

# **“THE STATE IS NOT OMNIPRESENT IN THE HOME”: MANDATORY FIREARM OWNERSHIP LAWS AND THE CONSTITUTION**

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*This Article addresses the constitutionality of mandatory firearm ownership ordinances. While the Supreme Court has settled that the Second Amendment creates an individual right to keep and bear arms for purposes unconnected with militia service, it has not decided whether the Amendment creates a right not to keep or bear arms, akin to the First Amendment rights not to express political opinions or not to practice a religion. Nor has the Court decided whether some other constitutional provision places the right to keep and bear arms within the protected zone of domestic privacy recognized in various Fourth and Fourteenth Amendment cases. After rejecting the notion that enforcement of these ordinances would violate the Second Amendment, the Article concludes that they might instead be unenforceable as violative of substantive due process under the Fourteenth Amendment.*

## **INTRODUCTION**

In 1982 the city of Kennesaw, Georgia, enacted an ordinance requiring all heads of household within city limits to “maintain a firearm, together with ammunition therefore [sic],” though the ordinance exempted paupers, convicted felons, those suffering “a physical or mental disability which would prohibit them from using such a firearm,” and those “who conscientiously oppose maintaining firearms as a result of beliefs or religious

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doctrine.”<sup>1</sup> Several other municipalities have since adopted ordinances modeled on Kennesaw’s.<sup>2</sup> Such ordinances have never been enforced,<sup>3</sup> but have nonetheless provoked their share of controversy, prompting the city of Nelson, Georgia, to amend its mandatory firearm ownership ordinance to recognize a Second Amendment liberty *not* to keep or bear arms.<sup>4</sup>

If a right not to keep or bear arms exists, where in the Second Amendment’s text or history does it reside? Legal academia has confronted the question of constitutional “rights not to” in a variety of contexts, and at least one scholar has argued that the Second Amendment implies a right not to keep or bear arms.<sup>5</sup> Absent in these discussions has been the role of Fourteenth Amendment substantive due process doctrines, whence most constitutional rights relevant to personal choices and private conduct within the home have emerged.

This Article will examine possible bases of constitutionality for these ordinances, under the counterfactual hypothetical that municipalities have determined to enforce such laws against their citizens. This constitutional analysis proceeds from the “pure case” wherein a citizen who is not exempt from a mandatory firearm ownership law refuses to keep a firearm in his home and is fined or otherwise prosecuted for his noncompliance. Part I reviews the Second Amendment’s scope, meaning, and application as articulated by the United States Supreme Court in its recent decisions. Part II discusses the brief history of local ordinances mandating firearm possession in the home. Part III sets forth possible constitutional justifications for enforcement of the ordinances. The Article ultimately concludes that, although there is no established negative liberty (or right not to keep or bear arms) under the Second Amendment, these ordinances would (if enforced) run afoul of the Fourteenth Amendment’s substantive due process guarantees. In essence, this Article asserts that the Due Process Clause’s established freedom of personal choice in the child-rearing, sexual,

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1. KENNESAW, GA., CODE OF ORDINANCES § 34-21 (1982).

2. Reid Kanaley, *Times Changing in a Town Where Guns Are the Law*, PHILA. INQUIRER (Feb. 13, 1994) (LEXIS).

3. See Omar Jimenez, *In this American Town, Guns are Required by Law*, CNN (Mar. 7, 2018), <https://www.cnn.com/2018/03/06/us/kennesaw-georgia-gun-ownership/index.html>; Bob Bernick Jr. & Nancy Perkins, *Town’s Gun Law Called Illegal*, DESERET NEWS (Sept. 4, 2001), <https://www.cnn.com/2018/03/06/us/kennesaw-georgia-gun-ownership/index.html>.

4. See NELSON, GA., CODE OF ORDINANCES § 38-6(c) (2013); see also Nick Young, *Georgia City Loses Battle Over Mandatory Gun Ownership Law, Affirms Right Not to Bear Arms*, HUFFINGTON POST (Aug. 23, 2013), [www.huffingtonpost.com/2013/08/23/nelson-georgia-guns\\_n\\_3805292.html](http://www.huffingtonpost.com/2013/08/23/nelson-georgia-guns_n_3805292.html).

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

and family-planning arenas properly implies a right not to keep a firearm at home.

## I. THE SECOND AMENDMENT

This Article considers the constitutionality of municipal ordinances which, in essence, demand that a citizen exercise her Second Amendment right to keep a firearm at home for the purpose of self-defense. To that end, this Part offers a brief summary of recent case law regarding the Second Amendment's construction.

In full, the Second Amendment provides that “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>6</sup> The United States Supreme Court's landmark ruling in *District of Columbia v. Heller*<sup>7</sup> held that the Second Amendment recognizes an individual right to own firearms for personal reasons such as self-defense and hunting. Nonetheless, academic debates persist on the meaning of “keep and bear Arms” and on the significance of the Amendment's “well-regulated Militia” prefatory clause, the only such clause in the entire Bill of Rights.<sup>8</sup>

In the years before *Heller* was decided in 2008, such debates stemmed from a divergence in thought on how properly to understand the Amendment's history and purpose. One school of thought held that the prefatory clause establishes the Amendment's *raison d'être* as enabling the people to organize themselves into state and local militias for the purpose of common defense (as against a tyrannical federal government, for example).<sup>9</sup> Thus, the prefatory clause was said to limit the reach of the right conferred by the “keep and bear Arms” operative clause.<sup>10</sup> This collective-right or “militia model” understanding, endorsed by Justice John Paul Stevens in his

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6. U.S. CONST. amend. II.

7. 554 U.S. 570 (2008).

8. See generally, e.g., Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016); Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward*, 39 FORDHAM URB. L. J. 1727 (2012); Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521 (2010); David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011).

9. See *Heller*, 554 U.S. at 595.

10. See *id.*

*Heller* dissent, had also drawn considerable support in federal<sup>11</sup> and state<sup>12</sup> court decisions prior to 2008.

Justice Antonin Scalia's majority opinion in *Heller* acknowledged that many early state constitutions contained analogues to the Second Amendment, and that some of these *restricted* the right to bear arms to use for the "common defence" or "defence of the State."<sup>13</sup> The opinion noted, however, that more state constitutions contained language explicitly *protecting* an individual right to bear arms.<sup>14</sup> Relying also on the work of Enlightenment- and Revolutionary-era scholars such as Sir William Blackstone and on a detailed examination of eighteenth-century English usage, the Court rejected the militia model in favor of a more capacious view of the Second Amendment's guarantees.<sup>15</sup> In this view of the Second Amendment, often called the "standard model" in legal academic literature,<sup>16</sup> the "well-regulated militia" prefatory clause simply "announces the purpose for which the right was codified: to prevent elimination of the militia," but "does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."<sup>17</sup> In recognizing an individual right to bear arms unconnected with service in a militia, the Court sided with two federal appeals courts (the Fifth and D.C. Circuits) over the collective-right view

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11. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1043-45 (8th Cir. 2004); *United States v. Parker*, 362 F.3d 1279, 1282-84 (10th Cir. 2004); *Silveira v. Lockyer*, 312 F.3d 1052, 1060-66 (9th Cir. 2002); *United States v. Napier*, 233 F.3d 394, 402-04 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1271-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam); see also *United States v. Miller*, 307 U.S. 174, 178 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantees of the Second Amendment were made. It must be interpreted and applied with that end in view.").

12. See, e.g., *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. 1989); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984); *Masters v. State*, 653 S.W.2d 944, 945-46 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *Burton v. Sills*, 248 A.2d 521, 525-28 (N.J. 1968).

13. See *Heller*, 554 U.S. at 601-02.

14. See *id.* at 600-03.

15. See *id.* at 579-81 (defining "the right of the people" as the right of individual persons), 581-92 (defining "to keep and bear Arms" as to own and maintain firearms).

16. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-65 (1995).

