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## Second Amendment Background Principles and Heller's Sensitive Places

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## SECOND AMENDMENT BACKGROUND PRINCIPLES AND *HELLER'S SENSITIVE PLACES*

Adam B. Sopko\*

### ABSTRACT

Judges and commentators have widely acknowledged that history enjoys a privileged status in Second Amendment cases, but its precise role is undertheorized and rarely controls case outcomes. In particular, courts have been unable to decide “sensitive places” cases—challenges to location-based gun laws—in a manner that adheres to Supreme Court precedent because existing Second Amendment doctrine lacks a test for sensitive places cases that uses history and tradition in a principled way. This Article proposes a solution to address that problem.

An untapped source of guidance is the Court’s takings jurisprudence. Interpreting their respective constitutional provisions, Justice Scalia observed that both property rights and the right to keep and bear arms are fundamental rights that prefigure ratification. Specifically, Scalia observed, both the Second Amendment and the Takings Clause rely upon bright-line rules subject to a location-based exception, require the use of history and tradition in their respective analyses, and deal with property interests. In several important cases—including *Heller* and *McDonald*—the Court has indicated that the right to keep and bear arms is animated by property-like principles. This suggests the Court’s well-established takings jurisprudence is a more germane source to inform its less-developed sensitive places doctrine than the sources scholars and judges currently look to, such as free speech doctrine.

This Article explores what the Court’s takings jurisprudence can teach us about the constitutionality of location-based gun laws. I propose a framework for courts to analyze sensitive places cases by borrowing from doctrine that is more familiar to courts, but similarly governs a pre-constitutional, individual right. My examination of the Court’s takings doctrine indicates that the role of history and tradition in analyzing a fundamental right, like the right to keep and bear arms, is more elastic than many assume—but that history and tradition should play a larger role than it currently does.

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#### INTRODUCTION

In the final week of its term, the Supreme Court released an opinion that re-interpreted the Constitution and, with it, disturbed over a century of tradition and precedent.<sup>1</sup> Writing for a Court split along ideological lines, Justice Scalia announced a new conception of an individual, natural right.<sup>2</sup> Scalia framed the right in categorical terms; however, he cautioned that the rule-like conception was not absolute, but could be subject to a few exceptions.<sup>3</sup> He observed that the proper analysis, to determine whether the right—under the Court’s novel interpretation—was violated or a challenged law fell into an exception, was to look to the right’s historical understanding.<sup>4</sup> In some ways, the Court’s property rights decision in *Lucas v. South Carolina Coastal Council*<sup>5</sup> presaged its ruling in the landmark Second Amendment case, *District of Columbia v. Heller*,<sup>6</sup> fifteen years later.

In *Heller*, the Court announced for the first time that the Second Amendment guarantees an individual right to keep and bear arms.<sup>7</sup> *Heller*’s holding was not entirely consistent with the preceding centuries of precedent.<sup>8</sup> Indeed, in many ways, *Heller*

<sup>1</sup> See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>2</sup> See *id.* at 1019.

<sup>3</sup> *Id.* at 1027–32.

<sup>4</sup> See *id.* at 1029.

<sup>5</sup> *Id.* at 1003.

<sup>6</sup> (*Heller I*) 554 U.S. 570 (2008).

<sup>7</sup> *Id.* at 595.

<sup>8</sup> See Jason Racine, *What the Hell(er)? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 605–06 (2009) (“Up until 2001, all of the federal circuit courts that

announced a new constitutional right. The novel interpretation conceived of a right governed by bright-line rules. However, as in *Lucas*, Justice Scalia made clear that this newfound right was “not unlimited,” but was subject to several exceptions.<sup>9</sup> One of those exceptions—the subject of this Article—was a location-based carve-out: “sensitive places.”<sup>10</sup> This exception to Scalia’s bright-line rule holds that certain places exist where the Second Amendment right does not extend, due to their sensitivity.<sup>11</sup> Scalia provided two examples of sensitive places—“schools and government buildings”—but no reasoning as to what makes a place sensitive or why schools and government buildings in particular are sensitive.<sup>12</sup> Rather, the Court simply observed that the proper Second Amendment analysis generally is one that looks to history and tradition.<sup>13</sup>

Unsurprisingly, many lower courts have struggled to apply the Court’s holding.<sup>14</sup> In sensitive places cases in particular, some courts have attempted to engage with

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had ruled on the meaning interpreted the Second Amendment as protecting either a collective right that did not apply to individuals or a sophisticated collective right that only applied individually to people linked to state militias.”); *see also* Richard Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [<https://perma.cc/4P3D-6LRB>] (“For more than two centuries the ‘right’ to private possession of guns . . . had lain dormant.”).

<sup>9</sup> *Heller I*, 554 U.S. at 626. Specifically, the Court observed that:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [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.

*Id.* at 626–27.

<sup>10</sup> *See id.*

<sup>11</sup> The reading of *Heller*’s exceptions that I adopt—interpreting the Second Amendment to not extend to certain people, places, and acts—enjoys support in the literature. *See, e.g.*, Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 710 (2012). That is, those people, places, and acts are outside the Second Amendment’s *scope*. However, there is another reading of *Heller*’s exceptions: that laws governing the exceptions will likely pass muster under any level of scrutiny, but the Second Amendment right nevertheless still reaches those people, places, and acts. That reading views those people, places, and acts as being beyond the Second Amendment’s *protection*. *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 223–26 (2017). The debate is not settled and is beyond the scope of this project.

<sup>12</sup> *See Heller*, 554 U.S. at 626.

<sup>13</sup> *See id.* at 626–27.

<sup>14</sup> *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

history or tradition, however, even in those instances, the analysis is typically unprincipled and lacks a clear framework.<sup>15</sup> Worse still, most lower courts avoid history and tradition altogether and instead rely on doctrinal tools that are more familiar and well-practiced than “doing history.”<sup>16</sup> Accordingly, the “prevailing approach,” a two-part decision structure, has not allowed courts to develop doctrine to govern the sensitive places exception.<sup>17</sup> The two-part framework asks first whether the Second Amendment right is implicated by the challenged law.<sup>18</sup> If the Second Amendment is implicated, then, at Step Two, the court asks whether the particular Second Amendment conduct is protected in the particular instance.<sup>19</sup> Beyond straightforward cases that allow a court to strictly adhere to *Heller*’s “schools and government buildings,” most courts assume without deciding the initial scope question and jump straight to Step Two.<sup>20</sup> Absent clear guidance or some rules of decision, it is not surprising that federal judges look to a more familiar method—i.e., tiers of scrutiny—to resolve Second Amendment cases.<sup>21</sup> This Article seeks to merge these two concepts. I endeavor to provide a potential solution for sensitive places cases that adheres to *Heller*’s doctrinal prescription in a form that is familiar to federal judges by borrowing from a well-established area of constitutional law.

The Second Amendment’s sensitive places exception shares doctrinal principles with another exception to a constitutional right: the Takings Clause’s nuisance exception. Like the property right, the right to keep and bear arms is a fundamental, individual right that, according to the Court, prefigures ratification.<sup>22</sup> Both sensitive places and nuisance are exceptions to the rule that the substantive right cannot be eliminated.<sup>23</sup> Both exceptions are location-based. An individual cannot bear arms in

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<sup>15</sup> See, e.g., *Masciandaro*, 638 F.3d at 471–73.

<sup>16</sup> See Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 163 (2017) (“[O]riginalism has not been the primary means of deciding cases.”).

<sup>17</sup> *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (referring to the two-part test as “the prevailing approach”); see also JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 120 (2018).

<sup>18</sup> BLOCHER & MILLER, *supra* note 17, at 110.

<sup>19</sup> See Kopel & Greenlee, *supra* note 11, at 212–13.

<sup>20</sup> See, e.g., *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1123 (10th Cir. 2015) (collapsing the two-part test into one); *United States v. Dorosan*, 350 F. App’x 874 (5th Cir. 2009) (holding a post office parking lot is a “government building” for the purposes of *Heller* and thus a sensitive place).

<sup>21</sup> See *Armed in America*, LIVE AM. TOWN HALL at 29:00 (Aug. 27, 2019), <https://constitutioncenter.org/interactive-constitution/podcast/armed-in-america> [<https://perma.cc/XM3Y-9AG6>] (describing the role of borrowing in fashioning decision rules).

<sup>22</sup> See *Heller I*, 554 U.S. 570, 592 (2008).

<sup>23</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding that the Takings Clause protects property rights against “total takings” which deprive the landowner of *all* economic value, unless the nuisance exception is triggered).

a given place because it is sensitive; similarly, one cannot use their property in a particular way in a certain place because it constitutes a nuisance.<sup>24</sup>

As Justice Scalia held in *Lucas v. South Carolina Coastal Council*, the nuisance exception requires a threshold inquiry into the history and tradition of nuisance law in a given state.<sup>25</sup> Since the Court decided *Lucas*, judges have developed a rich body of takings doctrine with which they are familiar.<sup>26</sup> Moreover, the analysis they would engage in focuses on history and tradition, rather than freestanding balancing.<sup>27</sup>

The Second Amendment is the subject of a growing academic literature, however the “sensitive places” exception has received relatively little scholarly attention. To be sure, I am not the first to recognize the overlap between property principles and the right to keep and bear arms,<sup>28</sup> or the Takings Clause and the Second Amendment.<sup>29</sup> However, this Article is the first attempt to prescribe a definitive, administrable test that comports with *Heller*’s doctrinal rules and draws on existing location-based constitutional principles.

Most sensitive places scholarship looks to the First Amendment for doctrinal guidance or as an analogical source.<sup>30</sup> Some entries in the conversation argue a place’s sensitivity turns on its level of security and nature of ownership—i.e., public or private.<sup>31</sup> Still others argue that sensitive places doctrine should effectively be distilled into heightened scrutiny in most all cases.<sup>32</sup> However, no one has examined the Second

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<sup>24</sup> See *Heller I*, 554 U.S. at 626; *Lucas*, 505 U.S. at 1027–29.

<sup>25</sup> 505 U.S. at 1027.

<sup>26</sup> See generally Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847 (2017) (discussing the effect *Lucas* has had on regulatory takings doctrine in the lower courts).

<sup>27</sup> See *Lucas*, 505 U.S. at 1029–31; *Heller*, 554 U.S. at 634–35.

<sup>28</sup> See Joseph Blocher, *Bans*, 129 YALE L.J. 308 (2019); John Schwab & Thomas G. Sprankling, *Houston, We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158, 158–59 (2012); John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 7–11 (2016).

<sup>29</sup> See Blocher, *supra* note 28, at 331–41.

<sup>30</sup> See Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537 (2014) (prescribing a sensitive places analysis that looks at the strength of an individual’s First Amendment rights in the particular place at issue to calibrate the level of protection on their right to bear arms there); Amy Hetzner, Comment, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 374–81 (2011) (analogizing sensitive places to the First Amendment’s “time, place, and manner” restrictions); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 182 (2018) (borrowing from the First Amendment’s expressive conduct doctrine to determine whether a place is sensitive under the Second Amendment).

