Domestic Violence and the Home-Centric Second Amendment

JOSEPH BLOCHER*

The most prominent line-drawing debate in Second Amendment law and scholarship is whether and to what degree the right to keep and bear arms extends outside the home. Inside the home, the right is thought to be strongest, as private interests are at their apex and governmental interests are correspondingly weaker. But an uncritical acceptance of this home-centric Second Amendment is not well-equipped to account for the intersection between guns and domestic violence (DV). For women in particular, domestic violence in the home is a more significant threat than assault by a stranger, and studies have shown that the availability of a firearm in the home can exacerbate the already-significant risk that such violence ends in murder. The reality of armed DV poses a challenge for the home-bound or home-centric right to keep and bear arms, and for Second Amendment law and scholarship more generally.

INTRODUCTION

The goal of this short Article is to bring together two parallel legal debates whose intersection has not been thoroughly explored: the desirability and constitutionality of laws designed to prevent domestic violence involving guns[1] (a matter about which there is, in many ways, a surprising degree of agreement[2]) and the degree to which the right to keep and bear arms is limited to the home (a matter about which there is substantial disagreement[3]). That intersection—illuminated by feminist legal scholarship on the concept of the "home"—sheds new light on standard positions in the gun debate.

The degree to which the right to keep and bear arms is home-bound[4]—or at least home-centric, in the sense that it is strongest within the home—is perhaps the

* Lanty L. Smith '67 Professor of Law, Duke Law School. Many thanks to Jake Charles for comments and to Genesa Cefali for research assistance.

1. I use the phrase "domestic violence" in part because its terminology evokes the home, which is my subject, and I will focus in particular on violence perpetrated by men against women, which accounts for the overwhelming majority of cases. Of course, intimate partner violence arises in other contexts as well, regardless of gender, marital status, or other markers.

2. *See, e.g.*, Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 27 (2005) ("The Domestic Violence Firearms Bans were passed despite a national trend of weakening gun control.").

3. *See infra* notes 30–31 and cases cited therein.

4. For an early scholarly exchange, see Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1281 (2009) (arguing that we should treat the right to keep and bear arms under the Second Amendment "the same way we treat the right to view adult obscenity under the First: a robust right to possess it in the home, subject to nearly plenary restriction by elected government officials everywhere else"); Eugene Volokh, *The First and Second Amendments*,

most important and most contested debate in Second Amendment law and scholarship. But that debate has not always grappled with the possibility that limiting the right to the home (a goal of many gun regulation supporters) would fail to address, and could even exacerbate, the threat of armed domestic violence.

Although much of the gun debate focuses on public violence like mass shootings in schools and public places—and, to the degree, that it focuses on women at all, scenes like dark alleys and parking lots[5]—gun violence in the United States is often much more "private."[6] Roughly half of all firearms-related homicides occur *within* the home.[7] Focusing on gun rights and regulation in public places might simply be a recognition of political necessity or constitutional limitation, but it also threatens to avoid addressing what is—especially for women—the primary site of gun violence.

Men and women face strikingly different realities with regard to gun-related violence and homicides. For women in the United States, the primary threat is not necessarily lurking strangers, but intimate partners.[8] A recent study from the Centers for Disease Control suggests that most women who are murdered in the United States are killed by an intimate partner, and that more than half of those murders involve a firearm.[9] One recent study found that, in cases where the perpetrator could be identified, half of female homicide victims were killed by

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109 COLUM. L. REV. SIDEBAR 97 (2009), https://columbialawreview.org/wp-content/uploads/2016/08/Volokh.pdf (criticizing analogy to obscenity doctrine).

5. *See, e.g.*, Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1101 (2014) (making this observation). NRA lobbyist Marion Hammer, perhaps the most prominent female gun lobbyist in the country, and architect of many of Florida's gun-friendly laws, frequently tells a story about how she was menaced in a parking garage. *See* Mike Spies, *The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies*, NEW YORKER (Mar. 5, 2018), https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies. And yet the Florida Castle Doctrine law, for which she advocated, specifically does not permit a woman to use deadly force in self-defense against a cohabitant unless there is an existing "injunction for protection from domestic violence . . . against that person." Fla. Stat. Ann. §§ 776.013 (2019); Franks, *supra*, at 1115.

6. The two phenomena are not entirely distinct, of course, and in fact, there are links even between mass shootings—the archetypal act of public gun violence—and domestic violence. *See, e.g.*, Nancy Leong, *What Do Many Mass Shooters Have in Common? A History of Domestic Violence*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence/.

7. Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 156 (2015).

8. Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, WASH. POST (Dec. 9, 2018), https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence/ (finding that nearly half of women murdered in the past ten years were killed by a current or former intimate partner).

9. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (July 2017). *See also* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (concluding that roughly 60 percent of intimate-partner homicides are committed with a firearm).

intimate partners, as compared to just six percent of male homicide victims.[10] Roughly one million women in the United States have been shot, or shot at, by an intimate partner.[11] Asking women to arm themselves in self-defense might only exacerbate the problem, as studies show that the presence of a gun makes it five times more likely that a woman will be killed by an abusive partner,[12] and firearm ownership rates are positively related to rates of domestic homicide.[13]

It is far beyond the scope of this short Article to analyze the effectiveness of laws addressing these problems.[14] My more limited goal is to explore one specific but important way in which the evolving law and theory of the Second Amendment intersects with—and should take better note of—how gun rights and regulation impact women.[15] In recent years, scholars have begun to explore that intersection in more depth;[16] my focus here is on how using the "home" as an organizing principle for the Second Amendment could obscure or even worsen the problem of armed domestic violence, which for women is arguably the central problem of gun violence.

Federal law, and the laws of many states, already restrict gun possession by those convicted of a DV misdemeanor or subject to a DV restraining order, and enforcement efforts seem to be ramping up in recent years.[17] Those laws have almost universally been upheld against Second Amendment challenges, and their constitutional foundation seems secure. But an uncritical embrace of the home-centric right to keep and bear arms could weaken that foundation, by providing abusers with a stronger argument for "private" gun possession in their homes. And regardless of what it means for the specific question of whether DV prohibitors are constitutional, a closer consideration of what the home-centric right to keep and bear arms means for women holds important lessons for the future of Second Amendment law and theory, including recent calls to adopt a test of "text, history, and tradition" for evaluating the constitutionality of gun regulations.[18]

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10. Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1278 n.109 (2017) (internal citation omitted).

11. Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: a Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 431, 431 (2018).

12. Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311, 312 (2019).

13. Jacqueline Campbell et al., *Risk Factors for Femicide Within Physically Abusive Intimate Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

14. For a general overview, see Ramsey, *supra* note 10, at 1314–42.

15. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (noting that one feminist legal method is "identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups").

16. *See, e.g.*, MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 51–104 (2018); Jennifer Carlson & Kristin A. Goss, *Gendering the Second Amendment*, 80 L. & CONTEMP. PROBS. 103 (2017); C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. OF WOMEN & L. 477 (2017).

17. *See infra* note 50.

18. *See, e.g.*, Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or

I. THE HOME-CENTRIC SECOND AMENDMENT

In the wake of the Supreme Court's landmark decision in *District of Columbia v. Heller*,[19] one of the most hotly litigated issues in Second Amendment law has been the degree to which the individual right to keep and bear arms includes a right to carry arms in public. This was not a question that the Court had to resolve in *Heller*, which focused largely on private possession of handguns within the home. Beginning with the first sentence of the opinion (which described the question presented in terms of home possession),[20] Justice Scalia's majority opinion repeatedly invoked the word "home," often in conjunction with that self-defense interest.[21] The Court defined the "core" of the Second Amendment as self-defense,[22] and noted that the self-defense interest is "most acute" in the home.[23]

The Court also went on to emphasize that the individual right to keep and bear arms, like all constitutional rights, is subject to some forms of regulation.[24] The majority specifically noted:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[25]

Elsewhere in the opinion, Justice Scalia also pointed to the longstanding legality of prohibitions on "dangerous and unusual" weapons[26] and concealed carrying.[27] Two years later, in *McDonald v. City of Chicago*, the Court made the Second Amendment applicable against state and local governments, but again repeated its assurances that gun regulation and the right to keep and bear arms can coexist, and that "[s]tate and local experimentation with reasonable firearms regulations will continue . . . ."[28]

The Court did not, however, specifically address whether and how the right to keep and bear arms extends outside the home. And in the decade since *Heller*,

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intermediate scrutiny."); Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting) ("Judge Kavanaugh is correct . . . ."), *withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012).

19. District of Columbia v. Heller, 554 U.S. 570 (2008).

20. *Id.* at 573 ("We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

21. *Id.* at 573, 575, 576, 577, 593, 615, & 616.

22. *Id.* at 630; *id.* at 599 ("central component").