17. *Heller*, 554 U.S. at 599.

taken by nine others.<sup>18</sup> At least five state supreme courts had also apparently (though all cursorily) endorsed the standard-model conception before the Court decided *Heller*.<sup>19</sup>

With respect to the question of mandatory firearm ownership evaluated in this Article, both the majority and dissent in *Heller* noted James Madison's first draft of the Second Amendment, whose language was as follows: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."<sup>20</sup>

In the *Heller* opinion, Madison's draft served as fodder for a debate between Justice Scalia and Justice Stevens on whether the phrase "bear arms" in the amendment as ratified was intended to describe service in a militia or simply the carrying of firearms, by militiamen or anyone else.<sup>21</sup> By Stevens's definition of "bearing arms," therefore, Madison's original draft included a typical conscientious-objector exemption from military conscription. Using the majority's standard-model definition, however, we might see this ultimately deleted language as demonstrating an early concern on Madison's part that the Amendment might be used to forcibly arm religious pacifists, such as Quakers.<sup>22</sup> As the majority points out, "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families."<sup>23</sup> Then again, Madison may have simply modeled his draft on language employed by the Virginia Ratifying Convention.<sup>24</sup>

The Supreme Court incorporated the Second Amendment against state and local governments—that is, held that the Second Amendment right applies as against state and local laws and regulations, not just on the federal level—two years after *Heller*, in *McDonald v. City of Chicago*.<sup>25</sup> The Court had previously rejected incorporation of the Amendment in a trio of

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18. See *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001).

19. See *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006) (en banc); *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 (Ky. 2006); *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004); *State v. Blanchard*, 776 So.2d 1165, 1168 (La. 2001); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. App. 1988), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352, 360 (Colo. 1992).

20. *Heller*, 554 U.S. at 659-60 (Stevens, J., dissenting) (citing THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997)).

21. See *id.* at 589-90 (Scalia, J.), 659-62 (Stevens, J., dissenting).

22. See *id.* at 589-90.

23. *Id.* at 590.

24. See *id.* at 656 (Stevens, J., dissenting).

25. See 561 U.S. 742, 791 (2010).

nineteenth-century cases, though all of these predated modern “selective incorporation” precedents by decades.<sup>26</sup>

Even after *Heller* and *McDonald*, expansive federal, state, and local restrictions still affect who may purchase and use firearms. On the federal level, the Gun Control Act of 1968,<sup>27</sup> as amended by the Brady Handgun Violence Prevention Act of 1993,<sup>28</sup> prevents several classes of persons—including both accused and convicted felons, drug addicts, the mentally handicapped or insane, and undocumented immigrants—from exercising their Second Amendment rights. The Act establishes a federal background check system in which state and local law enforcement officials may choose not to participate because of the Supreme Court’s ruling in *Printz v. United States*,<sup>29</sup> which held that Congress may not compel the states to implement federal regulatory programs. Congress also banned certain semi-automatic “assault weapons” from 1994 until 2004,<sup>30</sup> although it is not clear whether this prohibition would be constitutional post-*Heller*, and Congress continues to impose an excise tax on the manufacture and transfer of certain firearms pursuant to the National Firearms Act of 1934.<sup>31</sup> Meanwhile, state firearm laws vary greatly.<sup>32</sup>

## II. MANDATORY FIREARM OWNERSHIP ORDINANCES

Prior to approval of the famed Kennesaw mandatory firearm ownership ordinance in 1982,<sup>33</sup> the strongest historical precedents in the United States for government-mandated gun possession were early federal and state statutes establishing state militia forces akin to those “well-regulated Militia[s]” referred to in the Second Amendment’s text. Two exemplary

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26. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

27. See Act of Oct. 22, 1968, Pub. L. No. 90-618, 82 Stat. 1213-2 at 1220.

28. See Brady Handgun Violence Protection Act of Nov. 30, 1993, Pub. L. No. 103-159, 107 Stat. 1536.

29. See 521 U.S. 898, 925 (1997).

30. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 at 1996-98.

31. See National Firearms Act of June 26, 1934, 48 Stat. 1236, codified at 26 U.S.C. § 5801.

32. See James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 911-14 (2012); Lindsey Craven, Note, *Where Do We Go from Here? Handgun Regulation in a Post-Heller World*, 18 WM. & MARY BILL OF RIGHTS J. 831, 844-50 (2010). See generally Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L. J. 1449 (2012).

33. See Jonathan Hamilton & David Burch, *Gun Ownership – It’s the Law in Kennesaw*, <https://rense.com/general9/gunlaw.htm> (last visited Sept. 6, 2018).

statutes are the federal Militia Acts of 1792,<sup>34</sup> which essentially drafted “each and every free able-bodied white male citizen” between the ages of eighteen and forty-five into militia service and required that each enlistee “provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints,” and a number of other accoutrements within six months of becoming eligible for militia service.<sup>35</sup> Among others, the Vice President, Members of Congress, many federal employees, and pilots were exempt from service, as were “all persons who now are or may hereafter be exempted by the laws of the respective states.”<sup>36</sup> State militia membership was extended to able-bodied black men during the Civil War.<sup>37</sup> These militias, now all-volunteer forces, have been partly federalized since 1933 as the National Guard of the United States.<sup>38</sup>

Beyond these militia statutes, which perhaps seem more analogous to the contemporary Selective Service System than to the local ordinances in question,<sup>39</sup> Kennesaw’s ordinance appears to have been the first of its kind. Although its exemptions were and are rather generous,<sup>40</sup> and its original penalty mechanism (a \$50 fine) has never once been enforced,<sup>41</sup> the ordinance was officially passed as a public safety measure.<sup>42</sup> To this end, the city claimed an 89% decrease in burglaries within seven months of enactment, ostensibly because burglars were deterred by knowledge of the ordinance’s existence.<sup>43</sup> Most remarkably, perhaps, this reported decrease occurred in a municipality with an estimated 85% pre-ordinance gun ownership rate.<sup>44</sup> Despite its public safety impact, the ordinance was initially passed at least in part as a political statement; Kennesaw’s city council wished to show disapproval for a then-recent handgun ban enacted in the Chicago suburb of Morton Grove, Illinois.<sup>45</sup>

The small borough of Franklinton, Pennsylvania, followed rapidly in Kennesaw’s footsteps, as did “[a] handful of municipalities across the

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34. See Act of May 8, 1792, 1 Stat. 271; Act of May 2, 1792, 1 Stat. 264.

35. See Act of May 8, 1792 § 1, 1 Stat. at 271.

36. Act of May 8, 1792 § 2, 1 Stat. at 272.

37. See Act of July 17, 1862 § 1, 12 Stat. 597, 597.

38. See National Guard Status Act of 1933, 48 Stat. 153 at 157.

39. See Blocher, *supra* note 5, at 40-41.

40. See Hamilton & Burch, *supra* note 33.

41. See *infra* note 45.

42. See Jimenez, *supra* note 3.

43. See Eric P. Dolce, *To Keep and Bear Arms: Reconciling Firearms and the Public Health After Heller and McDonald*, 15 QUINNIPIAC HEALTH L. J. 155, 174 (2012).

44. See *id.*

45. See Michael I. Garcia, Comment, *The “Assault Weapons” Ban, the Second Amendment, and the Security of a Free State*, 6 REGENT U. L. REV. 261, 291 n.177 (1995).

country.”<sup>46</sup> Franklinton’s city council repealed the unenforced ordinance in 1994, amid concerns that it “play[ed] fast and loose with the [C]onstitution” and infringed upon the right not to own a gun.<sup>47</sup> Since 2000, the municipalities of Virgin<sup>48</sup> and Spring City<sup>49</sup> in Utah; Geuda Springs, Kansas;<sup>50</sup> Greenleaf, Idaho;<sup>51</sup> Nelson, Georgia;<sup>52</sup> and Nucla, Colorado,<sup>53</sup> have all approved ordinances inspired by Kennesaw’s. Such ordinances were rejected in Cherry Tree, Pennsylvania,<sup>54</sup> and Byron, Maine.<sup>55</sup> State legislators in South Dakota proposed a bill requiring all state residents over age 21 to purchase a gun, but the legislation was never voted on and was intended solely as a political statement about the purported unconstitutionality of the federal health care mandate.<sup>56</sup> Indeed, the bill’s sponsor professed his belief that the state of South Dakota could not constitutionally require its citizens to purchase firearms, though he did not explain his reasoning.<sup>57</sup>

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46. Reid Kanaley, *Times Changing in a Town Where Guns Are the Law*, PHILA. INQUIRER (Feb. 13, 1994), Local Section, at B01, [http://articles.philly.com/1994-02-13/news/25860412\\_1\\_gun-ordinance-gun-ownership-gun-control-law](http://articles.philly.com/1994-02-13/news/25860412_1_gun-ordinance-gun-ownership-gun-control-law).