<sup>31</sup> See Brian C. Whitman, Comment, *In Defense of Self-Defense: Heller’s Second Amendment in Sensitive Places*, 81 MISS. L.J. 1987, 1988–91 (2012).

<sup>32</sup> See David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 287 (2019).

Amendment's sensitive places exception as a location-based exception to a fundamental constitutional right, through the Court's property rights doctrine. In that sense this Article is a novel contribution to Second Amendment scholarship and the sensitive places conversation in particular.

This Article proceeds in five parts. It begins in Part I by discussing the ways courts have analyzed sensitive places challenges and concludes that extant methods are not conducive to developing a coherent sensitive places doctrine. Part II summarizes the nuisance exception to regulatory takings doctrine. Part III discusses how courts frequently rely on a more developed constitutional jurisprudence to inform undeveloped areas. Part IV briefly sketches what a new sensitive places test informed by the nuisance exception might look like, and attempts to apply the test to a hypothetical case. Finally, Part V addresses some likely criticisms of the proposed test.

### I. SENSITIVE PLACES "DOCTRINE"

This Part will briefly discuss how courts have decided sensitive places challenges. It will show that, though outliers exist (e.g., *GeorgiaCarry.Org*<sup>33</sup> and *Class*<sup>34</sup>), courts in sensitive places cases generally follow a two-step decision framework employed in other Second Amendment cases. This Part concludes that use of the two-part framework has undermined the development of coherent sensitive places doctrine and in some instances may run afoul of *Heller*'s emphasis on history and tradition.

The two-part framework currently employed by state and federal courts is the approach most courts have adopted since *Heller* was decided.<sup>35</sup> The structure—typically referred to as the “two-part test” or “two-step test”—is based primarily on First Amendment jurisprudence; it is the product of borrowing.<sup>36</sup>

At Step One of the framework the court engages in a *coverage* analysis: it seeks to determine whether the regulated activity implicates the Second Amendment right.<sup>37</sup> If the court answers the question in the negative—the Second Amendment is not implicated—then the analysis ends.<sup>38</sup> However, if the activity at issue does implicate the Second Amendment, then the court proceeds to Step Two. At Step Two, the court engages in a *protection* analysis to determine whether the conduct regulated by the law at issue is protected by the Second Amendment.<sup>39</sup> Protection analysis typically involves

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<sup>33</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

<sup>34</sup> *Class v. United States*, 138 S. Ct. 798 (2018).

<sup>35</sup> See Eric M. 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, 1451 (2018).

<sup>36</sup> See generally *infra* Section III.A (discussing borrowing).

<sup>37</sup> BLOCHER & MILLER, *supra* note 17, at 110.

<sup>38</sup> *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir 2010); see also BLOCHER & MILLER, *supra* note 17, at 110.

<sup>39</sup> See *Marzarella*, 614 F.3d at 89; see also BLOCHER & MILLER, *supra* note 17, at 110.

the court applying some form of heightened scrutiny to the government's justification for the law at issue. Depending on the level of scrutiny applied, the relative strength of the government's reasoning for the law, and how tailored the law is to meet those interests, the court will strike down or uphold the law.<sup>40</sup>

The way courts have implemented this framework is not uniform.<sup>41</sup> On one end of the spectrum are courts that more closely adhere to a more comprehensive analysis at both Step One and Step Two. These courts will typically engage in some form of historical inquiry at Step One to determine whether the conduct at issue was traditionally considered part of the Second Amendment right. However, even with these courts, the efforts lack a clear principle or coherent method of historical analysis. This has led to inconsistent results that have frustrated litigants across the ideological spectrum.

On the other side are courts that effectively skip Step One altogether by assuming without deciding that the conduct at issue is covered by the Second Amendment. The courts' reasoning here is even less rigorous and strays even further from a more history- and tradition-focused approach. By avoiding the initial scope question, these courts engage in little, if any, historical analysis. Instead, the bulk of the work is done by a means-end scrutiny inquiry.<sup>42</sup> In any event, none of the ways courts currently implement the two-part test are conducive to consistent results or the development of a real sensitive places doctrine. Some examples will help support this notion.

Consider the Fourth Circuit's reasoning in *Masciandaro*—it represents the majority approach to courts' sensitive places analyses.<sup>43</sup> Sean Masciandaro was arrested after a Park Police officer found him asleep in the parking lot at a national park outside Washington, D.C.<sup>44</sup> Masciandaro was violating federal law, as he had a 9mm pistol in

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<sup>40</sup> See *Marzzarella*, 614 F.3d at 95–97; see also BLOCHER & MILLER, *supra* note 17, at 110.

<sup>41</sup> The foregoing discussion is not exhaustive. For a more comprehensive treatment of the two-part framework and the ways federal courts deploy it, see Kopel & Greenlee, *supra* note 11, at 212–26.

<sup>42</sup> Fourth Circuit case law is particularly demonstrative of this particular analytical approach. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *United States v. Chapman*, 666 F.3d 220, 225–26 (4th Cir. 2012); *United States v. Staten*, 666 F.3d 154, 159–68 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010). This analytical approach is not unique to sensitive places cases—it is present in nearly all facets of Second Amendment litigation. Stymieing the development of doctrine is one challenge this approach presents; however, another is its impact on the court's work at Step Two. In particular, skipping Step One leaves little to no grist for the court to calibrate its scrutiny analysis at Step Two. For an example of why this can be problematic see *Ass'n of N.J. Rifle & Pistol Clubs v. Attorney Gen. N.J.*, 910 F.3d 106, 116–17, 128–29 (3d Cir. 2018) (en banc) (Bibas, J., dissenting). *But see* Blocher, *supra* note 28, at 359–60 (arguing that the issues that occur when the Two Part test is collapsed into one are not a feature of the test but a bug in *Heller*'s reliance on bright line rules). The test proposed in this Article aims to provide a solution for this very problem.

<sup>43</sup> *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

<sup>44</sup> *Id.* at 460.

his car, inside the park.<sup>45</sup> One question before the court was whether a national park is a sensitive place.<sup>46</sup> To frame his analysis for the court, Judge Wilkinson relied upon the then-nascent two-step framework.<sup>47</sup> However, the court skipped Step One and couched its analysis in the Step Two inquiry. Rather than “resolv[ing] the ambiguity in [*Heller*’s] sensitive places language,” and determining whether George Washington Parkway is a sensitive place, the court went straight to scrutiny analysis and found the regulation passed “constitutional muster under the intermediate scrutiny standard.”<sup>48</sup> Most courts decide Second Amendment challenges in general and sensitive places cases in particular like the *Masciandaro* court.<sup>49</sup>

In *United States v. Bonidy*, the Tenth Circuit followed a similar approach.<sup>50</sup> In *Bonidy*, the question was whether a post office parking lot was a “government building” under *Heller*’s sensitive places exception.<sup>51</sup> The court analyzed the question two ways and answered the question in the affirmative under both. First, it looked at the parking lot’s features as they related to the purpose and function of the post office in general.<sup>52</sup> It found that because the “postal transactions” occurring within the building were also occurring in the parking lot via a drop-box, the parking lot and building “should be considered as a single unit . . . Thus, the [sensitive places exception] in *Heller* applies with the same force to the parking lot as to the building itself.”<sup>53</sup> The court reached this conclusion primarily by applying Tenth Circuit precedent.<sup>54</sup>

However, because the parking lot “present[ed] a closer question,” the court offered an alternative basis for its holding.<sup>55</sup> For its alternative analysis, the court attempted to apply the two-part framework, but, like the *Masciandaro* court, it too collapsed the steps into one. Rather than engaging in a more robust inquiry, and engaging with

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 471–73 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). The two-part framework or “two-step test” is generally attributed to *Marzzarella*. However, an empirical analysis of all Second Amendment litigation from *Heller* through February 1, 2016 found a few decisions that applied it before *Marzzarella*. See Ruben & Blocher, *supra* note 35, at 1490.

<sup>48</sup> *Masciandaro*, 638 F.3d at 473.

<sup>49</sup> See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (observing that the two-part test had been largely adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits), *cert. denied*, 136 S. Ct. 2486 (2016); *Taylor v. City of Baton Rouge*, 39 F. Supp. 3d 807 (M.D. La. 2014); see also Ruben & Blocher, *supra* note 35, at 1490–91 (finding empirical evidence that state and federal courts applied tiered scrutiny in approximately half of all Second Amendment challenges in 2008 to 2016, but discussing the challenges of actually identifying when a court is applying the framework because some apply the test implicitly).

<sup>50</sup> *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

<sup>51</sup> *Id.* at 1125.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *id.* (citing *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013)).

<sup>55</sup> *Id.*

history and tradition at Step One, the court concluded that it was “not necessary . . . to make a definitive ruling on” whether the parking lot was sensitive because, “even if . . . the parking lot is not itself considered part of a ‘government building’” the challenged law is upheld under “intermediate scrutiny.”<sup>56</sup>

State courts follow a similar analysis in sensitive places cases. Consider *People v. Cunningham*.<sup>57</sup> In *Cunningham*, a question was whether state housing could restrict firearm possession on its premises under the sensitive places exception, or whether that was in tension with *Heller*’s holding.<sup>58</sup> The Illinois Court of Appeals upheld the regulation,<sup>59</sup> and the Illinois Supreme Court denied review.<sup>60</sup> In its analysis, the intermediate court jumped straight to Step Two.<sup>61</sup> It avoided the threshold question of whether the Second Amendment was implicated, and analyzed the regulation under “heightened intermediate scrutiny.”<sup>62</sup> The *Cunningham* Court noted that though the law at issue imposed “some burden” on Second Amendment rights, because it was not a complete ban on the right, a “more rigorous showing” was not needed.<sup>63</sup>

Some courts, however, have analyzed sensitive places questions in a manner that arguably adheres more closely to a text, history, and tradition approach. One such case, *Ezell v. City of Chicago*, dealt with a zoning ordinance that effectively barred shooting ranges from most of Chicago.<sup>64</sup> The city argued the policy fell into *Heller*’s sensitive places exception.<sup>65</sup>

The Seventh Circuit stated that, though it was unsure how to “understand” *Heller*’s sensitive places exception, the case did not require such comprehension.<sup>66</sup> Instead the court identified the two-part framework as the proper inquiry, where Step One is a “textual and historical inquiry,” that requires the government to establish that its regulation falls outside the scope of the right as it was originally understood.<sup>67</sup> Step Two is implicated only “if the historical evidence is inconclusive or suggests

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<sup>56</sup> *Id.* at 1125–29.

<sup>57</sup> 126 N.E.3d 600 (Ill. App. Ct. 2019).

<sup>58</sup> *Id.* at 606–07; *see also Heller I*, 554 U.S. 570, 628 (2008) (observing that the Second Amendment’s core right of self-defense is “most acute” in the home).

<sup>59</sup> *Cunningham*, 126 N.E.3d at 615.

