic to expansive gun rights acknowledge that the text’s original public meaning is not on their side.¹⁷

Equally unavailing is a purposivist approach built around the object of “self-defense.” As my coauthor and I have mentioned elsewhere, self-defense covers persons—like prisoners and minor children—who plainly have no rights to possess firearms.¹⁸ Self-defense cannot distinguish between

¹⁴ For arguments that original public meaning is the only legitimate method of constitutional interpretation, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 654 (1999) (“Putting a constitution in writing is conducive to preserving the rights of the people from infringement by government officials, but only if its original meaning is not contradicted or altered without adhering to formal amendment procedures.”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1131 (2003) (arguing that the “proper” method is “application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law”); and see also *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (“[B]ecause the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict.”).

¹⁵ 554 U.S. at 582–86.

¹⁶ Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510–11 (2019) (finding that of 900 uses of “bear arms” in eighteenth-century records, only seven were nonmilitary or ambiguous); Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, PANORAMA (Aug. 3, 2018), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/> [<https://perma.cc/43CW-ZL6T>] (reviewing 181 documents from 1765 to 1795 with the phrase “bear arms” and concluding that the term “referred to an activity undertaken by groups of people, not only by individuals”); Brief of Neal Goldfarb as Amicus Curiae in Support of Respondents, Arguing that as to the Second Amendment Issue, the Petition Should be Dismissed as Improvidently Granted at 2, 21, N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280) (reviewing over 500 contemporaneous uses of “bear arms” and finding that “as to almost every important conclusion about the meaning of [the operative clause], *Heller* was mistaken”). For challenges to this methodology and its resulting conclusions, see Shlomo Klapper, *(Mis)judging Ordinary Meaning?: Corpus Linguistics, the Frequency Fallacy, and the Extension-Abstraction Distinction in “Ordinary Meaning” Textualism*, 8 BRIT. J. AM. LEGAL STUD. 327, 352 (2019) (“In sum, it is entirely possible that in its most empirically frequent use, ‘bear arms’ was not synonymous to ‘carry arms.’ But that does not matter for linguistic or legal interpretation. Rather, the question is: is ‘bear arms’ a sufficiently ordinary way to describe individual gun possession?”).

¹⁷ Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/> [<https://perma.cc/ZNH2-42VC>] (“[T]he overwhelming majority of instances of ‘bear arms’ was in the military context.”).

¹⁸ See, e.g., JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 152–54 (2018) (“[F]elons and the mentally ill can

the claims of individuals, groups, states, or nations. For example, is it acceptable to carry a firearm solely to prepare for confrontation with police? Plus, self-defense at common law is more limited than the right to keep and bear arms.¹⁹ Self-defense requires an imminent threat, and that threat may only be countered by necessary and proportional force. Yet, one can possess firearms in the home for self-defense, no matter how remote the threat, how unnecessary the firearm, or how disproportionate lethal force is to the threat that materializes.²⁰

It would seem that textualism—at least of the “original public meaning” variety—will not suffice to steer the doctrine in the next decade; nor will purposivism—if “purpose” is understood simply to mean self-defense. Equilibrium-adjustment theory may help resolve the impasse and set the doctrine on the right course.

A decade ago, Professor Orin Kerr wrote a brilliant article: *An Equilibrium-Adjustment Theory of the Fourth Amendment*.²¹ His theory was that judges apply Fourth Amendment doctrine to maintain an equilibrium between government power and personal liberty. As he writes:

When changing technology or social practice makes evidence substantially harder for the government to obtain, the Supreme Court generally adopts lower Fourth Amendment protections for these new circumstances to help restore the status quo ante level of government power. On the other hand, when changing technology or social practice makes evidence substantially easier for the government to obtain, the Supreme Court often embraces higher protections to help restore the prior level of privacy protection.²²

Professor Kerr’s model begins with a thought experiment: a “Year Zero” without technology (no fences, no cars, no cell phones, and no wiretaps).²³ In Year Zero, the power of the state and the protection of privacy are in equilibrium, maintained by certain rules: warrants for the searches of homes and probable cause for arrest of persons.²⁴ As new technology becomes available or new social customs develop, the courts in a case-by-case fashion try to restore the balance set at Year Zero. So, for example, as

claim moral and legal rights to self-defense, and yet *Heller* specifically carves them out from Second Amendment coverage.”).

¹⁹ *Id.* at 153.

²⁰ *Id.*

²¹ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

²² *Id.* at 480.

²³ *See id.* at 482–83 (discussing “a world with no tools to help commit or investigate crimes”).

²⁴ *See id.* at 484. This equilibrium does not have to be ideal in any welfarist or deontological sense—it could empower the police too much; it could protect privacy too much—but it is an equilibrium. *Id.* at 485.

criminals obtain cars to transport contraband, courts interpret Fourth Amendment rules to grant law enforcement greater flexibility to search automobiles and hence restore the distribution of police power and privacy that existed in Year Zero.²⁵

Equilibrium-adjustment theory holds promise for rationalizing Second Amendment jurisprudence. Like the Fourth Amendment, the Second Amendment appears to suggest a Year-Zero equilibrium (or actually, multiple equilibria) between government power to possess, use, and control the implements of violence and private power to do the same. And, like the Fourth Amendment, Second Amendment doctrine must contend with both technological change (more deadly and concealable arms, micro-stamping,²⁶ and 3D printing²⁷) and social change (more social acceptance of concealed carry²⁸ and more sensitive places²⁹). These technological and societal changes can upset whatever the Year-Zero balance of gun rights and regulation may have been.

Of course, Second Amendment equilibrium-adjustment differs from the Fourth Amendment in crucial respects. Fourth Amendment equilibrium-adjustment focuses on just one dynamic: police power and individual privacy.³⁰ But with the Second Amendment, there are potentially numerous equilibria: individuals versus individuals, individuals versus law enforcement, and individuals versus the military.³¹

Also, Professor Kerr's equilibrium-adjustment theory does not consider societal or technological change that can fundamentally *reset* the Year-Zero distribution of power.³² An initial equilibrium between civilian and military

²⁵ *Id.* at 507–08.

²⁶ See generally *Microstamping & Ballistics in California*, GIFFORDS L. CTR. (Oct. 14, 2020), <https://giffords.org/lawcenter/state-laws/microstamping-ballistics-in-california/> [<https://perma.cc/7MKP-R9GK>] (explaining microstamping technology).

²⁷ See generally Jake Hanrahan, *3D-Printed Guns Are Back, and This Time They Are Unstoppable*, WIRED (May 20, 2019), <https://www.wired.co.uk/article/3d-printed-guns-blueprints> [<https://perma.cc/DL2N-B3SK>] (describing the rise of a decentralized network of 3-D-printed gunsmiths).

²⁸ See Harel Shapira, Katherine Jensen & Ken-Hou Lin, *Trends and Patterns of Concealed Handgun License Applications: A Multistate Analysis*, 5 SOC. CURRENTS 3, 11 (2018) (discussing an increase in applications for concealed-carry licenses).

²⁹ See *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (holding that the United States Capitol building parking lot was a “sensitive place”).

³⁰ See Kerr, *supra* note 21, at 480.

³¹ See *infra* Section I.B. For a similar insight, see DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 287 (2003) (“In modern America, we . . . live under a condition of checks and balances for the distribution of arms.”).

³² See *infra* Part II (discussing technological change and its effect on Year-Zero distribution of power); see also, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 409 (1998) (discussing “constitutional moment[s]”); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59–60 (2017)

access to weapons may rest on the premise that there is no, and will be no, standing army.³³ Once it is stipulated that a standing army is a permanent feature of the American constitutional order, the balance is fundamentally altered, and a new balance must be maintained.

Additionally, the federal case law from which to build a Second Amendment equilibrium-adjustment model is meager compared to the Fourth Amendment. The Supreme Court has decided only four Second Amendment cases since 2008,³⁴ including the landmark *Heller* opinion.³⁵ By comparison, the Court has handed down nearly two hundred Fourth Amendment cases.³⁶ Finally, Professor Kerr focuses mostly on Fourth Amendment Supreme Court case law,³⁷ rather than on subconstitutional, statutory, or regulatory adjustments, which appear just as relevant when considering Second Amendment equilibrium-adjustment theory, especially given the thin Supreme Court precedent. That said, equilibrium-adjustment theory does offer some purchase on the problem of change in Second Amendment adjudication and provides a vocabulary to explain the objectives of the emerging doctrine.

Part I of this Essay explains the equilibrium-adjustment model, modified to address the specific issue of gun rights and regulation. It specifies different possible Year-Zero equilibria for the right to keep and bear arms: individual versus individual, individual versus law enforcement, and individual versus military. It then discusses how the law may try to restore the *ex ante* distribution of power and authority at Year Zero. Part II considers how historical events could fundamentally reset the equilibria. Part III applies this approach to the two contenders for Second Amendment analysis going forward: the “text, history, tradition, and analogy-only” approach and the “two-step” framework.

(discussing the effect of “gloss” on clarifying “the Constitution’s distribution of authority” among and within the federal government branches); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3–4 (2019) (discussing James Madison’s concept of “liquidation” of terms through a period of public government practice).

³³ For example, North Carolina’s 1776 Declaration of Rights stated in relevant part: “[A]s standing armies in time of peace are dangerous to liberty, they ought not to be kept up” N.C. CONST. of 1776, art. XVII.

³⁴ *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curiam); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

³⁵ 554 U.S. 570 (2008).

³⁶ Brent E. Newton, *The Supreme Court’s Fourth Amendment Scorecard*, 13 STAN. J.C.R. & C.L. 1, 4 (2017) (identifying 173 Fourth Amendment decisions between 1982 and 2015).

³⁷ Kerr, *supra* note 21, at 494–95.