47. *Council Repeals Mandatory Gun Law, Mayor Won't Sign It*, GETTYSBURG TIMES (May 6, 1994), at 1A, 8A, <http://news.google.com/newspapers?nid=2202&dat=19940506&id=fQwmAAAAIAAJ&sjid=hf0FAAAIAAJ&pg=2630,510019>.

48. *See Town in Utah Requires Owning Guns*, ABC NEWS (Nov. 5, 2000), <http://abcnews.go.com/US/story?id=95092>.

49. *See Jenny Deam, Rural Utah City Encourages Gun Ownership*, L.A. TIMES (Feb. 23, 2013), <http://articles.latimes.com/2013/feb/23/nation/la-na-utah-guns-20130224>.

50. *See Kansas Community Requires Households to Have Guns*, USA TODAY (Nov. 23, 2003), [http://usatoday30.usatoday.com/news/nation/2003-11-23-kansas-guns\\_x.htm](http://usatoday30.usatoday.com/news/nation/2003-11-23-kansas-guns_x.htm).

51. *See Town Founded by Quakers Issues Call to Arms*, NBC NEWS (Nov. 16, 2006), <http://www.nbcnews.com/id/15751662/#.UoO7t-JuHVQ>.

52. *See Erin McClam, Georgia Town Passes Law Requiring Citizens to Own Guns and Ammo*, NBC NEWS (Apr. 2, 2013), [http://usnews.nbcnews.com/\\_news/2013/04/02/17567999-georgia-town-passes-law-requiring-citizens-to-own-guns-and-ammo](http://usnews.nbcnews.com/_news/2013/04/02/17567999-georgia-town-passes-law-requiring-citizens-to-own-guns-and-ammo).

53. *See Lauren Loftus, Life in the Small Colorado Town That Requires a Gun in Every Household*, WASH. POST (Aug. 28, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/08/28/less-than-700-residents-no-stoplights-and-a-law-requiring-a-gun-in-every-household/?utm\\_term=.1437f90af226](https://www.washingtonpost.com/news/storyline/wp/2014/08/28/less-than-700-residents-no-stoplights-and-a-law-requiring-a-gun-in-every-household/?utm_term=.1437f90af226).

54. *See Borough Won't Require All Homeowners to Have Guns*, PITTSBURGH POST-GAZETTE (Dec. 7, 2006), <http://www.post-gazette.com/breaking/2006/12/07/Borough-won-t-require-all-homeowners-to-have-guns/stories/200612070324>.

55. *See Sarah Mahoney, Residents of Byron, Maine, Reject Bid to Force People to Own Guns*, NBC NEWS (Mar. 12, 2013), [http://usnews.nbcnews.com/\\_news/2013/03/12/17280738-residents-of-byron-maine-reject-bid-to-force-people-to-own-guns](http://usnews.nbcnews.com/_news/2013/03/12/17280738-residents-of-byron-maine-reject-bid-to-force-people-to-own-guns).

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

57. *See id.*

In May 2013, the Brady Center to Prevent Gun Violence sued the city of Nelson in federal court, challenging the constitutionality of Nelson's ordinance (whose text closely parallels that of Kennesaw's seminal ordinance).<sup>58</sup> Its complaint contended that the Second Amendment "does not authorize the government to force an individual to purchase a firearm for self-defense in the home," and that the ordinance also violates the First Amendment (by compelling city residents to endorse a certain view in the gun-rights debate) and the Fourteenth Amendment (by infringing upon the fundamental "zone of privacy" articulated in the Supreme Court's modern substantive due process precedents and irrationally distinguishing between heads of household and other residents).<sup>59</sup> The litigation settled out of court several months later.<sup>60</sup> As part of the settlement, the city agreed to amend its ordinance to explicitly state that it would never be enforced and, more interestingly, to recognize that "the United States Constitution protects the right of Americans to choose not to" own or maintain a gun in their homes.<sup>61</sup> Parts III.A and III.B consider the merits of the Brady Center's suit, finding the Center's Fourteenth Amendment argument considerably more persuasive (based on analogies to other private decisional rights) than its First or Second Amendment claims.

### III. CONSTITUTIONAL JUSTIFICATIONS AND DILEMMAS

This Part evaluates three possible bases of a constitutional challenge to mandatory gun ownership laws. Part III.A analyzes whether the Second Amendment establishes a negative freedom from compelled gun ownership which these laws could violate, and asserts—contrary to recent work by Professor Joseph Blocher<sup>62</sup>—that it does not. Part III.B then sets forth a substantive due process theory of unconstitutionality, arguing that the Fourteenth Amendment right to privacy, long applied to various family, sexual, and home contexts, could properly be extended to recognize as constitutionally protected a homeowner's right to decide whether to keep a firearm in her home.

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58. See Complaint for Declaratory Relief and Permanent Injunction, *Brady Ctr. to Prevent Gun Violence v. City of Nelson*, Civil Action No. 2:13-mi-99999-UNA (N.D. Ga. filed May 16, 2013), <http://www.bradycampaign.org/sites/default/files/2013-05-16.Complaint-BradyCenterVsCityofNelson-E-FILED.PDF>.

59. See *id.* at 9–14.

60. See *Nelson, Georgia Agrees to Settle Lawsuit Over Mandatory Ordinance*, BRADY CTR. TO PREVENT GUN VIOLENCE (Aug. 22, 2013), <http://www.bradycampaign.org/inthenews/nelson-georgia-agrees-to-settle-lawsuit-over-mandatory-gun-ordinance>.

61. See Settlement Agreement and Release, *Brady Ctr. to Prevent Gun Violence v. City of Nelson* (Oct. 2013), <http://bradycampaign.org/sites/default/files/Georgia-Settlement.pdf>.

62. See generally Blocher, *supra* note 5.

A. *The Second Amendment and Negative Liberty*

In evaluating the Second Amendment's history and purpose, it seems natural to compare it to other Bill of Rights provisions. The First and Second Amendments both seem to evince a public policy aim of the founding generation that "the people" be allowed unreservedly to express their political, ethical, and religious views and mobilize, either in political demonstration or (if necessary) militia service, against a federal government that might in time become tyrannical. Yet, as the *Heller* majority held, the Second Amendment is not concerned solely with collective mobilization.<sup>63</sup> Like the Third, Fourth, and Fifth Amendments, perhaps the Second Amendment also reflects the Founders' sensibility that the people's homes and personal belongings must be protected from search, seizure, or destruction at the hands of the state unless certain procedural safeguards ("in a manner prescribed by law," "probable cause," "just compensation") are first respected, though the Second Amendment specifies no such procedures precisely because it confers no apparent power on the government.

Although the Amendment states that the individual right it guarantees "shall not be infringed,"<sup>64</sup> it is obvious from various court decisions, *Heller* included,<sup>65</sup> that government actors can enact and enforce certain laws and regulations limiting the exercise of the right to keep and bear arms. Just as freedom of speech is bounded by the impermissible extremes of libel,<sup>66</sup> obscenity,<sup>67</sup> incitement,<sup>68</sup> "fire in a theatre,"<sup>69</sup> and "fighting words,"<sup>70</sup> despite the First Amendment's absolutist text,<sup>71</sup> the right to keep and bear arms is obviously subject to time, place, and manner restrictions,<sup>72</sup> and even outright denial to certain classes of persons (felons, most notably) who lack or forfeit other basic constitutional rights.<sup>73</sup> But even if it is clear that states and municipalities may restrict exercise of the Second Amendment right, are they symmetrically empowered to *require* exercise of the right?