<sup>60</sup> *People v. Cunningham*, 132 N.E.3d 307 (Ill. 2019).

<sup>61</sup> *Cunningham*, 126 N.E.3d at 609.

<sup>62</sup> *Id.* at 615. The court found support for its analysis in a federal district court case, *Doe v. Wilmington Housing Authority*, which it found was sufficiently analogous. 880 F. Supp. 2d 513 (D. Del. 2012), *rev’d in part*, 568 F. App’x 128 (3d Cir. 2014).

<sup>63</sup> *Cunningham*, 126 N.E.3d at 615 (quoting *People v. Chairez*, 104 N.E.3d 1158, 1172 (Ill. 2018)); *cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007–10 (1992) (finding a violation of the Takings Clause because the challenged regulation eliminated *all* economic value of the owner’s property).

<sup>64</sup> (*Ezell II*), 846 F.3d 888 (7th Cir. 2017).

<sup>65</sup> *Id.* at 895.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 892; *see also Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 701–03 (7th Cir. 2011).

that the regulated activity is *not* categorically unprotected,” in which case the analysis turns to the government’s justification for its regulation.<sup>68</sup>

The court found the government was unable to point to sufficient historical evidence that demonstrated that target practice was an unprotected act; the ordinance thus failed at Step One.<sup>69</sup> At Step Two, the court subjected the ordinance to a form of heightened scrutiny.<sup>70</sup> The court found the city’s rationale wanting; the public health reasoning was, according to the court, unsupported by the evidence provided, thus the regulation was held unconstitutional.<sup>71</sup>

*Ezell* was a court’s attempt to import *Heller*’s formalist features into the two-part framework. However, even the historical inquiry at Step One lacked rigor and nuance. Thus, even a leading example of engaging with history and tradition in a sensitive places analysis is relatively shallow.<sup>72</sup>

Further, some outlier cases barely follow the two-part framework. The reason for the disuniformity is generally because the place at issue is more clearly a “school” or “government building”: the only two locations specifically referenced in *Heller* as sensitive. This line of analysis is problematic for two primary reasons. First, it ignores *Heller*’s text, resulting in an erroneously underinclusive conception of sensitive places. Justice Scalia made clear in *Heller* that sensitive places go beyond only “schools and government buildings” when he qualified that phrase with “such as.”<sup>73</sup> To the extent courts are developing doctrine by reading *Heller* narrowly, coupled with a lukewarm engagement with history and tradition, that doctrine is likely in tension with *Heller*.

Consider *United States v. Dorosan*, the first sensitive places case after *Heller* was decided.<sup>74</sup> Clarence Dorosan, a postal worker, carried a pistol in his mailbag and car onto post office property—illegal under federal law.<sup>75</sup> The question for the Fifth

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<sup>68</sup> *Ezell I*, 651 F.3d at 703; *see also Ezell II*, 846 F.3d at 892.

<sup>69</sup> *Ezell II*, 846 F.3d at 895–96.

<sup>70</sup> *Id.* at 893.

<sup>71</sup> *Id.* at 896.

<sup>72</sup> Many scholars and commentators have observed that *Heller* provided little in the way of guidance for subsequent Second Amendment cases, besides looking to history and tradition. Unsurprisingly, the efforts by judges have been, to say the least, inconsistent. *See* Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 *FORDHAM L. REV.* 969, 971–76 (2015) (discussing the many issues that attend applying the original public meaning method of constitutional interpretation with any rigor); *see also* ERIC J. SEGALL, *ORIGINALISM AS FAITH* 143–47 (2018) (discussing some of the gaps in *Heller*’s reasoning that create difficulties for lower courts); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case For Gun Control*, 92 *WASH. U. L. REV.* 1187, 1197 (2015) (finding *Heller*’s prescribed method of originalist interpretation presents lower courts with “serious difficulties” to implement in subsequent Second Amendment cases).

<sup>73</sup> *Heller I*, 554 U.S. 570, 626 (2008).

<sup>74</sup> *See generally* *United States v. Dorosan*, 350 F. App’x 874, 875 (5th Cir. 2009) (per curiam).

<sup>75</sup> *United States v. Dorosan*, No. 08-042, 2009 WL 273300, at \*1 (E.D. La. Jan. 28, 2009), *aff’d*, *Dorosan*, 350 F. App’x 874.

Circuit was whether the post office was a “government building” for Second Amendment purposes, and thus outside the Amendment’s scope.<sup>76</sup>

The court answered the question in the affirmative. Because the parking lot was used for “regular government business,” the post office *and* the parking lot “fall[] under the ‘sensitive places’ exception recognized by *Heller*.”<sup>77</sup> The office and parking lot fell so neatly into *Heller*’s exception as a “government building” that the court did not need to analyze them under Step Two. Indeed, the court held the statute was constitutional under “any applicable level of scrutiny.”<sup>78</sup>

The Virginia Supreme Court relied on similarly categorical reasoning in *DiGiacinto v. Rector and Visitors of George Mason University*.<sup>79</sup> In *DiGiacinto*, a visitor to George Mason University challenged a regulation that prohibited anyone other than a police officer from possessing or carrying a weapon on university property.<sup>80</sup> The state supreme court upheld the regulation as falling into the sensitive places exception, as the university is both a school and a government building.<sup>81</sup> Though the court made clear that its holding was based on the fact that George Mason is both a school and a government building, it considered the fact that schools carry a “reasonable expectation” that students will be free from “foreseeable harm.”<sup>82</sup>

Following a strict-reading approach like the preceding examples has a negative corollary. It undermines the ability to develop sensitive places doctrine, which makes it harder for judges to decide subsequent cases. Because this strict constructionist-type test lacks a clear principle, it does not contribute to consistency in how federal courts determine whether a place is sensitive under the Second Amendment. The doctrines that govern sister rights were developed over decades as judges, scholars, and practitioners worked through the principles and values that undergird their substance—not by cutting corners.<sup>83</sup> By resorting purely to scrutiny analysis, courts significantly shorten the leash on their ability to develop doctrine for the Second Amendment.<sup>84</sup> This is troubling because, to the extent that the Second Amendment has an existing theoretical foundation, it is “surprisingly thin” to begin with.<sup>85</sup>

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<sup>76</sup> *Dorosan*, 350 F. App’x at 875–76 (citing *Heller I*, 554 U.S. at 626–27).

<sup>77</sup> *Id.* (citing 39 C.F.R. § 232.1(1)).

<sup>78</sup> *Id.* at 876.

<sup>79</sup> 704 S.E.2d 365 (Va. 2011).

<sup>80</sup> *Id.* at 367.

<sup>81</sup> *Id.* at 370.

<sup>82</sup> *Id.* In reaching its holding, the court suggested that places where “people congregate and are most vulnerable” is a characteristic material to a sensitive place analysis. *Id.*; *see also* *S.B. v. Seymour Cmty. Schs.* 97 N.E.3d 288 (Ind. App. Ct. 2018) (finding no Second Amendment violation when school system prohibited plaintiff from bringing an AK-47 to school because it would violate the expectation of peace and safety that inhere within school grounds).

<sup>83</sup> Jacob D. Charles, *Constructing a Constitutional Right*, 99 N.C. L. REV (forthcoming 2021) (manuscript at 37).

<sup>84</sup> *See id.* (manuscript at 38).

<sup>85</sup> BLOCHER & MILLER, *supra* note 17, at 150.

Finally, some courts have attempted to build upon the existing two-part framework by expanding sensitive places doctrine beyond scrutiny analysis. For example, in *GeorgiaCarry.Org, Inc. v. Georgia*, a gun rights organization brought a pre-enforcement challenge against a state regulation that criminalized carrying firearms in particular locations.<sup>86</sup> Specifically, they argued the state could not restrict weapons in places of worship.<sup>87</sup> The court's analysis began with the "historical background of the Second Amendment," which looked first at the relationship between private property rights and the right to keep and bear arms.<sup>88</sup>

The court discussed the extensive relationship between the Second Amendment right and property rights at common law.<sup>89</sup> It observed that "property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment."<sup>90</sup> Further, the court found that the "Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment"—one right does not "abrogate" the other.<sup>91</sup> Thus, the court concluded, it was entirely consistent with the Second Amendment to permit a place of worship to forbid firearms on its property, based on the fundamental property right at common law.<sup>92</sup>

In another Eleventh Circuit case initiated by *GeorgiaCarry.Org, Inc.*, the gun rights group challenged a federal statute that proscribed certain weapons from being carried loaded on Army Corps of Engineers property.<sup>93</sup> The organization's arguments were dismissed as unpersuasive, but the Eleventh Circuit briefly hinted at what its sensitive places analysis might have looked like.<sup>94</sup> Specifically, the court enumerated several characteristics of the area—the Altoona Dam—signaling that such facts weigh in a sensitive place analysis, in addition to history and tradition.<sup>95</sup> It

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<sup>86</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1248–49 (11th Cir. 2012). The regulation proscribed the carrying of "weapons or long guns" in certain places absent a small number of exceptions. The list of locations included government buildings; courthouses; jails or prisons; places of worship; state mental health facilities; bars; nuclear power facilities; or areas within "150 feet of any polling place." *Id.* at 1248 n.3 (quoting O.C.G.A. § 16-11-127).

<sup>87</sup> *Id.* at 1248–49. However, it left an exception to the owners of the eight specified locations to permit the carriage of weapons on their premises in accord with their own specific safety protocols. The statute further made it a misdemeanor should any permit holders who were permitted to carry in a specific place fail to follow the location's specific safety procedures. *Id.* at 1249.

<sup>88</sup> *Id.* at 1261–63.

<sup>89</sup> *See id.* at 1261–63.

<sup>90</sup> *Id.* at 1263.

<sup>91</sup> *Id.* at 1264–65.

<sup>92</sup> *Id.*; *see also* THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 4–5 (Dennis Patterson ed., 2010) (discussing the fundamental property right at common law).

<sup>93</sup> *GeorgiaCarry.Org, Inc. v. Army Corps. of Eng'rs*, 788 F.3d 1318 (11th Cir. 2015).

<sup>94</sup> *Id.* at 1328.

<sup>95</sup> The specific features the court wished to consider in its analysis included "the size of

mentioned, among other factors, the dam's size and the recreational area it adjoins, as well as the dam's national security implications.<sup>96</sup> This discussion, albeit brief, suggests that physical and communal characteristics have a role in the analysis as to whether a place is sensitive for a Second Amendment challenge. However, the court never fully fleshed out these characteristics, nor did it apply them as a framework.