I. SECOND AMENDMENT EQUILIBRIA

Where should we start for our Year Zero for the Second Amendment? In the beginning, there were no tools for self-defense and no rules for self-defense. Weapons were fists and teeth, deceit and treachery. The rule was get what you can, when you can, how you can. Everyone judged his own case and executed his judgment on everyone else.³⁸ The strong preyed on the weak, and the cunning preyed on the scrupled. If it sounds familiar, it should—it's the Hobbesian state of nature,³⁹ the unregulated marketplace of violence.⁴⁰ One can imagine fleeting symmetries in this primeval state, but they are extremely fragile and always disintegrate.⁴¹ Any theory of a Second Amendment right that begins with the state of nature isn't really a theory of law. It's like creating a standard model of time and space before the Big Bang.⁴²

A. *Setting the Year-Zero Equilibria*

Instead, we must calibrate our Year-Zero equilibria to a time when there were rules for violence and some technology to inflict it. The rules in this initial state are rooted in history and are, to some extent, transcultural and transtemporal. Accurately describing the Year-Zero equilibria is essential to this exercise. One can dispute any given distribution of power and authority as normatively wrong. The initial equilibria could empower government or individuals too much. They could be morally suspect either as a matter of right or as a matter of utility. In that sense, this objection is no different than that anticipated by Professor Kerr in his Fourth Amendment article, and my answer to those skeptics is the same—nothing about the initial distribution of power and authority for the Second Amendment says anything about whether it is normatively desirable. The point is not that the equilibria are ideal; the point is that they exist.⁴³

³⁸ See JOHN LOCKE, *The Second Treatise of Government*, in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 17, 22 (Paul E. Sigmund ed., 2005) (“[I]t is unreasonable for men to be judges in their own cases, [because] self-love will make men partial to themselves and their friends[,] and . . . passion[] and revenge will carry them too far in punishing others . . .”).

³⁹ THOMAS HOBBES, *LEVIATHAN* 97 (Clarendon Press 1909) (1651) (describing life in the state of nature as “nasty, brutish, and short”).

⁴⁰ See BLOCHER & MILLER, *supra* note 18, at 155.

⁴¹ See Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L., ECON. & POL'Y 1, 5–6 (2005) (“In the state of nature, cooperation over time becomes a nonstarter because of the overpowering risk of defection.”).

⁴² Stephen Hawking, *Remarks at the Pontifical Academy of Sciences*, <http://www.pas.va/content/accademia/en/publications/acta/acta24/hawking.html> [<https://perma.cc/AZ8X-HQ5Q>] (“Asking what came before the Big Bang[] is meaningless . . . because there is no notion of time available to refer to. It would be like asking what lies South of the South Pole.”).

⁴³ See Kerr, *supra* note 21, at 485.

Of course, the stated initial equilibria could be descriptively wrong. This objection, unlike the normative one, is subject to falsification. To create a description of the rules and customs at Year Zero with certainty would be a herculean undertaking. It would require the compilation and coding of a vast dataset of historical legal and social practices—not just a few remarks in Blackstone’s *Commentaries*,⁴⁴ a stray comment by an antebellum state judge,⁴⁵ or a random musing by Thomas Jefferson.⁴⁶ Instead, it would demand the cataloging of arms and related data, from a wide range of sources, including folkways, state and local customs, law enforcement records, newspaper reports, private correspondence, and policy statements, as well as statutes, regulations, and state and federal court decisions.

The existing method of simply looking to published cases and statutes for the legal rules surrounding firearms and self-defense suffers from critical selection biases. There may be legal rules that went unchallenged because no one thought they were unlawful. There may be practices that went unregulated because everyone thought they were protected, or because everyone considered them so aberrational that they didn’t need to be specifically prohibited. After compiling such a database of historical laws and practice, the task would be to determine a stable set of rules and understandings over some span of time and explain how they form the baseline equilibria between rights and regulation for Year Zero.⁴⁷

Amassing historic regulations and practices into a comprehensive, searchable database is no easy feat. Other scholars have developed methods to achieve this goal with other kinds of sources. Bodies of digitally searchable written content and associated research techniques—like corpus linguistics—enable scholars to examine vast amounts of words and phrases

⁴⁴ See 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

⁴⁵ *Bliss v. Commonwealth*, 2 Litt. 90, 91–92 (Ky. 1822) (“[T]o be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form . . .”). *But see* Wyo. Comp. Laws ch. 52 § 1 (1876) (codified at Wyo. Stat. § 980 (1887)) (“Hereafter 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.”).

⁴⁶ Letter from Thomas Jefferson to Peter Carr (Aug. 19, 1785), in 1 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 395, 398 (H.A. Washington ed., 1853) (“Let your gun, therefore, be the constant companion of your walks.”).

⁴⁷ For example, as both Professor Kerr and I note, the home appears to anchor a number of legal claims about rights versus regulation through time. Kerr, *supra* note 21, at 518 (“The home is the one space protected by the Fourth Amendment that seems impervious to changing technology, changing social practice, and changing law.”); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1305 (2009) (noting the “privilege of the home works a kind of alchemy with the Constitution”).

within certain time parameters to see how they are used.⁴⁸ To the extent original-public-meaning originalism rests on a falsifiable proposition about linguistic practice in the Founding Era, these techniques allow lawyers and linguists to draw conclusions about how phrases were typically used, rather than idiosyncratically used.⁴⁹

Similarly, the Year-Zero Second Amendment equilibria could be understood as those typical social and legal practices drawn from a vast database of information about the contemporaneous social and legal environment. Stating the Second Amendment Year-Zero rules with confidence would then be akin to a data-intensive application of Professor William Baude's and Professor Stephen Sachs's positive- or original-law originalism,⁵⁰ where the task is to identify the "original law" that existed at the relevant time period. Or, alternatively, it may look like a data-driven form of Professor Lee Strang's abduced-principles originalism,⁵¹ in which lawyers "ascertain the archetypal practices that the [constitutional text] was understood to permit, prohibit, or require" and then distill a legal principle from them.⁵² Or, yet a third option, it may demand some big-data version of Professor Saul Cornell's intellectual-history approach, which requires the

⁴⁸ Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 833 (2018) ("To the extent our understanding of ordinary meaning should be informed by the linguistic norms and conventions prevailing at the time that a given legal text was drafted, corpus linguistics can provide powerful evidence of historic language use.").

⁴⁹ See Darrell A.H. Miller, *Owning Heller*, 30 U. FLA. J.L. & PUB. POL'Y 153, 164 (2020) (highlighting that outlier usages of "bear arms" are not indicative of the ordinary meaning of the constitutional text); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 269 (2019) (suggesting that the search in "original public meaning" originalism is for the average speaker of English).

⁵⁰ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 821 (2015); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015). To his credit, Judge Jay S. Bybee in the Ninth Circuit recently attempted to do something like this with a thorough investigation of seven centuries of regulations and commentary and concluded "[o]ur review of more than 700 years of English and American legal history reveals a strong theme: government has the power to regulate arms in the public square." *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc).

⁵¹ Strang, *supra* note 1; see also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996) (articulating legal reasoning as "abductive" reasoning); *Young*, 992 F.3d at 813 ("[T]he overwhelming evidence from the states' constitutions and statutes, the cases, and the commentaries confirms that we have never assumed that individuals have an unfettered right to carry weapons in public spaces.").

⁵² See Strang, *supra* note 1, at 957, 964 ("Using abduced-principle originalism based on archetypal practices as an example: first, a judge must identify the data, the archetypal practices regarding which there was a consensus. Second, the judge must put forward possible norms that explain the data. Third, the judge will test the possible norms utilizing fit and, if necessary, the Framers' and Ratifiers' perspectives, to ascertain which norm is the best explanation of the archetypal practices. Fourth, the judge will apply that norm in the case before him, the case that had required him to articulate the constitutional text's original meaning through the process of abduction.").

contextualization of constitutional provisions in a web of practice from both high and low culture.⁵³

B. *Stating the Year-Zero Equilibria*

Because such a comprehensive undertaking is not possible in these few pages, an informed hypothesis will have to do. The following description of Second Amendment equilibria at Year Zero is my best, good faith effort to synthesize a broad, varied, transnational, and transtemporal set of rules into an initial distribution of power and authority. Those with more time and resources could analyze and code various data points about the initial distribution differently, and I welcome such an effort. With these caveats—and accepting the contingent nature of this description—the players and rules of the Year-Zero equilibria follow.

1. *The Players*

a. *Individuals*

Individuals have a right to keep arms “suitable to their condition and degree” as allowed by law.⁵⁴ Individuals can openly carry arms only upon reasonable fear of imminent confrontation,⁵⁵ or when and where it is customary for them to do so—but only with sufficient guarantees that they

⁵³ See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 729 (2013) (“[T]he public and intersubjective nature of language enjoins historians to recognize that the meaning of a text is determined by a range of contextual factors, some linguistic and others social.”).

⁵⁴ BLACKSTONE, *supra* note 44, at *139.

⁵⁵ See *State v. Burkett*, 234 P. 681, 682 (N.M. 1925) (“[I]t is error to refuse to instruct that one having reasonable grounds to anticipate an unlawful attack endangering life or limb has a right to arm himself for the purpose of resisting such attack.”); *Medley v. State*, 448 A.2d 363, 368 (Md. Ct. Spec. App. 1982) (“[W]hat authority there is on the subject seems to establish the . . . principle—that, at common law, it was unlawful for a person to go about armed, even as a protective measure in anticipation of attack.”); 6 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* § 2496 (Philadelphia, Kay & Bro. 7th & rev. ed. 1874) (“A man cannot excuse wearing such armor in public, by alleging that such a one threatened him, and that he wears it for the safety of his person against his assault”); 1 GILBERT HUTCHESON, *TREATISE ON THE OFFICES OF JUSTICE OF PEACE; CONSTABLE; COMMISSIONER OF SUPPLY; AND COMMISSIONER UNDER COMPREHENDING ACTS, IN SCOTLAND* 381 (Edinburgh, William Creech 2d ed. 1809) (same); see also *Medley*, 448 A.2d at 369 (“[M]ost courts faced with the issue have expressly refused to recognize apprehension of impending danger as a permissible basis for one to carry a weapon in contravention of a general statutory prohibition.”); 3 EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* 161–62 (London, W. Clarke & Sons 1817) (describing the case of Sir Thomas Figett, charged with the crime of carrying weapons when he went “armed under his garments,” and in front of the king’s ministers, to “safeguard [] his life” even though he’d been threatened by Sir John Trevet that week).

present no threat to the public peace.⁵⁶ Individuals may use force only when necessary and only as much as is proportional to the threat.⁵⁷ Because the law values life above all else, individuals must retreat from confrontation if at all possible, except within the home.⁵⁸ Individuals must internalize all costs associated with violation of the previous rules and costs unreasonably inflicted upon third parties.⁵⁹ Deadly force used in a public setting must have express or implicit public benefit and sanction.⁶⁰

b. Domestic law enforcement

Individuals are under a duty to carry arms when performing a law enforcement function⁶¹ and, when performing this function, are not permitted

⁵⁶ 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (London, Nutt & Gosling 1739) (“Persons of Quality are in no Danger of offending against th[e] Statute [of Northampton] by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace.”).