23. *Id.* at 628 (noting that the D.C. handgun law "extends . . . to the home, where the need for defense of self, family and property is most acute").

24. For an initial effort to describe some of the legal tools needed to evaluate the constitutionality of gun regulation after *Heller*, see JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018).

25. *Heller*, 554 U.S. at 626–27.

26. *Id.* at 627.

27. *Id* at 626.

28. McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) (quoting Brief for State of Texas et al. as Amici Curiae in Support of Petitioners at 23, *McDonald*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4378909).

those questions have been central to some of the most important and contentious Second Amendment litigation throughout the country. One primary target of litigation has been "good cause" restrictions that require those seeking a permit to carry their guns in public (usually concealed) to show a sufficient reason for doing so.[29] Although most of these laws have been upheld,[30] some have not,[31] and public carrying is generally regarded as the central battlefield in Second Amendment law.

In defending these and other laws regulating gun use in public, gun violence prevention advocates have often argued for a home-bound—or at least home-centric—Second Amendment. This argument draws strength from *Heller* itself (if the right is "most acute" in the home, it must be less acute elsewhere) and from the long history of regulating guns more stringently in public places.[32] The argument also often invokes a kind of hydraulics involving the relative balance of private and public interests: The private interests of gun owners are at their apex in the home, to which the law often accords special treatment. In *Woollard v. Gallagher*, for example, the Fourth Circuit applied intermediate scrutiny to a law regulating guns in public, but specifically noted that strict scrutiny might be appropriate for restrictions on the "core right of self-defense in the home."[33]

In other constitutional contexts, too, the Supreme Court has repeatedly emphasized the ways in which private conduct in the home is entitled to strong constitutional protection.[34] As the majority put it in *Lawrence v. Texas*, "[i]n our tradition the State is not omnipresent in the home."[35] That is true, notably, in the context of self-defense law, which traditionally gave greater latitude to acts of self-defense—including especially the use of deadly force—within the home.[36] As Blackstone emphasized, "the law of England has so particular and tender a regard

29. *See* Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218 (2014).

30. *See, e.g.*, Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); Peruta v. Cty. of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Kachalsky v. Westchester, 701 F.3d 81 (2d Cir. 2012).

31. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 666–67 (D.C. Cir. 2017) (citations omitted) (striking down Washington, D.C.'s good-cause concealed carry licensing standard). *See also* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1484–85 (2018) (footnotes omitted) (noting that public carry challenges succeed at a higher rate than other categories of Second Amendment claims).

32. *See generally* Patrick J. Charles, *Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012).

33. *Woollard*, 712 F.3d at 876–78 (quotations and citations omitted). The outlier again is *Wrenn*, which held that the right to carry guns in public is "on par" with the right to do so at home. *Wrenn*, 864 F.3d at 663.

34. *See, e.g.* Stanley v. Georgia, 394 U.S. 557 (1969) (establishing constitutional protection for private possession of obscene materials); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

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

36. 3 WILLIAM BLACKSTONE, COMMENTARIES *288 ("Every man's house is looked upon by the law to be his castle."); 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND *162 ("A man's house is his castle—for where shall a man be safe if it be not in his house?"). *See generally* CAROLINE E. LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICAN'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE (2018).

to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . ."[37] That tradition changed in American law by the end of the nineteenth century, with the adoption of the "true man" doctrine under which a person had no duty to retreat from any place where he had a right to be—even in places outside the home.[38] And it continues to be revamped today with the spread of Stand Your Ground laws and other expansions of self-defense rights. But the traditional conception retains a powerful hold in law and the popular imagination.[39]

Conversely (or symmetrically, depending on how one looks at it) the government's interests in regulation are typically thought to be higher in the public square than in the home. In *Kachalsky v. County of Westchester*, for example, the Second Circuit held that "[t]he state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public" where "firearm rights have always been more limited" and there is a "tradition of states regulating firearm possession and use."[40]

The combination of these vectors points in the direction of a Second Amendment right that is robust within the home, but subject to substantial regulation outside of it. For many gun violence prevention advocates, this represents a kind of reasonable compromise. Gun owners have wide latitude to possess weapons at home. Once they bring guns into public spaces, however, the state's interest in regulation increases, and there must be greater latitude for laws to prevent mayhem and murder.

Although there are many dimensions to the gun debate and to Second Amendment litigation, it is fair to say that this is perhaps the most central and contested issue. But an uncritical focus on public regulation, and acceptance of gun possession at home, misses—and might exacerbate—the enormous problem of DV and the disproportionate harms it inflicts on women.

