

THE CONSTITUTIONALITY OF SOCIAL COST

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INTRODUCTION

During the Passover Seder, it is customary in the Jewish faith for the youngest child at the table to ask a series of four questions that begins with, “Why is this night different from all other nights?” To understand the future of the Second Amendment, one must ask, “Why is this right different from all other rights?” In *District of Columbia v. Heller*¹ and *McDonald v. City of Chicago*,² the majority and dissenting opinions differed wildly over the historical pedigree of the individual right to keep and bear arms, but they agreed that the governmental interest in

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

2. 130 S. Ct. 3020 (2010).

reducing the risk of danger from firearms should play some role in the constitutional calculus, and that the Second Amendment should be treated differently from other constitutional rights.

At first blush, this may make sense. Guns can be dangerous if misused.³ As Justice Breyer noted in *McDonald*, “the carrying of arms . . . often puts others’ lives at risk.”⁴ Because a “primary concern of every government [is] a concern for the safety and indeed the lives of its citizens,”⁵ when construing the Second Amendment, it would seem straightforward that courts take into consideration the potential social cost, or presumed negative externalities, of private ownership of firearms.⁶ So obvious, in fact, that courts and pundits perfunctorily gloss over the constitutionality of limiting liberty in order to minimize social costs. This judicial oversight is glaring, and it has contributed in no small part to the currently disjointed state of Second Amendment jurisprudence.

Although the Second Amendment has been singled out from its brethren in the Bill of Rights as the most dangerous right, it is not the only dangerous right. The Supreme Court has developed over a century of jurisprudence to deal with forms of liberty that yield negative externalities. The right to speak freely is balanced with the possible harm that can result from people preaching hate, violence, intolerance, and even fomenting revolution.⁷ The freedom of the press permits the media to report on matters that

3. In this Article I will assume, arguendo, that widespread gun ownership may produce net social negativities, and those seeking to restrict access to firearms are acting solely to promote public safety and eliminate negative externalities. I do not necessarily endorse these positions but assume them here to facilitate a meaningful discussion of the constitutionality of social cost. I intentionally omit any treatment of the extensive body of literature that suggests that in fact gun ownership by law-abiding citizens produces net social benefits.

4. *McDonald*, 130 S. Ct. at 3120 (Breyer, J., dissenting).

5. *Id.* at 3126 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

6. See Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1443 (2009) (arguing that one of the “four different categories of justifications for restricting” the right to keep and bear arms should be “danger reduction justifications, which rest on the claim that some particular exercise of the right is so unusually dangerous that it might justify restricting the right”).

7. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down statute prohibiting cross burning); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (striking down a statute prohibiting a neo-Nazi march).

may harm national security.⁸ The freedom of association allows people to congregate to advocate for certain types of violence. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures enables the possession of the fruits and instrumentalities of crime with impunity.⁹ Inculpatory evidence seized in violation of this right is generally inadmissible during trial,¹⁰ permitting crimes to go unpunished. Likewise, a violation of a person's *Miranda* rights renders certain confessions—even an uncoerced inculpatory confession—inadmissible.¹¹

Procedural rights during the criminal trial—including the right to grand jury indictment, the right against self-incrimination, the right against double jeopardy, the right of compulsory process, the right of confrontation, the right of a speedy and public trial, and the right of trial by jury—all make the prosecution of culpable defendants significantly harder.¹² The Due Process Clause, which imposes limitations on all government actions, places the burden of proof beyond a reasonable doubt on the prosecution.¹³ The right to non-excessive bail and reasonable fines make it easier for suspects to avoid prison during prosecutions and may allow them to abscond before trial. The right against cruel and unusual punishments removes certain forms of retribution from the quiver of the state, thereby limiting the range of punishments for those found guilty of a crime.¹⁴ The right of habeas corpus ensures that a person—however dangerous—cannot be detained indefinitely without proper procedures.¹⁵ Liberty's harm to society takes many forms—not just from the exercise of the right to keep and bear arms.¹⁶ These precedents show how

8. See, e.g., *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam) (declining to enjoin newspapers from publishing a classified report on Vietnam).

9. See, e.g., *Weeks v. United States*, 232 U.S. 383 (1914) (holding that warrantless seizures of items from a home violate the Fourth Amendment).

10. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

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

12. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3045 (2010).

13. *In re Winship*, 397 U.S. 358, 364 (1970).

14. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

16. Cf. *McDonald*, 130 S. Ct. at 3110 (Stevens, J., dissenting) ("The defendant's liberty interest is constrained by (and is itself a constraint on) the adjudicatory

the Court balances freedom and the harm that may result from its exercise. Although a “primary concern of every government [is] a concern for the safety and indeed the lives of its citizens,”¹⁷ this concern is not constitutionally sacrosanct.

This Article explores the constitutional dimensions of the social cost of liberty. Although some have suggested that courts should look to the First Amendment for interpretational guidance for the Second Amendment,¹⁸ I propose a more holistic approach: look to the entire Bill of Rights. Liberty interests certainly vary by type, but the Court’s precedents balancing those interests against society’s need for safety and security coalesce into different schools. By reconceptualizing the right to keep and bear arms through the lens of social cost, in light of over a century of Supreme Court jurisprudence, one can see that despite its dangerous potential, the Second Amendment is not so different from all other rights; accordingly, it should not be treated differently.

With regard to how courts should develop the right, I do not hold the key. Judges will invariably do what judges do. My aim for this Article is to counsel others to consider the Second Amendment in a different light than that in which some previous scholars and court opinions have cast it. All rights are subject to certain balancing tests. Yet the scales used to balance the Second Amendment should be calibrated similarly to scales used to consider other rights.

This Article proceeds in five parts. Part I explores a Coasean view of freedom that balances liberties and externalities, and introduces the concept of the constitutionality of social cost. Extending a principle from Ronald Coase’s canonical article, *The Problem of Social Cost*,¹⁹ this concept recognizes that exercising all forms of liberty yields both positive and negative social costs. For over a century, the Court has explicitly, and in many cases, implicitly, balanced this reciprocal relationship when protecting individual liberties and society from harms.²⁰ Even

process. The link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun’s bullets *are* the violence.”).

17. *Id.* at 3126 (Breyer, J., dissenting) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

18. See, e.g., Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

19. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

20. See *infra* Part IV.

though they are dangerous, these social costs take on a constitutional dimension, and consequently demand judicial protection—or more precisely, judicial toleration of the negative externalities, notwithstanding legislative findings to the contrary in many cases. Viewing the Second Amendment in these Coasean terms helps to illuminate the value, or lack thereof, the Supreme Court has assigned to this right. This part introduces the notion of the constitutionality of social cost, and recognizes how the Court balances liberty and social costs.

Part II provides an overview of the competing views of social cost in *Heller* and *McDonald*, focusing on Justice Breyer's balancing test and Justice Scalia's pragmatic dicta. In *Heller*, Justice Scalia showed "aware[ness] of the problem of handgun violence in this country" in holding that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."²¹ In *McDonald*, Justice Alito found that the Second Amendment, like "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes" have "controversial public safety implications."²² Although these opinions ostensibly discount the role that illegal gun violence should play in construing the Second Amendment,²³ the holding and nebulous dicta in these cases reveal that pragmatic concerns trump any originalist or other rationales. Even though the Court rejects Justice Breyer's interest-balancing approach, the most significant portions of *Heller* for the lower courts are based on the same pragmatic—and not originalist—consideration of asserted social costs that may stem from gun ownership. This pragmatism reflects the same fear that animated Justice Breyer's dissent. The difference between the two opinions is one of degree, not of kind.

Part III considers the loneliness of the Second Amendment in the Bill of Rights and confronts many of the arguments of the dissenting Justices that the majority did not refute. Although the majority prevailed with respect to the historical narrative, it remains to be seen whether the Court's pragmatic dicta or the dis-

21. *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

22. *McDonald*, 130 S. Ct. at 3045.

23. See *Nordyke v. King*, No. 07-15763, slip op. at 5639–40 (9th Cir. May 2, 2011) ("*Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime. . . . [T]he majority rejected such [a balancing] test because it would allow judges to constrict the scope of the Second Amendment in situations where they believe the right is too dangerous.>").

sender's pragmatism—which can be easily blurred together—will prevail in the lower courts. First I consider whether the “liberty interest[s]” protected by the Second Amendment are “dis-similar from those [the Court has] recognized in its capacity to undermine the security of others.”²⁴ Are they “[u]nlike other forms of substantive liberty, [because] the carrying of arms . . . often puts others lives at risk[?]”²⁵ The Second Amendment certainly presents “highly complex” issues and numerous unanswerable questions to which judges lack “comparative expertise.”²⁶ Yet, the Court has proven adept at resolving similarly tough topics in various other constitutional contexts. Even accepting Justice Breyer's statistics about violence from firearm ownership from *McDonald* at face value, the Second Amendment is not really “[u]nlike other forms of substantive liberty.”²⁷ Next, I explore an issue left open by both the majority and dissenting opinions: can Second Amendment rights be limited based on local circumstances, such as high crime in an urban area? Does the Second Amendment have an implicit geography clause so that locational rights can mean different things in different places?

Part IV views the Second Amendment through the lens of the constitutionality of social cost and considers the “wide variety of constitutional contexts [in which the Court] found . . . public-safety concerns sufficiently forceful to justify restrictions on individual liberties.”²⁸ These precedents, and several others that balance individual liberty and social costs, are usually decided by a consideration of four primary factors: the imminence of the harm, the propensity of the actor to inflict harm on society, the constitutional liberty at stake, and the appropriate level of judicial scrutiny. These precedents historically have fallen into three categories.

First, when a threat to society is imminent, the courts permit greater infringements of individual liberty with minimal, if any, judicial oversight. Second, when a threat is not yet imminent, but a person's previous misconduct reveals a propensity towards future violence, the courts permit an infringement of individual lib-

24. *McDonald*, 130 S. Ct. at 3110 (Stevens, J., dissenting).

25. *Id.* at 3120 (Breyer, J., dissenting).

26. *Id.* at 3125, 3127.

27. *Id.* at 3120.

28. *Dist. of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (citations omitted).

erties, but mandate certain forms of judicial oversight. Third, when a threat is cognizable, but not necessarily imminent, infringements are permitted with greater judicial scrutiny. However, when the threat is neither cognizable nor imminent, and when the actor exhibits no propensity for danger, but the proposed harm is predicted purely on *ex ante* assessments based on empirical data of what may or may not happen, courts have never permitted the substantial restriction of an enumerated right in the absence of evidence that the regulation actually, and not abstractly, advances a compelling government interest—until now. With the advent of Second Amendment jurisprudence following *Heller*, the Supreme Court has ushered in a fourth category. There is an important and fundamental disconnect between *Heller* and the Court's precedents—the deprivation of liberty occurs before any actual risk materializes. This framework is unprecedented.

Building on Parts I–IV, Part V provides a roadmap for the development of Second Amendment jurisprudence going forward. I propose a framework that provides a judicially manageable standard for courts to consider these issues. First, it is essential to recognize that the analysis the Court permitted in *Heller* is unprecedented, and does not fall into any of the three categories discussed above. Second, in order to reconcile the right to keep and bear arms with its brethren in the Bill of Rights, I discuss five questions inherent in all gun cases—what, where, when, who, and why. The answers to these questions lead to the framework I propose: Second Amendment challenges should be bifurcated based on the social costs involved and the actor's propensity for violence. For the deprivation of the liberty of persons lacking a propensity for violence, the burden of persuasion should remain with the state, and stricter judicial scrutiny is warranted. For those who have demonstrated a propensity for violence and who are likely to inflict harm in the future, such as violent felons, the burden should rest with the individual, and less exacting judicial scrutiny is appropriate. Under such an approach, which fits snugly inside *Heller's* rubric, the Second Amendment can develop and assume its equal station among our most cherished constitutional rights.

I. LIBERTY AND EXTERNALITIES: A COASEAN VIEW OF FREEDOM

Liberty is costly, but restraining liberty can be even more costly. In his landmark article *The Problem of Social Cost*, in addi-

tion to exploring the use of legal rules to avoid transaction costs, Nobel Prize-winning economist Ronald Coase recognized that limiting the rights of *A* to protect *B* creates a “problem of a reciprocal nature.”²⁹ Coase’s study of nuisance law provides insights into the study of the Second Amendment. Considering nuisance laws, generally speaking, when the quantum of *A*’s conduct harming *B* is less than the quantum of *B*’s conduct harming *A*, *A* should be permitted to engage in the conduct. For example, *A*’s factory emits smoke that bothers *B*. *B* seeks an injunction that would shut down *A*’s factory. In this case, the quantum of *A*’s conduct harming *B* (a productive factory that emits noxious smoke) is less significant than *B*’s desired conduct harming *A* (shutting down an entire factory that will eliminate jobs and reduce on production).

But when the quantum of *A*’s conduct that harms *B* is greater than the quantum of *B*’s conduct that harms *A*, the conduct is a nuisance, and the law mandates that it should be abated.³⁰ Using the previous example, rather than seeking to shut down *A*’s factory, *B* seeks the installation of relatively inexpensive smoke-reducing devices. In this case, *A*’s conduct harming *B* (emitting smoke) is now greater than *B*’s desired conduct harming *A* (requiring the purchase of inexpensive technology). This is black letter nuisance law. Yet Coase notes a shortcoming in this approach: “What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.”³¹

Although Coase wrote about torts and nuisance law, his insights apply equally to constitutional law. Coase noted:

The question is commonly thought of as one in which *A* inflicts harm on *B* and what has to be decided is: how should we restrain *A*? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to *B* would inflict harm on

29. Coase, *supra* note 19, at 2.

30. *Id.* at 19 (“Thus, to quote Prosser on Torts, a person may ‘make use of his own property or . . . conduct his own affairs at the expense of some harm to his neighbors. He may operate a factory whose noise and smoke cause some discomfort to others, so long as he keeps within reasonable bounds. It is only when his conduct is unreasonable, in the light of its utility and the harm which results, that it becomes a nuisance.’” (emphasis added) (alterations in original)).

31. *Id.* at 27.

A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?³²

It is helpful to rephrase this argument in terms of the Second Amendment. The cases that have considered the Second Amendment—primarily *Heller* and *McDonald*—view the limitations on the right to keep and bear arms in terms of limiting the harm that A (the gun owner) could inflict on B (the potential victim of the gun owner). Like Coase, I think this inquiry only tells half the story. If the “purpose of [the Second Amendment is] self-defense,”³³ upholding certain types of gun control laws “[t]o avoid the harm to B[,] would inflict harm on [the constitutional rights and liberties of] A.”³⁴ The relationship between harms and liberty is reciprocal in nature. “The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?”³⁵

Is the right of B to be free from fear of harm greater than the exercise of A’s constitutional right to keep and bear arms? This is the question of the constitutionality of social cost. This is a question that courts only consider cursorily, if at all, when looking at the constitutionality of gun control restrictions. For over a century, the Court has explicitly, and in many cases implicitly, balanced this reciprocal relationship when protecting individual liberties.³⁶ Yet the *Heller* framework is different and distinct from any harm-based analysis used for other constitutional rights.

The protection of individual rights yields social costs or, in economic terminology, negative externalities. Securing liberty is inversely proportional to the power of the state to order society. The more individual liberty persons have, the harder it is for the government to maintain the health, safety, and welfare of the state. The less important individual liberty is, the easier it is for the state to do as it wishes. Even if dangerous, when a liberty is protected by the Constitution, its social costs take on a constitutional dimension and consequently demand judicial protection—or more precisely, judicial toleration of the negative externalities.

32. *Id.* at 2.

33. *Heller*, 554 U.S. at 630 (majority opinion).

34. Coase, *supra* note 19, at 2.

35. *Id.*

36. *See infra* Part IV.

Courts do not permit the infringement of a right simply because the exercise of that right can be harmful to society.³⁷

Although Justices Scalia and Alito waxed eloquent about the fundamental nature of these rights, the distance between their approach and Justice Breyer's is shorter than one may realize.³⁸ Coase recognized that "courts are conscious of this and . . . often make, although not always in a very explicit fashion, a comparison between what would be gained and what lost by preventing actions which have harmful effects."³⁹ *Heller* and *McDonald* implicitly compare "what would be gained" by firearm ownership and the harm that may result by "preventing" various forms of ownership.

Viewing the Second Amendment in Coasean terms helps to illuminate the value, or lack thereof, the Supreme Court has assigned to this right. It is troubling to consider gun ownership as a nuisance that can be abridged because it may result in harm. If the Second Amendment is in fact an individual constitutional right, then it should not be treated as if it were a nuisance that can be enjoyed only when judges think it is not dangerous. No other constitutional right is held to such a flimsy standard. As demonstrated below, a careful look at the constitutionality of social cost in the contexts of the First, Fourth, and Fifth Amendments reveals that the courts are much less inclined to consider the possible harm *A* may cause *B* when construing whether *B* can limit the rights of *A*.

Although courts are apt to use ad-hoc balancing tests to weigh social harms in non-constitutional contexts—ranging from the simple determination of reasonable care and negligence in a tort case to balancing the equities in a complex tax case—in the context of constitutional rights, the frameworks are different. In due process analysis, tiers of scrutiny set the appropriate burden placed on the state to justify its infringement of the liberty of the individual. In free speech analysis, doctrines of prior restraint, obscenity, and overbreadth limit how the government can abridge expression. In criminal procedure, various strands of the

37. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961).

38. See *infra* Part III.

39. Coase, *supra* note 19, at 27–28.

exclusionary rule and *Miranda* warnings all control the admissibility of evidence tainted by constitutional violation.

But in the context of the Second Amendment, long-standing gun control laws—even those laws passed before the Second Amendment was constitutionally recognized as an individual right—are presumptively constitutional, and the state has unfettered power to limit access to guns in “sensitive places.”⁴⁰ This approach is separate and distinct from the protection of any other constitutional right. Further, the entire protection of the right is premised on minimizing the social harm as opposed to maximizing the individual liberty interests protected by the Second Amendment.

All rights create externalities, both positive and negative. Despite these harms, the courts aim to protect constitutional values. The intrinsic value of a constitutional right places it on a different plane with respect to cost-benefit analysis. Discussing the constitutional presumption of innocence, Justice Marshall wrote:

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. Honoring the presumption of innocence is often difficult; sometimes we must pay substantial *social costs* as a result of our commitment to the values we espouse.⁴¹

A constitutional right is not a nuisance that should be tolerated solely when its danger is contained. It is a palladium of liberty that should be celebrated.

This Article will not present an argument in terms of scrutiny, an issue intentionally left open in *McDonald* and *Heller*. Although scrutiny tests ostensibly consider “compelling government interest[s]” or “substantial[] relat[ionships] to . . . important government interests,” these tests “often obscure more than they reveal.”⁴² The Court’s real inquiry when considering these cases is to determine “whether and when a right may be substantially burdened in order to materially reduce the danger flowing from the exercise of the right, and . . . what sort of proof must be given to show that the substantial restriction will in-

40. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

41. *United States v. Salerno* 481 U.S. 739, 767 (1987) (Marshall, J., dissenting) (internal citation omitted) (emphasis added) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

42. Volokh, *supra* note 6, at 1461.

deed reduce the danger.”⁴³ This is the question of the constitutionality of social cost that I address.

The relationship between the constitutionality of a law abridging a right, and the social cost that law aims to limit, has largely been ignored in the literature. Most assume without argument that the social cost of a right can be used as a determinant in a constitutional analysis. This need not always be true. Rather, the case law provides guideposts about the use of social costs in limiting a right. The Constitution does not demand ignorance of the social costs of the exercise of a right. Indeed, the Constitution “is not a suicide pact.”⁴⁴ However, the social costs of a right need not be the sole, or even primary, determinant of the constitutionality of the exercise of a right. This article introduces the notion of the constitutionality of social cost, and recognizes how the Court balances liberty and negative externalities.

II. THE SUPREME COURT AND THE SECOND AMENDMENT

Nearly two hundred years after the Second Amendment’s ratification, the Supreme Court found that it protects an individual right to keep and bear arms. In *District of Columbia v. Heller*, and subsequently in *McDonald v. City Chicago*, the Supreme Court recognized that the people hold this individual right against infringement by the federal government and the States. The bulk of these opinions involved debates about the original meanings of the Second Amendment and the Fourteenth Amendment. Although the originalist debates in these opinions are of interest with respect to the constitutionality of social cost, these arguments are mostly historical footnotes. In this Article I focus, rather, on the majority’s and the dissent’s constitutional calculus: balancing individual liberty and negative externalities.

Even though Justice Breyer did not agree with Justice Scalia’s historical account that the Second Amendment as originally understood protects an “individual [right of] self-defense,” he assumed *arguendo* that “even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense,” the District’s handgun ban still would be consti-

43. *Id.*

44. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

tutional.⁴⁵ For the purposes of this Article, I assume—as did Justice Breyer⁴⁶—that the Second Amendment protects an individual right to keep and bear arms. The crux of the outcome in *Heller* and *McDonald*, and in future lower court opinions, is based not on history, but on balancing the externalities and liberty interests of the Second Amendment. In this part, I will focus on the two provisions of *Heller* and *McDonald* that speak directly to this equilibrium—Justice Breyer’s balancing test and Justice Scalia’s pragmatic dicta. In the former, Lady Justice peeks from behind her blindfold and weighs the interests on an uncalibrated scale. The latter, although purporting to reject balancing tests, blends categorical limitations with an unjustifiably weighted interest analysis.