⁵⁷ Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 82 (2020) (“Self-defense is only lawful when necessary and proportional. Those requirements have the effect of shepherding conflicts away from violence, and especially lethal violence.”).

⁵⁸ *Id.* at 86 (“A traditional exception to the retreat requirement is when lethal self-defense occurs in the home.”).

⁵⁹ See MICHAEL DALTON, THE COUNTRY JUSTICE 185 (1655) (stating “[a]ll such as shall go or ride armed (offensively) in Fairs, Markets, or elsewhere; or shall wear or carry any guns, dags, or pistols charged; . . . any Constable seeing this, may arrest them, and may carry them before the Justice of peace, and the Justice may binde them to the peace” and noting armed individuals “strieth a fear and terrour into the Kings subjects”); MODEL PENAL CODE § 3.09(3) (AM. L. INST. 1985) (“When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.”); cf. Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PENN. L. REV. 591, 605 (2016) (arguing that Fourth Amendment law is calibrated to make law enforcement agents internalize the costs of investigation they would otherwise externalize).

⁶⁰ See Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567–68 (1903) (discussing that historically “homicide could be justified only when done in execution of the king’s writ, or by authority of a custom by which a thief hand-having and back-bearing, an outlaw, or perhaps other manifest felons, might be taken by force without a warrant; in short, in cases where the homicide was committed in execution of the law”); see also 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 479 (Cambridge Univ. Press 2d ed. 1898) (justifiable homicides at common law “would have been regarded less as cases of . . . self-defence than as executions”); Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 90–91 (2017) (discussing historical manner in which homicide had to serve a public purpose to be justified); Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. LEGIS. 523, 528 (2010) (“The only justifiable homicide . . . was one committed under the auspices of the state, or at least in clear furtherance of the state’s interests.”).

⁶¹ 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 116 (London, E. & R. Brooke 1797) (1644) (“[T]he duty of the constable is, to raise the power of the towne, as well in the night as in the day, for the prosecution of the offender”); WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL LAW 137 (St.

to retreat from confrontation.⁶² When they perform a law enforcement function, they must arm themselves in such a fashion, or in such numbers, as to exercise superior capacity for force than those they confront.⁶³ Individuals exercising a legitimate law enforcement function can use any force, including deadly force, necessary to protect life, limb, and property, or to effect an arrest.⁶⁴ Individuals who are not performing a legitimate law enforcement function are culpable as ordinary miscreants and can be resisted as such.⁶⁵

c. Military

Individuals are under a duty to arm themselves in anticipation of confrontation with enemies foreign and domestic and to protect the life,

Paul, West Publ'g Co. 1894) (“It is not only every person’s right, but it is his legal duty, to prevent a felony, even if he has to go to the extreme of taking the life of the person attempting to commit it.”); HUTCHESON, *supra* note 55, at 381 (stating it is not a crime for a person to “arm[] himself to suppress dangerous rioters, rebels, or enemies, and endeavour[] to suppress or resist such disturbers of the peace and quiet of the realm”).

⁶² Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1156 (2008) (observing that states “allow officers to defend themselves even in circumstances when others cannot, because officers’ defensive force serves the state’s ends as well the officer’s”); *Boykin v. People*, 45 P. 419, 422 (Colo. 1896) (reasoning that a police officer effecting arrest “may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose; and this right of the defendant goes even to the extent, if necessary, of taking human life”); *United States v. Thomas*, 11 M.J. 315, 317 (C.M.A. 1981) (“[I]t is a police officer’s duty to protect the public as well as to subdue his adversary . . .”).

⁶³ See Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 306 (2018) (“Whatever acts the law labels as force or violence, there should be little doubt that police secure order through threats of superior physical force, and at least sometimes, actual exercises of it.”); see also Letter from Alexander Hamilton to James McHenry (Mar. 18, 1799), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-22-02-0344> [<https://perma.cc/FW7Y-KPMW>] (“Whenever the Government appears in arms it ought to appear like a *Hercules*, and inspire respect by the display of strength.”).

⁶⁴ See John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1238 (2014) (“Under the common law fleeing felon rule, both law enforcement officers and private citizens enjoyed the privilege of using deadly force to secure the arrest of felons, but neither could use the privilege to secure the arrest of misdemeanants.”); see also *Tennessee v. Garner*, 471 U.S. 1, 12 (1985) (“[T]he common-law rule . . . allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant.”).

⁶⁵ See Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129 (1969) (“An action by an official in excess of his authority was a trespass that could be resisted by physical force.”); see also *State v. Bethune*, 99 S.E. 753, 754 (S.C. 1919) (affirming “[t]he right of a person to resist an unlawful arrest, even to the extent of taking the life of the aggressor, if it be necessary, in order to regain his liberty”); *Queen v. Tooley* (1709) 92 Eng. Rep. 349, 353 (Q.B.) (“[A] man ought to be concerned for Magna Charta and the laws; and if any one against the law imprisons a man, he is an offender against Magna Charta.”).

liberty, and property of their nation's inhabitants or its sovereignty.⁶⁶ The nation may only use such force as is necessary and proportional to an imminent threat to life, liberty, property, or sovereignty of the nation.⁶⁷ Nations may arm themselves so as to present military capability superior to that of other nations.⁶⁸ Military power is subordinate to civil authority, and both are subordinate to the Constitution.⁶⁹ Responsibility for military power is shared between states and the central government.⁷⁰ Individuals, working in concert, can use their collective power as military units to counterbalance the depredation of a lawless national government when all ordinary political processes fail or on behalf of government to quash lawless insurrections.⁷¹ Standing armies are not permitted.⁷²

2. *The Power Dynamics Among the Players*

At this initial distribution of power and authority, the lines between these different groups are indistinct, the roles played by individuals are dynamic, and the boundaries between public and private, permitted and

⁶⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 649 (2008) (Stevens, J., dissenting) (“The Virginia military law, for example, ordered that ‘every one of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer.’” (quoting *An Act to Amend and Reduce into One Act, the Several Laws for Regulating and Disciplining the Militia, and Guarding Against Invasions and Insurrections*, 1785 Va. Acts ch. 1, § III)).

⁶⁷ John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 59–60 (2010) (articulating the customary international law *Caroline* Doctrine, which specifies that a nation can only exercise self-defense where its need is “instant, overwhelming, leav[es] no choice of means, and no moment for deliberation,” and that the force used for self-defense must be proportional).

⁶⁸ See Letter from Alexander Hamilton to James McHenry, *supra* note 63.

⁶⁹ See, e.g., IND. CONST. of 1816, art. I, § 20 (“That the people have a right to bear arms for the defence of themselves and the state; and that the military shall be kept in strict subordination to the civil power.”); MASS. CONST. of 1780, pt. 1, art. XVII (“[I]n time of peace, armies are dangerous to liberty, they ought not to be maintained, without the consent of the Legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.”); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 196–98 (2006) (quoting these and other provisions).

⁷⁰ See U.S. CONST. art. I, § 8, art. II, § 2 (stating that state militias may be called into service by the federal government).

⁷¹ THE FEDERALIST NO. 28, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Power being almost always the rival of power; the General Government will, at all times, stand ready to check the usurpations of the State Governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.”).

⁷² N.C. CONST. of 1776, art. XVII (“[A]s standing armies in time of peace are dangerous to liberty, they ought not to be kept up”); OHIO CONST. of 1802, art. VIII, § 20 (“[S]tanding armies, in the time of peace, are dangerous to liberty, they shall not be kept up”); PA. CONST. of 1776, cl. XIII (“[A]s standing armies in the time of peace are dangerous to liberty, they ought not to be kept up”).

forbidden actions are porous.⁷³ Private individuals who commit homicide in self-defense require forgiveness of the sovereign, who eventually dispenses it as a matter of course.⁷⁴ The exception is when one kills expressly or implicitly in service of law enforcement, such as performing an execution or punishing a felon, in which case the homicide is not merely excusable but justified.⁷⁵

Groups cannot arm themselves for public confrontation, even to protect each other,⁷⁶ unless they act at the direction of the local magistrate to effect domestic law enforcement or security, or under a set of preexisting rules for activating domestic law enforcement (like the hue and cry).⁷⁷ If they do so arm themselves as a law enforcement group, they may arm themselves to present a superior force to those criminal suspects they encounter. However, if they use excessive force as law enforcement agents, they lose the benefit of acting in that capacity and are reduced to mere lawless individuals, and may be resisted with appropriate force. Groups of individuals who are armed publicly, in a fashion or place that is not familiar or customary, are liable for breach of the peace, unlawful assembly, riot, or treason,⁷⁸ unless they are

⁷³ See NAOMI D. HURNARD, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307*, at 92 (1969) (noting that, as far back as the medieval period, “[t]he boundary between self-defence and felonious slaying . . . raised problems”).

⁷⁴ See Miller, *supra* note 60, at 89–90.

⁷⁵ *Id.* at 91. The distinction is not always clear. See HURNARD, *supra* note 73, at 91 (“[A] distinction was made between killing a felon who resisted arrest and killing in resisting attempted robbery. While the former did not normally call for pardon the latter . . . was often thought to require it.”).