II. THE HOME AS A SITE OF GUN VIOLENCE

The home-centric vision of the Second Amendment, though an attractive compromise position in many ways, is complicated by two other basic facts: Gun violence and the concept of the "home" are both gendered in important ways.

As noted above,[41] men and women face very different threats when it comes to gun violence. Only about 1 in 20 male victims of gun homicide is killed by an intimate partner; for women, the figure is about 1 in 2.[42] Studies have shown that

37. 4 BLACKSTONE *223–24.

38. Katelyn E. Keegan, Note, *The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines*, 65 HASTINGS L.J. 259, 263–64 (2013).

39. JEANNIE SUK, AT HOME IN THE LAW: HOW DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 76 (2009) ("Rhetoric among supporters of the Castle Doctrine laws has consistently focused on the home as the core imaginative location of self-defense.").

40. Kachalsky v. County of Westchester, 701 F.3d 81, 94 (2d Cir. 2012). *See also* United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) (citations omitted) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.").

41. *See supra* notes 8–13 and accompanying text.

42. Ramsey, *supra* note 10, at 1278 n.109. Again, this figure only reflects those homicides in which

domestic violence is far more likely to result in homicide when a gun is present in the home. As Senator Frank Lautenberg put it, "[A]ll too often, the difference between a battered woman and a dead woman is the presence of a gun."[43] (Although my focus here is on the intersection of domestic violence and firearms, it should be noted that the problem of domestic violence goes far beyond firearms—only 3.4 percent of *non*fatal intimate partner injuries involved guns.[44])

Lautenberg's advocacy helped earn passage of the legal prohibition that now bears his name. The Lautenberg Amendment, adopted in 1996, prohibits the receipt or possession of a firearm that has traveled in interstate commerce by anyone who has been convicted of or pled guilty to a misdemeanor crime of domestic violence.[45] It thereby builds on a 1994 federal law that generally prohibits anyone subject to a domestic violence restraining order from possessing or receiving a firearm.[46] Many states also have laws that restrict or prohibit firearm access by these groups.[47]

The adoption of those laws did not immediately lead to rigorous enforcement. Especially in the first few years after the federal laws went into effect, prosecutions were quite rare,[48] and there is still some reason to think that their application is uneven.[49] But in recent years there has been increasing emphasis on enforcement at both the federal and state levels.[50] This is a welcome development, though as with any law there are also potential costs of rigorous enforcement. It brings the state into the home in unprecedented ways,[51] and "might chill the reporting of abuse; exacerbate recidivism; lead to unemployment, a known

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the perpetrator is identifiable. It seems plausible that stranger homicides are disproportionately likely to have unidentified perpetrators, meaning that the percentages of *both* men and women killed by intimate partners is much lower. The ratio between them would still be dramatically different, though.

43. Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 823 (2000) (internal citation omitted).

44. Ramsey, *supra* note 10, at 1307.

45. 18 U.S.C. § 922(g)(9) (2018).

46. *Id*. § 922 (g)(8). For this prohibition to be effective, the order must include actual notice and a hearing for the person subject to it.

47. *Gun Law Navigator—Domestic Violence*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/navigator/states.html?dataset=domestic_violence&states=undefined (last visited July 21, 2019) (providing visual representation of state restrictions and their relationship to existing federal law).

48. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 531–32 (2003) (footnotes omitted) (finding that, between, 1996 and 2001, § 922(g)(8) cases increased from three to sixty-eight, while § 922(g)(9) cases grew from one to 125).

49. May, *supra* note 2, at 2–3 ("Judges are inappropriately denying orders of protection and throwing out misdemeanor domestic violence pleas, thereby allowing batterers to continue owning, possessing, transferring, and using firearms despite the federal statutes that specifically prohibit them from doing so.").

50. Kerry Shaw, *Federal Prosecutors Are Cracking Down on Domestic Abusers Who Keep Guns*, TRACE (Mar. 25, 2019), https://www.thetrace.org/2019/03/domestic-violence-federal-prosecutions-gun-law/. *See also* Aaron Jolly, *Patchwork of Protection: American Regulation of Domestic Gun Violence*, 53 CRIM. L. BULL. 674, 706–07 (2017) (noting increasing legal enforcement at state level).