The Eleventh Circuit's brief discussion was cited favorably by the D.C. Circuit in *United States v. Class*.<sup>97</sup> In *Class*, the defendant was arrested for possessing three firearms on his person and in his car within 1,000 feet of the Rayburn House Building on Capitol Grounds.<sup>98</sup> The court upheld the challenged regulations as constitutional at Step One.<sup>99</sup> The parking lot where Class parked is sufficiently "integrated" with the Capitol buildings that surround it to constitute a sensitive place.<sup>100</sup> Central to its analysis, the court looked at the types of individuals who frequent the area, the proximity to the national legislature, and potential national security implications.<sup>101</sup>

Some courts—such as those deciding *GeorgiaCarry.Org. Inc. v. Army Corps. of Engineers* or *Class*—have been more willing to try and define the exception's contours before falling back on a straight scrutiny analysis.<sup>102</sup> Few courts—save, perhaps, those deciding *Ezell* and *GeorgiaCarry.Org. Inc. v. Georgia*—employed anything close to the historical analysis that *Heller* seemingly prescribes.<sup>103</sup> Indeed, the fact remains that the two-step framework is preferred by most courts over the "originalist" method *Heller* and *McDonald* discussed. And understandably so: Second Amendment litigation is voluminous,<sup>104</sup> yet *Heller* provided lower court judges no

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the Allatoona Dam, . . . a potential national security concern," as well as "the size of the recreational area at issue," *Id.* In particular the court wanted to know "how far the recreational area extend[ed] beyond the dam, whether the recreational area is separated from the dam itself by a fence or perimeter, or to what extent the dam is policed," as well as the amount of traffic the location received. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See 930 F.3d 460, 465 (D.C. Cir. 2019).

<sup>98</sup> *Id.* at 462.

<sup>99</sup> *Id.* at 464.

<sup>100</sup> *Id.* ("[T]he lot is close to the Capitol and legislative office buildings. Class possessed a firearm less than 1,000 feet away from the entrance to the Capitol, and a block away from the Rayburn House Office Building.").

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*; *GeorgiaCarry.Org. Inc. v. Army Corps. of Eng'rs*, 788 F.3d 1318, 1328 (11th Cir. 2015).

<sup>103</sup> For an argument as to why *Ezell*'s historical analysis is the "recommended" methodology, see Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207, 220–21 (2016). For an argument rejecting that notion, see Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 36 (2012).

<sup>104</sup> See Ruben & Blocher, *supra* note 35, at 1486.

instructions on how to apply any kind of a “text, history, and tradition” method that some say it requires.<sup>105</sup> Absent clarification from the Court, it makes sense that lower court judges would turn to a methodology that is more familiar.

But the way lower courts have been applying the two-part framework is not doctrine. Rather, the test is “scaffolding,”<sup>106</sup> or a “decision-making structure.”<sup>107</sup> The cases briefly discussed in this Part show that judges are still seeking the tools that comprise the two-part structure to assist their sensitive places analyses in Second Amendment litigation. In particular, lower courts are unfamiliar with how to implement a history- and tradition-based test at Step One. As the cases discussed further show, courts have either attempted minimal engagement with history and tradition, adhered strictly to *Heller*’s “schools and government buildings” language, or jumped straight to the scrutiny analysis at Step Two.<sup>108</sup> This inconsistency is due primarily to the fact that no test currently exists that judges can readily implement. Indeed, the cases show that there is not yet a unifying analytical method that has drawn a consensus, beyond applying the decision structure itself. Moreover, though lower court judges have indicated they are “await[ing]” further guidance from the Court, implementing the two-part framework indicates judges look more favorably upon analytical tools they are familiar with, and preferably ones that have a body of case law associated with them.<sup>109</sup>

Fortunately, there is existing doctrine that is both familiar and carries a rich body of case law that could assist judges with sensitive places analyses.<sup>110</sup> Indeed, though *Heller*’s sensitive places are an underdeveloped category within an already “embryonic” area of constitutional law, location-based exceptions to a constitutional right are not unique.<sup>111</sup> To be sure, the Second Amendment is not the only individual, fundamental constitutional right that pre-figures the founding, that is subject to such an exception. A discussion of the nuisance exemption to the Takings Clause is instructive.

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<sup>105</sup> See, e.g., *Mance v. Sessions*, 896 F.3d 390, 395 (5th Cir. 2018) (Elrod, J., dissenting from the denial of rehearing en banc) (advocating for a text, history, and tradition approach); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012), *withdrawn and superseded on reh’g by* 682 F.3d 361 (5th Cir. 2012) (Elrod, J., dissenting) (“As several of our sister circuits have recognized, *Heller* and *McDonald* dictate that the scope of the Second Amendment be defined *solely* by reference to its text, history, and tradition.”) (emphasis added); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280–82 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (advocating for the text, history, and tradition approach).

<sup>106</sup> Charles, *supra* note 83, at 1.

<sup>107</sup> BLOCHER & MILLER, *supra* note 17, at 117.

<sup>108</sup> See, e.g., *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888 (7th Cir. 2017); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

<sup>109</sup> *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

<sup>110</sup> See *infra* Part II (discussing the nuisance exception to the Takings Clause of the Fifth Amendment).

<sup>111</sup> Morgan, *supra* note 30, at 199.

## II. THE TAKINGS CLAUSE AND ITS NUISANCE EXCEPTION

The founders viewed the right to property to be a fundamental, individual right.<sup>112</sup> They protected this right by providing the means to challenge government action that unlawfully prevents continued use of property, renders it unusable, or expropriates it.<sup>113</sup> The relevant portion of the Fifth Amendment provides: “[N]or shall private property be taken for public use, without just compensation.”<sup>114</sup> The provision was written to govern the balance between individual liberty and the community’s wants and needs.<sup>115</sup> It demonstrates a truism in constitutional law that no right is absolute.<sup>116</sup>

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<sup>112</sup> See Jud Campbell, 32 CONST. COMMENT. 85, 97 (2017) (reviewing RANDY E. BARNETT, *REPUBLICANISM AND NATURAL RIGHTS AT THE FOUNDING OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)); see also 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*129 (discussing the property right as a fundamental right).

<sup>113</sup> See Paul J. Larkin, Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1, 8–9 (2016).

<sup>114</sup> U.S. CONST. amend. V.

<sup>115</sup> Leslie Bender, *The Takings Clause: Principles or Politics*, 34 BUFF. L. REV. 735, 745 (1985); cf. *Heller I*, 554 U.S. 570, 635 (2008) (“[The Second Amendment] is the very *product* of an interest balancing by the people[.]”).

<sup>116</sup> Since before Ratification, American courts recognized that even fundamental, individual rights are secondary to public welfare. For a good example, see *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357 (Pa. 1788) (finding no violation and no compensation needed when the Commonwealth of Pennsylvania took 227 barrels of flour from the plaintiff to prevent the goods from potentially falling into the hands of the British army, thus assisting in their attempted capture of Philadelphia). Though necessity was doing most of the work in *Sparhawk*, it was being exercised via Pennsylvania’s sovereign police power. Justice Shaw of the Supreme Judicial Court of Massachusetts explored the distinction between permissible regulation via the police power and a violation of one’s property right. In *Commonwealth v. Tewksbury*, for example, Shaw found the line between regulation and condemnation to be fuzzy:

It is extremely difficult to lay down any general rule, or draw a precise line between the cases where the restraint of the right of the owner is such that compensation ought to be provided, and where the regulation is such only as to prevent a particular use of the property from being a public nuisance.

52 Mass. (11 Met.) 55, 58–59 (1846). In upholding the law, Justice Shaw recognized the “high power” legislatures have over the “the right of private property” when the exercise of the right is injurious to the public. *Id.* at 56–58. In *Commonwealth v. Alger*, the plaintiff violated the law when he built a wharf in a particular part of Boston harbor statutorily foreclosed from construction. 61 Mass. (7 Cush.) 53 (1851). Upholding the law, Justice Shaw wrote:

We think it is a settled principle . . . [that r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

*Id.* at 84–85. In doing so, Justice Shaw clarified that regulating property rights was not a *per se* taking, but rather a rightful power of the legislature to limit risks to the public stemming

This principle is well recognized and reflected in the state's police power to regulate nuisances created by an individual's use of their property.<sup>117</sup>

In a line of cases, beginning in the late nineteenth century, the U.S. Supreme Court formalized the states' ability to regulate an individual's use of their property without constituting a taking under the nuisance exception. The exception would expand until Justice Scalia narrowed it in *Lucas v. South Carolina Coastal Council* in 1992.<sup>118</sup>

The first case to recognize the nuisance exception was *Mugler v. Kansas*.<sup>119</sup> In *Mugler*, state law effectively banned the manufacture and sale of liquor as a nuisance to the community.<sup>120</sup> The law rendered the plaintiff's distillery worthless. The Court found no taking, however, as it recognized the police power as a remedial power for the state to protect public health from what the state deems a nuisance.<sup>121</sup> Thus, the state's prohibition on the production and sale of alcohol did not violate the Constitution.<sup>122</sup> The Court's reasoning essentially rested not only on the axiom that the property right is not absolute, but on the principle that "no man should use his property to injure that of his neighbor."<sup>123</sup>

The next important case expounding on the nuisance exception was *Hadacheck v. Sebastian*,<sup>124</sup> where, unlike *Mugler*, it was the location of the nuisance that drove the Court to find an exception to the property right. The City of Los Angeles made it unlawful to operate a brickyard within its limits due to the smoke produced by kilns.<sup>125</sup> The California Supreme Court upheld the city's ordinance, resting its conclusion on two important bases. First, the city's ordinance carried a "presumption[] in favor of"

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from an individual exercising their constitutional right. Indeed, a well-recognized principle at common law preached that "no man should use his property so as to injure that of his neighbor." Scott M. Reznick, Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U.CHI. L. REV. 854, 862 (1973).

<sup>117</sup> See, e.g., *Tewksbury*, 52 Mass. (11 Met.) at 56–58.

<sup>118</sup> 505 U.S. 1003 (1992).

<sup>119</sup> 123 U.S. 623 (1887).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 688–69.

<sup>122</sup> In particular, the Court observed that:

A prohibition . . . [on] the use of property for purposes that are declared, by valid legislation, to be injurious to the health . . . or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

*Id.*

<sup>123</sup> See Reznick, *supra* note 116, at 862.

<sup>124</sup> 239 U.S. 394 (1915).

<sup>125</sup> *Id.* at 404.

its lawfulness.<sup>126</sup> Second, the inconvenience to residents in the area outweighed the city's infringement on the petitioner's private individual right.<sup>127</sup> The U.S. Supreme Court affirmed this reasoning and added an additional dimension.<sup>128</sup> Justice Rutledge, writing for a unanimous Court, observed that the city was not foreclosing the petitioners from brickmaking—i.e., they were not banned.<sup>129</sup> Rather, the decision below was affirmed because the ordinance was location-based; it prohibited brickmaking only “within the designated locality.”<sup>130</sup> In doing so, the Court expanded the nuisance exception doctrine beyond just per se nuisances, to include location-based nuisances, as well.