A. District of Columbia v. *Heller* and
McDonald v. City of Chicago

In its landmark 2008 opinion, *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual’s right to keep and bear arms, unconnected to service in a militia.⁴⁷ The Court accordingly struck down D.C. statutes banning the possession of handguns and the keeping of any functional firearms within the home.⁴⁸ The *Heller* decision was “everything a Second Amendment supporter could realistically

45. *Heller*, 554 U.S. at 681 (Breyer, J., dissenting) (“Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.”).

46. *Id.* at 683, 722 (“I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. . . . Assume, for argument’s sake, that the Framers did intend the Amendment to offer a degree of self-defense protection.”).

47. *Id.* at 612 (majority opinion). For a thorough and insightful background into the history and story behind *District of Columbia v. Heller*, see Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127. Neily, along with Alan Gura and Bob Levy, was counsel of record for *Heller*. See also Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty: An Originalist Critique of the Heller Dissents and Judges Posner’s and Wilkinson’s Unoriginalist Assault on the Liberty To Keep and Bear Arms* (Dec. 19, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318387.

48. *Heller*, 554 U.S. at 628–29.

have hoped for,"⁴⁹ but for one inherent limitation. The case having arisen as a challenge to the law of the federal capital, the Court chose not to reach the question of whether, and to what extent, the right to keep and bear arms applies against the States and their units of local government. Justice Scalia's opinion for the Court did, however, observe that its nineteenth-century precedent declining to apply the Second Amendment right against the States "also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."⁵⁰

Within minutes of the Supreme Court's decision in *Heller*, petitioners in what would become *McDonald v. City of Chicago* brought suit challenging Chicago's handgun ban and several overly burdensome features of its gun registration system.⁵¹ The following day, the National Rifle Association filed suits challenging the Chicago ordinances as well as ordinances in the suburb of Oak Park.

The Supreme Court held in a four-to-one-to-four split decision that the right to keep and bear arms is incorporated⁵²—how the Court got there is a little more complicated. Justice Alito, writing for the plurality on behalf of Chief Justice Roberts, Justice Scalia, and Justice Kennedy, held that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment.⁵³ Justice Scalia concurred with the plurality and wrote separately to dispute much of Justice Stevens's dissent.⁵⁴ Justice Thomas refused to join Justice Alito's opinion and concurred in the judgment only.⁵⁵ Although Thomas agreed that the right to keep and bear arms should be applied against the States and agreed that the right is "fundamental," he found that the right was properly extended

49. Neily, *supra* note 47, at 147.

50. *Heller*, 554 U.S. at 620 n.23.

51. Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 165. For a detailed account of *McDonald v. City of Chicago*, see generally Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right To Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010).

52. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

53. *Id.* at 3050.

54. *Id.* (Scalia, J., concurring).

55. *Id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

through the Privileges or Immunities Clause.⁵⁶ Justice Stevens dissented for himself only.⁵⁷ Justice Stevens found that the Second Amendment should not be incorporated, and even if it was, it need not provide as much protection to persons in the states as it provides to persons in federal enclaves.⁵⁸ Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor, and argued that *Heller* was wrongly decided in light of history, the Second Amendment should not be incorporated, and that *McDonald* would result in more crime and violence.⁵⁹

For purposes of this Article, *Heller* and *McDonald* will generally be discussed interchangeably. The merits of incorporation notwithstanding, the arguments for and against the constitutionality of the Chicago ordinance with respect to social costs largely mirror those regarding the District's statute. Although Justice Stevens penned a lengthy response to Justice Scalia's originalist jurisprudence in *McDonald*, no one else joined his opinion.⁶⁰ Unless Justice Kagan accepts Justice Stevens's view—which remains to be determined—its future vitality is questionable. Accordingly, I will focus almost exclusively on Justice Scalia's majority opinion and Justice Breyer's dissent from *Heller*, and Justice Alito's plurality opinion and Justice Breyer's dissent from *McDonald*.⁶¹

B. Justice Breyer's Balancing Test

Even though Justice Breyer's views are only in dissent, it would be shortsighted simply to disregard them. First, one of the most troubling aspects of Justice Scalia's *Heller* opinion—besides the nebulous dicta that creates a presumption of constitutionality for a number of gun control laws⁶²—is his failure to

56. *Id.* at 3058–59.

57. *Id.* at 3088 (Stevens, J., dissenting).

58. *Id.* at 3088–90.

59. *Id.* at 3120 (Breyer, J., dissenting).

60. *Id.* at 3088 (Stevens, J., dissenting).

61. For more on Justice Thomas's concurring opinion in *McDonald*, see Gura, Shapiro & Blackman, *supra* note 51, at 187–93.

62. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. . . . We identify these presumptively

rebut many of Justice Breyer's pragmatism-based objections. Second, because both the hearts of the majority and dissenting opinions sound in functionalism, lower courts, contrary to the intent of Justice Scalia, can faithfully cite *Heller's* and *McDonald's* originalist doctrine while implicitly balancing interests in the manner Justice Breyer sought.⁶³ Third, and perhaps most importantly, the battle lines drawn for these contentious five-to-four opinions, especially on an aging Court, may soon be in flux. Addressing these points directly provides a counterweight to the dissenters' unchallenged arguments.

Although Justice Breyer's lengthy dissents touch on a number of issues they ultimately boil down to a single point: "[G]un regulation may save . . . lives."⁶⁴ Justice Breyer fears that if the Court strikes down gun control statutes, [t]hose who live in urban areas, police officers, women, and children, all may be particularly at risk."⁶⁵ Justice Breyer therefore believes that a "law [that] will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime" would be a legislative judgment entitled to strong judicial deference.⁶⁶ This "legislative response" is "permissible" because it is in "response to a serious, indeed life-threatening, problem."⁶⁷

lawful regulatory measures only as examples; our list does not purport to be exhaustive.").

63. In *United States v. Masciandaro*, No. 09-4839, slip op. at 21–22 (4th Cir. Mar. 24, 2011) the court noted that "historical meaning enjoys a privileged interpretative role in the Second Amendment context." *Id.* at 22. The court cited *Heller*, 128 S. Ct. at 2816; *United States v. Skoien*, 587 F.3d 803, 809 (7th Cir. 2009), *rev'd en banc* 614 F.3d 638 (7th Cir. 2010), and cited only one case from 1846. *Masciandaro*, No. 09-4839, slip op. at 22 (citing *Nunn v. State*, 1 Ga. 243, 249 (1846)). Based on this limited historical inquiry, the court fashioned a balancing test that "take[s] into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation." *Id.* at 21. These are the exact balancing tests the *Heller* Court purported to reject, but implicitly permitted and Justice Breyer endorsed. *Cf. Heller*, 554 U.S. at 689 (Breyer, J., dissenting) ("Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.").

64. *McDonald*, 130 S. Ct. at 3127 (Breyer, J., dissenting).

65. *Id.*

66. *Heller*, 554 U.S. at 682 (Breyer, J., dissenting).

67. *Id.* at 681–82.

Justice Breyer finds that the “adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible . . . because almost every gun-control regulation will seek to advance (as the one here does) a ‘primary concern of every government—a concern for the safety and indeed the lives of its citizens.’”⁶⁸ Indeed, “the Government’s general interest in preventing crime” is “compelling.”⁶⁹ Given that Justice Breyer was willing to uphold the District’s and Chicago’s bans—among the most draconian in the nation—it is unclear what licensing regime, if any, he would find unconstitutional. The precise tailoring of the right Justice Breyer requires effectively narrows the individual right to keep and bear arms to a limited sphere of liberty, constrained more than any other freedom.

Although Justice Breyer’s balancing test purportedly places “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other” side of the scale, Justice Breyer ostensibly only looks at one front of this skirmish.⁷⁰ A closer inquiry reveals a discernible judicial thumb on the District’s and Chicago’s pans. In *Heller*, Justice Breyer asks “whether th[e] benefit [of ownership of a useable firearm in the home] is worth the potential death-related cost.”⁷¹ He finds that “that is a question without a directly provable answer.”⁷² Justice Breyer sets up a scale:

Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.⁷³

Although the Fourth Circuit in *United States v. Masciandaro* cited to Justice Scalia’s opinion, it almost precisely copied Justice Breyer’s

68. *Id.* at 689 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987) (internal quotation marks omitted)).

69. *Id.* (quoting *Salerno*, 481 U.S. at 750, 754).

70. *Id.*

71. *Id.* at 703.

72. *Id.*

73. *Id.* at 689.

views on applying strict scrutiny.⁷⁴ Judge O’Scannlain’s opinion in *Nordyke v. King* adopted similar reasoning in rejecting strict scrutiny,⁷⁵ effectively citing Scalia while embracing Breyer.

On one side are the potential costs to life guns can cause. But what is on the other side? What is the “benefit” of gun ownership? In calculating the constitutionality of social cost, we know what the externalities are, but what about the liberty interests? Justice Breyer spends seven detailed pages of his twenty-two-page *Heller* dissent, with ample footnotes, discussing the potential death-related costs⁷⁶—yet he devotes only two sparse pages, which are dismissive of any social benefits of firearm ownership.⁷⁷ He identifies three interests behind the Second Amendment: preserving the militia, safeguarding guns for sporting purposes, and protecting ownership of firearms for self-defense.⁷⁸ Because the District has no organized militia, there is really no feasible benefit to this first interest. With respect to sporting purposes, Justice Breyer suggests that D.C. residents could ride the Metro to Virginia or Maryland, where guns can be used for hunting purposes, and cites to the Washington Metro System’s website.⁷⁹ With respect to self-defense, Breyer concedes, begrudgingly, that the D.C. regulation “bur-

74. See *United States v. Masciandaro*, No. 09-4839, slip op. at 23 (4th Cir. Mar. 24, 2011) (“Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to prevent[] armed mayhem in public places, and depriving them of a variety of tools for combating that problem. While we find the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home (where the need for defense of self, family, and property is most acute), we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.”) (alteration in original) (internal citations and quotation marks omitted).

75. See *Nordyke v. King*, No. 07-15763, slip op. at 5639 (9th Cir. May 2, 2011) (“Conversely, applying strict scrutiny to every gun-control regulation would be inconsistent with *Heller*’s reasoning. Under the strict scrutiny approach, a court would have to determine whether each challenged gun-control regulation is narrowly tailored to a compelling governmental interest (presumably, the interest in reducing gun crime). But *Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime.”).

76. *Heller*, 554 U.S. at 693–99 (Breyer, J., dissenting).

77. *Id.* at 706–10.

78. *Id.* at 706.

79. *Id.* at 708–09.

dens to some degree an interest in self defense.”⁸⁰ When Justice Breyer weighs a relatively one-sided sample of studies discussing the dangerousness of guns against three restrained interests, it is unsurprising how that scale tilts.

Assuming that the pros and cons of gun control are at equipoise—that is, that the evidence is not clear whether striking down this law will protect people’s liberty or cause more violence—why need the tie go to the government, when there is an express protection of this liberty in the Bill of Rights? Judge J. Harvie Wilkinson frankly admits his preferred approach: Any time “the question is this close,” the government should win.⁸¹ Justice Breyer’s analysis is not so lucid.

Notwithstanding that the Second Amendment is a “specific prohibition of the Constitution . . . [in] the first ten amendments,” Justice Breyer effectively ignores *Carolene Products*’s footnote four’s “narrower scope for operation of the presumption of constitutionality when legislation” restricts such a constitutional right,⁸² while at the same time citing footnote four’s scrutiny for laws “with the purpose of targeting ‘discrete and insular minorities.’”⁸³ In the absence of a clear outcome, should not the tie go to one of our most fundamental rights? Our liberty?⁸⁴

The answer to this question lies in the subjective value Justice Breyer assigns to the right to keep and bear arms. Judge Posner, who is quite critical of Breyer’s balancing approach,⁸⁵ admits that he is:

80. *Id.* at 710.

81. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009) (“When a constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes.”). Judge Wilkinson made a similar point in *United States v. Masciandaro*, No. 09-4839, slip op. 31–32 (4th Cir. Mar. 24, 2011) (“To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of *popular governance*, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business.” (emphasis added)).

82. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

83. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3125 (2010) (Breyer, J., dissenting) (quoting *Carolene Prods.*, 304 U.S. at 153 n.4). Justice Breyer seemingly only considers part of footnote four.

84. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

85. See RICHARD A. POSNER, *HOW JUDGES THINK* 336 (2008) (“Is Breyer’s commitment to democracy or just to policies that he happens to favor?”).

tempted to describe him as a *bricoleur*—one who uses “the instruments he finds at his disposition around him, . . . which had not been especially conceived with an eye to the operation for which they are to be used and to which one tries by trial and error to adapt them, not hesitating to change them whenever it appears necessary.”⁸⁶

Or as Clark Neily put it, Justice Breyer’s balancing test “lends a distinctly preordained feeling to the whole enterprise.”⁸⁷

If consistently applied, Justice Breyer’s deference to the elected branches would be a principled aim representing the view that the state should be able to act to promote the safety and security of society without exacting judicial scrutiny. But Justice Breyer’s jurisprudence is not so consistent. These are the type of questions the Court routinely confronts. More importantly these are questions that Justice Breyer and the other *Heller* and *McDonald* dissenters do not shy away from. It is quite instructive to look at the value Justice Breyer places on the deterrence function of the exclusionary rule⁸⁸ and the prophylactic safeguard of *Miranda*.⁸⁹ In these cases, Justice Breyer’s concerns for various social costs that may result from expanding these liberty interests is more restrained. These are certainly tough questions for the Court to answer—but the Court has answered them in the past, and the Court will answer them in the future.

C. *Justice Scalia’s Pragmatic Dicta*

Justice Scalia succinctly characterizes Justice Breyer’s reasoning: “Because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.”⁹⁰ Justice Scalia purports to discard Justice Breyer’s “freestanding ‘interest-balancing’ approach,” finding that “no other enumerated constitutional right[s] . . . core protection has been sub-

86. *Id.* at 341 (alteration in original) (quoting JACQUES DERRIDA, *WRITING AND DIFFERENCE* 285 (1978)).

87. Neily, *supra* note 47, at 156.

88. See *Hudson v. Michigan*, 547 U.S. 586, 608–09 (2006) (Breyer, J., dissenting); *infra* Part IV.C.1.

89. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *infra* Part IV.C.2.

90. *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

jected to" such ad hoc treatment.⁹¹ The Second Amendment, which "enshrine[d this] constitutional right," eliminates certain "policy choices," including "the absolute prohibition of handguns held and used for self-defense in the home."⁹²

Justice Alito in *McDonald*, more so than Justice Scalia in *Heller*, confronts the argument regarding the social costs of the Second Amendment: "The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications."⁹³ Justice Alito notes that "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category," listing several examples.⁹⁴ First, he notes that the "[t]he exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large."⁹⁵ The Speedy Trial Clause means that in certain cases "a defendant who may be guilty of a serious crime will go free."⁹⁶ Justice Alito harkens back to Justice White's dissent in *Miranda*, where Justice White noted that the Court's holding "[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime."⁹⁷ This list, quite nonexhaustive, enumerates some of the social costs that emanate from many, if not all of our liberties. In his concurring opinion, Justice Scalia continues the theme, and questions whether Justice Stevens thinks that the Court should "only [protect] rights that have *zero* harmful effect on *anyone*."⁹⁸ Were this to be the case, Justice Scalia notes, "even the First Amendment [would be] out."⁹⁹

Yet, a faint-hearted formalist here,¹⁰⁰ Justice Scalia does not practice what he preaches. Although the originalist portions of

91. *Id.*

92. *Id.* at 636.

93. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3045 (2010).

94. *Id.* (citing *United States v. Leon*, 468 U.S. 897, 907 (1984)).

95. *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

96. *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)).

97. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting)).

98. *Id.* at 3055 (Scalia, J., concurring).

99. *Id.*

100. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("Having made that endorsement, I hasten to confess that in a crunch I may prove a faint-hearted originalist."); see also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

Heller sound in formalism, much of Justice Scalia's opinion—in fact, the most important portions as far as lower courts are concerned¹⁰¹—sound in pragmatism.¹⁰² Lower courts can pay lip service to originalism and proceed to rely on the exact balancing tests Scalia rejected.¹⁰³ *Heller* represents a “clever judicial strategy [that] consist[s] of loud pronouncements on the inviolability of constitutionalized rights coupled with more subtle indications of the court's possible willingness to bend principles so as to satisfy pressing considerations relating to enforcement costs, compliance costs, or redistributive costs.”¹⁰⁴ Specifically, Justice Scalia's inclusion of the following oft-criticized dicta¹⁰⁵ in *Heller* evinces functionalism devoid of originalism:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁰⁶

Justice Breyer, who is quite adept at recognizing various disparate factors to balance constitutional interests,¹⁰⁷ is “puzzled

101. See, e.g., *United States v. Skoien*, 614 F.3d 638, 647–48 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (“But my colleagues [in the majority opinion] are not clear about how this limiting dicta should inform the constitutional analysis. The court thinks it ‘not . . . profitable to parse these passages of *Heller* as if they contained an answer to the question whether [the statute] is valid,’ but proceeds to parse the passages anyway.” (citation omitted)).

102. For a discussion of the distinction between formalism and functionalism, see Elizabeth Bahr & Josh Blackman, *Youngstown's Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 546–51 (2010) (exploring the functionalist and formalist divide in national security law).

103. See, e.g., *supra* note 63.

104. Jonathan M. Barnett, *Rights, Costs, and the Incommensurability Problem*, 86 VA. L. REV. 1303, 1331 (2000) (reviewing STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999)).

105. For a critique of the dicta, see, for example, Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

106. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). Justice Scalia reiterated in a footnote that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26.

107. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) (“We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custo-

by the majority's list . . . of provisions that in its view would survive Second Amendment scrutiny."¹⁰⁸ "Why these?" Justice Breyer asks.¹⁰⁹ In *McDonald*, he elaborates:

But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound *sensible* without being able to explain why or how Chicago's handgun ban is different.¹¹⁰

The key word here is *sensible*.¹¹¹ Justice Scalia is correct to note that there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."¹¹² If "[c]onstitutional rights [were] enshrined with the scope they were understood to have when the people adopted them," then "future judges," including Justice Scalia, cannot limit the protections, even if they "think that scope [is] too broad."¹¹³ Justice Scalia's finding that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,"¹¹⁴ does exactly what he criticizes Justice Breyer for doing: narrowing the scope of the Second Amendment irrespective of the history of the right, in this instance to

dial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.").

108. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting). The majority's list of provisions that in its view would survive Second Amendment scrutiny consist of: (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached "to the commercial sale of arms." *Id.* at 626–27 (majority opinion). In contrast, Justice Breyer makes no attempt to identify from where the five factors he identified in *Comstock* derived.

109. *Id.* at 721 (Breyer, J., dissenting).

110. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3127 (2010) (Breyer, J., dissenting) (emphasis added).

111. Reasonable, a synonym for sensible, also proves elusive to define. See *United States v. Masciandaro*, No. 09-4839, slip op. at 28 (4th Cir. Mar. 24, 2011) ("As the district court noted, Daingerfield Island is a national park area where large numbers of people, including children, congregate for recreation. Such circumstances justify reasonable measures to secure public safety." (citation omitted)).

112. *Heller*, 554 U.S. at 634 (majority opinion).

113. *Id.* at 634–35.

114. *Id.* at 635.

self-defense in the home, potentially excluding self-defense outside the home.

In *Heller*, Justice Scalia showed “aware[ness] of the problem of handgun violence in this country, and [took] seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution.”¹¹⁵ Based on these concerns, Justice Scalia concedes that the “Constitution leaves the District of Columbia a variety of tools for combating [the] problem” of social costs.¹¹⁶ Even if an “interest-balancing” approach is rejected, Justice Scalia’s “sensitive places”¹¹⁷ dicta lends support to the notion that the government can consider the specific conditions of an area—such as high crime and violence rates—when imposing restrictions on the right to keep and bear arms. Notwithstanding this “exaggerated rhetoric of individual rights,”¹¹⁸ Justice Scalia’s pontification about the fundamentality of the right represents little more than “rhetorical flourish[.]”¹¹⁹

Although courts have found that *McDonald* did “not alter [the] analysis of the scope of the right to bear arms,”¹²⁰ a closer inspection of Justice Alito’s opinion suggests otherwise. Justice Alito, giving teeth to Justice Scalia’s *Heller* dicta, notes that “longstanding regulatory measures” and laws limiting the bearing of arms in “sensitive places” are not to be doubted.¹²¹ The plurality in *McDonald* thus adopts the *Heller* dicta, but does so in an interesting way: After citing the controlling language from *Heller*,¹²² Justice Alito remarks that “[w]e repeat those as-

115. *Id.* at 636.

116. *Id.*

117. *Id.* at 626.

118. J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 304 (2010).

119. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 97 (1999) (“Rights are familiarly described as inviolable, pre-emptory, and conclusive. But these are plainly rhetorical flourishes.”).

120. *United States v. Marzzarella*, 614 F.3d 85, 88 n.3 (3d Cir. 2010).

121. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

122. *Id.* (“It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’ We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’” (citations omitted)).

surances here.”¹²³ Note these are not constitutional rules or originalist-inspired standards. They are merely assurances. This statement bolsters my contention that these pragmatic rules are essentially interest-based carve-outs of the rights, assurances to those afraid that the social costs of firearm ownership will be ignored. And assurances for whom? In the next sentence, Justice Alito identifies the recipient of these assurances—the municipal respondents (the cities of Chicago and Oak Park).¹²⁴ Justice Alito reassures proponents of strict gun control regimes that despite their “doomsday proclamations, incorporation does not imperil every law regulating firearms.”¹²⁵ This wink and a nod is quite telling—in other words, do not worry, the courts will not second-guess your laws when doing so may yield too many social costs.

Heller and *McDonald* were indeed the “Court’s first in-depth examination of the Second Amendment,” and no one could “expect it to clarify the entire field.”¹²⁶ Yet Justice Scalia’s limiting approach imposing a presumption of constitutionality restricts the ability of the Second Amendment to flourish alongside its brethren in the Bill of Rights. Although Justice Scalia remarks that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned,”¹²⁷ he provides no historical rationale, whatsoever, for the “longstanding prohibitions” dicta.

The authors of both the controlling opinions of *McDonald* and *Heller* are more explicit about their concerns for social costs elsewhere. Recently, in *United States v. Comstock*, Justice Breyer writing for the Court upheld the constitutionality of a statute that enforced the “civil commitment of individuals who are both mentally ill and dangerous—almost the exact groups identified in *Heller*—once they have been charged with, or convicted of, a federal crime” because of a congressional finding that such people present a “substantial risk of bodily injury to another person or serious damage to the property of another.”¹²⁸ In fact, one of the five factors Justice Breyer consid-

123. *Id.*

124. *Id.*

125. *Id.*

126. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

127. *Id.*

128. *United States v. Comstock*, 130 S. Ct. 1949, 1960 (2010) (citation omitted).

ered in determining whether a “statute is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to . . . maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others” is “the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody.”¹²⁹

Likewise, Justice Alito, who concurred in the judgment, agreed that “it is . . . necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems.”¹³⁰ Justice Scalia, who joined Justice Thomas’s dissent, did not dispute this central point: The historical record thus supports the Federal Government’s authority to detain a mentally ill person [who poses a threat to others] against whom it has the authority to enforce a criminal law.”¹³¹ Rather, the dissenters doubted whether the “Necessary and Proper Clause . . . grant[s] Congress the power to authorize the detention of persons without a basis for federal criminal jurisdiction.”¹³² The considerations of social cost in *Comstock* closely mirror those concerns expressed by Justice Scalia in *Heller* and Justice Alito in *McDonald*. Yet the very interest-balancing approach they rejected in the Second Amendment context they adopted in the context of civil detention.¹³³

Similarly, in *Boumediene v. Bush*, Justice Scalia dissented, writing that the Court’s opinion “will almost certainly cause more Americans to be killed.”¹³⁴ Justice Scalia’s *Boumediene* concerns parallel Justice Breyer’s *McDonald* worries. Relatedly, during oral arguments in *Schwarzenegger v. Plata*, Justice Alito expressed concern about the social costs of a court’s prison release order whereby 40,000 prisoners would be released. He questioned whether the released prisoners would “contribute[] to an increase in crime,” citing a different release in Philadelphia that yielded

129. *Id.* at 1965.

130. *Id.* at 1970 (Alito, J., concurring in the judgment).

131. *Id.* at 1980 (Thomas, J., dissenting).

132. *Id.*

133. The Court declined to consider whether an individual constitutional right was present, so perhaps these cases can be distinguished on this ground. *Id.* at 1965 (majority opinion) (“We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution.”).

134. *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting).

“cost[s]” in terms of the “number of murders, the number of rapes, the number of armed robberies, the number of assaults.”¹³⁵

The Courts’ pragmatic rules in *Heller* and *McDonald*, not grounded in any history, are based on concerns about the social costs of the Second Amendment. Justice Breyer’s approach is transparent on this ground, and he concedes that these concerns animate his constitutional calculus. The Courts in *Heller* and *McDonald* do not. These exceptions were not, and cannot be, based on history or originalism. Rather, they were based on the same pragmatism and fear of asserted social costs that may emanate from gun ownership, the same fear that animated Justice Breyer’s dissent. The distance between the two views is one of degree, not of kind. The entire Court effectively agreed with this approach. With this implicit constitutional bias in mind, the constitutionality-of-social-cost framework emerges as a potential unifying principle for future Second Amendment jurisprudence.

III. THE LONELY SECOND AMENDMENT

The Court’s nascent treatment of the right to keep and bear arms is unlike that of any other right protected in the Bill of Rights. Although the majority prevailed with respect to the historical narrative, and I doubt any lower court will supplant that history,¹³⁶ it remains to be seen whether the majority’s prag-

135. Transcript of Oral Argument at 47–48, *Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010) (No. 09-1233) (“JUSTICE ALITO: That is a very indirect way of addressing the problem, and it has collateral consequences. If—if I were a citizen of California, I would be concerned about the release of 40,000 prisoners. And I don’t care what you term it, a prison release order or whatever the . . . terminology you used was. If 40,000 prisoners are going to be released, do you really believe that if you were to come back here 2 years after that, you would be able to say they haven’t—they haven’t contributed to an increase in crime in the State of California? In the—in the amicus brief that was submitted by a number of States, there is an extended discussion of the effect of one prisoner release order with which I am familiar, and that was in Philadelphia; and after a period of time they tallied up what the cost of that was, the number of murders, the number of rapes, the number of armed robberies, the number of assaults. You don’t—that’s not going to happen in California?”).

136. *See, e.g., United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“Although the passages we have quoted are not dispositive, they are informative. They tell us that statutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.”). *The Ninth Circuit in Nordyke v. King*, No. 07-15763 (9th Cir. May 2, 2011)

matic dicta, or the dissenters' pragmatism—which can be easily blurred together¹³⁷—will prevail. For that reason, a deeper probing of functionalist firearm jurisprudence is warranted. First, I consider whether the Second Amendment is unlike all other rights, focusing primarily on the dissenters' attempts to distinguish this liberty from all others. Second, I confront the dissenters' professed judicial modesty with respect to the Second Amendment. Although the Second Amendment certainly presents “highly complex” issues and numerous unanswerable questions to which judges lack “comparative expertise,”¹³⁸ the Court has proven adept at resolving similarly tough topics in various other constitutional contexts. The failure to do so here appears to be convenient judicial restraint. Third, I explore an issue left open by both the majority and dissenting opinions: Can Second Amendment rights be limited based on local circumstances, such as high crime in an urban area? Or, as I phrase it, does the Second Amendment have a geography clause? Can a constitutional right mean different things in different places? If the Second Amendment can be curtailed in high crime urban areas—which tend to be the jurisdictions with the most draconian gun laws—*McDonald's* continued viability beyond complete handgun bans is questionable.

A. *Is the Second Amendment Unlike All Other Rights?*

In the words of Justice Stevens, the “liberty interest” protected by the Second Amendment is “dissimilar from those we have recognized in its capacity to undermine the security of others,”¹³⁹ and “firearms have a fundamentally ambivalent relationship to liberty.”¹⁴⁰ Justice Stevens acknowledges that “some of the Bill of Rights’ procedural guarantees may place ‘restrictions on law enforcement’ that have ‘controversial public safety implications.’”¹⁴¹ Although the societal implications of in-

did not even attempt to cite any historical sources to support its holding that a ban of gun shows on public property does not violate the Second Amendment.

137. *See supra* note 63.

138. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3125, 3127 (2010) (Breyer, J., dissenting).

139. *Id.* at 3110 (Stevens, J., dissenting).

140. *Id.* at 3107.

141. *Id.* at 3110 (quoting *id.* at 3045 (plurality opinion)).

voking the right to remain silent,¹⁴² or the exclu[sion of] certain evidence,¹⁴³ “are generally quite attenuated . . . [t]he link between handgun ownership and public safety is much tighter.”¹⁴⁴ Similarly, though other substantive rights can be offensive to others, such as “remark[s] made by the soapbox speaker, the practices of another religion, or a gay couple’s choice to have intimate relations,” such “offense is moral, psychological, or theological” and “actions taken by the rights bearers do not actually threaten the physical safety of any other person.”¹⁴⁵ To Justice Stevens, “[t]he handgun is itself a tool for crime; the handgun’s bullets are the violence,”¹⁴⁶ and just as a firearm “can help homeowners defend their families,” it can also “facilitate death and destruction and thereby . . . destabilize ordered liberty.”¹⁴⁷

According to Justice Breyer, “[u]nlike other forms of substantive liberty, the carrying of arms . . . often puts others’ lives at risk.”¹⁴⁸ The municipal respondents asserted that “the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety,” noting “that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries.”¹⁴⁹ Is the Second Amendment unlike all other rights?

142. *Miranda v. Arizona*, 384 U.S. 436, 440 (1966).

143. *Mapp v. Ohio*, 367 U.S. 643 (1961).

144. *McDonald*, 130 S. Ct. at 3110 (Stevens, J., dissenting).

145. *Id.*

146. *Id.*

147. *Id.* at 3107–08. This language mirrors Justice Stevens’s opinion in *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986) (“Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a ‘dangerous weapon.’ First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.”). *See also*, *United States v. Masciandaro*, No. 09-4839, slip op. at 32 (4th Cir. Mar. 24, 2011) (“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.”).

148. *McDonald*, 130 S. Ct. at 3120 (Breyer, J., dissenting).

149. *Id.* at 3045 (plurality opinion).

Justice Breyer distinguishes the right to keep and bear arms from other rights enumerated in the Bill of Rights that have been incorporated. Citing Justice Brandeis's dissent from *Whitney v. California*,¹⁵⁰ Justice Breyer observes that the right to keep and bear arms is dissimilar from the right of free speech in that "the private self-defense right does not comprise a necessary part of the democratic process that the Constitution seeks to establish."¹⁵¹ This citation is particularly curious when one considers what Justice Brandeis wrote in *Whitney*. On the page Justice Breyer cited, Justice Brandeis opines that the "courageous, self-reliant men" who "won our independence by [armed] revolution were not cowards" and they "did not exalt order at the cost of liberty."¹⁵² This language would seem to endorse the contrary conclusion that the right to keep and bear arms, as well as the right of freedom of speech, played a central role in the thinking of those "courageous [and] self-reliant men" who "won our independence by [armed] revolution."¹⁵³

Next, Justice Breyer lumps together "the First Amendment's religious protections, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth and Sixth Amendments' insistence upon fair criminal procedure, and the Eighth Amendment's protection against cruel and unusual punishments," which he asserts differ from the Second Amendment in that "the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority."¹⁵⁴ This argument—made without any citation to case law—is un-

150. 274 U.S. 357 (1927).

151. *McDonald*, 130 S. Ct. at 3125 (Breyer, J., dissenting) (citing *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)).

152. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.").

153. *Nordyke v. King*, No. 07-15763, slip op. at 5663 n.7 (9th Cir. May 2, 2011) (Gould, J., concurring in part and dissenting in part) ("An example of an arms regulation that specifically restricts resistance of tyrannous government is a law barring only members of a disfavored or dissident group from gun ownership. This sort of regulation is a familiar way that autocrats have seized and centralized power.").

154. *McDonald*, 130 S. Ct. at 3125 (Breyer, J., dissenting).

persuasive. Historically, disarmament has been a potent weapon and a tool of tyrannical majorities to subjugate discrete and insular minorities.¹⁵⁵ While these concerns “may not grab the headlines the way vivid stories of gun crime routinely do,” failing to defend these rights “is a mistake a free people get to make only once.”¹⁵⁶ Indeed, eternal vigilance is the price—or in the parlance of this article, the *social cost*—of liberty.

Further, “unfair or inhumane treatment at the hands of a majority” need not be limited to oppression by the government. Several of the petitioners in *McDonald* had been the targets of violence. Otis McDonald, a community organizer from a rough neighborhood in Chicago, had been threatened by drug dealers, and the Lawsons had been targeted by burglars in their home.¹⁵⁷ This seems to be the essence of the right of “private self-defense,” as Justice Breyer phrases it¹⁵⁸—the ability to defend oneself from the oppression and unfair treatment of others when the government is unable to provide that protection.

Justice Breyer next objects that “unlike the Fifth Amendment’s insistence on just compensation, [the Second Amendment] does not involve a matter where a majority might unfairly seize for itself property belonging to a minority.”¹⁵⁹ This objection only seems to apply to the Takings Clause, and its application to any other right incorporated in the Bill of Rights is somewhat unclear. Justice Breyer’s final objection is that incorporating the Second Amendment will “work a significant disruption in the constitutional allocation of decision-

155. *Id.* at 3080–81 (Thomas, J., concurring in judgment) (“Many legislatures amended their laws prohibiting slaves from carrying firearms to apply the prohibition to free blacks as well.”) (citations omitted); *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (“Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. . . . [T]he institution of slavery required a class of people who lacked the means to resist.”); see David B. Kopel, *Armed Resistance to the Holocaust*, 19 J. FIREARMS & PUB. POL’Y 144 (2007).

156. *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of rehearing en banc) (“[F]ew saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed. . . .”).

157. *McDonald*, 130 S. Ct. at 3027 (majority opinion).

158. *Id.* at 3120.

159. *Id.* at 3125 (Breyer, J., dissenting).

making authority, thereby interfering with the Constitution's ability to further its objectives."¹⁶⁰

Justice Breyer makes a similar remark later, noting "the important factors that favor incorporation in other instances—*e.g.*, the protection of broader *constitutional objectives*—are not present here."¹⁶¹ What exactly are these constitutional objectives? If the Fourteenth Amendment extends federal protection of substantive rights as against the States, would this not be an objective of the Constitution? How would incorporation possibly frustrate this objective? It would seem to advance, rather than interfere, with this objective.

Additionally this objection applies equally to every provision in the Bill of Rights. All incorporated rights disrupt the "allocation of decisionmaking authority" by shifting this power from the legislative and executive branches of the States to the federal judiciary. Justice Breyer observes that "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make."¹⁶² Justice Breyer laments adding to the "daily judicial diet" the task of "fine tuning . . . protective rules"¹⁶³ to provide for the "safety and indeed the lives"¹⁶⁴ of citizens. Although Justice Breyer notes that this task is only "*sometimes present*" when considering other incorporated rights,¹⁶⁵ his self-professed modesty is atypical, as the Court routinely lays down bright-line rules that impact public safety in areas arguably outside the competency of the judiciary.¹⁶⁶

160. *Id.*

161. *Id.* at 3129 (emphasis added).

162. *Id.* at 3126.

163. *Id.*

164. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

165. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (free speech); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (religion); *Brigham City v. Stuart*, 547 U.S. 398, 403–04 (2006) (Fourth Amendment); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (Fifth Amendment); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (bail)).

166. *See, e.g., Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (joined by Justice Breyer) ("We think it appropriate to specify a period of time [at which time the clock is reset]. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."). The Court does not note why fourteen days, quite the "fine tuning" of rules, is appropriate. *See* Orin Kerr, *Does the*

If the Second Amendment is simply different from all other constitutional rights, as Justices Stevens and Breyer wrote, then it stands to reason that this right should be treated differently from all others. But if the Second Amendment is to stand as a fundamental constitutional right—as the *Heller* and *McDonald* Courts found and its enumeration in the Bill of Rights suggests—then it should not be treated differently.

As part of my goal to propose rules of engagement for Second Amendment inquiries, I aim to bring these cases in line with the Court's treatment of other rights. I am not suggesting that rights should be applied equally—that is the job of the Equal Protection Clause. Rather, a holistic view of the Constitution suggests that rights should be treated equally—that is, one right should not be treated as more or less important than others. The presumption should be that an enumerated, fundamental right in our Constitution that is “deeply rooted in this Nation's history and tradition”¹⁶⁷ should be treated equally to other such important rights. Those aiming to detract from this standard bear the burden of establishing a disparate treatment, not the other way around. The scales of rights should be set at equipoise, and balance in a similar fashion liberty interests and social costs. Seeking to provide for the equality of all of our rights, the framework I propose would ensure that the Second Amendment is lonely no more.

B. *Faux-Restraint and Judicial Engagement*

What is the proper role for Judges to engage with Second Amendment cases? Justice Breyer notes that “[u]nlike the protections offered by many of these same Amendments [in the Bill of Rights, Second Amendment issues do] not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation.”¹⁶⁸ This position is curious considering that Justice Breyer and the other dissenting Justices routinely address matters with respect to which judges trained in the law possess little if any comparative advantage over experts in the field: civil

Constitution Have a 14-Day Clause?, SCOTUSBLOG (Feb. 25, 2010, 11:45 AM), <http://www.scotusblog.com/2010/02/does-the-constitution-have-a-14-day-clause/>.

167. *McDonald*, 130 S. Ct. at 3036 (majority opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

168. *Id.* at 3125 (Breyer, J., dissenting).

rights,¹⁶⁹ racial integration,¹⁷⁰ and due process for detainees during times of war,¹⁷¹ to name a few. The mere fact that the Court opines on such hot-button issues, with some regularity, does not denote any relative expertise. Standard legal training hardly makes judges experts on a host of topics, yet society nonetheless accepts their decisions. In the words of Justice Jackson, “We are not final because we are infallible, but we are infallible only because we are final.”¹⁷²

Yet, when it comes to the Second Amendment, Justice Breyer hesitates to engage with the constitutional issues out of a concern that “state and local gun regulation can become highly complex.”¹⁷³ Mimicking Chief Justice Roberts’s litany of unanswered questions from *Caperton v. A.T. Massey Coal Co., Inc.*,¹⁷⁴ Justice Breyer poses a series of questions about the possible impact of various gun control regulations on crime and violence to illustrate that the Court lacks the competence to address these tough issues.¹⁷⁵ Although these questions do not have simple answers, the Court has considered, and answered, similar questions in various other constitutional contexts. Even though these “highly complex” issues generate “only a few uncertainties that quickly come to mind,”¹⁷⁶ they do not represent issues that warrant unqualified judicial deference to the

169. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

170. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

171. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

172. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

173. *McDonald*, 130 S. Ct. at 3127.

174. 129 S. Ct. 2252 (2009).

175. *McDonald*, 130 S. Ct. at 3126–27 (“Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government’s ability to take special measures during, say, national security emergencies?” (citing *Caperton*, 129 S. Ct. at 2261 (Roberts, C.J., dissenting))).

176. *Id.* at 3127 (quoting *Caperton*, 129 S. Ct. at 2261 (Roberts, C.J., dissenting)).

elected branches—especially when the case involves an enumerated constitutional right.

First, Justice Breyer asks a series of questions about whether the Second Amendment should apply “outside the home,” in the “car,” or at “work.”¹⁷⁷ Admittedly, Justice Scalia’s “sensitive places” dictum is quite unhelpful,¹⁷⁸ so Justice Breyer is correct to note that there remains uncertainty about the geographical reach of the Second Amendment. A reference to the scope and protections of the Fourth Amendment is quite relevant here, as the Court has considered this right outside the home, in the car, and at work. For more than a century, the Court has defined the contours of the Fourth Amendment.¹⁷⁹ Although warrantless entries into the home are not permitted,¹⁸⁰ searches of automobiles, which are mobile and permit the easy transportation of evidence, are held to a mere probable cause standard.¹⁸¹ The Court has also considered Fourth Amendment rights at work, both in the private¹⁸² and public employment¹⁸³ contexts. Presumably, a private employer would be free to limit an employee’s constitutional rights, so long as it did not violate any affirmative obligations, such as labor rights. The Court has also considered the applicability of First¹⁸⁴ and Fourth Amendment¹⁸⁵ rights in schools, one of the presumptively sensitive places Justice Scalia identified. The Court’s First Amendment jurisprudence regularly varies based on both the forum and neutral time, place, and manner regulations.¹⁸⁶

177. *Id.* at 3126.

178. *See id.* at 3127.

179. *See* *Boyd v. United States*, 116 U.S. 616 (1886).

180. *Payton v. New York*, 445 U.S. 573, 576 (1980) (holding that the Fourth Amendment “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest”).

181. *Carroll v. United States*, 267 U.S. 132, 155–56 (1925).

182. *See* *INS v. Delgado*, 466 U.S. 210, 212 (1984) (holding that the actions of INS agents in moving systematically through factory to inquire about workers’ citizenship while INS agents were stationed at each exit did not amount to Fourth Amendment seizure of the entire work force of the factory).

183. *See* *O’Connor v. Ortega*, 480 U.S. 709 (1987).

184. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

185. *See* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

186. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).

Justice Breyer's second set of questions queries the permissible types of guns "necessary for self-defense."¹⁸⁷ What types of guns should be permitted? Again, Justice Scalia's explanations are unsatisfying. In *Heller*, the Court's continued reliance on the outmoded *United States v. Miller*,¹⁸⁸ finding that the Second Amendment permits weapons "in common use" by the militias at the time of the ratification of the Second Amendment,¹⁸⁹ is unhelpful. This Article does not purport to answer what arms are appropriate for self-defense. It simply aims to highlight the fact that the Court has grappled with similar hot-button issues in other areas of the law without shirking its constitutional responsibility and simply deferring to the elected branches.