⁷⁶ Compare 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 516 (John Curwood ed., 8th ed. 1824) (1716) (“[A]n assembly of a man’s friends in his own house, for the defence of the possession thereof . . . is indulged by law . . .”), with *Queen v. Soley* (1707) 88 Eng. Rep. 935, 937 (Q.B.) (“Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened . . . for he is in the protection of the law, which is sufficient for his defence.”).

⁷⁷ HUTCHESON, *supra* note 55, at 381 (stating that it is not a crime for a person to “arm[] himself to suppress dangerous rioters, rebels, or enemies, and endeavour[] to suppress or resist such disturbers of the peace and quiet of the realm”). On the “hue and cry,” see Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 579 (1936) (noting that “until quite modern times police duties were the duties of every man” and the “hue and cry . . . obliged all to cease work and join immediately in pursuit of an offender”).

⁷⁸ HUTCHESON, *supra* note 55, at 381 (“[E]ven where there has been no affray, or actual fighting and assault, the public peace is . . . broken by such conduct as gives others serious cause of uneasiness and alarm.”); An Act for the Punishment of Criminal Offenders (N.H. 1701), *reprinted in* 1 LAWS OF NEW HAMPSHIRE 677, 679 (Albert Stillman Batchellor ed., 1904) (“[I]t is Enacted by the Authority aforesaid, that every Justice of the Peace within this Province, may cause to be Stayd and Arreasted all Affrayers, Rioters, Disturbers, or Breakers of the peace or any other that shall goe Armed Offensively”); Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61, 71 (2018) (“Massachusetts directly tied its restriction on carrying weapons in public with riot, affray, and breach of peace by calling for the arrest of ‘all Affayers, Rioters, Disturbers or Breakers of the Peace, and such as shall ride or go armed

acting at the direction of the local magistrate, on behalf of domestic law enforcement, or as part of a military unit.

Organized military force, comprised of individuals, is a duty of the community, and in America, governance is shared between different levels of national and state government. Private individuals who take up arms as a military unit at the direction of government can do so to suppress rebellions and insurrections⁷⁹ or to counter tyrannical government when all political controls have failed. However, such group activity is not pursuant to any ordinary concept of positive law as much as it is an appeal to “Nature and Nature’s God.”⁸⁰

In this state of initial equilibria, ordinary individuals would have a right to possess weapons allowed by law in their homes, as well as incidental rights to transport them to and from a place of manufacture or repair.⁸¹ They would have to articulate a credible threat of imminent attack to take a weapon out of their dwellings, unless the individuals provide assurances that appearing armed would not be understood as a breach of the peace or that carrying weapons accords with some other kind of accepted custom. If one must use force for self-defense, the force must be necessary and proportional to the threat. One cannot use a deadly weapon, for example, to defend oneself from a battery committed by an unarmed child. If an individual can retreat from the confrontation, he must, because society places superior value on human life and public order than it does on any individual’s sense of grievance. A person may not use a weapon that is capable of more force than she is threatened with; otherwise, she becomes the threat, and the other party is entitled to equalize the force.⁸² If an individual does kill an attacker, the

Offensively.” (quoting An Act for the Punishing of Criminal Offenders, no. 6, 1694 Mass. Laws 12); *United States v. Mitchell*, 26 F. Cas. 1277, 1278 (C.C.D. Pa. 1795) (No. 15,788) (recording the prosecution’s instruction that “[b]y the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war” and that “whether it shall be treated as riot, or treason, will depend on the quo animo”).

⁷⁹ See Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1367 (2015) (“[T]he grant of authority to use the militias to suppress rebellions hinted that Congress had acquired a general power to enact measures meant to subdue rebels.”).

⁸⁰ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁸¹ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 725 (2007) (“Where a law is so broad as to make gun ownership—or at least gun purchasing and repair—illegal, the courts insure that the underlying right is more than illusory.”).

⁸² See Elizabeth Papp Kamali, *The Devil’s Daughter of Hell Fire: Anger’s Role in Medieval English Felony Cases*, 35 LAW & HIST. REV. 155, 177 (2017) (“Typically the use of disproportionate force, such as wielding a knife in response to a punch, would have been fatal to a self-defense plea.”); HURNARD, *supra* note 73, at 93 (“In dealing with the point that the force used in self-defense must have been no more than commensurate with the violence of the attack, a convenient rule of thumb was to judge it

individual must demonstrate that it advances a public purpose and the action must receive the actual or implicit approbation of the community.

If an individual is summoned to perform a law enforcement duty, she is permitted to take a weapon with her out of her dwelling for that purpose. And, similarly, she is allowed to threaten use of that weapon to effectuate an arrest, to preserve property or life, or to maintain order. However, if she threatens force in excess of her lawful authority, or if the arrest is wrongful, the law enforcement agent becomes a criminal, and individuals may resist that agent with force as if she was just another law-breaking individual.⁸³

Finally, if an individual is summoned as part of the national defense, he is allowed to equip himself with whatever weapons he possesses, and he can be forced to equip himself with weapons of such quality to effectively help others defend the nation or any portion of it. The power to summon this force is shared between the federal and state governments, and persons exercising this function are subject to the limitations and conditions of military regulation. That individual may also join with other individuals in order to resist tyrannical government, once all political safeguards have failed.

Clearly, there are multiple equilibria in this hypothetical scenario. Individuals may only confront other individuals in public on an equal basis and only as a last resort. Law enforcement may confront suspected lawbreakers with superior force and anticipatorily. But if law enforcement agents act outside of the law, individuals may treat those agents as simply other threatening individuals and may respond with equal force. Nations may confront foreign and domestic threats with superior force, and anticipatorily, but only at the behest of national or state civil authorities. Because the national defense is constituted by individuals, its function is limited by the honor, willingness, and capacity of individuals to perform their duty. Finally, an armed populace can resist the national defense in the extreme case in which the nation uses the defense for tyrannical ends.⁸⁴

excessive if an edged weapon had been used against an assailant who was unarmed or armed only with a blunt instrument This rule was enforced with great strictness on occasion.”); *Etter v. State*, 205 S.W.2d 1, 4 (Tenn. 1947) (“It is [a] well recognized principle of law that when one is beset with a single personal assault, not made by one of overpowering strength and force, the resistance thereto must be proportionate to the nature of the assault.”).

⁸³ See HURNARD, *supra* note 73, at 90 (discussing the case of Geoffrey le Skippere, who was imprisoned “for having killed a thief who resisted arrest” on the supposition that Skippere had used excessive force); see also cases and sources cited *supra* note 65.

⁸⁴ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (“It was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”).

C. Equilibrium-Adjustment

Technological and social change can upset the balance among these different categories of actors, requiring legal efforts to restore the initial distribution of force and authority. This Essay focuses on three salient factors that disrupt the Year-Zero equilibria: firearms and other weapons technology, concealed weapons, and public carry.

1. Firearms and Other Weapons Technology

Firearms and other weapons technology upset the Year-Zero equilibria. In the initial state, individuals can keep weapons to protect themselves in their homes. Attackers armed with clubs, knives, and swords present a comparatively smaller threat to an individual who is within her home than out of her home; nor do such weapons possessed by an individual within her home pose much of a threat to persons outside. The home serves as a kind of perimeter for the rights to weapons, the use of self-defense, and the externalities associated with both.

As the functional features of weapons—range, rate of fire, muzzle velocity, and lethality—change, they upset these equilibria. Strategies like barricading a door are less effective against someone armed with a firearm than they are against someone armed with a club. Homeowners who repel attackers with firearms in turn impose risks on others. The same rounds that can penetrate walls and harm assailants can injure innocent neighbors, pedestrians, or motorists when fired in self-defense.⁸⁵ In public confrontation, it is much more difficult to safely retreat from parties armed with firearms than from those armed with clubs or knives.⁸⁶

Technology similarly disrupts the relationship between individuals and law enforcement. The initial distribution of force and authority presumes that private parties will perform law enforcement duties and will arm themselves in such a fashion or in such numbers as to present superior force to those they confront. An individual in the home with a firearm, however, can repel many dozens of individuals who may not be similarly armed. Accordingly, law enforcement activity like serving warrants, and certainly no-knock warrants, become far more hazardous. This would mean that individuals performing a law enforcement function must be able to equip themselves to outgun any potential suspect or criminal. Moreover, to the extent the ex ante

⁸⁵ See *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) (“The same military-style features pose heightened risks to innocent civilians and law enforcement officers—certainly because of the capability to penetrate building materials and soft body armor, but also because of an amalgam of other capabilities that allow a shooter to cause mass devastation in a very short amount of time.”).

⁸⁶ See *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905) (“The doctrine of ‘retreat to the wall’ had its origin before the general introduction of guns . . . Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.”).

position requires private parties to conduct public law enforcement activities with their own self-defense weapons, those weapons are likely to be more powerful, further destabilizing the equilibria.

The disruption becomes starker once we move beyond firearm technology to other law enforcement and military technologies. A home booby-trapped to explode is undeniably safe from invasion, but it is also an extreme hazard to the neighbors. Placing lethal weapons on personal drones provides protection but plainly threatens others.⁸⁷ If we extend the idea of arms to military-grade weapons, biological or chemical agents, or improvised explosive devices, individuals can potentially impair the defensive capabilities of national governments.

Both protections of and restrictions on weapons technology aim to restore the initial distribution of power. On the protection side, the fact that firearms are allowed by law means that others must have access to them to equalize the capacity for force.⁸⁸ However, regulating their lethality, whether by rate of fire, range, caliber, or other kinds of mechanisms, also attempts to restore the *ex ante* balance, which prefers life over lethal confrontation—a rule that, prior to firearms, would have been enforced by self-defense doctrines like retreat.⁸⁹

Such restrictions also help ensure that law enforcement has the capacity to provide superior force in apprehending criminals. Restricting very powerful weapons that would hold at bay numerous law enforcement actors at once ensures that law enforcement has a superior capability than any one individual. The same is true of prohibiting private ownership or manufacture of military-grade weaponry.