The nuisance exception expanded beyond a fixed conception of nuisance in *Miller v. Schoene*.<sup>131</sup> In *Miller*, Virginia's apple orchards were dying due to a rare plant disease carried by red cedars.<sup>132</sup> The state quickly enacted the Cedar Rust Act, which declared trees carrying the disease within a certain distance of apple orchards a nuisance.<sup>133</sup> Anyone who “own[ed], plant[ed] or ke[pt] alive and standing” any red cedars, within the specified locations violated the Act.<sup>134</sup> The Court upheld the state statute. In doing so, it noted that it did not need to “weigh with nicety the question whether the infected cedars constitute[d] a nuisance according to the common law; or whether they may be so declared by statute.”<sup>135</sup>

This expansion of nuisance, from a static, common law–like basis, to a more deferential standard was repeated in *Goldblatt v. Town of Hempstead*.<sup>136</sup> In *Goldblatt*, the town passed an ordinance that prohibited the petitioner from continuing its mining practice, after it crossed a specified depth beyond the water table.<sup>137</sup> Petitioner argued that its individual right to use its land for profit was removed completely—it was effectively banned from exercising its property right.<sup>138</sup> The town argued the regulation was constitutional, as it was using its police power to prevent children from drowning in artificial lakes—like the one at issue—as well as to protect against possible pollution of the local water supply.<sup>139</sup> The Court rejected the petitioner's argument.<sup>140</sup> It noted that it is not “of controlling significance that [gravel mining] . . . is arguably

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<sup>126</sup> *Id.* at 409.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 412.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 408–11.

<sup>131</sup> 276 U.S. 272 (1928).

<sup>132</sup> *Id.* at 277.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 280 (citing *Hadacheck v. Los Angeles*, 239 U.S. 394, 411 (1915)).

<sup>136</sup> 369 U.S. 590 (1962).

<sup>137</sup> *Id.* at 592.

<sup>138</sup> *Id.*

<sup>139</sup> *See* Brief of Appellee, at 20, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (No. 78), 1961 WL 101618.

<sup>140</sup> *Goldblatt*, 369 U.S. at 591.

not a common law nuisance”<sup>141</sup> and that so long as the regulation at issue is intended to preserve “the health, the morals, or the safety of the public,”<sup>142</sup> it is presumed valid.<sup>143</sup> Thus, if the state can produce facts supporting that presumption, the court’s inquiry ends.<sup>144</sup>

Whatever flexibility *Miller* and *Goldblatt* introduced to the nuisance exception, the doctrine was narrowed approximately three decades later in *Lucas*.<sup>145</sup>

#### A. Lucas’s History and Tradition Test

In 1992 the U.S. Supreme Court decided that when a state enacts legislation that strips all economically beneficial use from a piece of property the Constitution is violated.<sup>146</sup> Writing for the Court, Justice Scalia held that if a piece of property’s only value is a use that is proscribed by a statute, then that statute is “categorically” unconstitutional, as it effectively bans an individual’s property right.<sup>147</sup> However,

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<sup>141</sup> *Id.* at 593.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 594.

<sup>144</sup> *Id.*

<sup>145</sup> *Lucas* presented the Court with the optimal vehicle to move its takings jurisprudence away from the balancing tests prescribed by its earlier regulatory takings cases, *Penn Central* and *Mahon*. The factual record from the South Carolina trial court purportedly showed a total diminution in value of Lucas’s beachfront land. This allowed the Court to create the additional taking category and further narrow the nuisance exception back to those that existed at common law. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 n.9 (1992) (avoiding having to determine whether all economic value of *Lucas*’ land was indeed eliminated by merely accepting as true the factual findings of the state trial court). However, a number of the justices questioned the factual findings in the *Lucas* record. *See id.* at 1034 (Kennedy, J., concurring) (finding the record “curious” and expressing “reservations” about the majority’s acceptance of it); *id.* at 1036 (Blackmun, J., dissenting) (finding the record “implausible” and “almost certainly” erroneous); *id.* at 1076 (statement of Souter, J.) (observing that the record was “highly questionable” and stating that certiorari was “improvidently” granted). Similarly, some scholars suggest that Justice Scalia’s opinion in *Heller* necessitated the peculiar law at issue to sustain it. *See, e.g., ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 89–92, 175–78 (2d ed. 2013) (describing how the severity of D.C.’s law plus the NRA’s engineering were essential for the outcome in *Heller*); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 263 (2008) (“At the same time, the law at issue in *Heller* was among the most draconian in the nation—a genuine national outlier.”); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”).

<sup>146</sup> *See Lucas*, 505 U.S. at 1031–32.

<sup>147</sup> *Id.* at 1027. This new categorical rule represented an addition to existing per se takings, which render the statute at issue unconstitutional, regardless of the public interests it protects. The Takings Clause also renders per se unconstitutional regulations that require the property “owner to suffer a physical ‘invasion’ of his property.” *Id.* at 1015 (discussing *Loretto v.*

the new rule in *Lucas* was subject to an exception, based on the principles that animated *Mugler* and its progeny.

Justice Scalia would similarly structure his reinterpretation of a constitutional right nearly two decades later writing for the majority in *Heller*. In both cases, the Court, speaking through Scalia, conceived of a fundamental, natural right in bright-line, absolute terms.<sup>148</sup> However, in both instances it concludes that the right is not absolute, and identifies location-based exceptions to both.<sup>149</sup> Similarly, both courts observed that the proper analysis for property rights and the right to bear arms looks to history and tradition.<sup>150</sup> But like the underlying rights themselves, the historical analysis is similarly not an absolute—contemporary considerations can play a role in how courts analyze both. This Section will briefly examine how the Court’s well-established takings doctrine was narrowed to a more formalistic history- and tradition-based test, yet still left open consideration of contemporary factors, such as modern technology.

In *Lucas*, the petitioner challenged a statute enacted to protect the coastal land of the state’s beaches.<sup>151</sup> David Lucas purchased two oceanfront lots that he hoped to build homes on.<sup>152</sup> However, before he could begin construction the state passed the Beachfront Management Act to control erosion that had decimated the coastline.<sup>153</sup> The Act created a setback line, which prohibited any new construction within a specified zone on the beach. Lucas’s lots were within the zone.<sup>154</sup>

Lucas challenged the law as a regulatory taking, under the Fifth and Fourteenth Amendments.<sup>155</sup> In short, Lucas argued that, though the legislature lawfully passed the Act under its police power, the construction ban unconstitutionally deprived him of all economic use of his property.<sup>156</sup> In the opinion’s syllabus, the Court summarized his claim: “[E]ven though the Act may have been a lawful exercise of the State’s police power, the ban on construction deprived him of ‘all economically viable use’ of his property.”<sup>157</sup> The Court’s five-member majority accepted that argument. It held that a regulation that strips property of all economically beneficial use constitutes a taking and, thus, requires compensation, unless the use of the property violates “restrictions that background principles of the State’s law of property and

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Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); *see also* *Horne v. Dep’t. of Agric.*, 576 U.S. 350 (2015).

<sup>148</sup> *See Heller I*, 554 U.S. at 625–26; *Lucas*, 505 U.S. at 1027–28.

<sup>149</sup> *See Heller I*, 554 U.S. at 626; *Lucas*, 505 U.S. at 1030.

<sup>150</sup> *See Heller I*, 554 U.S. at 625–27; *Lucas*, 505 U.S. at 1030.

<sup>151</sup> 505 U.S. at 1009, 1021–22, n.10.

<sup>152</sup> *Id.* at 1006–07.

<sup>153</sup> *Id.* at 1007–08.

<sup>154</sup> *Id.* at 1008–09.

<sup>155</sup> *Id.* at 1007.

<sup>156</sup> *Id.* at 1009, 1020.

<sup>157</sup> *Id.* at 1003.

nuisance already place upon land ownership.”<sup>158</sup> Such uses fall outside the scope of an individual’s property rights and, thus, garner no protection.<sup>159</sup>

*Lucas*’s holding had several unique doctrinal and analytical features. First, it narrowed the nuisance exception’s scope by cutting the noxious-use conception—the capacious theories of nuisance that animated *Mugler* and *Miller*<sup>160</sup>—as a defense to a takings challenge.<sup>161</sup> Second, Justice Scalia suggested courts look to the Restatement (Second) of Torts to guide their nuisance inquiry.<sup>162</sup> Specifically, he suggested courts’ analyses focus on

[T]he degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant’s activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike . . . .<sup>163</sup>

Third, the conception of nuisance that Justice Scalia invoked is a historical one. *Lucas* requires a government defendant support its nuisance defense by showing that the regulation at issue is of the kind that would have supported a nuisance action at

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<sup>158</sup> *Id.* at 1029. This inquiry into a state’s “background principles” is “antecedent” to the takings analysis—i.e., it is a threshold question for a court. *Id.* at 1027. In any “total takings” challenge—whether it is a complete diminution case or a physical invasion challenge—the court begins by asking the *Lucas* background principles question: Does the owner’s property right recognize this particular use or piece of property? Thus, courts begin a takings analysis with a scope question. *Cf.* *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (“Our threshold inquiry, then, is whether [the regulation at issue] regulates conduct that falls within the scope of the Second Amendment.”).

<sup>159</sup> *Lucas*, 505 U.S. at 1027 (“[The state] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.”).

<sup>160</sup> *See supra* notes 119–23 and accompanying text.

<sup>161</sup> In doing so, cases like *Mugler* and *Miller* were implicitly overruled. *See* Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas*, 4 FORDHAM ENVTL. L. REP. 287, 302 (1993) (“The second and more controversial feature of the holding is that it overrules *Miller* and the other cases where the legislature had declared that certain uses of property were nuisances.”).

<sup>162</sup> *Lucas*, 505 U.S. at 1030–31.

<sup>163</sup> *Id.* (citing Restatement (Second) of Torts §§ 826, 827, 828(a), (b), (c), 830 and 831). The Restatement framework would serve as guideposts, whereas the bite of the inquiry must come from an “objectively reasonable application of relevant precedents,” as opposed to requiring a judge to find common law precedent that is directly on point. *Id.* at 1032 n.18. *Lucas*’s mode of analysis allows “some leeway in a court's interpretation of what existing state law permits.” *Id.*

common law.<sup>164</sup> However, this historical formulation is not absolute. Scalia observed that traditional concerns, like public health and safety, may justify new regulations.<sup>165</sup> To illustrate his point, Scalia provided an example where a private nuclear power plant is compelled to close because it is built upon an earthquake fault.<sup>166</sup> Such a use, though contemporary, was always outside the scope of the owner's Fifth Amendment rights, and thus unlawful because of where the right was being exercised.<sup>167</sup> That the technology or particular use was modern is not material to the analysis. Rather, the proper inquiry looks to see whether the use at issue implicates traditional concerns, like public safety.<sup>168</sup>

### *B. The History and Tradition Test Post-Lucas*

In *Lucas*, Justice Scalia implied the nuisance exception's background principles are restricted to a state's tradition of judge-made law. The case's other opinions indicate as much.<sup>169</sup> Notably, Justice Kennedy observed in his concurrence that "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be *prevented* from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source."<sup>170</sup> Since *Lucas* was decided in 1992, however, many state courts have relied upon Justice Kennedy's conception of the *Lucas* rule, and have permitted statutes to serve, in addition to common law precedent, as background principles guiding their takings analyses.<sup>171</sup>

But Justice Kennedy narrowed this conception about a decade later in *Palazzolo v. Rhode Island*.<sup>172</sup> Writing for the majority, he held that a takings claim "is not

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<sup>164</sup> *Id.* at 1029.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1030.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 1035 (Kennedy, J., concurring) (critiquing the majority's new rule as framing property rights based upon the "common law of nuisance"); *id.* at 1046–47 (Blackmun, J., dissenting) (characterizing the majority as creating a new "categorical rule" subject only to the "common-law" of nuisance or "property principles"); *id.* at 1068–69 (Stevens, J., dissenting) (characterizing the Court's nuisance exception test as looking at a "[frozen]" body of "the State's common law").