Third, Justice Breyer asks whether the "time-of-day matter[s]" with respect to the restriction of arms.¹⁹⁰ Time, place, and manner regulations governing the First Amendment provide clear examples where the Court has considered the constitutional dimensions of the timing of a regulation.¹⁹¹ Further, several Justices have found that the Fourth Amendment places some limitations on the time at which a search warrant can be executed without a special showing, notwithstanding local police customs.¹⁹²

Fourth, Justice Breyer asks whether the presence of a "child [or] convicted felon in the house matter[s]."¹⁹³ Courts have confronted similar issues in different contexts. In cases where a person lives in the same home as a convicted felon serving probation or on supervised release, that person is subject to a

187. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3126 (2010) (Breyer, J., dissenting) ("What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? . . . [W]hat kind [of weapons can people possess]?"). Justice Breyer also asks, "When is a gun semiautomatic?" *Id.* This would seem to be a question for the legislative branch. Justice Breyer may find an answer to this question in 18 U.S.C. § 921(a)(28) (2006) which defines a semi-automatic rifle as "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge."

188. 307 U.S. 174 (1939).

189. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (quoting *Miller*, 307 U.S. at 179).

190. *McDonald*, 130 S. Ct. at 2136 (Breyer, J., dissenting).

191. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

192. *Gooding v. United States*, 416 U.S. 430, 464 (1974) (Marshall, J., dissenting) (joined by Justices Douglas and Brennan) (arguing that searches at night "involve a greater intrusion than ordinary searches and therefore require a greater justification").

193. *McDonald*, 130 S. Ct. at 3126 (Breyer, J., dissenting).

reduced expectation of privacy.¹⁹⁴ The Court has also found that certain sexual-based “convictions may be used to limit where sex offenders can live (and whether they must register).”¹⁹⁵ Further, in upholding various limitations on the liberty of registered sex offenders, the courts scrutinized sex offender registries to ensure that the regulation did “not restrict [registrants’] freedom of action with respect to their families and therefore does not intrude upon the aspect of the right to privacy that protects an individual’s independence in making certain types of important decisions”—specifically the right to live with family members, including minor children.¹⁹⁶ The Supreme Court’s precedents recognizing rights of familial autonomy and self-determination would seem to bolster this judicial scrutiny.¹⁹⁷ If courts require procedures that permit children and non-felons to reside in the same homes as violent sex offenders, then the presence of guns seems to be an issue that the judiciary can manage. It does not require adhering precisely to the determinations of the other branches.

Fifth, Justice Breyer asks, “Do police need special rules permitting patdowns designed to find guns?”¹⁹⁸ Nothing in the *McDonald* plurality’s opinion would seem to cast any doubt on the standard for permissible patdowns established in *Terry v. Ohio* and its progeny.¹⁹⁹ If a law enforcement officer possesses a reasonable, articulable suspicion that criminal activity is afoot, he or she may detain the suspect and, if needed, conduct a pat-

194. Cf. *Latta v. Fitzharris*, 521 F.2d 246, 258 (9th Cir. 1975) (Hufstedler, J., dissenting) (remarking that “review by parole authorities or criminal courts provide no protection and no solace to the parolee’s family and friends whose privacy is invaded by unreasonable searches of the parolee’s home or temporary abode, which they may share with him”).

195. *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (citing *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003)).

196. *Paul P. v. Verniero*, 170 F.3d 396, 405 (3d Cir. 1999); see also, *Doe v. Moore*, 410 F.3d 1337, 1344–45 (11th Cir. 2005); *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005).

197. See *Doe v. Biang*, 494 F. Supp. 2d 880, 893 (N.D. Ill. 2006) (finding that the sex offender registration is constitutional, in part, because “[i]t does not limit Doe’s ability to live or work in a community with his family or to marry or raise children”). In several cases the Court has recognized “a right to privacy in matters relating to marriage, procreation, abortion and family relationships.” *Id.* (citations omitted).

198. *McDonald*, 130 S. Ct at 3126.

199. See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

down for weapons.²⁰⁰ Neither *Heller* nor *McDonald* appears to change this standard. In related contexts, where the First and Fourth Amendments intersect, the Supreme Court has approved the usual warrant process for the seizure of an allegedly obscene film.²⁰¹ The mere fact that a constitutional right is implicated does not require “special rules,” especially for the weaker standard of a *Terry* stop, as compared to the higher standard of probable cause. The presence of a firearm is not enough to vitiate these protections. In *Florida v. J.L.*, Justice Ginsburg, writing for the Court, noted that even though “[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. . . . [a]n automatic firearm exception” — wherein an “anonymous tip that a person is carrying a gun [would be], without more, sufficient to justify a” *Terry* stop — would “rove too far” from the Court’s “established [Fourth Amendment] reliability analysis.”²⁰²

Sixth, Justice Breyer approaches the licensing issue and asks, “[w]hen do registration requirements become severe to the point that they amount to an unconstitutional ban?”²⁰³ In the First Amendment realm, the Court has held that a sales tax on newspapers, even if applied as a generally applicable licensing scheme, is unconstitutional.²⁰⁴ The *Casey* “undue burden” framework, which seeks to determine when a restriction on access to abortion becomes unconstitutional,²⁰⁵ illustrates another scenario where the Court has crafted a standard for a controversial and difficult social issue.²⁰⁶ In these contexts, the Court has proven able to scrutinize the severity of a licensing scheme to assess

200. *Id.*

201. *Heller v. New York*, 413 U.S. 483, 492 (1973) (“If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.”).

202. *Florida v. J.L.*, 529 U.S. 266, 268, 272 (2000).

203. *McDonald*, 130 S. Ct. at 3126.

204. *Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 250 (1936).

205. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992).

206. Judge O’Scannlain, citing *Casey*, adopted a related “substantial burden” framework in *Nordyke v. King*, No. 07-15763, slip op. at 5644 (9th Cir. May 2, 2011) (“Thus, the proper inquiry is whether a ban on gun shows at the county fairgrounds *substantially burdens* the right to keep and to bear arms; not whether a county can ban all people from carrying firearms on all of its property for any purpose.” (emphasis added)).

constitutional violations, notwithstanding—and usually in opposition to—the determinations of the elected branches.

Seventh, Justice Breyer queries, “[w]ho can possess guns . . . ?”²⁰⁷ This question seemingly presupposes that some people, and not others, can possess firearms.²⁰⁸ Specifically, Justice Breyer asks if aliens, prior drug offenders, or prior alcohol abusers²⁰⁹ can possess firearms.²⁰⁹ The Court has considered how rights apply to different types of people in light of the Equal Protection Clause of the Fourteenth Amendment. With respect to aliens, individual constitutional rights are generally applied equally to a person regardless of his or her documented status.²¹⁰

Both present and current alcohol abusers do not surrender their constitutional rights, with the exception of certain terms imposed upon supervised release or probation. In contrast, relying on the state’s “overwhelming interest” in supervising parolees because “parolees . . . are more likely to commit future criminal offenses,” the Court has held that a suspicionless search of a parolee, conducted pursuant to a law requiring all parolees to agree to be subjected to search or seizure at any time, does not violate the Fourth Amendment.²¹¹ Further, Justice Breyer joined Justice Kennedy’s opinion in *Romer v. Evans*,²¹² where the Supreme Court reaffirmed *Davis v. Beason*, an

207. *McDonald*, 130 S. Ct. at 3126.

208. *See id.* at 3127.

209. *Id.*

210. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982). *Cf. Foley v. Connelie*, 435 U.S. 291, 296 (1978) (“citizenship may be a relevant qualification for fulfilling those ‘important nonelective executive, legislative, and judicial positions,’ held by ‘officers who participate directly in the formulation, execution, or review of broad public policy.’” (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973))). Because the *McDonald* plurality selected to incorporate the Second Amendment through the due process Clause, which applies to “all persons,” while Justice Thomas chose to incorporate the right through the Privileges or Immunities Clause, which only applies to “citizens,” the fact that the Second Amendment applies to all persons is not clear. Though for a practical matter, notwithstanding the *McDonald* voting paradox, the Second Amendment would apply equally to a citizen and a non-citizen.

211. *Samson v. California*, 547 U.S. 843, 852–53 (2006) (internal quotations omitted).

212. 517 U.S. 620, 634 (1996) (“To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.”).

1890 opinion by Justice Field that held that convicted felons may be denied the right to vote.²¹³

Eighth, Justice Breyer asks, “[h]ow would the right interact with a state or local government’s ability to take special measures during, say, national security emergencies?”²¹⁴ The Court, though infrequently, has dealt with civil rights during times of emergency.²¹⁵ In *Ex parte McCardle*, decided in the heat of Reconstruction, the Supreme Court found that Congress could withdraw the jurisdiction of the federal courts to hear habeas petitions.²¹⁶ In 1942, during the throes of World War II, the Supreme Court in *Ex parte Quirin* upheld the constitutionality of the military tribunal that tried German saboteurs captured in the United States.²¹⁷ Similarly, following the resolution of the contentious Iranian hostage crisis, the Supreme Court upheld the suspensions of claims filed in U.S. courts even though the President lacked a statutory authorization to do so.²¹⁸

However, at the peak of the Korean War, the Supreme Court found that President Truman could not unilaterally seize a steel mill to prevent an impending strike, even though the continued production of steel was necessary to the military effort.²¹⁹ Additionally, and perhaps freshest in our memories, are the Guantanamo detainee cases prompted by Congress’s attempts in concert with the President to withdraw habeas corpus jurisdiction through the Military Commissions Act. Yet the Court, including Justice Breyer, found that the jurisdiction-stripping provision was invalid and that the writ of habeas corpus protected detainees held at Guantanamo Bay.²²⁰ Although the champion of “Active Liberty”²²¹ has expressed caution about the courts overstepping their bounds during times

213. 133 U.S. 333, 346–47 (1890).

214. *McDonald*, 130 S. Ct. at 3127. Coincidentally, this exact issue is currently being litigated in North Carolina by Alan Gura, who argued *McDonald* and *Heller*. See *Bateman v. Perdue*, No. 5:10-cv-265 (E.D.N.C. filed June 28, 2010).

215. See Bahr & Blackman, *supra* note 102, at 565–74.

216. 74 U.S. (7 Wall.) 506, 514 (1868).

217. 317 U.S. 1, 48 (1942).

218. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

219. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

220. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

221. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

of crisis,²²² the Court, including Justice Breyer, has not shirked its responsibility during the most trying of times.

The purpose of listing these precedents is not to assert that the Court has taken a consistent—or even coherent—approach to balancing constitutional liberties and social costs. It has not. Nor do I purport to agree with all of these precedents as proper interpretations of constitutional liberties. I do not. I simply aim to note that the Court has, however reluctantly, taken up this task—even when the Justices have disagreed with the determinations of one, or even two of the elected branches. Justice Breyer’s minimalism notwithstanding, simply sidestepping these “unanswerable” questions and deferring to the legislature reflects a departure from the Court’s cherished role of protecting constitutional liberties. As hard as it is to weigh, judges must judge, and engage the constitutional issue.²²³ The Second Amendment is no different.

Society accepts the Court’s wading into these muddled waters because these cases involve our most fundamental rights—rights in many cases not enumerated in the Constitution—which demand protection. Yet for a right actually enumerated in the Bill of Rights, Justice Breyer catches a convenient case of judicial modesty, and refrains. This faux judicial restraint is unpersuasive.

C. *Federalism and Locational Constitutional Rights*

Does the Constitution have a geography clause?²²⁴ This section explores whether the Second Amendment is a national right or a local right that can be limited based on circumstances, such as high crime. Proponents of the geography clause argument fall into two camps. First, Justice Stevens in *McDonald* contended that the Second Amendment as applied against the States should provide weaker protections than the Second Amendment as applied against the federal government.²²⁵ Justice Alito adequately rebutted this erroneous application of Justice Brandeis’s laborato-

222. See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 68–70 (2010) (discussing the judicial crisis surrounding *Bush v. Gore*).

223. Cf. *United States v. Masciandaro*, No. 09-4839, slip op. at 32 (4th Cir. Mar. 24, 2011) (“If ever there was an occasion for restraint, this would seem to be it. There is much to be said for a course of simple caution.”).

224. Josh Blackman, *Does the Constitution Have a Geography Clause? How Can Rights Mean Different Things in Different Places?*, JOSH BLACKMAN’S BLOG (Oct. 15, 2009, 9:02 AM), <http://joshblackman.com/blog/?p=330>.

225. See *infra* Part III.C.1.

ries of experimentation thesis and Justice Harlan II's never-accepted incorporation jurisprudence.²²⁶ The other theory, advanced by Justice Breyer, contends that local municipalities should be able to consider whether an area has a high crime rate when construing the meaning of the Second Amendment.²²⁷ Although Justice Alito rejected Justice Stevens's two-track approach to incorporation, he leaves open the door for localities to devise solutions to social problems that "suit local needs and values" according to certain limitations.²²⁸ This section considers the First and Fourth Amendments, which countenance locational rights that can vary based on location, and distinguishes those frameworks from the approach Justice Breyer seeks.

1. *States as Second Amendment Laboratories of Democracy*

Long an opponent of the Rehnquist Court's "New Federalism,"²²⁹ Justice Stevens in *McDonald*, rediscovered the value of state government in the absence of federal judicial intervention. Justice Stevens notes that the incorporation of the Second Amendment "is a federalism provision. It is directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court *against* the States."²³⁰ He further remarks that "[t]he costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers."²³¹ Citing Justice Kennedy's concurring opinion in *United States v. Lopez*, Justice Stevens notes that "it is all the more unwise for this Court to limit experimentation in [the states in] an area 'where the best solution is far from clear.'"²³² Justice Scalia challenges this standard, admitting Justice Stevens's conclusion that "the best solution is far from clear"²³³ but noting that

226. *See id.*

227. *Dist. of Columbia v. Heller*, 554 U.S. 570, 722 (2008) (Breyer, J., dissenting).

228. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion).

229. *See, e.g., Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting).

230. *McDonald*, 130 S. Ct. at 3111 (Stevens, J., dissenting) (citations and internal quotations omitted).

231. *Id.* at 3095.

232. *Id.* at 3114 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

233. *Id.* at 3056 (Scalia, J., concurring) (citing *id.* at 3114 (Stevens, J., dissenting)).

the Court nonetheless decided cases involving such serious social issues as coerced confessions²³⁴ and the death penalty.²³⁵ In such cases, “the optimal answer is in the eye of the beholder.”²³⁶

Building on Justice Brandeis’s famous “laboratories of democracy” metaphor from *New State Ice Co. v. Liebmann*,²³⁷ Justice Stevens remarks that “[t]he costs of federal courts imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities.”²³⁸ *Liebmann*, generally remembered for Justice Brandeis’s classic dissent, considered whether the Due Process Clause of the Fourteenth Amendment prevented a state legislature from arbitrarily creating restrictions on businesses—in this case, the State had prevented Liebmann from selling ice without a license.²³⁹ Justice Brandeis’s dissent focused on experimentation in the states with respect to matters of economic liberties, to which he found that the Constitution does not set a minimum floor.²⁴⁰ Contrary to Justice Stevens’s assertion, Justice Brandeis’s dissent does not permit the states to “experiment” with the protection of federally protected constitutional rights or incorporated enumerated rights.

Justice Alito rejects the notion that Second Amendment is a “second-class right” that warrants an “entirely different body of rules” for incorporation into the Due Process Clause.²⁴¹ “Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed

234. *Id.* at 3056–57 (Scalia, J., concurring) (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966)).

235. *Id.* at 3056–57 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

236. *Id.* at 3057.

237. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

238. *McDonald*, 130 S. Ct. at 3095 (Stevens, J., dissenting).

239. *Liebmann*, 285 U.S. at 271 (majority opinion).

240. *Id.* at 311 (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.”).

241. *McDonald*, 130 S. Ct. at 3044 (plurality opinion).

public safety implications.”²⁴² No such precedents exist. Although Justice Alito finds the Second Amendment “binding on the States [notwithstanding] that the right at issue has disputed public safety implications,”²⁴³ he still countenances those public safety implications in a manner unlike any other right in our Constitution. The Court is right to say it will treat the Second Amendment as equal to other incorporated rights, but the equal treatment ends there. The Court’s analysis in *McDonald*, much like the opinion in *Heller*, effectively allows the Second Amendment to exist as a “second-class right.”

A state cannot act as a laboratory by infringing a person’s freedom from unreasonable search and seizure because the person is dangerous.²⁴⁴ No more should a state be able to deny a person’s right to self-defense because an area has a high crime rate. Incorporated provisions of the federal Constitution provide a floor, so to speak. States can provide additional protections above that floor, but failure to provide the minimum level of protection violates the Constitution. Indeed, “‘primarily, and historically,’ the law has treated the exercise of police powers, including gun control, as ‘matter[s] of local concern.’”²⁴⁵ However, even a state’s police power is bound, as are all state actions, by the United States Constitution. Justice Alito fully rebuts Justice Breyer’s assertions, noting that even though “[i]ncorporation always restricts experimentation and local variations . . . that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights.”²⁴⁶

2. *Locational Constitutional Rights*

Do constitutional rights mean different things in different places? In two primary contexts—First and Fourth Amendment cases—the Court considers location to determine the content of

242. *Id.* at 3045.

243. *Id.*

244. See *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (“We thought it obvious that the Fourth Amendment’s meaning did not change with local law enforcement practices—even practices set by rule. While those practices ‘vary from place to place and from time to time,’ Fourth Amendment protections are not ‘so variable’ and cannot ‘be made to turn upon such trivialities.’” (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996))).

245. *McDonald*, 130 S. Ct. at 3129 (Breyer, J., dissenting) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

246. *Id.* at 3050 (plurality opinion).

rights. These locational constitutional rights must be distinguished from the Second Amendment jurisprudence that the dissenters propose and the majority fails to rebut. In both of these contexts, geography is but one factor that must accompany an ex post observation of a cognizable act. In contrast, as Justice Breyer explains, geography—such as “high-crime urban areas,” however that is defined—by itself could be assessed ex ante to deprive law-abiding citizens, who have engaged in no harmful activity, of their constitutional rights.²⁴⁷

a. The Second Amendment in High-Crime Urban Areas

A central thrust of Justice Breyer’s dissenting opinions in *Heller* and *McDonald* focuses on the pervasiveness of crime in urban areas and the attendant need of those municipalities to have stricter gun control laws to address that crime. Effectively, Justice Breyer seeks to provide a watered-down version of the Second Amendment in urban areas with high crime and a prevalence of gun-related deaths and injuries, such as the District of Columbia and Chicago, based solely on those empirics. Justice Breyer fears the “unfortunate consequences that [*Heller*] is likely to spawn,” as he sees no “untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas.”²⁴⁸ Justice Breyer argues that the District’s statute is narrowly tailored, focusing on “the presence of handguns in high-crime urban areas.”²⁴⁹ Stressing the relevance of the District’s problems, the “[l]aw is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban,”²⁵⁰ even though the law applied to Anacostia and Georgetown equally. Further, Justice Breyer finds it constitutional to restrict access to “handguns, which are specially linked to urban gun deaths and injuries.”²⁵¹

Justice Breyer made similar points in *McDonald*. Focusing on the “local value-laden nature of the questions that lie at the heart” of gun control, Justice Breyer is loathe to take that deci-

247. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 681–82 (2008) (Breyer, J., dissenting).

248. *Id.* at 722.

249. *Id.* at 681.

250. *Id.* at 682.

251. *Id.*

sionmaking power “from the people,” querying what a judge “knows better” about “local community views and values.”²⁵² Noting that “[u]rban centers face significantly greater levels of firearm crime and homicide,” Justice Breyer finds that “[t]he nature of gun violence also varies as between rural communities and cities.”²⁵³ Specifically, certain “idiosyncratic local factors” can place two different cities in “dramatically different circumstances: For example, in 2008, the murder rate was 40 times higher in New Orleans than it was in Lincoln, Nebraska.”²⁵⁴ These empirical observations are essentially *ex ante* predictions of social harm in the absence of any cognizable act, unlike the analyses for First and Fourth Amendment locational rights discussed later in this Article.

The municipal respondents in *McDonald* asked the Court to “treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that [the Court has] held to be incorporated into the Due Process Clause.”²⁵⁵ Justice Alito finds that “line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases.”²⁵⁶

Justice Alito insists that “[i]ncorporation always restricts experimentation and local variations,” and “[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table,”²⁵⁷ but the plurality’s holding is not so clear. Justice Alito is correct to note that the right as applied against the States should be equal to the right as applied against the federal government.²⁵⁸ However, this only covers part of the city’s objections. The plurality, like Justice Breyer, argue that urban cities should still have flexibility to impose more stringent gun control ordinances because of the prevalence of crime. It does not matter if the city is the District of Columbia, where the Second Amendment applies directly, or Chicago, where the Second Amendment applies through the Fourteenth Amendment.

252. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3128–29 (Breyer, J., dissenting).

253. *Id.* at 3128.

254. *Id.* at 3129.

255. *Id.* at 3044 (plurality opinion).

256. *Id.*

257. *Id.* at 3050 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

258. *Id.* (“This conclusion [about incorporation] is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.”).