51. *See generally* SUK, *supra* note 39.

contributor to intimate femicide for abusers whose jobs require them to carry a gun; and leave victims without weapons for self-defense."[52]

For present purposes, what is notable about these laws is that they reach into the *home*. DV misdemeanants are prohibited from possessing weapons even where their interest in self-defense is, as *Heller* put it, "most acute." But for women, the home has never been a site of autonomy in the same way as it has for men.[53] What is true of domestic violence generally is true of other crimes as well—most sexual assaults (55 percent) occur in the victim's home, for example, as opposed to just 25 percent in public places, including enclosed public places like parking lots.[54] And that, in turn, complicates the notion of the home as a private place in which individual interests are at their apex and governmental interests at their lowest ebb. As Elizabeth Schneider puts it, "[c]oncepts of privacy permit, encourage, and reinforce violence against women."[55] Feminist scholars have long argued that domestic violence renders the "private" space of the home effectively "public."[56]

The implications of that transformation are explored in more depth in Jeannie Suk's *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy*.[57] Suk notes that "[t]he image of the home as the exemplary place of coercion and abuse is gaining cultural ascendance. . . . The rising legal vision of the home is that of actual or potential violence. Home is where the crime is."[58] She argues that "[l]egal practices make public and private more legally similar spaces than they have been in the past, even as the discourse of home abounds."[59] In fact, in the particular context of domestic violence protection orders, "it is as if . . . the home has become an extension of the courthouse."[60]

This effort to extend legal protections into the home, especially with regard to domestic violence and guns, is in some tension with the home-bound or home-centric approach to the Second Amendment discussed above. It is one thing to overcome criminal law's traditional aversion to regulation within the home.[61] It is

52. Ramsey, *supra* note 10, at 1260 (footnotes omitted). Ramsey goes on to emphasize that "a simplistic, politically-motivated call for women to arms themselves is not the answer either," *id.*, and that "the myth of guns as an equalizer is supported by neither history nor recent social-scientific evidence." *Id.* at 1261.

53. *Cf.* CHARLOTTE PERKINS GILLMAN, THE YELLOW WALLPAPER (1899).

54. *Scope of the Problem: Statistics*, RAINN, https://www.rainn.org/statistics/scope-problem (last visited July 21, 2019).

55. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 87 (2000).

56. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869 (1996) (footnotes omitted) ("Much of feminist academic discourse concerning domestic violence has centered on the argument that 'private' violence must be reconceptualized as 'public' in order to compel state intervention.").

57. SUK, *supra* note 39.

58. *Id.* at 5–6.

59. *Id.* at 6.

60. *Id.* at 41. Suk highlights in particular the ways in which protection orders impose a kind of *de facto* divorce. *Id.* at 43.

61. *See, e.g.*, Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. REV. 321, 338–48 (2003) (footnotes omitted); Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 852 (2000) (footnotes omitted).

quite another to overcome a *constitutional* limitation—especially one that even advocates of gun regulation seem largely to accept.

III. CHALLENGES FOR SECOND AMENDMENT THEORY AND DOCTRINE

Post-*Heller* Second Amendment theory and doctrine are starting to take shape, but foundational questions remain unanswered and in some cases unaddressed. What is the basic normative theory of the Second Amendment? How should it be interpreted? The intersection of DV and the home-centric vision of the Second Amendment can illuminate and complicate those questions.

Perhaps the two most prominent justificatory theories for the right to keep and bear arms are that it promotes personal safety (the self-defense theory) and that it prevents tyranny (the anti-tyranny theory). The implications and internal workings of each theory are still in their early stages of development.[62] But, with a few notable exceptions,[63] efforts to flesh them out have not paid due attention to the important gendered differences in gun violence.

In general, discussions of the self-defense theory tend to invoke the image of "criminals" either in public places or as invaders into the home. And that image does a poor job of capturing the primary threats that women face: intimate partner violence, especially in the home. Jennifer Carlson notes that "although gun carriers may actively promote guns for women, they assume a particular understanding of crime that reproduces masculine privilege by emphasizing fast, warlike violence perpetrated by strangers—the kinds of crime men, as opposed to women, are more likely to face."[64]

Of course, advocates of gun carrying are not blind to the relationship between firearms and domestic violence. For some, the solution is for women to arm themselves against their abusers.[65] NRA leader Wayne LaPierre has insisted both that "[t]he only thing that stops a bad guy with a gun is a good guy with a gun"[66] and that "the one thing a violent rapist deserves to face is a good woman with a gun."[67]

But that is a much more complicated proposition when the violent rapist is one's own intimate partner, family member, or friend, as is the case for most sexual assaults. Often, DV is not a single incident so much as a pattern of abuse, one that might not lend itself to a single obvious moment of self-defense. Moreover, some studies have shown that gun ownership is ineffective for women facing intimate partner violence,[68] and that, in fact, women who own guns actually face *higher*

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62. For a brief overview of the theories, see BLOCHER & MILLER, *supra* note 24, ch. 6.