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63. See *District of Columbia v. Heller*, 554 U.S. 570, 579-80 (2008).

64. U.S. CONST. amend. II.

65. See *Heller*, 554 U.S. at 626-27; see also *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

66. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-42 (1974).

67. See, e.g., *Miller v. California*, 413 U.S. 15, 18-20 (1973).

68. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

69. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

70. See *Chaplinsky v. United States*, 315 U.S. 568, 573 (1942).

71. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

72. See *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

73. See *id.* at 626.

Professor Blocher, like the Brady Center, says no. Analogizing the Second Amendment to the First, he points out that the Supreme Court has recognized that the freedom of speech implies a freedom not to speak.<sup>74</sup> Indeed, the Court has held that the First Amendment protects the rights of schoolchildren not to salute the American flag or recite the Pledge of Allegiance,<sup>75</sup> drivers not to display the state motto on their vehicle license plates,<sup>76</sup> and a public utility not to publish messages with which it disagrees.<sup>77</sup> The Court has embraced at least two other kinds of First Amendment rights: rights to non-exercise of religion and to non-association. “No person,” wrote Justice Hugo Black, “can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”<sup>78</sup> By the same token, “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints,” and thereby offends the First Amendment.<sup>79</sup>

With respect to amendments in the Bill of Rights other than the First, it becomes difficult to discern any implied liberty not to exercise one’s rights. Perhaps Congress could not, consistent with the Fourth Amendment, compel criminal defendants to hide their personal effects from the police, but it could certainly enact a statute excluding certain kinds of evidence from admissibility at trial.<sup>80</sup> The Court has already recognized that the Sixth Amendment does not entitle defendants to a bench trial rather than a jury trial in criminal cases, stating that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”<sup>81</sup> The Eighth Amendment’s text explicitly withholds from convicts the right to request cruel and unusual punishments, which “shall not be . . . inflicted.”<sup>82</sup> Congress could not prohibit suspects from incriminating themselves, but the reason it could not is again a question of compelled

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74. See Blocher & Miller, *supra* note 8, at 18-23.

75. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

76. See *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977).

77. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16-21 (1986).

78. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (holding that compelled school prayer violates the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 433 (1962).

79. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

80. See, e.g., FED. R. EVID. 801; FED. R. EVID. 802.

81. *Singer v. United States*, 380 U.S. 24, 34-35 (1965); see also Joseph Blocher, *Rights to and Not to*, 100 CALIF. L. REV. 761, 764 (2012) (“[W]aiving a right to X and claiming a right to not-X are significantly different.”).

82. U.S. CONST. amend. VIII.

speech under the First Amendment rather than any “right to self-incrimination” under the Fifth.<sup>83</sup>

The distinction between the First Amendment, which contains guaranteed rights to non-speech, irreligion, political inactivity, non-publication, and non-association, and these other amendments is entirely clear: the freedoms of speech, of religion, of the press, and of assembly would lose all meaning if the government were permitted to compel its citizens to say or publish certain words, practice certain religious rituals, or engage in certain types of social and political association with each other.<sup>84</sup> There is no such logical corollary to the compelled (or simply automatic) exercise of other constitutional rights. The freedom from unreasonable search and seizure does not ring hollow if citizens can choose to offer evidence. The criminal defendant has a right to counsel, but also a right to represent herself.<sup>85</sup> Voluntary criminal confessions in no way defeat the freedom from self-incrimination.<sup>86</sup> Nor do voluntary donations of private property to the public sector amount to uncompensated takings in violation of the Fifth Amendment.<sup>87</sup>

Bearing in mind that waivers of constitutional rights and the existence of constitutional “rights not to” are not synonymous, the literature on waivers is nevertheless instructive, in that both waivers and rights not to relate to the question of a given constitutional right’s variability in being exercised;<sup>88</sup> thus, waivers can provide a useful point of comparison. Observing that criminal defendants are permitted to plea-bargain away their Fourth, Fifth, and Sixth Amendment rights<sup>89</sup> while the “unconstitutional conditions doctrine” prevents state actors from, for example, requiring Democratic Party affiliation as a precondition to employment,<sup>90</sup> Professor Jason Mazzone has argued for the principle that “if waiver of a constitutional right would undermine a compelling public value protected by the Constitution, then individuals should not be able to waive the right.”<sup>91</sup> This “value-oriented

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83. See *Wooley*, 430 U.S. at 714 (1977) (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”) (quoting *Barnette*, 319 U.S. at 637).

84. See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”) (emphasis in original).

85. See generally *Faretta v. California*, 422 U.S. 806 (1975).

86. See *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

87. See U.S. CONST. amend. V.

88. See generally Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003).

89. See *id.* at 801.

90. See *id.* at 812–13.

91. *Id.* at 864. Of course, “compelling public value” is precisely the sort of flexible, subjective language which pervades (or invigorates, or bedevils) constitutional law generally.

approach” helps to explain the distinction between the susceptibility to waiver of individual criminal and property rights and the Supreme Court’s relative resistance to waiver of speech rights. As Mazzone puts it:

Courts and commentators have identified several public functions performed by freedom of speech. Free speech promotes truth through a marketplace of ideas. It exposes the mischief of government officials and keeps government power in check. It protects minority citizens against an over-zealous majority. It aids in the development of tolerant, democratic citizens. By protecting deliberation among citizens, free speech also facilitates participation and self-government. . . .

Other constitutional rights are mostly oriented towards the interests of individuals. The Takings Clause of the Fifth Amendment, for example, protects individual property-holders and members of disfavored groups rather than the interests of the public at large. As we have already seen, while the right to a jury trial serves an important public purpose, other Sixth Amendment rights, including the right to assistance of counsel and to confront witnesses at trial, appear principally oriented to safeguarding the interests of individual criminal defendants.<sup>92</sup>

Leaving aside the issue of under which circumstances one’s voluntary residence in a municipality could constitute a “waiver,” this formulation raises an obvious question: is the Second Amendment similar to the First, in that its purpose can only be honored if the people remain entitled *not* to exercise their right to keep and bear arms?

With that question in mind, we can revisit Madison’s initial draft of the Second Amendment, as quoted in *Heller*.<sup>93</sup> Since the Second Amendment as ratified does not contain the exemption which Madison proposed,<sup>94</sup> it might be foolish to delve into this history at all. Even if certain Founders initially saw the Amendment’s purpose as allowing citizens to choose whether, how, and when to defend themselves, their loved ones, and their property with force, Madison’s “religiously scrupulous” language did not make the final cut. It is entirely possible that the Second Amendment as ratified protects only a right to keep and bear arms, and not a right to refrain from keeping and bearing arms, even if at one point it was contemplated to protect both. Still, accepting the *Heller* Court’s understanding of eighteenth-century usage, the excised language might constitute evidence that at least *some* Founding-era thinkers shared the Brady Center’s contemporary unease with the notion of compelled weapon ownership.

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92. *Id.* at 866-67.

93. *See* *District of Columbia v. Heller*, 554 U.S. 570, 659-60 (2008) (Stevens, J., dissenting).

94. *See id.* (Stevens, J., dissenting) (citing *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 169 (Neil H. Cogan ed., 1997)).

On the other hand, *Heller* explicitly treats the Second Amendment as safeguarding the interests of individuals, in that it creates an individual right that need not be connected even with the public purpose stated in the Amendment's prefatory clause—militia service. As the majority wrote, "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."<sup>95</sup> At least for purposes of waiver (as distinct from a "right not to"), this understanding appears to place the Second Amendment right firmly in the same category as other waivable rights.