In *Heller*, Justice Scalia agrees that whether the Second Amendment is “outmoded [in places] where gun violence is a serious problem” is “perhaps debatable.”²⁵⁹ Although Justice Scalia notes that “it is not the role of this Court to pronounce the Second Amendment extinct,”²⁶⁰ he implicitly leaves open the gun violence debate as an element of Second Amendment jurisprudence. The plurality in *McDonald* found that even though a Bill of Rights guarantee is “fundamental” and “fully binding on the States,” the states can still “devise solutions to social problems that suit local needs and values” according to certain limitations.²⁶¹ This finding implicitly concedes what Justice Scalia left open in *Heller* and what Justice Breyer advocates. Based on “local needs and values,” urban areas—presumably those areas with high crime—can fashion different types of constitutional gun control ordinances based solely on this geographic fact—that is, in no way based on any cognizable act of individuals posing threats to others. Does this suggest that a law restricting a constitutional right in an urban high-crime area would be unconstitutional elsewhere? Not necessarily. But combined with the failure to rebut Justice Breyer’s dissent, this dicta gives judges a license to grant a “[s]afe harbor”²⁶² for such location-based laws.

b. *First Amendment Locational Rights*

Several First Amendment doctrines consider location to ascertain the scope of rights. The government may impose reasonable regulations on the time, place, or manner of protected speech, provided that the regulation is content neutral.²⁶³ This

259. *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

260. *Id.*

261. *McDonald*, 130 S. Ct. at 3046.

262. *See, e.g.*, *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (“Some courts have treated *Heller*’s listing of ‘presumptively lawful regulatory measures’ . . . for all practical purposes, as a kind of ‘safe harbor’ for unlisted regulatory measures.”); *United States v. Skoien*, 614 F.3d 638, 646 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (“The government invoked *Heller*’s anticipatory language about certain ‘presumptively lawful’ firearms regulations—specifically, felon-dispossession laws—as a sort of ‘safe harbor’ for analogous prohibitions.”); Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)?: Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1247–48 (2009) (noting that *Heller*’s dicta about “presumptively lawful” exceptions to the Second Amendment right may have opened a “safe harbor” for a wide swath of firearms regulation).

263. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

doctrine does not indicate that First Amendment rights vary based on where one speaks; rather, if the government aims to regulate the speech in a content-neutral manner, it can limit the places, as well as the times and manners, in which one may speak.²⁶⁴ The more suitable First Amendment doctrine to consider in this context is forum analysis, for the purpose of which the Court has “sorted government property into three categories”²⁶⁵—traditional public forums,²⁶⁶ designated public forums,²⁶⁷ and limited public forums.²⁶⁸ The government can designate certain types of private property, such as a shopping mall, as open to the public as a venue for free expression, so long as the government acts without regard to content.²⁶⁹ The Court in *Heller*, by listing certain “sensitive places such as schools and government buildings,”²⁷⁰ took the first steps towards sorting the different forums for Second Amendment protection.²⁷¹

The closest analogue to the locational Second Amendment doctrine Justice Breyer proposes is obscenity doctrine. The first prong of the test for obscenity inquires “whether the average person, applying *contemporary community standards* would find that the work, taken as a whole, appeals to the prurient interest.”²⁷² The Court in *Miller* reasoned that “[i]t is neither realistic

264. This time, place, and manner analysis may lend itself to future discussions about whether the Second Amendment protects the right to carry outside the home, and presumably, into different places.

265. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010).

266. *Id.* (“[I]n traditional public forums, such as public streets and parks, ‘any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.’” (citations omitted)).

267. *Id.* (“[G]overnmental entities create designated public forums when ‘government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose’; speech restrictions in such a forum ‘are subject to the same strict scrutiny as restrictions in a traditional public forum.’” (citations omitted)).

268. *Id.* (“[G]overnmental entities establish limited public forums by opening property ‘limited to use by certain groups or dedicated solely to the discussion of certain subjects.’ . . . [I]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral.” (citations omitted)).

269. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77–78, 88 (1980).

270. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

271. *See also*, *Nordyke v. King*, No. 07-15763 (9th Cir. May 2, 2011) (finding that the Second Amendment does not protect the right to operate a gun show on public property).

272. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted) (emphasis added). *Cf.* Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to*

nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”²⁷³ Thus, a prosecution for the same obscene material in Las Vegas and Mississippi would apply different rules of law.²⁷⁴ The Court found that “[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.”²⁷⁵ Likewise, Justice Breyer notes that, “in 2008, the murder rate was 40 times higher in New Orleans than it was in Lincoln, Nebraska,”²⁷⁶ and contends different Second Amendment standards should apply accordingly.

Forum analysis, as well as the time, place, and manner framework, differ from the *Miller* obscenity test. Forum analysis broadly divides different types of governmental property into categories based on their historical roles, rather than any empirical data, such as high crime rates. Time, place, and manner analysis likewise does not make First Amendment rights vary based on the particularities of an area, but instead permits limits on where expression can occur within that area without regard to content. *Miller*, by contrast, directly considers how local circumstances affect the contours of a right. In this sense, *Miller* is an outlier. Indeed, in *Ashcroft v. ACLU*, Justice Breyer casted doubts on the notion that First Amendment law should turn on standards from “geographically separate local areas,” rather than the “Nation’s adult community taken as a whole.”²⁷⁷

c. *Fourth Amendment Locational Rights*

The Fourth Amendment, through its reasonableness standard, permits the government to consider particularized factors, including location, when determining reasonable

Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image Over the Internet, 49 SANTA CLARA L. REV. 313, 389–90 (2009).

273. *Miller*, 413 U.S. at 32.

274. Indeed, the federal government routinely prosecutes obscenity cases in more conservative jurisdictions to avail itself of tougher local community standards.

275. *Miller*, 413 U.S. at 33.

276. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3129 (2010) (Breyer, J., dissenting).

277. 535 U.S. 564, 589 (2002) (Breyer, J., concurring in part and concurring in the judgment).

suspicion or probable cause.²⁷⁸ But location alone is insufficient. In the context of a *Terry* stop and frisk, for example, a police officer still must make a reasonable determination that “criminal activity may be afoot,” that the suspect “may be armed and presently dangerous,” and that the officer has a lingering and “reasonable fear for his own or others’ safety.”²⁷⁹ A police officer observing a suspect in a high-crime area can consider that factor, but it cannot be dispositive in his determinations regarding reasonable suspicion. Location may be considered in the reasonable suspicion calculus as a single, but not dispositive, factor, so long as it is coupled with an imminent, cognizable threat of harm.

The Court has found that even in purportedly “high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.”²⁸⁰ The mere fact that a police “stop occurred in a ‘high crime area’ [is] among the relevant contextual considerations in a *Terry* analysis.”²⁸¹ It is not dispositive. As Justice Scalia noted in *Virginia v. Moore*, an opinion Justice Breyer joined, “[w]e thought it obvious that the Fourth Amendment’s meaning did not change with local law enforcement practices.”²⁸² Even though police “practices ‘vary from place to place and from time to time,’ the Fourth Amendment protections are not ‘so variable’ and cannot ‘be made to turn upon such trivialities.’”²⁸³

Justice Thomas, writing for the majority in *Samson v. California*, “devotes a good portion of [his] analysis to the recidivism rates among parolees in California.”²⁸⁴ In a reversal of sorts, Justice Stevens in dissent, joined by Justice Breyer, expresses incredulity about whether the “statistics... actually demon-

278. See Note, *The Fourth Amendment’s Third Way*, 120 HARV. L. REV. 1627, 1627 (2007) (arguing that “the [Fourth] Amendment should be interpreted as dynamically incorporating state law and it explains how this interpretive method injects substantive legal content into the vague constitutional text and reconciles the tension between the Amendment’s two clauses”).

279. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

280. *Maryland v. Buie*, 494 U.S. 325, 334–35 n.2 (1990).

281. *Illinois v. Wardlaw*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147–48 (1972)).

282. 553 U.S. 164, 172 (2008).

283. *Id.* at 172 (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

284. 547 U.S. 843, 865 n.6 (2006) (Stevens, J., dissenting).

strate that the State's interest is being served by the [suspicionless] searches."²⁸⁵ Justice Stevens would not deny "that the interest itself is valid; but t]hat said, [such statistics have] never been held sufficient to justify suspicionless searches."²⁸⁶ Justice Stevens concluded that "[i]f high crime rates [proven by statistics] were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter."²⁸⁷ The same could be said for the Second Amendment under the dissenters' jurisprudence.

In *City of Indianapolis v. Edmond*, the Court considered the constitutionality of police checkpoints that were designed to "detect evidence of ordinary criminal wrongdoing."²⁸⁸ The Court expressly rejected an ex ante approach to law enforcement based on statistics and generalized concerns, rather than individualized suspicions.²⁸⁹ In *Edmond*, the Indianapolis police selected checkpoint locations "weeks in advance based on such considerations as area crime statistics and traffic flow,"²⁹⁰ rather than any particularized factors of cognizable, current crimes. Respondents brought suit against the city, asserting a violation of their Fourth Amendment rights. In the past, the Court had "upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens,"²⁹¹ and "at a sobriety checkpoint aimed at removing drunk drivers from the road."²⁹²

The Court in *Edmond* distinguished those cases, noting the "difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control."²⁹³ *Martinez-Fuerte* and *Sitz* represented responses to either an "immediate hazard" on the roads²⁹⁴ or to the special challenges as-

285. *Id.*

286. *Id.*

287. *Id.*

288. 531 U.S. 32, 38 (2000).

289. *See id.* at 42–43.

290. *Id.* at 35.

291. *Id.* at 37 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

292. *Id.* (quoting *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).

293. *Edmond*, 531 U.S. at 40.

294. *Id.* at 39 ("Th[e] checkpoint program [in *Sitz*] was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional.").

sociated with securing the border.²⁹⁵ In both cases, law enforcement officials were responding to actual, cognizable threats to the safety of others. The police in *Edmond*, in contrast, implemented checkpoints planned ex ante based on “area crime statistics” aimed at “detect[ing] evidence of ordinary criminal wrongdoing.”²⁹⁶ The Court found these empirically-based checkpoints unconstitutional.²⁹⁷

Commenting on the constitutionality of social cost, Justice O’Connor noted that “traffic in illegal narcotics creates social harms of the first magnitude.”²⁹⁸ The “same can be said of various other illegal activities”—including the illegal use of firearms to harm others—yet “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”²⁹⁹ Further, the Court was “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”³⁰⁰

Martinez-Fuerte and *Sitz*, as well as an alternative scenario the *Edmond* Court tentatively approved wherein there is “some emergency” with “exigencies,”³⁰¹ suggest that the Court permits lessened judicial scrutiny for imminent threats.³⁰² By contrast, the standard the Court rejected in *Edmond* would have permitted the ex ante abridgment of constitutional rights without any particularized showing of harm,³⁰³ but rather based on, among other things, “crime statistics.”³⁰⁴ *Edmond* weakens the argument that Second Amendment rights can be infringed solely based on a “general interest in crime control”³⁰⁵ in high crime areas in the

295. *Id.* at 41 (“[E]ach of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”).

296. *Id.* at 35, 38.

297. *Id.* at 48.

298. *Id.* at 42.

299. *Id.*

300. *Id.* at 43.

301. *Id.* at 44.

302. See *infra* Part IV.A (discussing “Category I” rights).

303. *Edmond*, 531 U.S. at 41 (“[O]ur checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion.”).

304. *Id.* at 35; see *infra* Part V (discussing “Category IV” rights).

305. *Edmond*, 531 U.S. at 40.

absence of any cognizable threats to others. If the Court seeks to treat the Second Amendment consistently with the remainder of the Bill of Rights local circumstances such as high crime should not warrant the watering down of this right. The Second Amendment is not a local right, but a national one.³⁰⁶

IV. THE CONSTITUTIONALITY OF SOCIAL COST AND EQUALITY OF RIGHTS

The “Court has in a wide variety of constitutional contexts found . . . public-safety concerns sufficiently forceful to justify restrictions on individual liberties.”³⁰⁷ To illustrate that the Second Amendment exhibits similar concerns, Justice Breyer identifies five examples: free speech,³⁰⁸ freedom of religion,³⁰⁹ the Fourth Amendment,³¹⁰ the Fifth Amendment,³¹¹ and the right to non-excessive bail.³¹² These precedents, and several others that balance individual liberty and social costs are usually decided by a consideration of four primary factors: the imminence of the harm, the propensity of the actor to inflict harm on society, the constitutional liberty at stake, and the appropriate level of judicial scrutiny.

The aforementioned precedents historically fell into three categories. First, when a harm or threat to society is imminent, the courts permit greater infringements of individual liberty, with

306. *But cf.* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32. Posner is not opposed to national rights in general, rejecting the notion that “Mississippi should be permitted to stone adulterers, or Rhode Island to ban *The Da Vinci Code*.” *Id.* at 34. He would ensure that the Eighth Amendment’s prohibition on cruel and unusual punishment, and the First Amendment’s protection of freedom of speech be preserved as a “national right.” Not so for the Second Amendment—Posner asserts that “nationaliz[ing] an issue in the name of the Constitution calls for an exercise of judgment.” *Id.* In cases where “uniform national policy would override differences in local conditions, nationalization may be premature.” *Id.* For criticism of Posner’s article, see Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty: An Originalist Critique of the Heller Dissents and Judge Posner’s and Wilkinson’s Unoriginalist Assault on the Liberty To Keep and Bear Arms* (Oct. 9, 2009) (unpublished manuscript), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1318387.

307. *Dist. of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

308. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

309. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).

310. *Id.* (citing *Brigham City v. Stuart*, 547 U.S. 398, 403–04 (2006)).

311. *Id.* (citing *New York v. Quarles*, 467 U.S. 649, 655 (1984)).

312. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

minimal, if any judicial oversight.³¹³ Second, when a threat is not yet imminent, but a person's previous misconduct reveals a propensity towards future violence, the courts permit an infringement of individual liberties, but mandate certain forms of judicial oversight.³¹⁴ Third, when a threat is cognizable, but not necessarily imminent, the courts permit infringement, but with greater judicial scrutiny.³¹⁵

Historically, this triumvirate of standards fully embodied the Court's attempts to balance social costs and individual liberty—that is, until the Second Amendment's case law emerged. The jurisprudence the Court introduced in *Heller* does not fall into any of these three categories, but rather inhabits a fourth category, a treatment unprecedented in the Court's cases balancing individual liberty and social costs.

In this fourth category, even if a threat is not cognizable, nor is it imminent, and the anticipated actor presents no propensity for danger, and the proposed harm is based on empirical data of what may, or may not happen, courts can permit the infringement of the constitutional right.³¹⁶ In no other context is a pre-emptive infringement of a constitutional right permissible with such an attenuated relationship to preventing social costs, and such a minimal showing that the person whose rights are being infringed actually poses a danger. This framework is unprecedented.

A. *Category I: Imminent Harm*

The "ticking time bomb" scenario is a favorite of law professors.³¹⁷ It forces students to consider what degree of liberties they are willing to sacrifice in order to prevent imminent danger and

313. See *infra* Part IV.A.

314. See *infra* Part IV.B.

315. See *infra* Part IV.C.

316. See *infra* Part IV.C.2.

317. See, e.g., Kate Kovarovic, *Our "Jack Bauer" Culture: Eliminating the Ticking Time Bomb Exception to Torture*, 22 FLA. J. INT'L L. 251, 252 (2010) ("This is known as the 'ticking time bomb' exception. Under this principle, states that have legally prohibited the use of torture can resort to the use of torturous methods when they are faced with a large-scale and imminent catastrophe. The ultimate goal, of course, is that the use of these methods will compel a suspect to reveal crucial information that will help state officials prevent a catastrophe.").

save lives. For better³¹⁸ or worse,³¹⁹ the courts have rejected a Jack Bauer approach to interrogation.³²⁰ Yet the Supreme Court has recognized that in times of imminent danger, where lives are at risk, certain constitutional values may be limited. Professor Fallon writes that “[o]ne stringent version [of the Court’s strict scrutiny test] allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms.”³²¹ Likewise, Professor Volokh notes that if a right yields “some truly extraordinary danger,” the right may be more easily abridged;³²² rights with “dangers that are hundreds of times greater” than “ordinary dangers” may be subject to a different set of rules.³²³

Even when the harm would not register on a catastrophic scale, the government can curtail liberties. The first category of cases allowing the curtailment of liberties entails threats that have materialized and are poised to inflict imminent harm on others. In such cases, the Court often is willing to disregard the exercise of certain individual rights with negligible, if any, judicial scrutiny. *Brandenburg v. Ohio*,³²⁴ *Chaplinsky v. New Hampshire*,³²⁵ and *New York v. Quarles*³²⁶ demonstrate this dynamic.

318. See William F. Schulz, *The Torturer’s Apprentice*, THE NATION, May 13, 2002, at 26 (reviewing ALAN N. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* (2002)) (arguing that the “ticking bomb” scenario is flawed and that torture is never permissible).

319. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 142–49 (2002) (arguing that torturing the suspect in the “ticking bomb” case is permissible).

320. See *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (holding that confession obtained by coercion, brutality, and violence as basis for conviction and sentence violates due process); see also *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005) (finding that the Convention Against Torture’s “absolute prohibition on torture could not be clearer” as it extends by its terms to all “exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency.” (citations omitted)). *But cf.* Peter Lattman, *Justice Scalia Hearts Jack Bauer*, THE WALL STREET JOURNAL LAW BLOG (June 20, 2007, 11:37 AM), <http://blogs.wsj.com/law/2007/06/20/justice-scalia-hearts-jack-bauer> (reporting Justice Scalia said, “[a]re you going to convict Jack Bauer? Say that the criminal law is against him? ‘You have the right to a jury trial?’ Is any jury going to convict Jack Bauer? . . . I don’t think so.”).

321. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007).

322. Volokh, *supra* note 6, at 1464.

323. *Id.* (citing Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1209–12 (2005)).

324. 395 U.S. 444, 447 (1969) (per curiam) (advocacy directed at incitement to imminent violence).

325. 315 U.S. 568, 572 (1942) (unprotected “fighting words”).

1. *Unlawful Incitement to Imminent Violence*

Courts and commentators have attempted to analogize the Second Amendment to the First Amendment when evaluating Second Amendment challenges.³²⁷ Although abstract comparisons of rights are helpful to define the contours of novel jurisprudence, one aspect of First Amendment law is more helpful than others. Specifically, the harms of free speech in one context roughly correlate to the types of harms associated with firearms—namely, dangerous speech that can result in violence to others. In many cases, the pen is mightier than the sword, or the gun. This element of speech, seen in incitement cases such as *Brandenburg*, provides a model to analyze how the Court has treated other types of constitutional liberties that can result in imminent violence.

In *Brandenburg*, the Court found that the First Amendment permits the government to restrict advocacy that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³²⁸ Clarence Brandenburg, a leader of an Ohio Ku Klux Klan group, organized a rally at which he spewed racist and anti-Semitic vitriol and declared that the Klan would march on Washington, D.C. on the Fourth of July.³²⁹ Subsequently, Brandenburg was convicted under Ohio’s Criminal Syndicalism Act.³³⁰ The Supreme Court reversed his conviction and held that the Act violated the First Amendment because it failed to distinguish between “mere advocacy” and “incitement to imminent lawless action.”³³¹ The

326. 467 U.S. 649, 655 (1984) (public safety exception to *Miranda*).

327. See *United States v. Marzzarella*, 614 F.3d 85, 89 n.4 (3rd Cir. 2010) (“Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice.”). See also Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009), http://www.columbialawreview.org/Sidebar/volume/109/97_Volokh.pdf.

328. *Brandenburg*, 395 U.S. at 447 (per curiam).

329. *Id.* at 444–46.

330. *Id.* at 449 n.3 (“The first count of the indictment charged that appellant ‘did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform’ The second count charged that appellant ‘did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism’”).

331. *Id.* at 448–49, 449 n.4.

Court also reversed the “thoroughly discredited” *Whitney v. California*,³³² which upheld a similar statute³³³ on “the ground that, without more, ‘advocating’ violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it.”³³⁴

By construing precedents subsequent to *Whitney*, the Court found that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³³⁵ Because the statute, “by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action . . . [it] falls within the condemnation of the First and Fourteenth Amendments.”³³⁶

As in *Salerno*,³³⁷ the Court in *Brandenburg* looked to “imminent” action. The Court recognized the constitutional dimension of the attenuation between “mere abstract teaching . . . [of] a resort to force and violence” and “preparing a group for violent action and steeling it to such action.”³³⁸ When a law ignores the chasm between these two poles, it “impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments . . . [and] sweeps within its condemnation speech which our Constitution has immunized from governmental control.”³³⁹ Cognizant of the possible social costs of *Brandenburg*’s words, the Court found that the state’s ability to limit the former was significantly less than their ability to infringe on the latter.

Brandenburg exemplifies the Court’s reserved caution about restricting rights where the danger was imminent and pending. Justice Breyer is quick to rely on statistics showing alleged

332. 274 U.S. 357 (1927).

333. *Id.* at 371–72.

334. *Brandenburg*, 395 U.S. at 447.

335. *Id.*

336. *Id.* at 449.

337. *See infra* Part IV.B.1.

338. *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

339. *Id.* at 448.

connections between guns and violence,³⁴⁰ and Justice Stevens writes that “[t]he link between handgun ownership and public safety is much tighter”³⁴¹ than it is with respect to other rights. Yet there is an important and fundamental disconnect—the deprivation of liberty occurs before any actual risk materializes. *Brandenburg* could not be convicted merely for advocating violence; the Court required more. Notwithstanding the nature of *Brandenburg*’s Klan rally, the Court was not willing to allow the State to take preventive action. Essentially, *Brandenburg* would have to do something more, namely “incit[ement to] imminent lawless action.”³⁴²

2. *Fighting Words*

Walter Chaplinsky was convicted of violating a New Hampshire statute, which punished communicating any “offensive, derisive, or annoying word to any other person [lawfully in a] public place,”³⁴³ because he called a police officer a “damned Fascist” and a “God damned racketeer.”³⁴⁴ In *Chaplinsky*, the Supreme Court affirmed the defendant’s conviction, finding that “the prevention and punishment . . . [of] insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³⁴⁵ The Court stated that regulation of these words has “never been thought to raise any Constitutional problem[s].”³⁴⁶ The Court held that so-called fighting words “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”³⁴⁷ Although the definition of fighting words remains ambiguous,³⁴⁸ Justice Ginsburg commented on the “narrow

340. See *infra* Part IV.C.2.

341. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3110 (2010) (Stevens, J., dissenting).