Courts often consider whether a weapon is “dangerous and unusual” when evaluating the degree to which the individual’s possession or use of that weapon is protected by the Second Amendment. Yet, the metric to examine whether an arm is an unprotected “dangerous and unusual” weapon as opposed to a protected weapon in “common use”⁹⁰ cannot be the

⁸⁷ See Ben Wolfgang, *FAA Forum Gauges Approval of Drone Privacy*, WASH. TIMES (Apr. 3, 2013), <https://www.washingtontimes.com/news/2013/apr/3/faa-forum-gauges-approval-of-drone-privacy/> [<https://perma.cc/8NZR-CQE2>] (“A Missouri man said that the drone debate has been backwards, and that the focus should instead be on how quickly the federal government recognizes Americans’ freedom to own and operate drones as methods of self-defense under the Second Amendment.”).

⁸⁸ See *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (carrying weapons “‘in full open view’ . . . places men upon an equality”).

⁸⁹ See Ruben, *supra* note 57, at 83 (“Blackstone . . . explain[ed] a person’s duty to retreat by reference to ‘a real tenderness of shedding his brother’s blood.’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *185)).

⁹⁰ *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016) (“If a weapon is dangerous and unusual, it is not in common use and not protected by the Second Amendment.”).

commercial popularity of any particular weapons technology. That would be intolerably circular.⁹¹ Nor can it be that a weapon is in common use when it is used by the military and law enforcement because the military and law enforcement are supposed to maintain a superior capacity for force. Instead, guns are “dangerous and unusual” in private hands because they threaten to upset the status quo ante distribution of power between individuals, law enforcement, and the military. So, for instance, weapons that may be quite commonly used by police departments, the National Guard, and the U.S. military will still be “dangerous and unusual” to individuals because those weapons potentially supply individuals with lethal force that matches or exceeds that of either domestic law enforcement or the military.⁹² At a minimum, in order to maintain the equilibria, this may mean these law enforcement and military-style weapons in private hands would be subject to more thorough and intrusive regulation than other kinds of weapons.

2. *Concealed Carry*

Technology that makes weapons more concealable, as well as social acceptance of carrying such weapons, also destabilizes the status quo ante distribution of force and authority. In Year Zero, weapons could only be carried openly. Practically, when individuals carry weapons openly, it is far easier to establish whether they are doing so in accordance with the laws, customs, and norms of the ex ante position. An individual’s outward behavior with an openly carried weapon can help law enforcement assess whether the person is responding to an imminent attack or is the aggressor. Whether the weapon is being carried in a place and time according to custom is far easier to ascertain when carried openly, as in, for example, carrying a hunting rifle in the woods during deer-hunting season. It is also easier to assess an individual’s purpose when he carries weapons openly, as when an individual is engaging in law enforcement or is called up for active military service.

Conversely, to conceal a weapon traditionally implied malicious or lawless intent.⁹³ In 1811, an attorney general in the Orleans Territory (which

⁹¹ *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“[R]elying on how common a weapon is at the time of litigation would be circular . . .”).

⁹² *See McCutchen v. United States*, 145 Fed. Cl. 42, 52 (2019) (“[P]rohibitions [on dangerous and unusual weapons] have included machineguns and others that are used primarily by the military in warfare.”). This is why Justice Samuel Alito’s concurrence in *Caetano v. Massachusetts*, concerning whether or not law enforcement or the military commonly use stun guns, seems misguided. *See* 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring) (“[T]he [Massachusetts] Supreme Judicial Court’s assumption that stun guns are unsuited for militia or military use is untenable.”).

⁹³ *See, e.g., Bell v. State*, 8 So. 133, 133 (Ala. 1890) (“The carrying concealed of a barbarous weapon of this class, which is usually the instrument of an assassin, and an index of a murderous heart, is absolutely prohibited by section 3776 of the Criminal Code of this state.”).

would later become Louisiana) remarked on the legislature's need to curb "[t]he dangerous practice . . . which obtained in this country, and which still too generally obtains, of wearing concealed weapons, ready to carry into effect the irascible, malicious, and vindictive feelings of their owners."⁹⁴ Later, another Louisiana court pointed to prohibitions on concealed weapons "to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons."⁹⁵

Concealed carry also makes it more difficult to enforce the laws and customs that regulate where arms may be carried. Prohibitions on firearms in "sensitive places" are a way of limiting the carrying of firearms only when, where, and in such a manner as is customary.

The increased capacity and tolerance for concealed carry upsets this status quo. Law responds by attempting to restore the initial balance. Blanket prohibitions on weapons that are concealable, going back to the English Renaissance and extending to the modern day, are one method of restoring the status quo. For example, Henry VIII outlawed "little short hand-guns[] and little hagbutts" of less than "one whole yard" and "three quarters of one yard," respectively, because of their use in crime and riot and because they generated "peril and fear" in the populace.⁹⁶ The express purpose of this regulation was to "ma[ke] it almost impossible to conceal the weapon."⁹⁷ Similar prohibitions on the carrying of concealed weapons—if not their actual manufacture and possession—proliferated in the United States in an attempt to restore the initial state.⁹⁸

Alternatively, in lieu of blanket prohibitions on concealable weapons, regulations also attempt to ensure the concealed weapons holder is trustworthy—in other words, someone who will keep the peace and will not cause harm to others. Restricting licensing to those who show good cause to carry a concealed weapon reflects an attempt to restore the status quo ante that arms should be carried only by those who need them upon reasonable fear of imminent attack.⁹⁹ Similarly, licenses that require a gun owner to

⁹⁴ *Territory v. Mather*, 2 Mart. (o.s.) 48, 49 (Orleans 1811).

⁹⁵ *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850).

⁹⁶ The Bill for Cross-Bows and Hand-Guns (1541), reprinted in 5 DANBY PICKERING, *THE STATUTES AT LARGE, FROM THE THIRTY-SECOND YEAR OF KING HENRY VIII, TO THE SEVENTH YEAR OF KING EDWARD VI*, at 70, 71 (London, Cambridge Univ. Press 1763).

⁹⁷ LOIS G. SCHWOERER, *GUN CULTURE IN EARLY MODERN ENGLAND* 59 (2016).

⁹⁸ See 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, 584–86 (2006) (cataloging the rise of more concealed weapons and legislator and public-opinion opposition to the practice).

⁹⁹ See *infra* note 107 and accompanying text.

demonstrate she has training, or that require periodic license review and renewal, or that require some indicia of virtue or judgment, are attempts to restore the prior set of conditions that permitted arms bearing only among those people unlikely to breach the peace or inflict unjustified violence.

3. *Public Carry*

The social practice of carrying weapons, concealed or unconcealed, also disrupts the initial equilibria. In Year Zero, only those whose status showed them to be peaceable, those in imminent danger, or those in law enforcement or the military could carry arms publicly. “A gun is an ‘unusual weapon,’ wherewith to be armed and clad,” the North Carolina supreme court said in 1843.¹⁰⁰ “No man amongst us carries it about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.”¹⁰¹ To the extent public carry becomes commonplace, that disrupts the initial equilibria.

A custom of carrying firearms raises the risks associated with confrontation between individuals.¹⁰² Carrying firearms reduces the effectiveness of nonlethal self-defense tools—like doors, locks, whistles, and mace—and reduces the ability to safely retreat to avoid violence or loss of life. The more firearms in public hands, the more reason private individuals and law enforcement have to think that private confrontations or crime prevention will result in gunfire.¹⁰³ The practice of carrying arms publicly also creates potential risks of a dangerous norm cascade.¹⁰⁴ As Professor Saul Cornell has written, according to Joseph Keble and his 1689 justice of the peace manual, criminal prohibitions extend to instances when “a man shall shew himself furnished with Armour or Weapon which is not usually worn” because it will “strike a fear upon others that be not armed as he is.”¹⁰⁵ The reason why public arms are regulated is that, without them, there exists “an

¹⁰⁰ *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422 (1843).

¹⁰¹ *Id.*

¹⁰² LEGAL CMTY. AGAINST VIOLENCE, GUNS IN PUBLIC PLACES: THE INCREASING THREAT OF HIDDEN GUNS IN AMERICA (2011).

¹⁰³ *See id.*

¹⁰⁴ On norm cascades and risky behaviors like drugs and guns, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033 (1996).

¹⁰⁵ Saul Cornell, *Limits on Armed Travel Under Anglo-American Law: Change and Continuity over the Constitutional Longue Durée, 1688–1868*, in *A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 74, 75 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019) (quoting JOHN KEBLE, *AN ASSISTANCE OF THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY* 147 (2d ed. 1689)).

asymmetry of power between the individual armed and those unarmed, a situation that undermine[s] the peace.”¹⁰⁶

Laws that regulate carrying firearms reflect an attempt to restore the previous equilibria between individuals, law enforcement, and the military. As with permitting concealed carry, licensing helps arrest dangerous norm cascades that permit anyone with a concern about safety to carry a weapon. Individuals must demonstrate a particular need to have a deadly weapon to protect themselves, different from the background risk that was present in the *ex ante* situation, in order to discriminate between those facing an imminent risk and those facing a risk indistinguishable from those of any other individual.¹⁰⁷ Requiring training to publicly carry firearms attempts to reduce the costs imposed on third parties by errant firing, restoring the initial position that obliged those who carry weapons to internalize the costs. Criminal sanctions on carrying or parading with firearms without a license do the same.¹⁰⁸

II. RESETTING THE YEAR-ZERO EQUILIBRIA

One can imagine events that fundamentally reset the initial equilibria, so that new equilibria must guide future regulation and rights. How this reset occurs depends on how one imagines constitutional change to develop outside the Article V amendment process.¹⁰⁹

One theory of a fundamental reset would be through a process of historical gloss or constitutional liquidation.¹¹⁰ Gloss is the notion that government practice of longstanding duration and express or tacit acquiescence can give constitutional meaning to otherwise underdetermined constitutional institutions or principles.¹¹¹ Constitutional liquidation is

¹⁰⁶ *Id.*

¹⁰⁷ See MASS. GEN. LAWS ch. 140, § 131 (2021) (requiring good cause to obtain a concealed carry permit); *Bell v. State*, 8 So. 133, 133–34 (Ala. 1890) (noting defense to prohibitions on carrying concealed weapons that “at the time of carrying the weapon concealed, he had good reason to apprehend an attack, which the jury may consider in mitigation of the punishment, or justification of the offense” (citing ALA. CRIM. CODE § 3775 (1886))).