<sup>170</sup> *Id.* at 1035 (Kennedy, J., concurring) (emphasis added) (citations omitted).

<sup>171</sup> *See* Robert L. Glicksman, *Making A Nuisance of Takings Law*, 3 WASH. U. J. L. & POL'Y 149, 169–82 (2000) (discussing *K&K Constr. Inc., J.F.K. v. Dep't. of Nat. Res.*, 551 N.W.2d 413 (Mich. Ct. App. 1996); *City of Va. Beach v. Bell*, 498 S.E.2d 414 (Va. 1998); *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997); *Grant v. S.C. Coastal Council*, 461 S.E.2d 388 (S.C. 1995); *Scott v. City of Del Mar*, 68 Cal. Rptr. 2d 317 (Ct. App. 1997)).

<sup>172</sup> 533 U.S. 606, 630 (2001).

barred by the mere fact that the . . . title was acquired after the effective date of the state-imposed restriction.”<sup>173</sup> This was a response to what was effectively a race to pass statutes proscribing various uses before owners could purchase property for the purpose of a given use.<sup>174</sup>

*Palazzolo* did not completely eliminate statutes as a source of background principles, though. Justice Kennedy observed that “[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.”<sup>175</sup> In fact, in a subsequent takings case, other justices confirmed this notion: a state’s historical background principles come not just from common law but also statutes.<sup>176</sup> Though Kennedy failed to provide a specific rule for when a state statute or regulation can be considered a background principle, he noted that the determination “must turn on objective factors, such as the nature of the land use proscribed.”<sup>177</sup>

Lower courts generally follow the *Palazzolo* rule that statutes and regulations are a permissible source of background principles. They will look at the regulation to determine whether the particular use at issue was historically within a property owner’s property right, or whether the state historically or traditionally regulated it.<sup>178</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> The “notice rule” reasoned that when a buyer purchased property for a given use, a takings challenge was foreclosed so long as the prohibition on the particular use was on the books before the purchase, as the buyer would be on notice as to the lawfulness of the use. See Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. REP. 175, 176 n.4 (2004). Some argued this incentivized a race for developers to quickly purchase land before the intended use was foreclosed. See J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351, 359–60 (2005); cf. Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 384–85 (2009) (discussing how *Heller*’s “common use” test incentivizes a race between legislatures and gun owners to regulate a particular weapon class before it becomes too popular and thus in “common use”).

<sup>175</sup> *Palazzolo*, 533 U.S. at 627.

<sup>176</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting).

<sup>177</sup> *Palazzolo*, 533 U.S. at 630.

<sup>178</sup> Among other things, *Palazzolo* teaches that federal statutes can be the source of background principles. See, e.g., *Reeves v. United States*, 54 Fed. Cl. 652 (2002); *Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36 (2001). In *Reeves*, the Court of Federal Claims held that the Federal Land Policy and Management Act of 1976 was a “background principle,” thus disposing of the plaintiff’s takings claim at the threshold question of whether the owner’s property right was in fact implicated. *Reeves*, 54 Fed. Cl. at 672–73. The court held that as a matter of tradition, the federal government always had “broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.” *Id.* at 672. Similarly, in *American Pelagic*, the Court of Federal Claims held that a conservation statute was

In fact, Chief Justice Rehnquist, in his dissent in *Tahoe-Sierra*, where he indicated that at least some “valid zoning and land-use” regulations may serve as a source of background principles for *Lucas*’s nuisance exception, rested his reasoning on the fact that such regulations are “longstanding.”<sup>179</sup> A court will determine whether the particular use was traditionally part of an owner’s property right, or whether the regulation at issue reflects a “traditional sovereign regulation” of property rights.<sup>180</sup> Thus, even with Justice Kennedy’s gloss on the *Lucas* rule, history and tradition play a central role in a takings analysis.<sup>181</sup> However, since *Lucas* was decided, reliance on history and tradition has manifested as a threshold inquiry.

*Lucas* prescribes the historical examination as the “logically antecedent inquiry,” meaning the analysis begins with history and tradition—the inquiry occurs at Step One.<sup>182</sup> A court will look to the relevant state’s history to determine whether the particular use was traditionally deemed a nuisance. The court may look to judge-made or statutory law in its examination.<sup>183</sup> Whatever the source, judges have “some leeway” to interpret the state’s history and tradition; however, it must be “*objectively reasonable*.”<sup>184</sup> At Step One the court must determine whether the particular use is outside the owner’s rights. If so, then the regulation is upheld. But if the use is within the owner’s rights then the analysis proceeds to a multifactor test that is effectively identical to Step Two of the two-part test currently used in Second Amendment analyses.

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a “background principle” under *Lucas*, thus disposing of the plaintiff’s takings claim. *Am. Pelagic*, 49 Fed. Cl. at 1379. Specifically, it held that the statute was “consistent with the historical role played by the sovereign, state or federal, with respect to its waters.” *Id.*

<sup>179</sup> *Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting). In his dissent, Rehnquist explicitly mentioned the fact that “New York City enacted the first comprehensive zoning ordinance in 1916.” *Id.* Some scholars have noted that this represents a line drawing exercise such that regulations of the kind passed prior to 1916 are “insulated” from a takings challenge under the *Lucas* framework. See Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 358 (2005). However, the history of environmental and conservation law indicates that statutes enacted after 1916 would survive as well, due to their historical lineage. See *id.* Similar issues attend Second Amendment analyses. See BLOCHER & MILLER, *supra* note 17, at 129–30 (discussing the many analytic “difficulties” that attend conferring history a “privileged” position).

<sup>180</sup> *Reeves*, 54 Fed. Cl. at 671–72; see also Glenn P. Sugameli, *Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define if There is a Protected Property Interest*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES § 7.2 (2002).

<sup>181</sup> See, e.g., *Reeves*, 54 Fed. Cl. at 671–72.

<sup>182</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>183</sup> See *supra* notes 163–64 and accompanying text; see also *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 115 (1999) (relying on state water quality statutes to assess the scope of plaintiff’s property right), *aff’d on other grounds*, 247 F.3d 1355 (Fed. Cir. 2001).

<sup>184</sup> *Lucas*, 505 U.S. at 1032 n.18.

The Court's nuisance exception test provides a method for courts to determine whether a fundamental, individual right can be subject to exception based on where an individual exercises that right.<sup>185</sup> The framework relies upon history and tradition and limits balancing. It defines the scope of a right that is central to the republic; a right that often incites as much fervor in discussions inside and outside the courtroom as the right to keep and bear arms. One important question, though, is why we should look to the Fifth Amendment to inform our thinking of the Second. The next Part will take up that very question.

### III. WHY COURTS SHOULD BORROW FROM THE TAKINGS CLAUSE

Borrowing occurs when a court imports methodological or substantive features from one part of the Constitution to help develop jurisprudence in another. It is a well-trodden doctrinal path for the Court. However, this Part will seek to show why the Fifth Amendment's takings doctrine is a particularly ideal source to draw from for the Second Amendment's emerging sensitive places jurisprudence.

#### *A. Why Borrow?*

Professors Tebbe and Tsai have chronicled how judges and scholars rely on borrowing as a way to solve complex questions of constitutional law when doctrine is undeveloped, unworkable, or there is a dearth of precedent to draw from.<sup>186</sup> For instance, Justice Scalia borrowed from several other Amendments in *Heller*.<sup>187</sup> Indeed, his reliance on the First Amendment informed the two-part framework.<sup>188</sup> In the context of the Second Amendment, one scholar has commented that reliance on borrowing is "pervasive and wide-ranging."<sup>189</sup>

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<sup>185</sup> See discussion *supra* Section II.B.

<sup>186</sup> Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) ("A person engages in borrowing when . . . that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain."); see also *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 259 (2d Cir. 2015) ("Though we have historically expressed 'hesitan[ce] to import substantive First Amendment principles wholesale into Second Amendment jurisprudence,' we readily 'consult principles from other areas of constitutional law, including the First Amendment' in deciding whether a law 'substantially burdens Second Amendment rights.'") (quoting *United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012)).

<sup>187</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 579–80 n.6, 582, 591–92, 595, 635 (2008) (relying on the First, Fourth, and Ninth Amendments); see also *Armed in America*, *supra* note 21, at 28:30–29:43 (discussing the Court's use of borrowing).

<sup>188</sup> See, e.g., *United States v. Marzarella*, 614 F.3d 85, 96 n.15 (3d Cir. 2010) ("[T]he First Amendment is a useful tool in interpreting the Second Amendment.").

<sup>189</sup> Charles, *supra* note 83, at 21.

Borrowing helps legitimize the underdeveloped doctrine and promotes the rule of law.<sup>190</sup> This support is especially essential for a right that too often is “misunderstood, misrepresented, or wielded as a rhetorical weapon.”<sup>191</sup> Though takings law is, like all constitutional law, shifting and evolving, the Court’s takings doctrine has eliminated much of the guesswork for lower courts.<sup>192</sup> Judges have an established, familiar set of doctrinal tools at their disposal. In that way, importing takings doctrine to assist lower courts with Second Amendment analysis would similarly reduce ambiguity and increase the legitimacy of the doctrine.

As with borrowing generally, looking to common law jurisprudence in particular to inform doctrine governing a constitutional right is similarly established.<sup>193</sup> For example, in addition to the *Lucas* court looking to nuisance law to frame an individual’s property right, the Court has looked to trespass doctrine to frame privacy rights<sup>194</sup> and reputational torts to further define free speech rights.<sup>195</sup> However, the Fifth Amendment’s takings doctrine is an optimal “fit” for the Second Amendment’s sensitive places exception for two primary reasons.<sup>196</sup> The next two Sections will address them.

### B. Propertization

As previously discussed, looking to more established constitutional doctrine to inform less-established doctrine is not new.<sup>197</sup> When courts engage in borrowing, they are arguably engaging in analogical reasoning at the doctrinal level.<sup>198</sup> Analogies are typically deployed successfully only in instances where things have relevant similarities without relevant differences.<sup>199</sup> Thus, instances where a court borrows from one area of its jurisprudence for another suggests the similarities present between the two are doctrinally relevant, whereas any differences are not.<sup>200</sup> The Supreme Court has imported property-based elements into several constitutional rights—including the right to keep and bear arms.<sup>201</sup> Professor John Sprankling refers to the

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<sup>190</sup> Tebbe & Tsai, *supra* note 186, at 493.