63. *See supra* note 16 and sources cited therein.

64. Jennifer Carlson, *The Equalizer? Crime, Vulnerability, and Gender in Pro-Gun Discourse*, 9 FEMINIST CRIMINOLOGY 59, 61 (2014).

65. *See, e.g.*, Don B. Kates & Alice Marie Beard, Response, *Murder, Self-Defense, and the Right to Arms*, 45 CONN. L. REV. 1685, 1691–93 (2013)

66. Peter Overby, *NRA: "Only Thing That Stops a Bad Guy with a Gun Is a Good Guy with a Gun,"* NPR (Dec. 21, 2012, 3:00 PM), http://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun.

67. Daniel Blackman, *Wayne LaPierre, Gun Salesman*, HARV. POL. REV. (Mar. 21, 2013), http://harvardpolitics.com/united-states/wayne-lapierre-gun-salesman/.

68. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a*

rates of homicide than those who do not.[69] Even if a women does manage to use a gun in self-defense against an abuser, the law might not be on her side.[70] Contrast, for example, the cases of George Zimmerman and Marissa Alexander, who fired a shot into the ceiling when her estranged abusive husband threatened her in their home. Unlike Zimmerman, she was tried, convicted, and sentenced to twenty years.[71]

Holding aside the empirical question of whether gun possession makes abused women safer, the guns-in-the-home frame highlights the underlying theoretical difficulty: Gun ownership, *even in the home*, is not merely "private." This is a foundational point not only about gun regulation, as feminist scholarship about "privacy" and "the home" has illuminated in many areas of law. To take just one obvious example, if one is too quick to code sexual activity behind closed doors as fundamentally private and constitutionally shielded from state intervention, the impact might be to shield marital rape.

The same is true of the "fearful symmetry" of gun ownership—it is an act with consequences for others, even when it comes to something as seemingly private as safety within the home. As Justice Stevens put it in his *McDonald* dissent, "*[y]our* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence."[72] Nowhere is that more true than in the context of domestic violence. The very same features that make a gun in the home a powerful weapon of self-defense for an abused woman can make it a powerful weapon of oppression for her abuser.[73] As one abuse survivor put it, "In my case I got rid of the gun that I had because basically I was just arming him . . ."[74]

To be clear, there is broad agreement that the law can, consistent with the Second Amendment, deny guns to abusers. Courts have generally reached that conclusion either by carving DV perpetrators out of Second Amendment coverage entirely or by finding that government efforts to disarm them survive the requisite constitutional scrutiny.[75]

But two major doctrinal arguments advanced by gun rights supporters in recent years could change that. One is that arms-bearing is currently being treated as a "second class" right, and that courts must apply higher scrutiny to Second Amendment claims.[76] Sometimes this complaint is directed against the courts specifically, but sometimes it is a broader claim about social and political bias against the right to keep and bear arms. Men in particular are sometimes portrayed

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Multisite Case Control Study, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

69. Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENGLAND J. MED. 1583, 1587 (1999).

70. *See generally* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

71. FRANKS, *supra* note 16, at 98–99.

72. McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

73. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 710–12 (Breyer, J., dissenting) (noting that the features which make handguns attractive tools of self-defense also make them attractive for criminals).

74. Kellie R. Lynch & TK Logan, *"You Better Say Your Prayers and Get Ready": Guns Within the Context of Partner Abuse*, 33 J. INTERPERSONAL VIOLENCE 686, 694 (2018).

75. *See infra* notes 90–92 and sources cited therein.