¹⁰⁸ See *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (upholding prohibitions on private armed parades against a Second Amendment challenge).

¹⁰⁹ U.S. CONST. art. V.

¹¹⁰ I take no position at present on the differences between historical gloss and constitutional liquidation or their implications for constitutional theory. For more on the topic, see generally Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 1–2 (2020).

¹¹¹ *Id.* at 18 (stating that gloss requires “(1) governmental practice; (2) longstanding duration; and (3) acquiescence”). Bradley and Siegel suggest that historical gloss is poorly suited to analyze individual rights compared to separation of powers cases, although they recognize differences of opinion on that score. *Id.* at 37–39.

similar and comes from a remark from James Madison in *The Federalist*: “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”¹¹² Liquidation, according to Professor William Baude, requires constitutional indeterminacy, a course of practice over time, and a settlement reflected in official acquiescence and public sanction.¹¹³ A similar way of thinking of a reset is that it occurs slowly, as a continual layering of different Second Amendment-adjacent doctrines governing public arms, self-defense, private violence, and the like, that gradually obscure the Year-Zero equilibria and eventually supplant them. This looks very much like Professor David Strauss’s “common law constitution.”¹¹⁴ A final theory is one of “constitutional moments,” in the language of Professor Bruce Ackerman—events that irrevocably alter the initial arrangements of power and authority.¹¹⁵ In this model, the people act through exercise of “constitutional politics” marked by an express appeal to common good, ratified by mobilized American citizens, who then express “their assent through extraordinary institutional forms.”¹¹⁶ In these moments, our constitutional order is amended, even though the formal requirements of Article V have not been met.¹¹⁷

One need not subscribe to gloss, liquidation, common law constitutionalism, or constitutional moments to accept that some fundamental assumptions in the Year-Zero equilibria no longer prevail. Indeed, the *Heller* majority obliquely recognizes two of them: the ascendancy of the standing army and the rise of the professional police force.¹¹⁸ In some puzzling passages in *Heller*, Justice Scalia recognizes that the security apparatus of 1791 and of the twenty-first century are fundamentally different.¹¹⁹ Near the end of the opinion, Justice Scalia speaks, seemingly with approval, of a “standing army [that] is the pride of our

¹¹² THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

¹¹³ Baude, *supra* note 32, at 13–21.

¹¹⁴ See generally DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010) (arguing that we have a common law constitution in which precedent and incremental change are as or more significant than text).

¹¹⁵ Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1055–56 (describing the New Deal Era as a process of “constitutional creation” in which, “[r]ather than acting under the explicit procedures established by Article V . . . We the People of the United States expressed its will through a higher lawmaking process that relied primarily upon the structural interaction of Articles I, II and III of the Constitution”).

¹¹⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 627–28, 636 (2008).

¹¹⁹ *Id.* at 636.

Nation” and “well-trained police forces [that] provide personal security.”¹²⁰ He acknowledges that

[i]t may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.¹²¹

And he further appears to endorse that, notwithstanding this lack of private military capacity to counter a standing army, military weapons and their analogues (“M-16 rifles and the like”) may be banned from private armories.¹²² And yet, Justice Scalia also curiously claims “modern developments . . . cannot change our interpretation of the [Second Amendment] right.”¹²³

That sentiment may be true with respect to the notion that modern developments cannot change interpretation of the right to keep a weapon at home for self-protection. As with the Fourth Amendment, the home is the fixed star for privacy as well as self-defense in Anglo-American law.¹²⁴ However, beyond that narrow understanding, it is almost impossible to square these passages with other sections of *Heller* that disclaim any right to possess, much less use, military-grade weapons, or other features of constitutional law that question any constitutional right to resist law enforcement with force of arms.¹²⁵ If Justice Scalia *really* meant nothing had changed with the right, it would empower individuals to possess shoulder-fired missiles and biological weapons. It would mean that private citizens would have rights to all the equipment that highly militarized police departments use to apprehend criminals, protect property, quell riots, or fight terrorists. It would mean that those perceiving wrongful arrests or excessive force could threaten police with their publicly carried weapons.¹²⁶ This isn’t the society we live in. It must be that, notwithstanding Justice Scalia’s protestations, *something* has changed about the initial distribution of force

¹²⁰ *Id.*

¹²¹ *Id.* at 627.

¹²² *Id.* at 627–28.

¹²³ *Id.*

¹²⁴ Kerr, *supra* note 21, at 517–18; Miller, *supra* note 47, at 1303.

¹²⁵ *United States v. Johnson*, 542 F.2d 230, 233 (5th Cir. 1976) (“We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers Thus we hold that the mere invalidity of a law officer’s conduct under the fourth amendment, without more, can never justify the threat of deadly force in opposing the officer.”).

¹²⁶ See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1230 (2017) (“Until the latter half of the twentieth century, most American states and the Supreme Court recognized and even celebrated a common law ‘right’ to resist unlawful arrest.”); see also cases and sources cited *supra* note 65 (noting examples of a right to resist unlawful unrest).

and authority from the initial equilibria, either through gradual acceptance by political actors over time, or as a result of a convulsive national event and subsequent ratification by the people at large.

Whatever the mechanism, we now live in a society in which a standing, professional army, not citizen-soldiers, provide the national defense, as *Heller* itself recognizes.¹²⁷ Similarly, our streets and communities for the most part are policed by select, designated law enforcement professionals accountable to political actors and constitutional restraints, not collections of private individuals summoned in an emergency to enforce the laws of the community. Both of these societal changes have permanently altered the initial distribution of authority going forward.

A. *The Standing Army*

According to Professor Richard Kohn, “No principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime.”¹²⁸ And yet within fifty years, and certainly after the first century of American history, that deep and abiding distrust of standing armies had given way to widespread acceptance of a permanent, professional military in America.

The eclipse of the militia in favor of a standing army is a multigenerational story of incompetence and corruption. Even at the Founding, no less a figure than George Washington—while recognizing his reliance on the citizen-soldier¹²⁹—privately denigrated them.¹³⁰ Conflict over command, readiness, and performance during the War of 1812 further sullied the reputation of the militia as an effective security force.¹³¹ “Within two

¹²⁷ See *Heller*, 554 U.S. at 636.

¹²⁸ RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 2 (1975).

¹²⁹ ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 596 (2005) (“Washington, dismayed as he often was by the militia, used such troops” rather than a special “military caste” as in Europe.).

¹³⁰ Letter from George Washington to the President of Congress (Sept. 24, 1776), in *GEORGE WASHINGTON: A COLLECTION* 75, 77-78 (W. B. Allen ed., 1988) (referring to the militia as “timid” and “ready to fly from their own shadows”); see also MIDDLEKAUFF, *supra* note 129, at 306 (describing Washington’s sense of the weakness of a nonprofessional force of citizen-soldiers).

¹³¹ MICHAEL D. DOUBLER & JOHN W. LISTMAN JR., *THE NATIONAL GUARD: AN ILLUSTRATED HISTORY OF AMERICA’S CITIZEN-SOLDIERS* 20 (2003) (“The War of 1812 revealed glaring inadequacies in the militia system and raised serious questions regarding the responsibilities the federal government and the states shared for the common defense.”). The Supreme Court later remarked that more formal drafting measures were required because militia support for the war was “weak” and rife with “insubordination . . . among the forces” who did not want to cross borders. *Arver v. United States*, 245 U.S. 366, 384-85 (1918).

decades of the ratification of the Constitution, American political leaders had abandoned the original concept of the militia.”¹³²

By the time of Reconstruction, militia units had all but ceased to be useful organizations for national security; instead, they’d become either targets for white-supremacist terrorism¹³³ or tools of white-supremacist oppression.¹³⁴ Carl Schurz in the immediate post-Civil War period pleaded with Republicans in Congress not to allow Southerners to reform their militias, knowing they’d be deployed to crush the freedmen’s new liberties.¹³⁵ When Southern governments successfully reestablished their militias, that’s exactly what they did.¹³⁶

By 1933, when Congress passed its last major restructuring of the militia, it “placed the final mark of inadequacy on the militia clause.”¹³⁷ Congress’s move in 1933 to create the National Guard of the United States and separate it from the National Guard of the various states “proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause.”¹³⁸

The implication for equilibrium-adjustment is that using a militia as a metric for private military power and authority is no longer viable.¹³⁹ It makes no sense in 2021 to assume that private citizens have legal claims to have the capacity to band together with sufficient personal force to actually repel an invading army or to prevail against the U.S. military—at least apart from some kind of splintering or mutiny of the organized militia. Whereas at one time there may have been merit to the Framers’ notion that armed citizens may be capable of spontaneously assembling to defend the nation,

¹³² William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 42 (1992).

¹³³ OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957).

¹³⁴ GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 26–28 (2007).

¹³⁵ CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH (1865), reprinted in 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279, 325–26 (Frederic Bancroft ed., 1913).

¹³⁶ See RABLE, *supra* note 134, at 28; SINGLETARY, *supra* note 133, at 5; see also ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 106–08 (1983) (discussing how Southern militias and law enforcement violently crushed Black labor organization in the late 1800s).

¹³⁷ Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 208–09 (1940).