342. *Brandenburg*, 395 U.S. at 447 (per curiam).

343. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (citing N.H. Pub. Law. C. 372, § 2 (codified as amended at N.H. REV. STAT. ANN. § 644:2 (2011))).

344. *Id.*

345. *Id.* at 572.

346. *Id.*

347. *Id.*

348. Transcript of Oral Argument at 43–44, *Snyder v. Phelps*, 130 S. Ct. 1207 (2010) (No. 09-751) (“JUSTICE SCALIA: You think that’s solid, absolutely, what’s

category” of speech that qualifies as fighting words during oral arguments in *Snyder v. Phelps*.³⁴⁹ Focusing on the imminence of the unprotected speech, Justice Ginsburg offered this example as constitutive of fighting words: “you say [something] to me and I’m immediately going to punch you in the nose, because I have—it’s an instinctive reaction.”³⁵⁰

As in *Brandenburg*, the Court in *Chaplinsky* was confronted with an imminent threat to public safety where the inchoate harm had already begun. Notwithstanding the First Amendment, when the harm was on the precipice of materialization the Court reasoned that the expression was not protected. No judicial scrutiny was required here, as fighting words were unprotected speech. Certainly a person brandishing a firearm in a menacing manner, about to injure another would have no valid claim to Second Amendment protections—this would likely constitute an assault. But challenges to firearm regulations concern a question that arises before any such altercation is imminent: whether a person can keep or bear a firearm in a certain manner or in a certain place.

3. *Public Safety Exception to Miranda and Exigent Circumstances*

In *New York v. Quarles*,³⁵¹ the Supreme Court recognized the public safety exception to *Miranda*, in large part based on a calculus involving the relevant social costs. In *Quarles*, Benjamin Quarles fled the police in a supermarket in Queens armed with a .38 caliber revolver.³⁵² Officer Kraft cornered Quarles, frisked him, and asked Quarles where his gun was located.³⁵³ Quarles told the officer that he had stashed the firearm “over there” in an empty carton in the store.³⁵⁴ The officer then seized the weapon before reading Quarles the *Miranda* warnings.³⁵⁵ Finding that “overriding considerations of public safety justify the

a fighting word; whereas, what is an outrageous statement is—is very much different from what’s a fighting word? I don’t see the difference.”). The Supreme Court did not address fighting words in its opinion in *Snyder*.

349. *Id.* at 45.

350. *Id.*

351. 467 U.S. 649 (1984).

352. *Id.* at 651–52.

353. *Id.*

354. *Id.*

355. *Id.* at 652.

officer's failure to provide *Miranda* warnings,"³⁵⁶ the Court did not suppress the seized firearm, and recognized the "'public safety' exception to . . . *Miranda*."³⁵⁷

Justice Rehnquist, writing for the majority, recognized that the Court in *Miranda* was "willing to bear the *cost*" "of certain "[p]rocedural safeguards . . . [that] were deemed acceptable . . . when the primary social cost of those added protections [was] the possibility of fewer convictions."³⁵⁸ The Court found, however, that the need for suspects to answer questions "in a situation posing a threat to the public safety outweigh[ed] the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."³⁵⁹

Although the Court in *Dickerson v. United States* found that *Miranda* is not a prophylactic, but rather a constitutional rule,³⁶⁰ the above calculus behind the public safety exception remains. If *Miranda* warnings had "deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the [social] cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles" because the more immediate purpose of securing the information was "to insure that further danger to the public did not result from the concealment of the gun in a public area."³⁶¹

More broadly, the Court has crafted an entire doctrine of Fourth Amendment jurisprudence dealing with imminent threats and emergencies. For instance, the warrant requirement is generally waived when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."³⁶² The Court has found that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency,"³⁶³ and obviates the warrant requirement.³⁶⁴

356. *Id.* at 651.

357. *Id.* at 655.

358. *Id.* at 657.

359. *Id.*

360. 530 U.S. 428, 437–38 (2000).

361. *Quarles*, 467 U.S. at 657 (emphasis added).

362. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978)).

363. *Mincey*, 437 U.S. at 392 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

Although a search of a home without a warrant is presumptively unreasonable, “law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”³⁶⁵ Also, law enforcement officers can enter warrantless onto private property in order to fight a fire or investigate its cause,³⁶⁶ to prevent imminent destruction of evidence,³⁶⁷ or to engage in the “hot pursuit” of a fleeing suspect.³⁶⁸ When the threat is imminent, regular judicial safeguards yield.

Although at first blush these doctrines may lend credence to Justice Breyer’s limitation on the right to keep and bear arms in light of the threat firearms pose to the public safety, a closer look at how the Court has defined these threats—in *Quarles* in particular—is instructive. First, the Court noted that the public safety exception is a “narrow exception to . . . *Miranda*,” and the specific “facts of [the] case . . . demonstrate[d this] distinction.”³⁶⁹ Second, the Court focused on the imminence of the situation— “[t]he police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.”³⁷⁰ If the Court had found that any case involving a firearm obviated the need to recite *Miranda* warnings, then a whole host of criminals who utilize firearms would be relegated outside the safeguards of our criminal justice system.

However, the Court did not so hold. *Quarles* was not a run-of-the-mill case where an officer suspected that a person might possess a gun. Rather, the officer recognized the “immediate necessity” to protect the lives of the other patrons in the supermarket.³⁷¹ As the Court noted, “so long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public

364. *Stuart*, 547 U.S. at 403.

365. *Id.* (citing *Mincey*, 437 U.S. at 392).

366. *Michigan v. Tyler*, 436 U.S. 499, 509–10 (1978).

367. *Ker v. California*, 374 U.S. 23, 40–41 (1963) (plurality opinion).

368. *United States v. Santana*, 427 U.S. 38, 42–43 (1976).

369. *New York v. Quarles*, 467 U.S. 649, 658 (1984).

370. *Id.* at 657.

371. *Id.*

safety: an accomplice might make use of it, a customer or employee might later come upon it.”³⁷² In rare cases characterized by the exigent nature of the situation, *Miranda* need not be applied “in all its rigor,” and judicial scrutiny is relaxed.³⁷³ Merely possessing a gun in public, absent an emergency situation, does not warrant relaxing the rigors of *Miranda*. Nor should ownership of a firearm at home, where the owner poses no immediate risk and any possible harm is quite attenuated, receive such lax judicial scrutiny as the dissenters suggest.

B. *Category II: Latent Threat from a Dangerous Actor*

Historically, those deemed by society as having a high propensity for violence—namely those convicted of felonies—have been deprived of certain civil and political rights.³⁷⁴ Yet, although those accused of a violent crime maintain a presumption of innocence,³⁷⁵ the mere accusation places them on a different scale because their potential harm to society is weighed against their constitutional liberties. In violent crime cases, the Court recognizes that a defendant’s propensity for violence—a threat not yet imminent, but derived from previous misconduct—may be used to place limitations on his freedom, so long as certain procedural rights are maintained.³⁷⁶

The Court has recognized that “[a] jury hearing evidence of a defendant’s demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee.”³⁷⁷ Although juries generally are not allowed to consider this evidence, judges are—and are just as likely to weigh the dangerousness of the actor when making certain decisions.

372. *Id.*

373. *Id.* at 656.

374. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.”).

375. *Patterson v. New York*, 432 U.S. 197, 208 (1977) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting that the Due Process Clause is “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”).

376. See *United States v. Comstock*, 130 S. Ct. 1949, 1979 (2010) (Thomas, J., dissenting) (“A federal criminal defendant’s ‘sexually dangerous’ propensities are not ‘created by’ the fact of his incarceration or his relationship with the federal prison system.”).

377. *Kelly v. South Carolina*, 534 U.S. 246, 253–54 (2002).

The balancing of liberties and potential societal harm is most clearly seen in cases dealing with the right to bail³⁷⁸ and the right to a speedy trial.³⁷⁹ These threats, though latent, assume an air of criticality in light of the bad actor.

1. Right to Bail

In *United States v. Salerno*, Chief Justice Rehnquist wrote for the Court that the Bail Reform Act's authorization of pretrial detention based on future dangerousness was constitutional, did not violate substantive due process, and did not present impermissible punishment prior to trial.³⁸⁰ Relying on legislative history indicating that Congress "perceived pretrial detention as a potential solution to a pressing societal problem," the Court viewed the Act as a "permissible regulation" rather than a "restriction on liberty constitut[ing] impermissible punishment."³⁸¹

The Court recognized that "preventing danger to the community is a legitimate regulatory goal"³⁸² and that "the safety and indeed the lives of . . . citizens" is a "primary concern of every government."³⁸³ Justice Breyer seized on this language, citing it in both *Heller*³⁸⁴ and *McDonald*³⁸⁵ to illustrate the government's seemingly unfettered interest in limiting access to firearms to advance this "primary goal." The holding of *Salerno* does not grant the State a general license to limit liberty to promote security, as Justice Breyer suggests.

As the *Salerno* Court noted, "The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes"; "[t]he arrestee is entitled to a prompt de-

378. See *United States v. Salerno*, 481 U.S. 739 (1987) (addressing the right to bail).

379. *Barker v. Wingo*, 407 U.S. 514 (1972) (addressing the right to a speedy trial).

380. *Salerno*, 481 U.S. at 754–55.

381. *Id.* at 747.

382. *Id.*

383. *Id.* at 755.

384. *Dist. of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) ("That is because almost every gun-control regulation will seek to advance (as the one here does) a 'primary concern of every government—a concern for the safety and indeed the lives of its citizens.'" (quoting *Salerno*, 481 U.S. at 755)).

385. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3126 (2010) (Breyer, J., dissenting) ("The determination whether a gun regulation is constitutional would thus almost always require the weighing of the constitutional right to bear arms against the 'primary concern of every government—a concern for the safety and indeed the lives of its citizens.'" (quoting *Salerno*, 481 U.S. at 755)).

tention hearing . . . and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.”³⁸⁶ Chief Justice Rehnquist wrote that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³⁸⁷ It is only because of this presumption of liberty, rather than of constitutionality,³⁸⁸ that the Court was “unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates” the Constitution.³⁸⁹ Applied to the facts of *Salerno*, where the defendant received “numerous procedural safeguards,”³⁹⁰ the holding is quite narrow.

Chief Justice Rehnquist—not generally thought of as a champion of criminal rights—concedes that “[i]n our society liberty is the norm.”³⁹¹ Although a concern for safety is the primary concern of society, exceptions to liberty should be narrowly constrained to protect that liberty.³⁹² The Court in *Salerno* recognized that “[w]hile the Government’s general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community.”³⁹³ The Court balanced this concern with “[o]n the other side of the scale, . . . the individual’s strong interest in liberty.”³⁹⁴

The Court reasoned that if “the [g]overnment proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community,”³⁹⁵ then his liberty can be restrained. This is a lofty standard that requires a showing that a person’s previous behavior and propensity for violence proves that he will be a threat if free. In “these narrow circumstances, society’s interest in crime pre-

386. *Salerno*, 481 U.S. at 747 (citations omitted).

387. *Id.* at 755.

388. See BARNETT, *supra* note 84.

389. *Salerno*, 481 U.S. at 755.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 750.

394. *Id.*

395. *Id.* at 751.

vention is at its greatest.”³⁹⁶ *Salerno* holds that only after a judge’s determination based on specific facts that an arrestee poses a threat to security can liberty be deprived. Likewise, decisions whether to release a defendant pending trial are “subject to the least restrictive further condition, or combination of conditions . . . [to] assure the . . . safety of any other person and the community.”³⁹⁷ These detention hearings, subject to strict procedural requirements,³⁹⁸ embody Chief Justice Rehnquist’s finding that liberty should be narrowly constrained, using the least restrictive means, even in light of the defendant’s potential threat to the safety of others.

In the case of the preemptive District of Columbia and Chicago statutes, liberty was constrained without a hearing, without any finding of facts, and without any process. A person who seeks to own a gun simply is presumed to be dangerous without any showing that he “presents an identified and articulable threat to an individual or the community,”³⁹⁹ Generalized empirics about the relationship between firearms and violence cannot make such a showing. Although the District’s statute “seeks to further the sort of life-preserving and public-safety interests that the Court has called ‘compelling,’”⁴⁰⁰ not even *Salerno* countenances the infringement of liberty based on that interest alone. A greater showing must be made before the public safety interest can suffice.

2. *Right to a Speedy Trial*

The Sixth Amendment right to a speedy trial balances the rights of the accused with the social costs of the accused at large. In *Barker v. Wingo*, the Court recognized these competing interests, noting that the right of “accused persons [to] be treated according to decent and fair procedures” needs to be balanced with certain “societal interest[s].”⁴⁰¹ The infringement on individual liberty of those “in jail awaiting trial has a detrimental impact on the [defendant]. It often means loss of a job; it

396. *Id.* at 750.

397. 18 U.S.C. § 3142(c)(1)(B) (2006).

398. *See id.* § 3142(f).

399. *Salerno*, 481 U.S. at 751.

400. *Dist. of Columbia v. Heller*, 554 U.S. 570, 705 (2008) (Breyer, J., dissenting) (quoting *Salerno*, 481 U.S. at 750, 754).

401. 407 U.S. 514, 519 (1972).

disrupts family life; and it enforces idleness."⁴⁰² In short, "time spent in jail is simply dead time."⁴⁰³

On the other front, the social costs associated with the delay "enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system."⁴⁰⁴ Further delays may provide defendants who are "awaiting trial . . . an opportunity to commit other crimes,"⁴⁰⁵ as "the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape."⁴⁰⁶ The Court recognized that it "must be of little comfort to the residents of Christian County, Kentucky" to know that "Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted."⁴⁰⁷

In finding that the five-year delay between the arrest and trial did not prejudice the defendant, the Court weighed both of these fronts and relied on several considerations that should be applied to a "balancing test"—including "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."⁴⁰⁸ The Court acknowledged that this balancing act is not easy: "courts must still engage in a difficult and sensitive balancing process."⁴⁰⁹ The Court stressed, however, that in "dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."⁴¹⁰ When a liberty interest is at stake, the Court considers both fronts: liberty and social costs. As in *Salerno*, the Court accorded the defendant his constitutional right while keeping in mind the possible social costs he could inflict on society during a lengthy delay. Yet, the Court was quite attentive to the facts of the case and was scrupulous of possible Constitutional violations if the right was not respected.

402. *Id.* at 532.

403. *Id.* at 532–33.

404. *Id.* at 519.

405. *Id.*

406. *Id.* at 520.

407. *Id.* at 519–20.

408. *Id.* at 530.

409. *Id.* at 533.

410. *Id.*

C. *Category III: Cognizable Threat That Is Not Imminent*

The public safety exception to *Miranda* and the exigent circumstance doctrine of the Fourth Amendment are outliers in our constitutional jurisprudence; the doctrines permit law enforcement to infringe certain constitutional liberties without traditional judicial scrutiny when the alleged harm is imminent. In contrast, the right to speedy trial and bail, weighed against a person's criminal history and propensity for violence, is the "carefully limited exception" to the "norm" in our society, which is "liberty."⁴¹¹ In cases where neither of these situations is present, and the propensity of the actor is not at issue—that is, a threat is cognizable, but not imminent—the Court's precedents fall into the third category.

A threat is cognizable when the State (and courts on review) can recognize it, at least in the abstract, but there is no specific indication that the harm would materialize soon, if at all. For example, a law enforcement officer suspects that a person is exhibiting suspicious tendencies, and may pose a threat to others. This standard is less exacting than the flexible reasonable suspicion standard, which requires that "criminal activity may be afoot," that the suspect "may be armed and presently dangerous," and that the officer has a lingering and "reasonable fear for his own or others' safety."⁴¹² A cognizable threat lacks such imminence. Generally, attempts to ferret out social harms (even threats that are cognizable) when the threat is not imminent, in the absence of a propensity for violence, are held to a more exacting judicial review. Two constitutional principles of criminal procedure, the exclusionary rule and *Miranda v. Arizona*, accurately express this tension. Although collecting evidence and confessions is an integral part of administering justice and avoiding social harms, these activities are closely monitored by the Court.

1. *The Exclusionary Rule and Its Good Faith Exception*

Under the Fourth Amendment, the people have the right to be free from unreasonable searches and seizures, and the exclusionary rule renders evidence seized in violation of this right inadmissible in criminal proceedings.⁴¹³ The rule has posi-

411. *United States v. Salerno*, 481 U.S. 741, 755 (1987).

412. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

413. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

tive externalities such as promoting privacy, promoting security in one's person and effects, deterring police misconduct and preventing the government from intruding into private lives without good reason and an independent judicial check. The exclusionary rule also has a significant negative externality—namely, that criminals who should be punished go free because of “technicalities.” Justice Holmes eloquently expressed this tension in his *Olmstead v. United States* dissent: “We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”⁴¹⁴

Like the backlash to *Miranda*,⁴¹⁵ opposition towards the exclusionary rule primarily stemmed from concerns about social costs. In 1976, Chief Justice Burger's concurring opinion in *Stone v. Powell* embodied the critics' hostility to the exclusionary rule: “The Court's opinion today eloquently reflects something of the dismal social costs occasioned by the rule.”⁴¹⁶ In *Stone*, Justice White remarked that the exclusionary rule constitutes a “senseless obstacle to arriving at the truth in many criminal trials.”⁴¹⁷ Presaging what became the good faith exception to the exclusionary rule, Justice White commented that “the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.”⁴¹⁸

Chief Justice Burger continued the assault on the exclusionary rule in *Brewer v. Williams*, arguing in his dissent that “the Court fails even to consider whether the benefits secured by

414. 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits.”).

415. See *infra* Part IV.C.2.

416. 428 U.S. 465, 501 (1976) (Burger, C.J., concurring).

417. *Id.* at 538 (White, J., dissenting).

418. *Id.*

application of the exclusionary rule in this case outweigh its obvious social costs.”⁴¹⁹ In the 1978 case *Rakas v. Illinois*, Justice Rehnquist similarly remarked that “[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.”⁴²⁰ Justice White, in his concurring opinion in *Illinois v. Gates*, further expressed the negative externalities that can result from the suppression of evidence: “[b]ecause of the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression, application of the exclusionary rule has been carefully ‘restricted to those areas where its remedial objectives are thought most efficaciously served.’”⁴²¹ In 1984, Chief Justice Burger described the exclusion of evidence as a “socially costly course [that] is needed to deter police”⁴²² misconduct “notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes.”⁴²³

The good faith exception to the exclusionary rule was formally recognized in *United States v. Leon* in 1984.⁴²⁴ The good faith exception permits the admission of evidence notwithstanding violations of the Fourth Amendment if the law enforcement official relied in good faith on a facially valid warrant.⁴²⁵ In introducing the good faith exception, the Court devoted a lengthy discussion to the constitutional dimensions of social cost. First, the Court noted that the “substantial *social cost* exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.”⁴²⁶ The Court recognized the competing interests—deterrence of police misconduct and the administration of criminal justice—in noting that “[o]ur cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of gov-

419. *Brewer v. Williams*, 430 U.S. 387, 422 (1977) (Burger, C.J., dissenting).

420. 439 U.S. 128, 137 (1978).

421. 462 U.S. 213, 254–55 (1983) (White, J., concurring) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

422. *Nix v. Williams*, 467 U.S. 431, 442 (1984).

423. *Id.* at 443.

424. 468 U.S. 897, 922 (1984).

425. *Id.*

426. *Id.* at 907 (emphasis added).

ernmental rectitude would impede unacceptably the truth-finding functions of judge and jury."⁴²⁷

Recently, in *Herring v. United States*, the Court reiterated its concern that the "principal [social] cost" of the exclusionary rule is "letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'"⁴²⁸ "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."⁴²⁹ Discounting whether, if at all, the "exclusionary rule . . . provide[s] some incremental deterrent, that possible benefit must be weighed against [its] *substantial social costs*."⁴³⁰

Evoking the tradeoff between improperly punishing the guilty and letting the guilty go unpunished first recognized by Justice Holmes in *Olmstead* nearly eight decades earlier,⁴³¹ the Court in *Leon* recognized that "[a]n objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains."⁴³² The Court included a lengthy footnote that cited a plethora of scholarship and empirical research showing that the exclusionary rule has a detrimental effect on the prosecution of crimes.⁴³³ Notwithstanding that the "impact of the exclusionary rule is insubstantial . . . the small percentages with which [researchers] deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures."⁴³⁴

Short of abolishing the exclusionary rule in all contexts, the Court recognized that in a narrow sliver of cases where the po-

427. *Id.* (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

428. 129 S. Ct. 695, 701 (2009) (quoting *Leon*, 468 U.S. at 908).

429. *Id.* (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998) (internal quotation marks omitted)); *see also* *United States v. Payner*, 447 U.S. 727, 734 (1980); *United States v. Havens*, 446 U.S. 620, 626–27 (1980).