76. Ruben & Blocher, *supra* note 31, at 1447–51.

as the victims of this persecution. In one of his speeches to the NRA, Charlton Heston claimed that men were on the losing end of the "cultural war."[77] (He also identified "feminists" as among the "enemies" of the Constitution.)[78]

The general claim about widespread persecution of gun rights is hard to credit, given the broad support for gun rights and relative skepticism of confiscatory gun control.[79] (If anything, the political process failure runs in the other direction, as overwhelmingly popular proposals like the expansion of background checks cannot even make it out of the Senate.[80]) But the gendered nature of the claim makes it especially relevant and worth noting in the present context. If courts were to accept the second class rights claim, and apply more stringent scrutiny on the basis that the right to keep and bear arms is under attack, DV restrictions could end up being among the laws whose constitutionality would be called into question—more so than, say, laws regarding felons.[81]

The other doctrinal innovation that some gun rights proponents have supported is what is sometimes called the test of "text, history, and tradition"—an approach that would evaluate the constitutionality of gun regulations on that basis, rather than considerations of government interest and tailoring.[82] This would, its proponents recognize, mean reasoning from analogy when the history and tradition do not clearly speak to a question.[83]

In the context of domestic violence prohibitions, the historical record is problematic to say the least. As Carolyn Ramsey notes, "[h]istorical support for the exclusion of domestic violence offenders from Second Amendment protection

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77. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 233 (2008) (quoting Heston's speech).

78. FRANKS, *supra* note 16, at 66.

79. *See* Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549, 568–69 (2004) ("[T]he movement for gun rights does not pit an oppressed group against an oppressive majority . . . . [S]upporters of gun rights are not, by any reasonable measure, oppressed."); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *As* Griswold, 122 HARV. L. REV. 246, 260 (2008) ("[O]pponents of [gun] control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process."); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness ("A majority of Americans support gun rights.").

80. Aaron Blake, *Manchin-Toomey Gun Amendment Fails*, WASH. POST (Apr. 17, 2013, 4:44 PM), https://www.washingtonpost.com/news/post-politics/wp/2013/04/17/manchin-toomey-gun-amendment-fails/.

81. *Cf.* United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) ("While the categorical regulation of gun possession by domestic violence misdemeanants thus appears consistent with *Heller*'s reference to certain presumptively lawful regulatory measures, we agree with the Seventh Circuit's conclusion in [*United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)] that some sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right.").

82. *See* Tyler v. Hillsdale County Sheriff's Department, 837 F.3d 678, 702–07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g by* 682 F.3d 361 (5th Cir. 2012); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1274 n.6, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

83. *Heller II*, 670 F.3d at 1275. For an argument against wholesale adoption of this test, see Nelson Lund, The Proper Role of History and Tradition in Second Amendment Jurisprudence, FLA. J.L. & PUB. POL'Y (forthcoming 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3454594.

appears rather thin."[84] Indeed, for much of US history, domestic violence itself was beyond the reach of the law.[85] The "right of chastisement"—of husbands to inflict corporal punishment on their wives—was recognized in US common law until the mid-1800s.[86] And, as Reva Siegel notes, "for a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery."[87]

> At the same time, the legal rights of women to defend themselves against domestic violence have also been heavily circumscribed. When the Second Amendment was ratified, a woman who killed her husband could face charges not only of murder but of petty treason.[88] And at least until the 1990s, many courts applied a cohabitant exception to the castle doctrine; some have argued that this was done specifically to limit the legal rights of women who kill their husbands.[89]

To be clear, the argument here is not against the constitutionality of DV prohibitors or the right of battered women to defend themselves with arms. In practice, courts are likely to consider the question at a somewhat broader level of generality, and conclude that DV misdemeanants are relevantly similar to felons, and can be denied weapons for the same reasons.[90] The point is that the test of text, history, and tradition makes that conclusion—which is plainly correct under any plausible reading of the Amendment—an exercise in strained analogies.

CONCLUSION

My goal in this brief Article has been to suggest that gendered violence—and specifically domestic violence by armed abusers—complicates the home-bound or home-centric Second Amendment. Exploring those complications is not meant to cast any doubt on the constitutionality of current laws restricting gun possession by domestic abusers. Courts have been near-unanimous in upholding laws banning possession of firearms by those convicted of domestic violence

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84. Ramsey, *supra* note 10, at 1301.

85. SUK, *supra* note 39, at 13.

86. FRANKS, *supra* note 16, at 77; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121–41 (1996).

87. Siegel, *supra* note 86, at 2118. SUK, *supra* note 39, at 13 ("Although wife beating was formally illegal in all U.S. states by 1920, it was not until the 1970s that efforts by the women's movement to recast DV as a public concern began to succeed.").

88. As Blackstone explained:

> [I]f the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason . . . the sentence of women was to be drawn and burnt alive.

1 WILLIAM BLACKSTONE, COMMENTARIES *445 n.103.

89. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 82 (1989).