<sup>191</sup> BLOCHER & MILLER, *supra* note 17, at 175.

<sup>192</sup> See Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 371 (2007).

<sup>193</sup> See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 *COLUM. L. REV.* 670, 713–19 (2011) (discussing three examples of “the Court’s continuing inclination . . . to incorporate the language and logic of constitutional tort doctrine in formulating its approach” to constitutional doctrine).

<sup>194</sup> See *United States v. Jones*, 565 U.S. 400, 409 (2012).

<sup>195</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272–73 (1964).

<sup>196</sup> Tebbe & Tsai, *supra* note 186, at 495–99 (discussing fit in doctrinal borrowing).

<sup>197</sup> See Charles, *supra* note 83, at 22.

<sup>198</sup> See *id.* at 22–26.

<sup>199</sup> See Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 773–74 (1993).

<sup>200</sup> See Laurin, *supra* note 193, at 722 (“Borrowing ‘works’ in the first instance only where there is some plausible resonance or fit between the source and target doctrines.”).

<sup>201</sup> Sprankling, *supra* note 28, at 6–7 (discussing other examples, such as Fourth Amendment rights.).

substantive borrowing of property principles as “proPERTIZATION.”<sup>202</sup> This Section will discuss the Court’s import of property principles to other constitutional rights and the significance of those principles on sensitive places doctrine.

In *Heller*, the Court concluded that the Second Amendment protects the use of a handgun for lawful self-defense in the home.<sup>203</sup> In reaching its holding, the Court introduced property-based principles into the novel constitutional right by framing it in a particular place—the home.<sup>204</sup> This move—baking property principles into a constitutional right—is something it has repeated since deciding *Heller*. In a landmark Fourth Amendment case, Justice Scalia, again writing for the Court, introduced property-based principles into the Fourth Amendment right to be free from “unreasonable searches.”<sup>205</sup>

In *United States v. Jones*, the Court was asked to determine whether the government violated the Fourth Amendment when it secured evidence supporting an indictment via a G.P.S. tracking device it attached to a defendant’s car.<sup>206</sup> The Court answered in the affirmative. Its analysis began by observing that courts before the founding emphasized “the significance of property rights in search-and-seizure analysis,” and that the Fourth Amendment right has a “close connection to property.”<sup>207</sup>

Specifically, the Court’s constitutional analysis turned not so much on *what* the government did, but *where* it did it.<sup>208</sup> That is, the Court’s reasoning was largely location-based and was framed by property principles.<sup>209</sup> By attaching the tracking device to the defendant’s car, the Court held, the government officers “encroached on a protected area,” thus, violating Jones’s Fourth Amendment rights.<sup>210</sup> As Scalia observed, for the purposes of constitutional protection, *where* a right is being asserted makes all the difference.<sup>211</sup> The Court’s holding in *Jones* suggests that when the Court frames a constitutional right as being subject to a location-based analysis, that right is animated by at least some property-based principles similar to those that undergird property doctrines like trespass.

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<sup>202</sup> Sprankling, *supra* note 28, at 6.

<sup>203</sup> *Heller I*, 554 U.S. 570, 636 (2008).

<sup>204</sup> *Id.* at 628–29.

<sup>205</sup> *See* *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (quoting U.S. Const. amend IV).

<sup>206</sup> *Id.* at 402.

<sup>207</sup> *Id.* at 405 (discussing *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

<sup>208</sup> *See id.* at 405–07.

<sup>209</sup> *See id.*

<sup>210</sup> *Id.* at 410. Importantly, Scalia noted that Jones was entitled to the property rights of an owner (or bailee). *See id.* at 404 n.2.

<sup>211</sup> *See id.* at 404–06. Scalia noted further that the Court’s holding in *Jones* reinvigorates the Court’s “property-based” Fourth Amendment jurisprudence. This assertion was made even more clear by Scalia’s reliance on old English property cases as he framed the scope of the Fourth Amendment right. *See id.* at 405 (citing *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)); *see also id.* at 426–27 (Alito, J., concurring) (questioning whether Scalia was applying the law of trespass).

Justice Scalia’s borrowing in *Jones* was not abnormal. One year later, again writing for the Court, Scalia expounded upon the Court’s reasoning in *Jones* and the property-based principles in the Fourth Amendment in *Florida v. Jardines*.<sup>212</sup> *Jardines* asked “whether using a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home is a ‘search’ within the meaning of the Fourth Amendment.”<sup>213</sup> Scalia answered in the affirmative; in so doing he affirmed that “the traditional property-based understanding of the Fourth Amendment” is still the law.<sup>214</sup>

As in *Jones*, the Court in *Jardines* held that a constitutional right was subject to location-based analysis—whether the challenged conduct occurred within a “constitutionally protected” or unprotected area.<sup>215</sup> The Court held that the Fourth Amendment right extends beyond the home, to the area “immediately surrounding” it, where the right to privacy is “most heightened.”<sup>216</sup> Because the government conducted its search within the constitutionally protected area, it violated the defendant’s rights.<sup>217</sup> Thus, as Justice Scalia stated in *Jones*, where a right is being asserted makes all the difference as to whether it is protected.<sup>218</sup>

The propertized holdings in *Jones* and *Jardines* echo Justice Scalia’s interpretation in *Heller*. There, Scalia held that the government had impermissibly infringed upon Dick Heller’s Second Amendment right by regulating the possession and use of handguns *within the home*.<sup>219</sup> Indeed, in striking down D.C.’s laws, Scalia expressly observed that the Second Amendment right is “most acute” not when it is exercised by a particular person or in a certain manner, but in a certain *place*.<sup>220</sup> Through Justice Scalia, the Court has shown that at least some constitutional rights—especially when their analyses turn on location-based rules or exceptions—are animated by property law principles.<sup>221</sup>

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<sup>212</sup> 569 U.S. 1 (2013).

<sup>213</sup> *Id.* at 3.

<sup>214</sup> *Id.* at 11.

<sup>215</sup> *Id.* at 5 (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

<sup>216</sup> *Id.* at 6–7; *cf. Heller I*, 554 U.S. 570, 628 (2008) (observing that the “need for defense of self, family, and property is most acute” in the home). Further, in holding the curtilage of *Jardines*’s house to be a protected area, Scalia relied on Blackstone’s location-based analysis of what constitutes burglary. *See Jardines*, 569 U.S. at 7 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*223, \*225).

<sup>217</sup> *Jardines*, 569 U.S. at 7.

<sup>218</sup> *See United States v. Jones*, 565 U.S. 400, 410 (2012).

<sup>219</sup> *Heller I*, 554 U.S. at 628–29.

<sup>220</sup> *Id.* at 628.

<sup>221</sup> *See* Michael W. Price, *Rethinking Privacy: Fourth Amendment “Papers” and the Third-Party Doctrine*, 8 J. NAT’L SECURITY L. & POL’Y 247, 258–59 (2016) (describing the Court’s property-based Fourth Amendment doctrine as being largely based on *where* the right is being asserted); *see also* Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 572–74

But in *Heller* Justice Scalia went further than he did in *Jones* or *Jardines* to propertize a constitutional right. In addition to its location-based framing, *Heller* was solely focused on firearms.<sup>222</sup> This curious elevation of a particular chattel worked to propertize the Second Amendment by “thingifying” the right to keep and bear arms.<sup>223</sup> The move further introduced property-like principles into the Second Amendment right by framing its protection around a specific thing in a particular place.<sup>224</sup>

As with the *Jones* and *Jardines* duo, a year after *Heller* was decided the Court further expounded upon the property-like principles in the Second Amendment in *McDonald v. City of Chicago*.<sup>225</sup> In *McDonald*, the question for the Court was whether and how to incorporate the new Second Amendment right onto the states.<sup>226</sup> Ultimately, the Court chose to apply *Heller*’s interpretation to the states through the Due Process Clause.<sup>227</sup> Though the right was ultimately incorporated as a liberty interest, Justices in both the majority and dissent signaled support for a property-based conception.<sup>228</sup> In his dissent, Justice Stevens observed that the right to keep and bear arms “may be better viewed as a property right[,] [since] [i]nterests in the possession of chattels have traditionally been viewed as property interests subject to definition and regulation by the States.”<sup>229</sup> Additionally, though Justice Scalia criticized Stevens’s argument in his concurring opinion, he observed the Due Process Clause “explicitly protects property,” and cited to a prior opinion where he argued that fundamental rights are best understood as property interests.<sup>230</sup>

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(2017) (observing that a primary factor in deciding whether the Fourth Amendment is implicated depends on *where* the right is being asserted).

<sup>222</sup> See *Kolbe v. Hogan*, 849 F.3d 114, 132 (4th Cir. 2017) (discussing *Heller*’s preferential treatment of handguns); MARY ANN FRANKS, *THE CULT OF THE CONSTITUTION* 79–80 (2019).

<sup>223</sup> See *id.* at 80; see also Kyle Hatt, Note, *Gun-Shy Originalism: The Second Amendment’s Original Purpose in District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505, 519 n.94 (2011) (“[A]s the *Heller* Court’s analysis implied, the Second Amendment protects just firearms.”); Joseph Blocher, *The Second Amendment of Things (and Grievances)*, BALKINIZATION (Oct. 11, 2019), <https://balkin.blogspot.com/2019/10/the-second-amendment-of-thingsand.html> [<https://perma.cc/FB87-Y3AL>] (reviewing FRANKS, *supra* note 222).

<sup>224</sup> See Schwab & Sprankling, *supra* note 28, at 167; cf. *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (distinguishing existing Fourth Amendment doctrine focused on the nature of the government’s actions to find a Fourth Amendment violation because the government intrusion took place in a “constitutionally protected area”).

<sup>225</sup> 561 U.S. 742 (2010).

<sup>226</sup> *Id.* at 750.

<sup>227</sup> *Id.* at 791.

<sup>228</sup> See Sprankling, *supra* note 28, at 9–10.

<sup>229</sup> *McDonald*, 561 U.S. at 894 (Stevens, J., dissenting); see also *supra* notes 203, 219 and accompanying text (discussing how *Heller*’s holding focused its constitutional protection on firearms, especially handguns).

<sup>230</sup> *McDonald*, 561 U.S. at 799–800 n.6 (Scalia, J., concurring) (citing *United States v. Carlton*, 512 U.S. 26 (1994)).

When discussing property principles, the question of what exactly is property will inevitably arise.<sup>231</sup> Indeed, the inquiry has long animated debates among judges and scholars. In particular, the discussion is frequently centered around whether property is a fixed or dynamic concept.<sup>232</sup> The answer to that question often dictates the elements and features of relevant doctrine.<sup>233</sup> Thus, for a property-based conception of Second Amendment doctrine, it is important to understand how, if at all, the Court may conceive of the property principles that animate the right to keep and bear arms.