¹³⁸ *Id.*

¹³⁹ Cf. *District of Columbia v. Heller*, 554 U.S. 570, 618 (2008) (“But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.” (quoting JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239 (New York, Hurd & Houghton 1868))).

or to defeat a standing army,¹⁴⁰ that is a vain concept as a matter of actual, implementable law in the twenty-first century. It's not just that the national military has a superior power; it is that the military's power utterly eclipses civilian power. Legal arguments that attempt to determine how much privately possessed firepower is required to effectively deter our own military enlist the judiciary in an odd and unsavory exercise.¹⁴¹

B. Professional Law Enforcement

Like the standing army, the emergence of a politically accountable, professionalized police force is also a permanent departure from the Year-Zero equilibria. The professional police force evolved in the middle of the nineteenth century, replacing the previous constable-and-watch system, in which private individuals with private weapons were called upon to keep the peace and pursue criminals, either as a regular civic duty, or as an obligation in an emergency.¹⁴² This was an unsustainable system of public law enforcement.¹⁴³ Volunteers were often unreliable.¹⁴⁴ More troubling, law enforcement through private groups could be fickle, protecting the guilty and punishing the innocent—especially as a method of policing norms of race, gender, and class. As with the military, “the Civil War . . . completely reordered the idea of a republican system of coercive enforcement.”¹⁴⁵ Even

¹⁴⁰ THE FEDERALIST NO. 28, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁴¹ Charles J. Dunlap Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 676 (1995) (“To suggest that civilians equipped with Second Amendment-type weapons are any match for modern security forces invites murderous confrontations that armed civilians will inevitably lose.”). For arguments that the Second Amendment protects effective civilian military capacity, see Andrew P. Napolitano, *The Right to Shoot Tyrants, Not Deer*, WASH. TIMES (Jan. 10, 2013), <http://www.washingtontimes.com/news/2013/jan/10/the-right-to-shoot-tyrants-not-deer> [https://perma.cc/WW48-S9WP] (“[The Second Amendment] protects the right to shoot tyrants, and it protects the right to shoot at them effectively, with the same instruments they would use upon us.”); John-Peter Lund, Note, *Do Federal Firearms Laws Violate the Second Amendment by Disarming the Militia?*, 10 TEX. REV. L. & POL. 469, 503 (2006) (doubting the constitutionality of prohibitions on civilian ownership of “fully automatic firearms, as these are typical infantry weapons”); Brief for the United States of America at 18, *United States v. Zaleski*, 686 F.3d 90 (2d Cir. 2012) (Nos. 11-660(L), 11-1888(CON)) (documenting effort by criminal defendant “to offer evidence at trial that he was, by statute, a member of Connecticut’s unorganized militia, and therefore his possession of . . . military-grade weapons” was protected). That it’s odd and unsavory has not kept one judge from speculating. *Miller v. Bonta*, No. 19-CV-1537-BEN (JLB), 2021 WL 2284132, at *42–43 (S.D. Cal. June 4, 2021) (citing the military victories of Fidel Castro, Ho Chi Minh, the Taliban, and Iraqi insurgents over standing armies for the proposition that AR-15s are protected by the Second Amendment), *appeal filed*, No. 21-55608 (9th Cir. June 10, 2021).

¹⁴² JONATHAN OBERT, THE SIX-SHOOTER STATE: THE DUAL FACE OF PUBLIC AND PRIVATE VIOLENCE IN AMERICAN POLITICS 52 (2018).

¹⁴³ See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1197–99 (1999).

¹⁴⁴ See *id.*

¹⁴⁵ OBERT, *supra* note 142, at 40.

as plutocrats began to hire private enforcement agencies, like the Pinkerton Detective Agency, “a new kind of specifically public interest in protection” emerged that presumed that “everyone, regardless of their particular racial or economic classification,” was entitled to law enforcement protection.¹⁴⁶ That kind of protection could only be provided by a stable, permanent, and professional (or semiprofessional) class of public defenders, accountable to the people and local constituencies rather than to any one person or family.

The professionalized police, and its power linked with democratic representation, also coincided with expansions of its authority, leaving the common law rules surrounding private violence and private law enforcement unsuitable to a permanent domestic security institution.¹⁴⁷ Rather than the common law of torts, courts now resort to constitutional and administrative law to regulate policing.¹⁴⁸ Today, a dizzying array of regulation and license, from police-protective rights concerning searches,¹⁴⁹ to limits on police officers’ use of deadly force,¹⁵⁰ to requirements for officer training,¹⁵¹ to police access to military surplus,¹⁵² govern how law enforcement professionals do their jobs.

As with the standing army, the implication is that the professional police force is a permanent feature of our constitutional order and has fundamentally reset the Year-Zero equilibria. It is not tenable to expect private parties to possess and deploy the same amount of force as law enforcement, nor is it expected that they possess the same authority to use those weapons. Indeed, one of the risks of expanding positive rights to arms, and a corresponding authority to use them, is that the ability of private parties to use deadly force may potentially outstrip the authority of the professional class specifically designated and trained to provide law enforcement.¹⁵³

¹⁴⁶ *Id.*

¹⁴⁷ See Harmon, *supra* note 62, at 1149.

¹⁴⁸ *Id.* (noting “the constitutionalization of excessive force regulation” for professional police).

¹⁴⁹ *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (holding that police can do a protective pat-down to ensure the individual is not carrying a weapon).

¹⁵⁰ See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (explaining that deadly force is not permitted to stop a nonviolent fleeing felon).

¹⁵¹ See *City of Canton v. Harris*, 489 U.S. 378, 387–88 (1989) (suggesting that municipalities can be liable for harms caused by equipping their officers with weapons but not training them on the constitutional limits of their use).

¹⁵² See Michael Leo Owens, Tom Clark & Adam Glynn, *Where Do Police Departments Get Their Military-Style Gear? Here’s What We Don’t Know*, WASH. POST (July 20, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/07/20/where-do-police-departments-get-their-military-style-gear-heres-what-we-dont-know/> [<https://perma.cc/Y4LV-BHKR>].

¹⁵³ The Governor of Florida’s proposal to allow private parties, under the state’s “stand your ground” law, to use deadly force to protect property in the vicinity of a mob is an example of private authorization

Constitutional entitlements for private parties to possess law-enforcement-grade weapons, with little to no training, and authorized to deploy deadly force beyond that of designated security professionals, appear inapt given the fundamental institutional changes in law enforcement over the last two centuries.

III. EQUILIBRIUM-ADJUSTMENT AND SECOND AMENDMENT DOCTRINE

There are currently two competing approaches to Second Amendment doctrine in the wake of *Heller*. The first is championed by then-Judge, now-Justice Brett Kavanaugh and can be termed the “text, history, tradition, and analogy-only” approach. In *Heller v. District of Columbia (Heller II)*, Judge Kavanaugh suggested that the only legitimate method for deciding Second Amendment cases was by reference to “text, history, and tradition” and analogical reasoning therefrom.¹⁵⁴ A prominent minority of judges have endorsed his approach,¹⁵⁵ as have several gun-rights advocates.¹⁵⁶

The second approach, applied by the majority of circuits,¹⁵⁷ is more conventional and is known as the “two-step” framework. In the first step, the court examines whether a practice or regulation is covered by the Second Amendment at all.¹⁵⁸ Judges frequently use history or tradition as a metric at the first step, but sometimes add other reference points. Some rely on Justice

to use lethal force. See Erik Ortiz, ‘Stand Your Ground’ in Florida Could Be Expanded Under DeSantis’ ‘Anti-Mob’ Proposal, NBC NEWS (Nov. 12, 2020, 5:31 PM), <https://www.nbcnews.com/news/us-news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555> [<https://perma.cc/ZD3L-USUN>].

¹⁵⁴ 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“[T]he proper interpretive approach is to reason by analogy from history and tradition.”).

¹⁵⁵ See, e.g., *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment) (“By giving little more than a nod to the originalist inquiry, the *Greeno* test radically marginalizes the role played by the text, history, and tradition of the Second Amendment”); *Mance v. Sessions*, 896 F.3d 390, 395 (5th Cir. 2018) (Elrod, J., dissenting from the denial of hearing en banc) (endorsing a text, history, tradition, and analogy-only approach); *United States v. McGinnis*, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, J., concurring) (“While our opinion today dutifully applies our court’s two-step framework for post-*Heller* Second Amendment challenges, I write separately to reiterate the view that we should retire this framework in favor of an approach focused on the Second Amendment’s text and history.”).

¹⁵⁶ See Brief Amicus Curiae of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Tennessee Firearms Ass’n, Conservative Legal Defense & Education Fund, & Restoring Liberty Action Committee in Support of Petitioners at 16, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280); Brief of Amicus Curiae National Rifle Ass’n of America, Inc. in Support of Petitioners at 4, *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. 1525 (No. 18-280).

¹⁵⁷ E.g., *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016) (“Our court, along with the majority of our sister circuits, has adopted a two-step inquiry in deciding Second Amendment cases”).

¹⁵⁸ *Id.* at 821.

Scalia’s language in *Heller* as a benchmark.¹⁵⁹ Others resort to spatial concepts like “cores” and “peripheries” of the right.¹⁶⁰ If the court determines the law is covered by the Second Amendment, the court then goes to the second, tailoring step to examine whether it is narrowly tailored to serve a compelling government interest (strict scrutiny) or reasonably fitted to an important government objective (intermediate scrutiny).¹⁶¹

Courts have struggled to apply these approaches, because the driver for the analysis is frequently articulated at far too high a level of abstraction (e.g., self-defense)¹⁶² or far too low (e.g., firearm prohibitions on eighteen-to-twenty-one-year-olds).¹⁶³ An equilibrium-adjustment theory of the Second Amendment can provide judges with better guidance. Thinking about how a modern rule relates to an initial set of equilibria can help explain what makes a certain historical rule, practice, or tradition, or its analogy, constitutionally relevant. For those that subscribe to the existing two-step framework, this theory can offer similar guidance for the history, tradition, and analogy inquiry at step one and help decide what kind of empirical data is relevant at step two.