430. *Herring*, 129 S. Ct. at 701 (quoting *Leon*, 468 U.S. at 908).

431. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

432. *Leon*, 468 U.S. at 907.

433. *Id.* at 907–08 n.6.

434. *Leon*, 468 U.S. at 908 n.6. *See also id.* ("[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawfulness." (quoting *Illinois v. Gates*, 462 U.S. 213, 257–58 (White, J., concurring in the judgment))).

lice rely in good faith on a facially valid warrant, the exclusionary rule “can have no substantial deterrent effect,” and “cannot pay its way in those situations.”⁴³⁵ In cases where “law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.”⁴³⁶ The exclusionary rule is not an ad hoc balancing test; “a defendant may not argue that in his particular case, despite the usual rules, deterrence would be effective enough to justify the cost.”⁴³⁷ Further, the exclusionary rule is “moored to background constitutional values: deterring police misconduct while minimizing the social cost of excluding probative evidence.”⁴³⁸ The Court in *Leon* stressed the limited nature of the application of the good faith exception. Indeed, it is an exception, rather than a rule. Only in cases where the authorities acted according to what seemed to be a correct application of the law, the error was slight, and the social costs would be too high should the evidence not be suppressed.

How should these competing costs and benefits be weighed? Justice Scalia and Justice Breyer sparred in *Hudson v. Michigan* over the significance of social costs in excluding evidence produced from the execution of no-knock searches.⁴³⁹ Justice Scalia, writing for the majority, noted, “quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except ‘where its deterrence benefits outweigh its ‘substantial social costs.’”⁴⁴⁰ Justice Scalia found the “costs [to be] considerable.”⁴⁴¹ Balancing these “substantial social costs,” the Court should “consider the deterrence benefits, existence of which is a necessary condition for exclusion.”⁴⁴² Deterrence benefits, though, are not a sufficient condition for exclusion, because it “does not

435. *Id.*

436. *Id.* at 908 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)).

437. Blocher, *supra* note 18, at 435.

438. *Id.* See also *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (“[W]e have held [the exclusionary rule] to be applicable only where its deterrence benefits outweigh its ‘substantial social costs.’” (quoting *Leon*, 468 U.S. at 902)).

439. 547 U.S. 586 (2006).

440. *Id.* at 594 (quoting *Scott*, 524 U.S. at 363); see also Volokh, *supra* note 6, at 1461 (“The government often tries to justify substantial burdens on constitutional rights by arguing that such burdens significantly reduce some grave danger.”).

441. *Hudson*, 547 U.S. at 595.

442. *Id.* at 596.

follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.”⁴⁴³

Justice Breyer disputed Justice Scalia’s balancing approach: “Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court’s prior case law, through its claim of “substantial social costs” — at least if it means that those “social costs” are somehow special here.”⁴⁴⁴ Justice Breyer noted that the only social costs mentioned in the Court’s Fourth Amendment precedent are:

- (1) that where the constable blunders, a guilty defendant may be set free (consider *Mapp* itself);
- (2) that defendants may assert claims where Fourth Amendment rights are uncertain (consider the Court’s qualified immunity jurisprudence), and
- (3) that sometimes it is difficult to decide the merits of those uncertain claims.⁴⁴⁵

The use of no-knock warrants may have fewer social costs than other Fourth Amendment scenarios, “such as determining whether a particular warrantless search was justified by exigency.”⁴⁴⁶ Thus, Justice Breyer noted that the Court’s “substantial social costs’ argument is an argument against the Fourth Amendment’s exclusionary principle itself.”⁴⁴⁷ This is “an argument that this Court, until now, has consistently rejected.”⁴⁴⁸

Justice Breyer’s position in *Hudson* must be contradistinguished with his views on gun control. Although these two cases are not directly analogous, they provide a window into Justice Breyer’s mindset with respect to the power of the State to limit liberty and social costs.⁴⁴⁹ In contrast to *Heller* and *McDonald*, the roles in the debate between Justices Breyer and

443. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 350 (1974)).

444. *Id.* at 614 (Breyer, J., dissenting) (citation omitted).

445. *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

446. *Id.*

447. *Id.*; see also *United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) (“Understood in this way, the [Fourth] Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.”).

448. *Hudson*, 547 U.S. at 614.

449. In fact, the facts of this case—where the police “waited only a short time—perhaps ‘three to five seconds,’—before turning the knob of the unlocked front door,” *Id.* at 588 (majority opinion), and executing a search warrant—fall closer to the types of imminent threats discussed in Category I, see *supra*, Part IV.A., where less judicial scrutiny is required for great infringements on individual liberty.

Scalia are curiously reversed. Justice Scalia is willing to limit the right when the social costs substantially outweigh the individual liberty interest. Justice Breyer refutes this assertion and is opposed to limiting the liberty interest, notwithstanding the social costs that may result from his opinion.

It is helpful to recast Justice Scalia and Justice Breyer's debate over the exclusionary rule for no-knock warrants in the parlance of the Second Amendment. First, the liberty interests: for the exclusionary rule it is deterring police misconduct and for the Second Amendment it is the individual right of self-defense. Second, the social costs: for the exclusionary rule, "the risk of releasing dangerous criminals into society,"⁴⁵⁰ and for the Second Amendment, the violence that may result from firearm ownership.

Rephrasing Justice Scalia's assessment in *Hudson*, the Second Amendment has never been applied to strike down a gun control law except where the individual right of self-defense outweighed the substantial harm and danger that may have resulted from firearm ownership. This is quite similar to the balancing test Justice Breyer fashioned in *Heller*⁴⁵¹ and far from the faux-formalistic standard Justice Scalia announced.⁴⁵²

On the other hand, rephrasing the argument from *Hudson*, Justice Breyer asserts that Justice Scalia's approach fails to respect the individual liberty interest of the Second Amendment notwithstanding the death and injuries that may result from firearm ownership—"at least if it means that those 'social costs' are somehow special here."⁴⁵³ Justice Breyer's reasoning recognizes that many of our rights yield social costs and that the exclusionary rule—as well as the Second Amendment—is not different. Perhaps most important for the purposes of this analysis is that, in certain circumstances, Justice Breyer is willing to tolerate substantial social costs to protect certain constitutional rights. The exclusionary rule enjoys membership in that club; the Second Amendment is left out.

450. *Hudson*, 547 U.S. at 588.

451. *Dist. of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) ("Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.").

452. See *supra* Part II.C.

453. *Hudson*, 547 U.S. at 614 (Breyer, J., dissenting) (citation omitted).

Justice Breyer concludes that Justice Scalia's "'substantial social costs' argument is an argument against the [Second Amendment] itself."⁴⁵⁴ Notwithstanding his assumption that the District's statute survives the Second Amendment even if it protects an individual right to keep and bear arms,⁴⁵⁵ Justice Breyer's own arguments in *Hudson* indicate his failure to consider all sides of this equation. Indeed, Justice Breyer's *Heller* and *McDonald* dissents can be seen as arguments not just against balancing liberty and social costs, but against the Second Amendment itself.

2. *Miranda v. Arizona*

From its genesis, *Miranda v. Arizona*⁴⁵⁶ was a controversial opinion. Justice Harlan first identified the social cost stemming from mandating warnings in his dissenting opinion, where he noted that "[h]ow much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy."⁴⁵⁷ Justice Harlan was cautious about effecting a revolution in criminal procedure where "[e]vidence on the role of confessions is notoriously incomplete," and "some crimes cannot be solved without confessions."⁴⁵⁸ Sounding the alarm, Justice Harlan expressed concern that "the Court is taking a real risk with society's welfare in imposing its new regime on the country."⁴⁵⁹ In short, "[t]he social costs of crime are too great to call the new rules anything but a hazardous experimentation."⁴⁶⁰

Although it is quite difficult to determine whether the social costs Justice Harlan augured have come to fruition, Professor—and later U.S. District Judge—Paul Cassell made a yeoman's effort on this front. In two articles⁴⁶¹ Professor Cassell consid-

454. *Id.*

455. *Heller*, 554 U.S. at 683, 722 (Breyer, J., dissenting) ("I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. . . . Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection.").

456. 384 U.S. 436 (1966).

457. *Id.* at 517 (Harlan, J., dissenting).

458. *Id.*

459. *Id.*

460. *Id.*

461. Paul G. Cassell & Richard Fowles, *Handcuffing The Cops? A Thirty-Year Perspective on Miranda's Harmful Effects On Law Enforcement*, 50 STAN. L. REV. 1055

ered the number of criminal cases that are “lost”—or in the words of Justice Harlan, “crimes [that could not] be solved without confessions”—because of *Miranda*. Although Cassell’s data has been subject to vociferous debate⁴⁶²—as most empirical data are—it provides a basis on which to ground the Court’s consideration of social costs and constitutional liberty:

[In 1993,] more than 500,000 [crimes outside the FBI crime index were lost], including: 57,000 lost cases for driving under the influence; 44,000 lost cases for assaults (not including aggravated assault); 42,000 lost cases for drug offenses; 19,000 lost cases for forgery and fraud; 12,000 lost cases for vandalism; and 9000 lost cases for weapons violations (carrying, possessing illegally, etc.).⁴⁶³

These crimes are often quite dangerous to society—“[r]oughly 28,000 arrests for serious crimes of violence and 79,000 arrests for property crimes slip through the criminal justice system due to *Miranda*, and almost the same number of cases are disposed of on terms more favorable for defendants.”⁴⁶⁴ The authors found that in “1993 *Miranda* produced roughly 28,000 lost cases against suspects for index violent crimes and 79,000 lost cases against suspects for index property crimes.”⁴⁶⁵ These violent crimes “can be divided into specific crimes, specifically 880 murder and non-negligent manslaughter cases, 1400 forcible rape cases, 6500 robbery cases, and 21,000 aggravated assault cases.”⁴⁶⁶ The equations suggest “that between 8,000 and 36,000 more robberies would have been solved in 1995 in the absence of the *Miranda* effect.”⁴⁶⁷ Further, “[a]s many as 36,000 robberies, 82,000 burglaries, 163,000 larcenies, and 78,000 vehicle thefts remain uncleared each year as a result of *Miranda*.”⁴⁶⁸

Interestingly, Justice Breyer in his *McDonald* appendix includes an analogous slate of statistics regarding gun violence: “over

(1998); Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) [hereinafter Cassell, *Social Costs*].

462. See, e.g., Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (disputing Professor Cassell’s research and conclusions).

463. Cassell, *Social Costs*, *supra* note 461, at 440.

464. *Id.* at 484.

465. *Id.* at 440.

466. *Id.*

467. Cassell & Fowles, *supra* note 461, at 1107.

468. *Id.* at 1126.

60,000 deaths and injuries caused by firearms each year,"⁴⁶⁹ "an abusive partner's access to a firearm increases the risk of homicide eightfold for women in physically abusive relationship,"⁴⁷⁰ in 1997 "firearm-related deaths accounted for 22.5% of all injury deaths of individuals between 1 and 19,"⁴⁷¹ "firearms killed 93% of the 562 law enforcement officers feloniously killed in the line of duty between 1997 and 2006,"⁴⁷² "those who live in urban areas [are] particularly at risk of firearm violence,"⁴⁷³ "half of all homicides occurred in 63 cities with 16% of the nation's population,"⁴⁷⁴ and "gun regulations have helped to lower New York's crime and homicide rates."⁴⁷⁵

Justice Breyer also cited a series of studies regarding handguns in the home—"handgun ownership in the home is associated with increased risk of homicide,"⁴⁷⁶ "those who die in firearms accidents are nearly four times more likely than average to have a gun in their home,"⁴⁷⁷ and "homes with one or more handguns were associated with a risk of suicide almost twice as high as that in homes containing only long guns."⁴⁷⁸ Finally, Justice Breyer presented a series of "data on regional views and

469. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3137 (2008) (Breyer, J., dissenting) (citing MARIANNE W. ZAWITZ & KEVIN J. STROM, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FIREARM INJURY AND DEATH FROM CRIME, 1993-97, at 2 (2000)).

470. *Id.* (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003)).

471. *Id.* (quoting Comm. on Injury & Poison Prevention, Am. Acad. Of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 PEDIATRICS 888, 888 (2000)).

472. *Id.* (citing FBI, CRIMINAL JUSTICE INFO. SERVS. DIV., LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, at tbl.27 (2006), available at <http://www2.fbi.gov/ucr/killed/2006/table27.html>).

473. *Id.* (citing DETIS T. DUHART, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, URBAN, SUBURBAN, AND RURAL VICTIMIZATION, 1993-98, at 1, 9 (2000)).

474. *Id.* (quoting Garen J. Wintemute, *The Future of Firearm Violence Prevention: Building on Success*, 281 JAMA 475, 475 (1999)).

475. *Id.* (citing Brief for U.S. Conference of Mayors as Amicus Curiae [sic] Supporting Respondents at 4-13, *McDonald*, 130 S. Ct. 3020 (No. 08-1521)).

476. *Id.* at 3138 (citing Brief for Orgs. Committed to Protecting the Public's Health, Safety, and Well-Being as Amici Curiae in Support of Respondents at 13-16, *McDonald*, 130 S. Ct. 3020 (No. 08-1521)).

477. *Id.* (citing Douglas J. Wiebe, *Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713-14 (2003)).

478. *Id.* (quoting Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992)).

conditions of firearm ownership”—“gun violence varies by state,”⁴⁷⁹ “urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately greater problems with nonhomicide gun deaths, such as suicides and accidents,”⁴⁸⁰ and the “murder rate is 40 times higher in New Orleans than it is in Lincoln, Nebraska.”⁴⁸¹

In several respects, the social costs of *Miranda* approximate the social costs of the Second Amendment. For example, a case study of Chicago homicide rates indicated that the post-*Miranda* confession rate was 26.5% lower than the pre-*Miranda* rate.⁴⁸² This finding can be compared with the finding that firearm-related deaths accounted for 22.5% of all injury deaths for individuals between ages one and nineteen in 1997.⁴⁸³ Even assuming firearm-related deaths could be brought to zero with complete bans—unlikely in light of Chicago and the District of Columbia’s high homicide rate notwithstanding their longstanding firearm bans—it seems that *Miranda* has a proportionally larger impact on murder confessions than the Second Amendment does on firearm-related deaths.

In *Dickerson v. United States*, the Supreme Court considered whether *Miranda* was a constitutional right, or merely a prophylactic rule that Congress could abrogate by statute.⁴⁸⁴ By invitation of the Court—the United States refused to defend a Fourth Circuit opinion finding that *Miranda* was not required by the Constitution—Professor Cassell argued the case.⁴⁸⁵ He extensively briefed the social costs associated with *Miranda* warnings.⁴⁸⁶ The Court in *Dickerson* rejected any reliance on the possible lost crimes that result from *Miranda*.⁴⁸⁷ Although antagonistic to *Miranda*, Justice Scalia, joined by Justice Thomas, did not rely on the negative externalities of *Miranda* in his dissent. Both the majority and dissent-

479. *Id.* (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 698–99 (2008) (Breyer, J., dissenting)).

480. *Id.* (citing *Heller*, 554 U.S. at 698–99 (2008)).

481. *Id.* at 3137 (quoting Garen J. Wintemute, *The Future of Firearm Violence Prevention: Building on Success*, 281 JAMA 475, 475 (1999)).

482. Cassell, *Social Costs*, *supra* note 461, at 414.

483. *See supra* note 471 and accompanying text.

484. 530 U.S. 428, 431–32 (2000).

485. *Id.* at 430.

486. Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 26–28, 41–43, *Dickerson*, 530 U.S. 428 (No. 99-5525).

487. *Dickerson*, 530 U.S. at 444.

ing opinions focused on the sole question of whether *Miranda* was a constitutional, or mere prophylactic rule.

Justice Scalia affirmed this point during oral arguments in *McDonald*, in the process of disagreeing with Justice Breyer over the role of statistics in determining constitutional rights:

JUSTICE BREYER: There are two ways [to consider the fire-arm regulation]. One is that—look at—all you have to do is look at the briefs. Look at the statistics. You know, one side says a million people killed by guns. Chicago says that their— their gun law has saved hundreds, including—and they have statistics—including lots of women in domestic cases. And the other side disputes it. This is a highly statistical matter.

....

JUSTICE SCALIA: There's a lot of statistical disagreement on whether the *Miranda* rule saves lives or not, whether it results in the release of dangerous people who have confessed to their crime, but the confession can't be used. We don't—we don't resolve questions like that on the basis of statistics, do we?⁴⁸⁸

Simply put, although statistics are important “for the legislatures,” they are not important for “the judges.”⁴⁸⁹ Yet Justice Scalia's opinion in *Heller* undercuts this point. Fear of gun violence from certain persons, and in certain “sensitive places,” enables the Court to grant a presumption of constitutionality to restrictions on the right.

Justice Breyer led as a champion of empirical-based jurisprudence in *Heller* and *McDonald*, and called gun control issues a “highly statistical matter.”⁴⁹⁰ Yet he never raised any objections about the social costs of *Miranda* in *Dickinson*, even those that parallel the statistics he cited in *McDonald*. Justice O'Connor, who concurred in *Withrow v. Williams* that the Court should reconsider *Miranda* “when presented with empirical data,”⁴⁹¹ also declined to adopt this path. In light of Justice Breyer's

488. Transcript of Oral Argument at 14–16, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Justice Scalia asked and answered his own question).

489. *Id.* at 17.

490. *Id.* at 14.

491. 507 U.S. 680, 714 (1993) (O'Connor, J., concurring in part and dissenting in part).

opinion in *Hudson*, it seems his consideration of social costs to balance liberty is inconsistently applied.

There is some tension between the good-faith exception to the exclusionary rule as articulated in *Leon* and the constitutionally mandated warnings in *Miranda*. In *Leon*, the Court does consider the social costs of letting guilty people go free. In *Miranda* and its progeny, the Court disregards these costs. Perhaps this difference stems from the nature of the right. Although *Miranda* is a constitutional rule—as the Court held in *Dickerson*—the exclusionary rule is not, and is merely a “judicially created means of deterring illegal searches and seizures.”⁴⁹² In *Pennsylvania Board of Probation and Parole v. Scott*, the Court made clear that the exclusionary rule is prudential, rather than constitutional, noting that “the government’s use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.”⁴⁹³ The exclusionary rule only applies in cases “where its remedial objectives are thought most efficaciously served.”⁴⁹⁴ This prudential rule is only applicable “where its deterrence benefits outweigh its ‘substantial social costs.’”⁴⁹⁵ Because the exclusionary rule is prudential, the Court permits the balancing of social costs. For constitutional rules, such as *Miranda*, and I would argue the Second Amendment, the significance of social costs in the calculus is not of the same magnitude.

The exclusionary rule and *Miranda* provide examples of how the Court deals with cognizable, but non-imminent threats—dangerous criminals accused of committing crimes. Unlike the public-safety exception to *Miranda* or the exigent circumstances doctrine, in the typical *Miranda* or search and seizure case officers are confronted with run-of-the-mill situations where they suspect criminal activity that need not be imminent. Further, unlike the Court’s cases dealing with certain latent threats from dangerous people—such as cases considering rights to bail and speedy trial—in *Miranda* and exclusionary rule cases, the courts do not look into the accused’s propensity for violence. Here, the Court, to

492. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

493. *Id.* at 362 (citing United States v. Leon, 468 U.S. 897, 906 (1984); Stone v. Powell, 428 U.S. 465, 482, 486 (1976)).

494. *Id.* at 363 (quoting *Calandra*, 414 U.S. at 348).

495. *Id.* (quoting *Leon*, 468 U.S. at 907).

varying degrees, considers the social costs, but applies an exacting form of judicial scrutiny to protect the individual rights.

V. A SECOND AMENDMENT FRAMEWORK THAT BALANCES
SOCIAL COSTS AND LIBERTY

The *Heller* and *McDonald* majorities reject balancing tests, but implicitly adopt one with their pragmatic dicta.⁴⁹⁶ The dissenting opinions adopt a balancing test that only looks at one side of the equation—the social costs—and not the liberty interests.⁴⁹⁷ Both of these views are lacking because they fail to give lower courts guidance about the constitutional significance of social costs. In this section I propose a framework that provides a judicially manageable standard for courts to consider these issues.⁴⁹⁸ First, we must recognize that the analysis the Court permitted in *Heller* is unprecedented, and does not fall into any of the three categories discussed above. Second, in order to reconcile the right to keep and bear arms with its brethren in the Bill of Rights, I discuss five questions inherent in all gun cases—what, where, when, who, and why.

Building on the three categories of the precedents discussed, Second Amendment challenges should be bifurcated based on the social costs involved and the actor's propensity for violence. For the deprivation of the liberty of people lacking a propensity for violence, the burden of persuasion remains with the State, and stricter judicial scrutiny is warranted. For those who have demonstrated a propensity for violence and are likely to inflict harm in the future, such as violent felons, the burden should rest with the individual, and less exacting judicial scrutiny is appropriate. Finally, longstanding prohibitions that conflict with the holding of the Second Amendment—that the Constitution guarantees an individual right to keep and bear arms—should be discarded as vestigial remnants of an erroneous understanding of the Constitution. This bifurcated-framework nestles snugly inside *Heller's* judicial embrace—which will likely be the relevant Second Amendment framework for the foreseeable future—and fills the gaps of the majority opinion's shortcomings.