Turning back to a posited right not to keep or bear arms, Blocher contends that the negative right arises symmetrically with the affirmative right from the self-defense purpose of the Second Amendment; that what the Second Amendment confers is an individual right to defend oneself either with or without firearms, and that the *Heller* Court clarified this purpose in rejecting the militia or collective-right approach.<sup>96</sup> Whatever the statistics on self-defense, many Americans feel that they are best protected by *not* owning a gun,<sup>97</sup> and "[i]f public safety is not a sufficient basis for limiting the affirmative right, then neither should it be a basis for rejecting the negative right. In short, whatever the plausibility of a public value interpretation of personal self-defense, it does not seem consistent with *Heller* itself."<sup>98</sup>

This argument seems fairly persuasive. If the Second Amendment indeed concerns the right of individuals "to use arms in defense of hearth and home,"<sup>99</sup> rather than the right of communities to organize militarily for the common defense, it seems inconsistent with this deferential attitude that municipalities should be able to dictate self-protection by force at the expense of some individuals' avowed preference for self-protection by nonviolence. Indeed, mandatory firearm ownership laws seem, from this vantage, inconsistent with the individualistic spirit of the overall Bill of Rights.

Blocher's proposed freedom from compelled keeping and bearing of arms encounters some difficulty from the Amendment's plain text. As discussed earlier in this Section, the enumerated individual rights with which the Second Amendment is most readily compared do not necessarily or even typically include implicit "rights not to." While "the freedom of speech" would clearly be imperiled by laws prescribing which sort of content citizens must express (when they would rather remain silent or express themselves

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95. *Id.* at 592.

96. *See id.* at 579-81.

97. *See* Blocher, *supra* note 5, at 29.

98. *Id.* at 30.

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

otherwise),<sup>100</sup> “the right of the people to keep and bear Arms” has nothing to say textually about pacifists, conscientious objectors, those with quizzical young children, the chronically clumsy, or anyone else who might prefer not to exercise this right. Interestingly, nor does it speak to those classes of “the people,” such as the mentally ill or disabled or violent felons, whom society would almost unanimously prefer remain unarmed.<sup>101</sup>

This omission might persuade us that the Second Amendment right includes implicit “reasonable bounds” of both individual rights and government authority, but a textualist reading in no way necessitates the conclusion that state-compelled firearm ownership exceeds these reasonable bounds. Indeed, a textualist might conclude that “shall not be infringed” is dispositive; it directly follows, and refers only to, “the right of the people to keep and bear Arms.” Because state and local governments retain the full police power, including a nearly plenary authority to regulate public safety,<sup>102</sup> and because the Second Amendment as incorporated prevents them only from infringing the affirmative right, deductive reasoning leads us to conclude that they *may* infringe some notional right to protect oneself and one’s family and property by refraining from gun ownership. Given the conscientious-belief exemption present in every mandatory firearm ownership ordinance yet enacted,<sup>103</sup> we might even credit municipalities for not treading where the Second Amendment evidently permits them to tread.

Blocher dismisses the textualist approach as unhelpful, since “existing constitutional doctrine . . . does not determine the existence of rights to and not to based solely or even primarily on the text alone.”<sup>104</sup> Certainly the Supreme Court has not discerned the right to an abortion purely from the language of the Fourteenth Amendment’s Due Process Clause,<sup>105</sup> nor does a corporation’s right to unlimited independent political expenditures present itself plainly from the First Amendment’s “freedom of speech,”<sup>106</sup> to name two especially controversial examples, but *Heller* was foremost a textualist decision. The majority and dissent both focused their analysis largely on the

100. See U.S. CONST. amend. II.

101. See *id.*

102. “The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (Rehnquist, C.J.) (plurality); see also *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (holding that a state legislature is empowered to “determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety”).

103. See, e.g., KENNESAW, GA., CODE OF ORDINANCES § 34-21.

104. Blocher, *supra* note 5, at 31.

105. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

106. See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

definitions of “keep Arms” and “bear Arms” commonly understood at or around the time of ratification, though the dissent also consulted legislative history at length.<sup>107</sup> In a Second Amendment context, at least, the Court has demonstrated an interest in hewing to the Framers’ words,<sup>108</sup> and—even treating the Amendment’s prefatory clause as mere dicta, just as the *Heller* Court did<sup>109</sup>—these words do not appear to create any individual right not to keep or bear arms.

*B. Substantive Due Process, the Home, and “the Right to Be Let Alone”*

In light of these conclusions about the Second Amendment, one could conclude that contemporary constitutional law lends no support to Professor Blocher’s purported right not to keep or bear arms. The assertion of such a right certainly appears novel—though so, too, does the post-1982 advent of mandatory gun ownership ordinances whose historical connection to the Militia Acts and conscription is demonstrably tenuous. Although the *Brady Ctr. v. City of Nelson* settlement is in no way precedential authority, and its terms may demonstrate little beyond the city of Nelson’s eagerness to limit its fiscal liabilities, it is nonetheless intriguing that the city recognized a constitutional “right of Americans to choose not to own or maintain a gun in their homes” in its amended ordinance.<sup>110</sup> Is such an understanding reconcilable with this article’s dismissal of the Second Amendment negative liberty notion? If, as we have seen, the Second Amendment lends little or no textual support to this purported right, does any federal constitutional provision protect it?

This Section first considers the shared policy aims of mandatory firearm ownership laws and the law of self-defense, then the traditional contours of the right to privacy at home and the scope of established privacy rights. Ultimately, this Section explores the viability of the Brady Center’s argument that the Due Process Clause of the Fourteenth Amendment prevents state and local governments from requiring homeowners to keep firearms, and concludes that this argument is tenable if the purported liberty from compelled gun ownership is analogized to established substantive due process freedoms in the realms of family life and personal autonomy.

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107. For the dissent’s evaluation of the Second Amendment’s historical origins and meaning in the Founding and post-Civil War eras, see *District of Columbia v. Heller*, 554 U.S. 570, 652-71 (Stevens, J., dissenting).

108. See generally *id.*

109. See *id.* at 595-603.

110. Settlement Agreement and Release, *supra* note 61, at 6.

# 1. Self-defense and privacy in the home.

Because *Heller* establishes that the Second Amendment is centered on the individual's defense of self, family, and property,<sup>111</sup> we might initially consult the law of self-defense for an answer. Most states have adopted the so-called Castle Doctrine, by which the ordinary "duty to retreat" from a violent confrontation dissolves when an individual is threatened in his or her own dwelling.<sup>112</sup> Some have gone further, expanding the Castle Doctrine to any location where the threatened individual is not a trespasser; such "stand-your-ground" statutes have attracted considerable scholarly commentary, particularly by law students.<sup>113</sup> This doctrine points in differing directions, however, depending on one's interpretation of its purpose. Does the Castle Doctrine intend to set aside the home as a special and significant location, exempt from society's usual evaluations of what constitutes appropriate defensive conduct? Or does it (especially as expanded by stand-your-ground laws) embody a public policy aim of encouraging people to use defensive force whenever they feel it necessary, hopefully as a means of deterring violent confrontations in general?

It seems clear that the Castle Doctrine and the law of self-defense do, indeed, seek to incentivize defensive force broadly. In essence, the law of self-defense prioritizes the life of the threatened over the life of the aggressor. This view is consistent with the traditional common-law characterization of self-defense killings as instances of justifiable (rather than merely excusable) homicide. But it does not follow that the law of self-defense would ever mandate defensive force, and in fact, no state does.<sup>114</sup> The primary purpose of the constitutional right to bear arms may well be to facilitate individuals to act in self-defense, with secondary concerns about hunting, survival in the wilderness, and ability to oppose a tyrannical government, perhaps *inter alia*, but facilitation is not compulsion. Particularly because the Court in *Heller* exalted the individualistic spirit of the Second Amendment,<sup>115</sup> the notion of

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111. See generally *Heller*, 554 US at 628.

112. See Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 664 (2003).

113. See, e.g., Denise M. Drake, Comment, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 SAINT MARY'S L. J. 573 (2008); Wyatt Holliday, Comment, "The Answer to Criminal Aggression is Retaliation": *Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOLEDO L. REV. 407 (2012); J.P. Neyland, Note and Comment, *A Man's Car Is His Castle: The Expansion of Texas' "Castle Doctrine" Eliminating the Duty to Retreat in Areas Outside the Home*, 60 BAYLOR L. REV. 719 (2008); Lydia Zbrzezny, Note and Comment, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231 (2012).