A. *The Exclusive Text, History, Tradition, and Analogy Approach*

An equilibrium-adjustment approach can help rationalize the text, history, tradition, and analogy-only approach to Second Amendment decision-making. As suggested by Chief Justice John Roberts,¹⁶⁴ and echoed by others, courts are to use text, history, tradition, and analogy to examine both rights *and* regulations. There are “lineal descendants” of arms in use in

¹⁵⁹ See *Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017) (“[T]he *Heller* Court specified that ‘weapons that are most useful in military service—M-16 rifles and the like—may be banned’ without infringement upon the Second Amendment right.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008))).

¹⁶⁰ See *Silvester*, 843 F.3d at 821. For more on “core” and “periphery” analysis of the Second Amendment, see William D. Araiza, *Arming the Second Amendment—and Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801, 1841 (2017).

¹⁶¹ *Silvester*, 843 F.3d at 821–22.

¹⁶² See *Kolbe*, 849 F.3d at 151–52, 154–55 (Traxler, J., dissenting) (stating that a prohibition on high-capacity magazines, primarily used for self-defense, “eviscerate[s]” the right to keep and bear arms). For more on the “denominator” problem of determining what portion of activity must be restricted to amount to a destruction of the Second Amendment right, see generally Joseph Blocher, *Bans*, 129 YALE L.J. 308, 343–51 (2019).

¹⁶³ *Nat’l Rifle Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing en banc) (noting no Founding Era regulation “specifically limits firearms possession or purchase by minors or 18 to 20 year old people”).

¹⁶⁴ Transcript of Oral Argument at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

the eighteenth century that are protected today,¹⁶⁵ and there are “lineal descendants” of traditional regulations.¹⁶⁶

But, as scholars have noted, working from analogy to text, history, and tradition without some object, some defined “rule of relevance,”¹⁶⁷ ends up making constitutional decision-making not only obscure, but obscurantist.¹⁶⁸ It leads to arcane arguments that because a multi-round weapon—the “Puckle Gun”—was patented in 1718 in England, extended magazines must be covered by the Second Amendment today.¹⁶⁹ Such an argument totally ignores significant differences between the technological viability, commercial availability, and lethality of such weapons then, compared to now,¹⁷⁰ and, more importantly, the effects of such weapons on the relative distribution of power and authority between individuals, law enforcement, and the military.

More problematic is the way some judges use analogy to favor only one side of the argument. The Massachusetts Supreme Judicial Court was guilty of this when it found that stun guns were not sufficiently similar to eighteenth-century weapons to be covered by the Second Amendment.¹⁷¹ In reversing, the Supreme Court reiterated that “the Second Amendment

¹⁶⁵ *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (“The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon . . .”), *aff’d sub nom. Heller*, 554 U.S. 570.

¹⁶⁶ Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07-290) (“Chief Justice Roberts: [Y]ou would define ‘reasonable’ in light of the restrictions that existed at the time the amendment was adopted . . . [Y]ou can’t take it into the marketplace was one restriction. So that would be—we are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well.”); *see also Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) (stating that modern gun-possession prohibitors “are ‘lineal descendants’ of historical laws banning dangerous people from possessing guns”).

¹⁶⁷ For discussion of the rule of relevance in analogical reasoning, see Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach, Florida*, 2013 SUP. CT. REV. 405, 421–23 (2014).

¹⁶⁸ *See Blocher, supra* note 162, at 363 (“Guns have no progeny, so one cannot trace their lineage directly through some kind of family tree. Instead, one must employ analogies, which depend on the identification of relevant similarities.”).

¹⁶⁹ *Duncan v. Becerra*, 970 F.3d 1133, 1147, 1149 (9th Cir. 2020).

¹⁷⁰ For the Puckle Gun’s limitations, see David B. Kopel, Clayton E. Cramer & Scott G. Hattrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1195 (1995) (“The Puckle gun was ridiculed at the time as an impractical design, and called a scheme for separating investors from their money. But it demonstrates that the *concept* of machine guns existed, even if the metal working technology of the day was not capable of making the weapon.”); *see also C. F.F., Puckle’s Gun*, 15 J. SOC’Y FOR ARMY HIST. RSCH. 46, 46–48 (1936) (describing that the Puckle Gun likely required two persons to operate, almost certainly could not fire very rapidly if at all, and may have sustained significant barrel damage after use).

¹⁷¹ *Commonwealth v. Caetano*, 26 N.E.3d 688, 693 (Mass. 2015) (reasoning that because “a stun gun was not in common use at the time of enactment,” it wasn’t covered by the Second Amendment, *cert. granted, vacated sub nom. Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam)).

extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹⁷²

Other jurists have erred in the opposite direction. These jurists look to analogues at a high level of generality when they decide whether an activity or technology is covered but then become extremely particular when they examine the provenance of regulations. So, for example, today’s large-capacity magazines are protected by the Second Amendment because they look like eighteenth-century Puckle Guns, but today’s good-cause licensing requirements are unconstitutional because they don’t look like eighteenth-century surety laws.¹⁷³ Examples of this asymmetry abound: guns in tents are like guns in homes and are therefore protected by the Second Amendment,¹⁷⁴ safe storage for guns and ammunition are unlike safe storage for gunpowder and, hence, are unconstitutional.¹⁷⁵

Equilibrium-adjustment may help rationalize this process. First, it can help judges to recognize that analogy has to take place on *both* the rights and the regulation side of the equation. Second, it provides a goal—the restoration of a status quo ante distribution of power and authority—that this exercise in analogical reasoning is supposed to produce.

B. *The Two-Step Framework*

The two-step framework also relies on history at step one, and so equilibrium-adjustment can help guide the analogical work at the first step the same as in the text, history, tradition, and analogy-only approach.¹⁷⁶ But, as is often the case, when the history is conflicted or indeterminate, or the analogy is strained, courts will suffer what Professor Kathleen Sullivan calls

¹⁷² *Caetano*, 136 S. Ct. at 1027 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581–82 (2008)).

¹⁷³ *Wrenn v. District of Columbia*, 864 F.3d 650, 664 (D.C. Cir. 2017) (“[W]e conclude that . . . carrying beyond the home, even in populated areas, even without special need, falls within the Amendment’s coverage, indeed within its core.”).

¹⁷⁴ *Morris v. U.S. Army Corps of Eng’rs*, 990 F. Supp. 2d 1082, 1086 (D. Idaho 2014) (“[A] typical home at the time the Second Amendment was passed was cramped and drafty with a dirt floor—more akin to a large tent than a modern home. Americans in 1791—the year the Second Amendment was ratified—were probably more apt to see a tent as a home than we are today.”).

¹⁷⁵ *See Heller*, 554 U.S. at 631 (dismissing “[a] 1783 Massachusetts law [that] forbade the residents of Boston to ‘take into’ or ‘receive into’ ‘any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building’ loaded firearms and permitted the seizure of any loaded firearms that ‘shall be found’ there” (quoting Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts p. 218)).

¹⁷⁶ *See supra* Section III.A.

an “analogical crisis,”¹⁷⁷ and judges must then turn to some kind of means–end scrutiny.

It is here that equilibrium-adjustment can help guide the analysis of what kind of data is relevant for purposes of tailoring. For example, if the ex ante position is that individuals who carry firearms must internalize costs they impose upon others—either through licensing, civil liability, criminal sanction, or ex ante insurance mechanisms—then equilibrium-adjustment theory can assess whether and to what extent any given regulation actually works to force individuals to internalize those costs. Similarly, to the extent that private possession of firearms in the home is meant to equalize the capacity and authority for use of force, equilibrium-adjustment can help decide empirically what kind of weapons, with how many rounds, and capable of what kind of stopping power, are necessary to adequately defend the occupants from ordinary criminal threats.

CONCLUSION

The next decade of Second Amendment doctrine will be pivotal to its success or failure. A constitutional doctrine must, at a minimum, make a constitutional right effective as supreme law, be capable of answering questions posed by social and technological change, be administrable by officers operating under various resource constraints, be intelligible to the populace it governs, and manage risk.¹⁷⁸

Typically, constitutional doctrine has decades to work through these various criteria. Perhaps because the stakes are so high,¹⁷⁹ Second Amendment case law at the Supreme Court level has been stymied. The

¹⁷⁷ Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 n.248 (1992); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (similar). One can imagine all kinds of analogical crises with the history-and-tradition approach: Federal law forbids handguns in the carry-on luggage of commercial airline passengers. Is the cabin of a commercial airliner more like a horse-drawn carriage? Or a boat? See An Ordinance to Prevent Accidents from the Firing of Cannon or Other Guns on Boats, in *Front of the City of Cincinnati* § 1 (1828) (“[I]t shall not be lawful for any person or persons having charge or being on board of any boat upon the Ohio river, when passing by, stopping at, or leaving the city of Cincinnati, to cause any cannon, gun or other fire-arms, to be so fired as to discharge its contents towards the city . . .”).

¹⁷⁸ See generally ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 32–33 (2014) (discussing the application of risk management to constitutional law). Some of these criteria are inspired by Professor Lon Fuller’s account of the internal morality of the law. See LON L. FULLER, *THE MORALITY OF LAW* 34–38 (rev. ed. 1969) (using the fictitious example of “Rex” to demonstrate eight ways to fail to make law).

¹⁷⁹ *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring) (“This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”).

Court has not decided the substance of a Second Amendment case in ten years, but that's certain to change given the recent certiorari grant in *New York State Rifle & Pistol Association v. Bruen*.¹⁸⁰ Equilibrium-adjustment theory is one way the Justices may be able to set the doctrine on the right track.

¹⁸⁰ No. 20-843 (U.S. Apr. 26, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html> [<https://perma.cc/V2JA-ME2E>] (granting the petition for a writ of certiorari limited to the question “[w]hether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment”); *see also* Devan Cole & Jessica Schneider, *Barrett’s Confirmation Could Lead to the Supreme Court Taking Rare Action on Gun Rights*, CNN (Oct. 10, 2020, 5:33 PM), <https://www.cnn.com/2020/10/10/politics/barrett-second-amendment-supreme-court/index.html> [<https://perma.cc/X7AR-ASRZ>].