90. *See, e.g.*, United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) (analogizing § 922(g)(8) to "longstanding" gun regulations approved in *Heller*, and finding it consistent with "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible").

misdemeanors[91] or subject to domestic violence restraining orders.[92] If one looks hard enough, there are some arguable outliers,[93] but the law is basically settled—for now.

And yet one could be forgiven for a sense of unease. After all, the constitutionality of nearly *all* gun regulation was well-settled until *Heller* was decided. There are ominous rumblings, including from within the Court itself.

In *Voisine v. United States*,[94] the Supreme Court was confronted with the question of whether the federal DV prohibitor applies to a person convicted under a misdemeanor assault statute that encompassed "reckless" conduct.[95] The case was widely reported not because of that legal question, but because it marked the first time in a decade that Justice Thomas asked a question in oral argument.[96] As the attorney for the government was concluding her argument, the Justice spoke up. "One question," he said. "[T]his is a misdemeanor violation. It suspends a constitutional right. Can you give me another area where a misdemeanor violation suspends a constitutional right?"[97] He followed up with several questions regarding the Second Amendment,[98] which had not been briefed or argued.

Those questions proved to be accurate evidence of his views. In a dissenting opinion, Justice Thomas argued that the majority's construction of the statute rendered it unconstitutional. No other Justice joined that part of his opinion, and the Court has repeatedly upheld the domestic violence prohibitor without expressing any concerns regarding its constitutionality.[99]

But Justice Thomas's opinion is still worth noting, as a potential harbinger of things to come. In *Printz v. United States*[100]—in which the majority opinion held

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91. *See, e.g.*, Stimmel v. Sessions, 879 F.3d 198, 201 (6th Cir. 2018) (upholding federal ban on possession by those who have committed misdemeanor crimes of domestic violence); United States v. Chovan, 735 F.3d 1127, 1139–41 (9th Cir. 2013) (same); United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (same); United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010) (en banc) (same).

92. *See, e.g.*, United States v. Chapman, 666 F.3d 220, 230 (4th Cir. 2012); United States v. Mahin, 668 F.3d 119, 123–24 (4th Cir. 2012); *Bena*, 664 F.3d at 1184; United States v. Reese, 627 F.3d 792, 794, 260 (10th Cir. 2010). The only pre-*Heller* federal case to clearly adopt the individual rights reading reached the same result. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

93. Cee v. Stone, 3rd Dist. Union No. 14-17-06, 2017-Ohio-8687 (Nov. 27, 2017) (affirming a constitutional challenge to a domestic violence restraining order that prohibited the respondent from possessing firearms).

94. Voisine v. United States, 136 S. Ct. 2272 (2016).

95. *Id*. at 2282.

96. Laura Wagner, *Clarence Thomas Asks 1st Question from Supreme Court Bench in 10 Years*, NPR (Feb. 29, 2016), https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years.

97. Transcript of Oral Argument at 35–36, *Voisine*, 136 S. Ct. 2272 (No. 14-10154).

98. *Id*. at 35–42 ("[Y]ou're saying that recklessness is sufficient to trigger a . . . misdemeanor violation of domestic conduct that results in a lifetime ban on possession of a gun, which, at least as of now, is still a constitutional right . . . . Can you think of another constitutional right that can be suspended based upon a misdemeanor violation of a State law?").

99. *See, e.g.*, *Voisine*, 136 S. Ct. at 2276; United States v. Castleman, 572 U.S. 157, 162–63 (2014) (holding that the predicate offense that triggers application of § 922(g)(9), "misdemeanor crime of domestic violence," requires only "offensive touching" and not "force").

100. Printz v. United States, 521 U.S. 898 (1997).

that the anti-commandeering doctrine permits local law enforcement officers to refuse to perform the background checks required by the Brady Act—he wrote a separate concurring opinion, again joined by no other Justice. Although *Printz*, like *Voisine*, technically involved no Second Amendment question, he pointed to the "impressive array of historical evidence" and the "growing body of scholarly commentary [that] indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[101] Thomas concluded his opinion by speculating that the future may present an opportunity for the Court "to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'"[102]

Eleven years later, the Court held as much in *Heller*.[103] An uncritical adoption of the home-centric view of the Amendment could raise similar challenges for DV laws in the future.

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101. *Id.* at 938 n.2 (Thomas, J., concurring).

102. *Id.* at 939.

103. District of Columbia v. Heller, 554 U.S. at 606 (noting, in the course of recognizing an individual right to keep and bear arms, St. George Tucker's suggestion that the Second Amendment was "true palladium of liberty").