114. In researching the self-defense statutes of all fifty states, the author could not find a single compulsory self-defense law.

115. See *Heller*, 554 U.S. at 598-605.

compelled self-defense (presumably for the community's benefit) would appear remarkably misplaced within it.

The law of self-defense may not even be the most helpful analogy in assessing the constitutionality of mandatory firearm ownership ordinances. We might look instead to bodies of law where government has regulated conduct within the home.<sup>116</sup> These, it seems, put such ordinances in a unique constitutional context. The Constitution itself lends both textual and implicit support to the notion that the state's ability to regulate or observe private conduct occurring within a home is extremely limited, relative to its regulatory authority elsewhere. The oft-forgotten Third Amendment restricts the circumstances in which soldiers may be "quartered in any *house*, without the consent of the Owner," and entirely prohibits such quartering in peacetime.<sup>117</sup> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures."<sup>118</sup> Fourth Amendment case law has proceeded accordingly: "the Fourth Amendment has drawn a firm line at the entrance to the house."<sup>119</sup> At least one scholar states the case far more broadly, tying Fourth Amendment case law to certain areas of First Amendment and substantive due process jurisprudence: "The privilege of the home works a kind of alchemy with the Constitution. Things of no constitutional value outside the home glister with constitutional meaning within it."<sup>120</sup>

It is worth noting that courts recognize certain private conduct as protected whether or not it occurs in the individual's home. After all, "the Fourth Amendment protects people, not places,"<sup>121</sup> for one famous example. As the *Lawrence v. Texas* majority wrote:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and

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116. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

117. U.S. CONST. amend. III (emphasis added).

118. U.S. CONST. amend. IV (emphasis added).

119. *Payton v. New York*, 445 U.S. 573, 590 (1980); see also *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Kyllo v. United States*, 533 U.S. 27, 40 (2001)).

120. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1305 (2009).

121. *Katz v. United States*, 389 U.S. 347, 351 (1967).

certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>122</sup>

Nor is this jurisprudence of respect for intimate decisions limited to cases of physical intrusion by the state (though that was the fact pattern in *Lawrence*). In *Griswold v. Connecticut*, the Supreme Court recognized a “zone of privacy created by several fundamental constitutional guarantees.”<sup>123</sup> In that case, the Court held that the zone of privacy protected the sanctity of the marital relationship, and so invalidated a Connecticut statute prohibiting the use of contraceptives, even by married people, under the Constitution’s various privacy aims.<sup>124</sup> In the majority’s view, the First Amendment’s freedom of association, the Third Amendment’s proscription on peacetime quartering in a house, the Fourth and Fifth Amendment’s protections of the criminally accused, and the Ninth Amendment’s catch-all language preserving unenumerated rights “retained by the people”<sup>125</sup> together created this right to privacy.<sup>126</sup> Two concurring opinions in the case advanced a different, and more precedentially rooted, theory of the statute’s unconstitutionality: that the Due Process Clause of the Fourteenth Amendment, not the “penumbras” of various other amendments, protects the right of married couples to engage in family planning using contraceptives.<sup>127</sup>

Long before *Griswold*, the Court had recognized that the Due Process Clause protects the liberty “to marry, establish a home and bring up children,”<sup>128</sup> and since *Griswold*, substantive due process has largely remained the constitutional basis for invalidating state laws that infringe upon privacy concerns not addressed in the Bill of Rights.<sup>129</sup> The Court has invalidated state laws restricting citizens’ available choices in highly personal domains such as family planning,<sup>130</sup> family residential

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122. 539 U.S. 558, 562 (2003).

123. 381 U.S. 479, 485 (1965).

124. See generally *id.*

125. U.S. CONST. amend. IX.

126. See *Griswold*, 381 U.S. at 484-85.

127. See *id.* at 500 (Harlan, J., concurring), 507 (White, J., concurring).

128. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Doe v. Bolton*, 410 U.S. 113, 211 (1973) (Douglas, J., concurring) (stating that the Fourteenth Amendment guarantees “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the Court’s precedents “have respected the private realm of family life which the state cannot enter”).

129. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Roe v. Wade*, 410 U.S. 113, 164 (1973).

130. See generally *Roe*, 410 U.S. 113; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. 479.

arrangements,<sup>131</sup> marriage,<sup>132</sup> and the education of children;<sup>133</sup> these decisions have all turned on the recognition of unenumerated constitutional liberties such as the right to “marital privacy,” an abortion, or school choice.<sup>134</sup>

The *Planned Parenthood of Southeastern Pennsylvania v. Casey* plurality poetically identified within the Due Process Clause a “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” this against the decidedly unpoetic backdrop of an abortion case.<sup>135</sup> Such a right, if genuine, would certainly include kinds of behavior well beyond the general realm of sexual conduct, romantic attachments, and child-rearing, and might prove remarkably difficult to enforce as against legislative intrusion by state and local governments. Nevertheless, the Court has not always hesitated to do so. In striking down the city of Jacksonville, Florida’s, vagrancy ordinance some twenty years before *Casey*, the Court wrote that a criminal prohibition on “wandering or strolling,” or other such activities which “are historically part of the amenities of life as we have known them,” could and did violate substantive due process rights.<sup>136</sup>

2. Whether homeowners have a “deeply rooted” freedom from compelled arms-keeping.

A primary question is why a homeowner’s abstention from firearm ownership would qualify as “part of the amenities of life as we have known them,” hence as within the realm of substantive due process protection, rather than as defiance of a constitutionally legitimate police-power interest. It should be simple enough to distinguish a person’s non-ownership of state-endorsed deadly weapons from his participation in felonious activities (such as illicit drug use) which might also occur at home. For one, we typically characterize drug use as an affirmative act, but noncompliance with ownership requirements as mere inaction; where exactly mere inaction becomes lawless defiance is a query beyond the scope of this Article, but

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131. See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

132. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967).

133. See generally *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

134. See *supra* notes 130-133 and accompanying text.

135. 505 U.S. 833, 851 (1992) (O’Connor, J., joined by Kennedy & Souter, JJ.) (plurality opinion). Interestingly, this conception of substantive due process appears to protect the individual’s own decision-making power rather than his mere self-expression (which presumably would fall within the First Amendment’s scope).

136. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164-65 (1972); see also *City of Chicago v. Morales*, 527 U.S. 41, 53-55 (1999) (Stevens, J.) (plurality opinion).

drug use at home typically has not been “part of the amenities of life as we have known them,” while citizens generally feel entitled to choose whether or not their homes will contain firearms. But it is more difficult to ascertain what makes a gun different from a smoke alarm. If states or municipalities conclude that both guns and smoke alarms are critical to public safety, why could they not mandate that citizens keep and maintain both at home?

Because non-ownership of firearms is not an enumerated right in the Constitution, such a distinction would have to rest on the notion that the decision whether to keep a gun at home is more innately private than the decision whether to install safety appliances like smoke alarms. That is, unless the one public safety measure—like bans on abortion, contraceptives, consensual homosexual conduct, private school education, and cohabitation with non-nuclear family members—reaches into a more intimate arena than does the other, there is likely no colorable distinction between a Kennesaw-style gun ordinance and any other ordinary public safety regulation. However, one’s decision whether to keep a gun at home is often closely linked to one’s personal values and parenting choices; if the courts see the link as sufficiently strong, then the ordinances in question may well exceed the constitutionally permitted reach of the police power.<sup>137</sup>

The Supreme Court’s typical approach for recognizing a substantive right under the Due Process Clause is to ask whether that asserted right is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>138</sup> Thus, behavior which the state has traditionally regulated or prohibited, like suicide, is typically a dubious basis for the assertion of a substantive due process right, though there are counterexamples where the Court has recognized a right plainly at odds with (at least nineteenth and twentieth-century) American legal history.<sup>139</sup> Even where governments have long offered a service to their citizens, such as public education, their provision of that service might not itself confer or recognize a substantive due process right.<sup>140</sup> When the Court does recognize a substantive due process right, it aims to tread lightly “lest the liberty

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137. See *supra* note 128 and accompanying text.

138. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

139. See, e.g., *Roe v. Wade*, 410 U.S. 113, 174-77 (1973) (Rehnquist, J., dissenting). Although *Lawrence* also recognized a right whose exercise had been prohibited at common law, and via criminal statute by all fifty states prior to 1961, *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), these laws were rarely enforced and therefore seem to amount to a weaker overall historical trend. See also *Lawrence v. Texas*, 539 U.S. 558, 571-73 (2003).

140. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-38 (1973) (rejecting the asserted constitutional right to receive an education).

protected by the Due Process Clause be subtly transformed into the policy preferences of” the Justices.<sup>141</sup>

Although a purported right not to purchase a firearm seems ungrounded in either case precedents or American tradition,<sup>142</sup> a clear analogy could be drawn between a homeowner’s choice to abstain from keeping deadly weapons at home and a spouse’s choice to avoid procreation, or a parent’s choice to withhold his child from the public schools. Such decisions are deeply personal, reflecting as they do critical aspects of an individual’s own values system, and are thus commonly viewed as the province of individual autonomy.<sup>143</sup> At least if we take seriously the *Casey* plurality’s dicta about “the mystery of human life,”<sup>144</sup> these are precisely the kinds of decisions which the Due Process Clause implicitly demands that the state respect. The *Casey* Court did, of course, uphold as constitutional some restrictions on abortion.<sup>145</sup> But if the analogy between the right to choose one’s own method of hearth-and-home protection and the right to reproductive choice is credible, then *Casey* demands that we consider when exactly the state’s restriction on this particular freedom becomes unduly burdensome. When the state entirely strips its citizens of the choice not to keep arms at home, as when it outright denies women the option of abortion, it surely imposes an undue burden on the exercise of that choice.

Recognizing this parallel, the Brady Center argued in its complaint that Nelson’s ordinance infringed upon *Griswold*’s “zone of privacy” and thus offended the Fourteenth Amendment, though it alleged other constitutional violations as well.<sup>146</sup> Indeed, the Court in *Griswold* ridiculed the notion of law enforcement officials “search[ing] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives,” deeming it “repulsive to the notions of privacy surrounding the marriage relationship.”<sup>147</sup> Taking as a premise the hypothetical case posited in this Article’s introduction, in which the police fine or arrest a local resident for his noncompliance with the municipality’s mandatory firearm ownership ordinance, do we find this prosecution nearly as “repulsive” as a search to the same effect, or the notions of privacy surrounding non-ownership of a

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141. *Glucksberg*, 521 U.S. at 720.

142. Indeed, “rights not to purchase” in general have received no constitutional traction under the Due Process Clause, and the plaintiffs in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), accordingly made no attempt to argue that their due process rights had been violated by the federal health insurance mandate.

143. See *supra* notes 130-133 and accompanying text.

144. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

145. See *id.* at 879-87, 899-900.

146. Complaint, *supra* note 58, at 10-11.

147. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

deadly weapon every bit as fundamental as those same notions “surrounding the marriage relationship”?

Professor Darrell A.H. Miller suggests that perhaps we should. Analogizing firearm ownership to possession of obscene materials and sexual activity, both of which are almost wholly constitutionally protected at home but subject to criminal prohibition when displayed in public, Miller contends that courts should treat Second Amendment rights as similarly “home-bound”:

With the Second Amendment, to “keep and bear” arms means to keep and bear them in the home for individual security and liberty. In public, however, to “keep and bear” arms means to keep and bear them in the service of the common defense and welfare. Outside the home, the social compact confers to the government a monopoly on legitimate violence.<sup>148</sup>

From this standpoint, an ordinance requiring shopkeepers or bank tellers, for instance, to keep and bear arms at work would seem more constitutionally defensible than one demanding the same of homeowners. Much like the *Heller* majority, Miller engages in considerable historical and textual analysis of the Second Amendment to support this conclusion, and his work need not be reproduced here.<sup>149</sup> For this Article’s purposes, his argument is relevant to the extent that the unenumerated right to privacy (from which most of Miller’s named “home-bound” constitutional rights derive<sup>150</sup>) might protect the individual’s non-ownership of firearms as well as her ownership thereof.

We return, then, to the question of symmetry with respect to a constitutional right. But here, within the expansive right-to-privacy umbrella, the protection of a negative right seems much more defensible, even obvious, than it might under the Second Amendment. It is unimaginable that the state could *require* married couples to own and use contraceptives, same-sex couples to engage in sexual activity, or women to have abortions. Indeed, a much older precedent than *Griswold* tells us this.<sup>151</sup> If the Due Process Clause incorporates against state and local governments an individual liberty to decide for oneself whether or not to exercise one’s right to keep and bear arms at home or, more fundamentally, how best to protect oneself, one’s loved ones, and one’s property within the limits of

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148. Miller, *supra* note 120, at 1308.

149. *See id.* at 1310-36.

150. *See id.*

151. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that Oklahoma’s compulsory sterilization of “habitual criminals” violates the Fourteenth Amendment).

public safety regulations,<sup>152</sup> then mandatory firearm ownership ordinances are plainly invalid.

### 3. Challenges and defenses to the guns-as-principles conception.

The notion of a constitutional liberty to decide on a means of protecting hearth and home encounters difficulty if we characterize this liberty as what Professor Blocher calls a “substantive option right” rather than a “substantive choice right.”<sup>153</sup> In Blocher’s words, substantive option rights “guarantee freedom from restraint but not from coercion”; they “do not treat autonomy as a dominant value, and as a result do not ensure the right not to engage in the enumerated activity or process.”<sup>154</sup> Under this conception, for the same reasons that the Second Amendment does not confer a right not to bear arms, the Due Process Clause would not confer a right to decide for oneself against that mode of self-protection at home which the legislature has deemed instrumental to the public good. Examples of the state making and enforcing policy endorsements, even in the right-to-privacy realm, are not hard to find.<sup>155</sup> Still, when privacy concerns are implicated, it is unusual that courts would allow a state to prescribe or proscribe a certain behavior—though suicide laws are an obvious example, in relation to the Due Process Clause’s right to life<sup>156</sup>—rather than pursuing its policy ends through deterrence-minded regulations, like those often enacted in the abortion context.<sup>157</sup>

A substantive option view of firearm non-ownership is, at first, appealing. The state could have as legitimate an interest in ensuring the safety of its law-abiding citizens as it does in keeping them alive, and for the same reasons. From this standpoint, courts might read the Due Process Clause as guaranteeing that individuals can make their own personal safety decisions only until they run afoul of the state’s endorsed means of self-protection and thereby risk their lives, just as they can make their own

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152. This was how the Brady Center characterized the city of Nelson’s alleged due process violation. See Complaint, *supra* note 58, at 10 (“The Constitution commits to each individual decisions about how best to defend oneself and one’s children. Such decisions include how and whether to bring a firearm into one’s home”).

153. See Blocher, *supra* note 81, at 781-82.

154. *Id.* at 782 (emphasis in original).

155. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (holding that Congress was free to ban an abortion procedure whose medical benefits and risks are contested); *Washington v. Glucksberg*, 521 U.S. 702, 728-33 (1997) (holding that the Washington legislature had legitimate policy interests in prohibiting assisted suicide); *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990) (“We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.”).