496. See *supra* Part II.C.

497. See *supra* Part II.B.

498. See *Baker v. Carr*, 369 U.S. 186, 226 (1962), for discussion of “judicially manageable standards.”

A. *Unprecedented Analysis*

Under our current Second Amendment jurisprudence people who have shown no propensity for violence may be denied the exercise of their constitutional right without any specific reason, based solely on legislative judgments grounded on disputed statistics⁴⁹⁹ that show a person with a firearm may be likely to engage in violence.⁵⁰⁰ This ex ante deprivation of liberty with restrained judicial oversight is unprecedented, and does not fit into any of the Court's three historical categories. First, these challenges do not fall into Category I. Merely seeking to obtain or carry a firearm does not present a cognizable harm or threat to society that is imminent.⁵⁰¹ Deprivation of individual liberty requires more of a nexus with harm than disputed statistics of what crime may or may not happen, and empty labels like "felons and the mentally ill"⁵⁰² are not always dispositive (a reformed prior felon or a healed person previously diagnosed as mentally ill may no longer pose dangers to others).⁵⁰³

The mere ownership or carrying of firearms is quite attenuated from any imminent crime. To borrow the lexicon of *Brandenburg*, how attenuated is the "mere" possession of firearms?⁵⁰⁴ Merely possessing a gun, like merely possessing ideas about calling others fascists and racketeers—as Chaplinsky presumably

499. For commentary on the Court's reliance on empirical data, see David K. Kessler, *Free To Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 83 n.171. See also Angelo N. Ancheta, *Science And Constitutional Fact Finding in Equal Protection Analysis*, 69 OHIO ST. L.J. 1115, 1122 n.30 (2008); David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 588–94 (1991); Shawn Kolitch, Comment, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673 (2006).

500. Cf. *Nordyke v. King*, No. 07-15763, slip op. at 5640 (9th Cir. May 2, 2011) ("Just as important as what *Heller* said about a government-interest approach is what *Heller* did not say. Nowhere did it suggest that some regulations might be permissible based on the extent to which the regulation furthered the government's interest in *preventing crime* [ex ante]. Instead, *Heller* sorted such regulations based on the burden they imposed on the right to keep and to bear arms for self-defense.").

501. See *supra* Part IV.A (discussing imminent threats).

502. Dist. of Columbia v. *Heller*, 554 U.S. 570, 626 (2008).

503. See *supra* Part IV.C.2 (discussing the Court's rejection of empirical data to weaken *Miranda*).

504. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (citation and internal quotation marks omitted).

planned in advance⁵⁰⁵—is far too attenuated to permit a limitation or infringement on a constitutional right with limited judicial scrutiny. Merely possessing a gun in public, absent an emergency situation, does not warrant relaxing the rigors of *Miranda*. Nor should ownership of a firearm at home—where the owner poses no immediate risk and any possible harm is quite attenuated—receive such lax judicial scrutiny as the dissenters suggest.

Second, these challenges do not fall into Category II. Even if there may be a threat that is not yet cognizable, in these circumstances a person's previous misconduct reveals no propensity towards future violence. Unlike the accused in *Salerno* and *Wingo*, most owners of firearms do not have a violent stigma attached to them. For example, the plaintiffs in *Heller* and *McDonald* were upstanding citizens. Dick Heller worked as a security guard for the federal judiciary, where he was permitted to carry a firearm to protect judges.⁵⁰⁶ Unlike the convicted sex offenders in *Comstock*, whose previous propensity for social harm warranted Congress's determination that they could be committed, Otis McDonald and Dick Heller have shown no such propensity. Any indication that they could inflict harm on others is based on nothing more than generalized statistics—a measure that the Court has never approved to limit a constitutional right. Even though these plaintiffs showed no propensity for violence, they were treated in the same manner as an unsavory armed and dangerous felon.

Third, these challenges do not fall into Category III. Even though a threat may be cognizable but not necessarily imminent, infringements are only permitted with greater judicial scrutiny. The Court in *Dickerson* rejected any reliance on the possible unsolved crimes that could result from *Miranda*. Although antagonistic to *Miranda*, Justice Scalia did not rely on this thread in his dissent. The exclusionary rule only applies in a small selection of cases—indeed, it is an exception. Judicial application of this rule demands a vigorous weighing of the relevant social costs, and the individual liberty interests in deterrence. Second Amendment rights-holders are not afforded the same treatment. Further, in these cases the remedies are generally ex post—exclusion of evidence, suppression of an illicit confession, et cetera. Regulations on the right to keep and bear arms, in contrast, are ex ante.

505. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

506. *See Heller*, 554 U.S. at 575.

B. *The What, Where, When, Who, and Why of the Second Amendment*

When confronting laws implicating the Second Amendment, it is helpful to consider five questions—what, where, when, who and why. First, what type of arms can a person keep? The Court in *Heller* found that this inquiry should be resolved by resort to history, relying on *United States v. Miller*.⁵⁰⁷ Weapons “in common use” by the militias at the time of the ratification of the Second Amendment are permitted.⁵⁰⁸ Courts have already backed away from this originalist inquiry.⁵⁰⁹ For instance, even when a court purports to “look to the historical pedigree of 18 U.S.C. § 922(g)[—banning the possession of firearms and ammunition by convicted felons—]to determine whether the traditional justifications underlying the statute support a finding of permanent disability in this case,” its analysis is still ultimately grounded in a balancing-type approach, the exact framework *Heller* purported to reject.⁵¹⁰ What lies at the heart of the Court’s opinion is not originalism, but pragmatism: “It is well established that felons are more likely to commit violent crimes than are other law-abiding citizens.”⁵¹¹ That is the core of the holding in both *Skoien* and *Barton*.

The Court routinely scrutinizes the means with which people can exercise constitutional rights that yield social costs. The Court, however aberrantly and nebulously, determines whether speech is obscene,⁵¹² constitutes fighting words,⁵¹³ or is commercial speech.⁵¹⁴ In the free exercise context, the Court has determined whether a religious belief is sincerely held.⁵¹⁵ In the context of re-

507. 307 U.S. 174 (1939).

508. *Heller*, 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179).

509. See, e.g., *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“[*Heller* tells] us that statutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.”).

510. *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011).

511. *Id.* at 175.

512. See *Miller v. California*, 413 U.S. 15 (1973).

513. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

514. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

515. See *United States v. Seeger*, 380 U.S. 163, 176 (1965) (granting statutory exemption to conscientious objectors); *United States v. Zimmerman*, 514 F.3d 851,

productive rights, the Court has made findings about which procedures can be banned at certain points during a pregnancy.⁵¹⁶

Second, where can a person keep and bear arms? This question addresses the next front in Second Amendment cases involving carrying a firearm, perhaps concealed, outside the home.⁵¹⁷ The Court in *Heller* aimed to address this question by noting that prohibitions on carrying in “sensitive places” were presumptively constitutional.⁵¹⁸ Constitutional protections in the home in the Fourth Amendment context are considered at their pinnacle,⁵¹⁹ whereas protections are less robust in public. In *Terry v. Ohio*, the Court permitted the search and seizure of a person in public upon a reasonable suspicion.⁵²⁰ More broadly, when a person is in public, the Court considers both a subjective and objective reasonable expectation of privacy.⁵²¹ Further, “objects such as weapons or contraband found in a public place may be seized by the police without a warrant.”⁵²² Time, place, and manner regulations governing the First Amendment provide further examples of the Court considering the constitutional dimensions of the location of a regulation.⁵²³ Although constitutional rights are strongest in the home, they are not surrendered outside of the home.

Third, when would a person be permitted to bear arms—more precisely, with what type of delay may an individual’s exercise of the right be burdened? The Court in *Heller* declined to “address the [District’s] licensing requirement,”⁵²⁴ though this issue is certainly likely to amble its way to One First Street in the near future. As discussed above, the Court has considered various licensing

854 (9th Cir. 2007) (per curiam) (“[T]he district court will need to determine whether Zimmerman’s religious beliefs are sincerely held, which is a question of fact.” (citing *Seeger*, 380 U.S. at 185)).

516. See *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (partial-birth abortion ban); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (undue burden framework); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (trimester framework).

517. See, e.g., *GeorgiaCarry.org, Inc. v. Georgia*, No. 5:10-CV-302 (M.D. Ga. Jan. 24, 2011) (order granting defendants’ motions to dismiss); *DiGiacinto v. Rector*, No. 091934, slip op. at 1–2 (Va. Jan. 13, 2011).

518. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

519. *Payton v. New York*, 445 U.S. 573, 576 (1980).

520. 392 U.S. 1, 30 (1968).

521. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

522. *Payton*, 445 U.S. at 587.

523. See *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989).

524. *Dist. of Columbia v. Heller*, 554 U.S. 570, 631 (2008).

regimes that touch on constitutional rights.⁵²⁵ These precedents may shed light on whether a licensing regime creates an undue burden to the exercise of the right to keep and bear arms.

Fourth, who can keep and bear arms—law-abiding citizens, minors, violent misdemeanants, non-violent felons, violent felons? Fifth, why is the right to keep and bear arms being restricted? I combine these two inquiries because in the context of social cost and the Second Amendment, they boil down to the same question: should this person be able to exercise his Second Amendment rights? Implicit in both the majority and dissenting view in *Heller* is the desire to limit violence stemming from firearm ownership. This aim is primarily a function of the person using the firearm. Guns don't kill people; people kill people. People are denied access to arms, and not the other way around. When addressing this question, even the majority conceded that laws forbidding "felons and the mentally ill"—presumably dangerous people—from bearing arms are presumptively constitutional.⁵²⁶ This is the key inquiry, and will be the subject of any licensing regime challenge. Should limitations on certain types of dangerous people be categorical or decided on case-by-case basis?⁵²⁷ Should people with no criminal background be treated in the same manner as those who have shown a propensity for violence? Who bears the burden of proving this dangerousness? The most important question is the last one. To address this issue, I propose bifurcating Second Amendment inquiries.

C. *Bifurcating Second Amendment Challenges Based on Social Cost and Propensity for Harm*

Challenges to laws touching the Second Amendment take two forms that are connected to the who and the why of social cost and liberty. The first type—like the suits in *Heller* and *McDonald*—seeks to challenge an ex ante, or preemptive, restriction to owning or carrying a firearm, such as the denial of a license. The second type of challenges deal with an actor who has shown a

525. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 527–28 (1993); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 244 (1936).

526. *Heller*, 554 U.S. at 626.

527. See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (accepting categorical bans on disarmament for misdemeanants); see also Blocher, *supra* note 18, at 414.

propensity for violence—such as cases wherein a convicted violent felon seeks restoration of his right to bear arms—and seeks to challenge an ex post restriction to owning or carrying a firearm, such as the reinstatement of Second Amendment rights.⁵²⁸

Even though the former group is much less likely to cause violence than the latter, under *Heller* and *McDonald*, both of these groups are treated identically. Viewing these challenges through the lens of the constitutionality of social cost, the latter category would likely fall into Category II—a latent threat from a dangerous actor—or perhaps Category III—a cognizable threat that is not imminent. The former challenges, in contrast, do not fall into any category. Second Amendment challenges should be bifurcated, as the Fourth Circuit suggested,⁵²⁹ based on who has a propensity for danger, and who does not.

The inquiry is not an abstract speculation about what danger the owner of the firearm may or may not pose. Rather, the inquiry revolves around the propensity or likelihood of the applicant to use the firearm dangerously. The showing of the harm must be based on something specific to the person seeking arms—not on general statistics dealing with gun ownership, a categorical approach. Although ex post measures to prevent people with no record from inflicting violence may be socially optimal, none of the Court's precedents permit such a preemptive ban. Courts may draw the line, as the *Heller* Court suggested, at "felons and the mentally ill."⁵³⁰ Perhaps certain types of categorical approaches are permissible when there is an actual threat of provable harm.⁵³¹ That is one possible line, but not the only one.

528. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 88 (3d Cir. 2010); *Skoien*, 614 F.3d at 639; see also *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment) (opining that character and propensities of the defendant are part of a "unique, individualized judgment regarding the punishment that a particular person deserves").

529. The Fourth Circuit considered, but did not decide, how the Second Amendment rights of people with and without criminal backgrounds may differ. *United States v. Masciandaro*, No. 09-4839, slip op. at 21 (4th Cir. Mar. 24, 2011) ("Indeed as has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented.").

530. *Heller*, 554 U.S. at 626.

531. See *Skoien*, 614 F.3d at 641; see also Blocher *supra* note 18, at 414.

Although some courts have adopted this approach,⁵³² as the Court noted in *United States v. Stevens*, the Court prefers not to recognize new categorical exceptions to constitutional rights.⁵³³

For deprivation of the liberty of people lacking this propensity, the burden should remain with the State.⁵³⁴ Professor Volokh identifies several ways to tie “danger reduction” to regulations controlling the right to keep and bear arms:

One approach would be to require some substantial scientific proof to show that a law will indeed substantially reduce crime and injury (and that other alternatives, such as liberalizing concealed carry, won’t do the job).

Another approach to ostensibly strict scrutiny would be to simply require a logically plausible theory of danger reduction that many reasonable people believe.⁵³⁵

Although these methods, which mirror the tact of Justice Breyer, may make sense in an empirical world, statistics are important “for the legislatures,” but are not important for “the judges.”⁵³⁶

Considerations of social cost should not trump individual rights without a showing of danger. This burden must be satis-

532. See *United States v. Barton*, 633 F.3d 168, 175 (3rd Cir. 2011) (“Despite the breadth of this exclusion, denying felons the right to possess firearms is entirely consistent with the purpose of the Second Amendment to maintain ‘the security of a free State.’ It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens.” (citations omitted)); *Skoien*, 614 F.3d at 641.

533. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (finding that obscenity, defamation, incitement, and so on are among the few “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942))).

534. See, e.g., *Skoien*, 614 F.3d at 646–47 (Sykes, J., dissenting) (“My colleagues discuss but do not decide the scope question and avoid the standard-of-review ‘quagmire’ by simply accepting the government’s ‘concession’ that ‘some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential, and that [the statute] is valid only if substantially related to an important governmental objective.’ When it comes to applying this standard, they give the government a decisive assist; most of the empirical data cited to sustain [the statute] has been supplied by the court. This is an odd way to put the government to its burden of justifying a law that prohibits the exercise of a constitutional right.”). The *Barton* court gives the government a “decisive assist” by citing to Bureau of Justice Statistics showing that “within a population of 234,358 federal inmates released in 1994, the rates of arrest for homicides were 53 times the national average.” *Barton*, 633 F.3d at 175.

535. Volokh, *supra* note 6, at 1467–68.

536. Transcript of Oral Arguments at 17, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Justice Scalia).

fied based on the individual nature of the applicant, rather than a general and categorical empirical concern. This roughly corresponds to what has been deemed a “shall issue” permit, where the burden lies with the State to identify particular reasons why the permit shall not issue.

In contrast, for those who have demonstrated a propensity for harm and are likely to inflict said harm in the future—such as violent felons—the burden should rest with the felon. Like the defendants in *Salerno* and *Wingo*, the burden would rest with the accused to demonstrate he does not pose a threat. This is not to say that felons of all stripes should be perpetually disarmed, as the very nature and number of felonies has proliferated to include many types of non-violent crimes⁵³⁷—crimes that say nothing about the defendant’s propensity for harming others (Martha Stewart for example).⁵³⁸ This burden is not insurmountable, but the individual must show that he no longer poses such a threat. Even the National Rifle Association is in favor of limiting firearm ownership to law-abiding citizens.⁵³⁹ This limiting principle would assuage concerns on both sides of the issue, and provide the Court with a judicially manageable standard to balance liberty and social costs.

A dividing line between those without a proven propensity for violence and those challenging rights rescinded as a result of violence enables the courts to alter based on this criterion who bears the burden of proving or disproving the threat of harm, and what level of judicial scrutiny is appropriate. The District’s and Chicago’s gun control statutes’ restriction of access to firearms occurred *ex ante*, without any judicial scrutiny, or required showing of possible harm. Although the statutes at issue in *Skoien* and other cases considering the rights of former-felons to possess arms may lend themselves to a categorical

537. See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

538. That is not to say all “felons” are dangerous. See C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698–713 (2009) (surveying the history of state laws limiting convicts’ entitlement to possess firearms).

539. See Brief for the NRA and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent at 1, 28, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

approach,⁵⁴⁰ the statutes at issue in *McDonald* and *Heller* denied arms to people who gave no indication that they would use the guns for harm. In such cases, the burden should fall on the State.

D. Reject Longstanding Prohibitions that Conflict with Heller

The Court in *Heller* as part of its “[non]exhaustive historical analysis . . . of the full scope of the Second Amendment” advised lower courts that the opinion should not “be taken to cast doubt on [certain] longstanding prohibitions.” Among the restrictions are, “the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁵⁴¹ The Court stressed that this list of presumptively constitutional prohibitions “does not purport to be exhaustive.”⁵⁴² Justice Alito reiterated in *McDonald* that the States would be permitted to “experiment[] with reasonable firearms regulations . . . under the Second Amendment.”⁵⁴³ How long must a prohibition stand to be a “longstanding prohibition”? This is rather unclear, and the courts are already grappling with this indeterminate standard.⁵⁴⁴

Professor Adam Winkler’s article, written about a year and a half before *Heller*,⁵⁴⁵ was cited in both *Heller* and *McDonald* by the dissenting Justices to identify the manner in which the States have regulated firearms.⁵⁴⁶ These precedents are relevant for historical purposes, perhaps, but to the extent that they conflict with the holding of *Heller* that the Second Amendment protects an individual right to keep and bear arms, I question their sustained validity. For example, if a state viewed the right to keep

540. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (“[By prohibiting possession by felons,] Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that ‘they may not be trusted to possess a firearm without becoming a threat to society.’” (quoting 114 CONG. REC. 14,773 (1968))).

541. *Heller*, 554 U.S. at 626–27.

542. *Id.* at 627 n.26.

543. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (plurality opinion) (citation omitted).

544. See *United States v. Skoien*, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (debating how longstanding is the prohibition of felon possession).

545. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

546. *McDonald*, 130 S. Ct. at 3113, 3130, 3135–36 (Breyer, J., dissenting); *Heller*, 554 U.S. at 691 (Breyer, J., dissenting).

and bear arms as a collective right, and premised its reasonable, longstanding regulations on that notion, then those regulations, even if longstanding, are unconstitutional. Why should they receive extra protection solely because of their early vintage?

If reasonable firearms regulations are those that comply with the Court's recognition of the Second Amendment in *Heller* and *McDonald* as an individual right, then I have no objection. But if these regulations are reasonable because they are longstanding—that is, if they are constitutional merely because they predated the Court's recognition of the Second Amendment as an individual right—then Justice Alito's opinion seeks to protect potentially unconstitutional laws simply because they are old, and people have grown to rely on them.

Further, despite the weak bonds of *stare decisis* for constitutional decisions, the Court in *Heller* still sought to protect certain longstanding prohibitions on the exercise of the right to keep and bear arms, notwithstanding that those laws were enacted under the authority of prior, now-overruled Second Amendment precedents. Reliance interests, usually a strong factor in prudential considerations, are significantly weaker in the context of constitutional law.⁵⁴⁷

Although Justice Breyer finds it “unsurprising that States and local communities have historically differed about the need for gun regulation,”⁵⁴⁸ this is constitutionally unremarkable. Many Americans have become so accustomed to living in a world where the Second Amendment is not a constitutional right that even after *Heller*, it is difficult to view it as such. The Court in *Heller* was willing to maintain various longstanding prohibitions, even though those precedents were set before the Second Amendment was recognized as an individual right.

Until the Fourth Amendment was incorporated, states certainly “differed about the need for”⁵⁴⁹ protections of criminal procedure rights. Likewise, until the First Amendment was incorporated, states “differed about the need for” protecting free

547. See *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment) (noting that “*stare decisis* is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part))).

548. *Id.* at 3129 (Breyer, J., dissenting).

549. *Id.*

speech and free exercise. These historical vestiges of the preincorporation status serve as nothing more than a reminder of how our Constitution existed before the robust enforcement of federal rights that we have come to enjoy. Following *Mapp v. Ohio*⁵⁵⁰ and *Miranda v. Arizona*,⁵⁵¹ longstanding police interrogation techniques that violated the Constitution were not upheld. Neither should the prohibitions the Court in *Heller* identified. As a result of this anachronistic regime where rules premised on a flawed understanding of the Constitution control, even under *Heller* and *McDonald*, the Second Amendment is quite lonely. The Second Amendment should enter that pantheon of rights. Then our history of longstanding unconstitutional ideals will be relegated to just that—history.

CONCLUSION

Although the historical debate over the Second Amendment is likely to rage for some time, the future of this jurisprudential skirmish will be waged on a battlefield with two fronts—liberty and social costs. The frontier will ebb and flow between the two opposing sides. This Article does not purport to set the boundaries. Rather, it aims to propose rules of engagement, and ensure a fair fight. The purpose of this Article is to redefine our understanding of the Second Amendment in the context of the other provisions in the Bill of Rights. If our nascent Second Amendment jurisprudence is to evolve, we must leave behind our pre-*Heller* view of the constitutionality of gun control laws and start treating the right to keep and bear arms like the other individual rights in our Constitution. The Second Amendment should be lonely no more.

550. 367 U.S. 643, 660 (1961).

551. 384 U.S. 436, 444–45 (1966).