156. See, e.g., *Glucksberg*, 521 U.S. 702.

157. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

decisions about medical treatment only until they try to evade the state's prohibition on assisted suicide.<sup>158</sup>

But here, perhaps reality belies theory. Given that mandatory firearm ownership laws aim to ensure universal self-defense, the best analogy for a state fining or prosecuting its citizens for failure to keep arms at home would be fines or prosecution for failure to defend oneself against criminal violence. Yet as noted above, no state even authorizes such penalties.<sup>159</sup> Compulsory self-defense is almost an unimaginable notion in the United States. When asked to determine whether there was a “deeply rooted” right to assisted suicide in *Washington v. Glucksberg*, the Court found illuminating the long Anglo-American history of suicide bans.<sup>160</sup> By contrast, legislation which, if enforced, intends to compel self-defense (at least ownership of a given means of self-defense) outside of the conscription context appears to be essentially unprecedented in the United States before 1982, and since then has proliferated only in a few municipalities.<sup>161</sup> Whether the historical absence of a policy restricting some liberty evidences that the liberty is deeply rooted is, of course, debatable, but the Court has seemed to take such a view before.<sup>162</sup> It has especially endorsed this conception of “deeply rooted” when the vast majority of jurisdictions refrain from restricting the liberty in question.<sup>163</sup>

The courts could recognize this liberty from compelled gun ownership not to supplement the Second Amendment's affirmative right with a negative counterpart as a policy matter, but rather because it proceeds logically from the general domain of “freedom of thought, belief, expression, and certain intimate conduct.”<sup>164</sup> An individual's decision not to purchase and maintain a firearm, like her decision not to purchase contraceptives or seek an abortion, but unlike a rebellious homeowner's refusal to purchase a smoke alarm, often signifies more than mere frugality or stubbornness. Indeed, Americans' differing convictions on the utility of gun ownership are often deeply felt and unmoved by empirical data.<sup>165</sup> Some (or many) individuals

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158. See generally *Glucksberg*, 521 U.S. 702.

159. See *supra* note 114 and accompanying text.

160. See 521 U.S. at 722-28.

161. See, e.g., KENNESAW, GA., CODE OF ORDINANCES § 34-21.

162. See *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05 (1977) (noting society's traditional respect for extended family households); *Roe v. Wade*, 410 U.S. 113, 132-41 (1973) (noting that abortion before quickening was legal at common law and in most states until the nineteenth century).

163. For a small survey of decisions in which the Supreme Court has targeted legislative “outliers” in a substantive due process context see David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 874-87 (2009).

164. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

165. See Blocher, *supra* note 5, at 3 nn.11-12.

might consider the decision whether to keep a firearm in their homes as a comparably fundamental personal choice as decisions like whether to cohabitate, get married, procreate, or send one's children to public or private schools.<sup>166</sup> These are precisely the kinds of personal, "home-bound" decisions which the Supreme Court has already deemed protected from state intrusion under the Due Process Clause.<sup>167</sup> This may be less because of the political message gun ownership can send than because of other considerations, like a person's own unease with the concept of storing a deadly weapon at home (particularly if the person has young children, or a spouse or partner prone to violent outbursts).<sup>168</sup> Nevertheless, guns are imbued with symbolic significance well beyond their functionality as means of self-defense and sustenance, conceivably to the extent that an individual's decision whether to keep them in the privacy of her home should be deemed private in the constitutional sense.<sup>169</sup>

#### 4. Guns as private decisions, not public expressions.

Perhaps mandatory firearm ownership ordinances rescue themselves from unconstitutionality by exempting those (as Kennesaw's ordinance phrases it) "who conscientiously oppose maintaining firearms as a result of beliefs or religious doctrine."<sup>170</sup> While "beliefs" might be broad enough wording to include those who "believe" that their children will be injured, their partners will become violent, or they themselves are insufficiently educated on firearm safety procedures, it seems likelier that this language intends to ensure that the ordinance complies with First Amendment guarantees in particular, not to protect the kind of transcendent personal liberty described in *Lawrence* or what future Justice Louis Brandeis concisely dubbed in 1890 "the right to be let alone."<sup>171</sup> This demonstrated concern that a municipality's mandatory armament policy still ensure religious freedom should remind us of Madison's first draft of the Second Amendment, of course, but also of another instance in the Constitution's

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166. See *supra* notes 130-133 and accompanying text.

167. See Miller, *supra* note 120.

168. See generally Dylan Matthews, *How Gun Ownership Became a Powerful Political Identity*, VOX (Mar. 23, 2018), <https://www.vox.com/2018/2/27/17029680/gun-owner-nra-mass-shooting-political-identity-political-science>.

169. Consider Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1293-94 (2003) (concluding that the pervasiveness of this symbolism undermines the likelihood that empirical data would affect the gun control debate).

170. KENNESAW, GA., CODE OF ORDINANCES § 34-21.

171. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

early history. As Professor Akhil Reed Amar recounts, the Founders' shared distaste for politically motivated "thought crime" prosecutions was a major impetus behind ratification of the Fifth Amendment's Incrimination Clause.<sup>172</sup>

Despite the conscientious-objector exemption, the Brady Center contended in its complaint that Nelson had sought to compel pro-gun speech on the part of its residents.<sup>173</sup> Yet as a matter of common experience, firearm ownership is probably not a form of "expression" contemplated by the First Amendment.<sup>174</sup> Our culture certainly politicizes guns,<sup>175</sup> perhaps even to the extent that many people would decide to buy (or not buy) a firearm as a political statement; indeed, a city council's desire to make precisely such a political statement appears to have given birth to the contemporary wave of mandatory firearm ownership ordinances.<sup>176</sup> But an individual's choice not to purchase a gun is much more plausibly characterized as a matter of personal autonomy than as a political statement demanding First Amendment protection, in the same sense that the individual does not consider her marital, sexual, or educational choices to be public speech.

The conscientious-objector exemption cannot save mandatory gun ownership ordinances from constitutional scrutiny if the decision whether to own firearms for protection of hearth and home is properly characterized as a personal safety decision rather than as a public, expressive act; that is, if the decision to keep (or not to keep) firearms in the home stems from the same due process "right to define one's own concept of existence . . . "as the decision to procreate (or not to procreate).<sup>177</sup> However culturally significant a homeowner's decision to keep a gun at home may be, the firearm's very location *within* the home rather than on display in the front yard or at the office should tell us much about the *private* nature of firearm ownership, at least ownership for the purpose of self-defense. This understanding militates in favor of a Fourteenth Amendment substantive due process, rather than an enumerated Bill of Rights, conception of a constitutional freedom from compelled gun ownership. A law requiring homeowners to keep and bear arms probably is not one crafted with an eye toward suppressing or compelling speech, nor does it infringe upon any established Second Amendment liberty. At best, such a law aims to bolster public safety by

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172. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 (1994).

173. See Complaint, *supra* note 58, at 12.

174. U.S. CONST. amend. I.

175. See *supra* note 168.

176. See Garcia, *supra* note 45, at n. 177.

177. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (O'Connor, Kennedy, and Souter, JJ.) (plurality).

detering burglaries, making it a valid (and perhaps empirically justified) exercise of the police power. At worst, it does so by unduly invading a space and a privacy interest which the Supreme Court has repeatedly characterized as constitutionally sacrosanct.<sup>178</sup>

#### CONCLUSION

Even though the Second Amendment does not protect some hypothetical right *not* to defend home and hearth with firearms, *Heller* clarified that the Amendment concerns the individual's right to use defensive force when necessary, rather than the community's right to mobilize for the common defense.<sup>179</sup> *Heller* therefore makes it more constitutionally suspect, not less, for the state to regulate private firearm ownership on behalf of the public interest. In line with existing precedents, the courts should recognize that the Fourteenth Amendment zone of privacy surrounding an individual's most personal decisions includes decisions involving personal safety, and especially personal safety within the individual's home. In this way, firearm ownership at home for the purpose of self-defense is not analogous to a public political statement, but neither is it an interest so idiosyncratic or trivial that states and municipalities may casually negate it in the name of the police power. Instead, it is best understood as a kind of constitutionally protected privacy interest, analogous to those interests affecting social relationships and the family unit which the Supreme Court has already recognized as existing beyond the reach of governmental intrusion.

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178. See *supra* notes 130-133 and accompanying text.

179. See generally *District of Columbia v. Heller*, 544 U.S. 570 (2008).