In *Heller* and *McDonald*, the plaintiffs were challenging laws that infringed on the possession of handguns.<sup>234</sup> In *Heller*, Justice Scalia read the Second Amendment's text as guaranteeing the right to "have weapons" and "possess[] arms."<sup>235</sup> Justice Alito struck down a similar law in *McDonald* in recognition that states cannot ban the possession of arms.<sup>236</sup> Possession is a property interest; however neither *Heller* nor *McDonald* expounded upon what conception of property the Second Amendment relies.<sup>237</sup> The Court's recent decision in *United States v. Henderson*, though, signaled how the Court might answer that question.<sup>238</sup> Its unanimous decision indicates the Court sees the propertized Second Amendment as being based upon a more fluid conception of property—as it did with the Takings Clause in *Lucas*<sup>239</sup>—despite its rhetoric implying fixed, static conceptions of rights and liberties.<sup>240</sup>

At issue in *Henderson* was whether a felony conviction precludes a court from ordering a felon's firearms be transferred to a third party to whom the felon has sold their property interest.<sup>241</sup> A unanimous court answered the question in the negative.<sup>242</sup> Justice Kagan's opinion focused on the distinction between ownership and possession, noting that the federal law governing felon possession—18 U.S.C. § 922(g)—regulates only "a single incident of ownership, one of the proverbial sticks in the bundle of property rights, by preventing the felon from knowingly *possessing* his . . . guns."<sup>243</sup>

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<sup>231</sup> See MERRILL & SMITH, *supra* note 92, at 2.

<sup>232</sup> Blocher, *supra* note 223 (quoting Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012)).

<sup>233</sup> MERRILL & SMITH, *supra* note 92, at 2.

<sup>234</sup> *McDonald*, 561 U.S. at 742; *Heller I*, 554 U.S. 570, 570 (2008).

<sup>235</sup> *Heller I*, 554 U.S. at 582–83.

<sup>236</sup> See *McDonald*, 561 U.S. at 780–87, 791.

<sup>237</sup> See MERRILL & SMITH, *supra* note 92, at 121 ("Possession is more than a method of original acquisition. Possession is arguably the most basic property institution.").

<sup>238</sup> 135 S. Ct. 1780 (2015).

<sup>239</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–32 (1992).

<sup>240</sup> See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 260–63 (2007) (discussing Scalia's conception of property in *Lucas*).

<sup>241</sup> *Henderson*, 135 S. Ct. at 1783.

<sup>242</sup> *Id.* at 1783, 1787.

<sup>243</sup> *Id.* at 1784. Perhaps subsequent research could further examine the Court's discussion in *Henderson* and its import on the scope of the property based Second Amendment right. Specifically, takings law teaches that destroying a single stick from the bundle does in itself not constitute a taking. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979). Rather, the

A large percentage of Second Amendment cases arise under Section 922(g).<sup>244</sup> Though *Henderson* cited neither *Heller*, *McDonald*, nor the Second Amendment, it nevertheless has significant import on understanding the propertized Second Amendment right.<sup>245</sup> When the Court held that the government “conflate[d] the right to possess a gun with another incident of ownership, which [§ 922(g)] does not affect: the right merely to sell or otherwise dispose of that item,” it was arguably suggesting that property principles inhere in the Second Amendment right.<sup>246</sup>

The Court reaffirmed that the Second Amendment plausibly contains property-like principles in *Caetano v. Massachusetts*.<sup>247</sup> In *Caetano* the Court vacated a decision by the Supreme Judicial Court of Massachusetts that held stun guns outside the Second Amendment’s scope.<sup>248</sup> In a two page order the Court explained the Massachusetts Supreme Judicial Court erred by viewing the case through a “contemporary lens,” which led it to misapply the “dangerous and unusual” test and misread “*Heller*’s clear statement that the Second Amendment extends . . . to . . . arms . . . that were not in existence at the time of the founding.”<sup>249</sup>

Justice Alito wrote separately to further expound upon the Court’s “dangerous and unusual” and “common use” tests.<sup>250</sup> Alito clarified for the court below that

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bundle must be viewed in the aggregate—as a whole. *See id.* This potentially has important implications for a property based Second Amendment right. For example, some courts have read *Heller* to mean the Second Amendment precludes complete bans. *See, e.g., Heller II*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“It follows from *Heller*’s protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.’s ban on them is unconstitutional.”); *see also id.* at 1285 (Kavanaugh, J., dissenting) (“A ban on a class of arms is not an ‘incidental’ regulation. It is equivalent to a ban on a category of speech.”). Of course, an important question for these courts is what the scope of the Second Amendment entails. The Court’s recent decision in *Caetano* suggests the Second Amendment may reach more than just handguns. *See infra* notes 247–54. If that is true, then one could argue that possession of a semiautomatic rifle is but one stick in the Second Amendment bundle. In that case, a law prohibiting possession or ownership (or both) of a semiautomatic rifle may not be a violation. Because *Henderson* suggests a more dynamic conception of the right to keep and bear arms, it could be that destroying but one stick does not violate the Constitution.

<sup>244</sup> *See* Ruben & Blocher, *supra* note 35, at 1481 (finding felon possession cases represented nearly one quarter of all Second Amendment litigation from when *Heller* was decided in February 2016).

<sup>245</sup> *See Henderson*, 135 S. Ct. at 1783.

<sup>246</sup> *Id.* at 1785; *see* Sprankling, *supra* note 28, at 10 (observing that the Court’s decision in *Henderson* makes the Second Amendment right to “keep and bear” arms “seem[ingly] indistinguishable” from the traditional property interest that accords possession and ownership); *see also* MERRILL & SMITH, *supra* note 92, at 121 (“Possession is the most basic property institution.”).

<sup>247</sup> 136 S. Ct. 1027 (2016) (per curiam).

<sup>248</sup> *Id.* at 1027–28.

<sup>249</sup> *Id.* at 1028.

<sup>250</sup> *Id.* at 1030–31 (Alito, J., concurring).

*Heller* expressly precludes “categorically prohibiting” firearms merely because they are “dangerous.”<sup>251</sup> His brief opinion reaffirmed that the right to keep and bear arms is governed by “bright-line rule[s] subject to historically indicated exceptions whose definition involves significant judicial discretion.”<sup>252</sup> Aside from the property-like principles that inhere in the Second Amendment, Alito’s characterization of the Second Amendment right is identical to the analytical approach the Court announced governed property rights in *Lucas*.<sup>253</sup> Indeed, Alito’s characterization of the Second Amendment’s “dangerous and unusual” test in *Caetano* is so similar to the Court’s takings inquiry that it is “impossible to miss.”<sup>254</sup>

There are at least some property principles animating the Second Amendment. The doctrine surrounding the right to keep and bear arms continues to develop, presenting courts with opportunities to refine and sharpen it. Property-based doctrines could provide an informative source of decision rules as courts undertake such efforts. However, there are other reasons why takings doctrine in particular could be helpful. The next Section will address them.

### C. Privileging History and Tradition

The precise role of history in constitutional interpretation is a rich debate. Few would contend that history is useless; indeed, history has played an important role, in some form, since the Constitution was drafted.<sup>255</sup> Rather the disagreement circles around a handful of questions that assume a role for history.<sup>256</sup> Property rights and the right to keep and bear arms are no exception. This Section will explore the role history plays in the context of both constitutional rights in an attempt to show why the takings doctrine could be an optimal source for courts to examine when deciding sensitive places challenges under the Second Amendment.

Historical sources played a central role in the *Heller* and *McDonald* decisions.<sup>257</sup> However, their precise role and significance in deciding future cases was never fully explained.<sup>258</sup> Indeed, courts and scholars continue to disagree on where history fits in Second Amendment litigation, and how much weight it deserves.<sup>259</sup> Nevertheless,

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<sup>251</sup> *Id.* at 1031.

<sup>252</sup> Blocher, *supra* note 28, at 351.

<sup>253</sup> *Id.* at 335.

<sup>254</sup> *Id.* at 351.

<sup>255</sup> See, e.g., PATRICK J. CHARLES, HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE 1–31 (2014); Lorianne Uppike Toler, Joseph Cecere & Don Willett, *Pre-“Originalism,”* 36 HARV. J.L. & PUB. POL’Y 277 (2013).

<sup>256</sup> CHARLES, *supra* note 255, at 1.

<sup>257</sup> *Id.* at 20.

<sup>258</sup> See *id.*

<sup>259</sup> See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 CLEV. ST. L. REV. 197, 198

the Court emphasized in both decisions that history enjoys an elevated place in Second Amendment doctrine.<sup>260</sup>

To be sure, when courts engage in a Second Amendment analysis, history and tradition play a privileged role in answering “any question concerning the right to keep and bear arms.”<sup>261</sup> However, the *Heller* and *McDonald* courts show that lower courts have flexibility in their historical inquiry.<sup>262</sup> Indeed, Justice Scalia cautioned that the Court’s analysis in *Heller* was not “exhaustive,” and that gun regulations could be upheld under newly discovered “historical justifications.”<sup>263</sup>

In addition to history, *Heller* and *McDonald* made clear that tradition plays an important role in defining the scope of the Second Amendment.<sup>264</sup> Though there was no discussion as to what qualifies, *Heller* used the word “longstanding” to describe the types of regulations that are “presumptively lawful” under the Second Amendment.<sup>265</sup> The use of “longstanding” in both cases indicates the importance of tradition to frame the scope of the right.<sup>266</sup> Though inquiries into tradition often “blend[] with

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(2019) (“[M]uch of [Second Amendment] commentary centers on history-in-law; that is, the study of how the law has evolved in a particular area, what events and factors caused the law to evolve, and how—if at all—this history is important for the courts when adjudicating constitutional questions.”). Compare *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1174–75 (9th Cir. 2014) (“In light of *Heller*, the Second Circuit erred in outright rejecting history and tradition as unhelpful and ambiguous, and the Third and Fourth Circuits erred in following suit.” (citation omitted)), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016), and *Moore v. Madigan*, 702 F.3d 933, 935–37 (7th Cir. 2012) (conducting a historical analysis and criticizing sister courts that do not), *with Drake v. Filko*, 724 F.3d 426, 430–31 (3d Cir. 2013) (rejecting a historical inquiry because history does not “speak with one voice” and going straight to Step Two), and *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91–92 (2d Cir. 2012) (“Even if we believed that we should look solely to this highly ambiguous history and tradition to determine the meaning of the [Second] Amendment, we would find that the cited sources do not directly address the specific question before us [.]”). A recent empirical analysis of all Second Amendment case law from *Heller* through January 2016 found, however, that “original historical analysis is not the sole driving force in Second Amendment cases.” Ruben & Blocher, *supra* note 35, at 1491.

<sup>260</sup> See Charles, *supra* note 259, at 206.

<sup>261</sup> *Id.* at 202 (quoting Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 861–62 (2013)). For additional examples of what a historical analysis might look like in a Second Amendment context, see, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924–42 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197, 1207–12 (10th Cir. 2013).

<sup>262</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010); *Heller I*, 554 U.S. 570, 626 (2008).

<sup>263</sup> *Heller I*, 554 U.S. at 626–27, 635; see also Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1848–54 (2012) (discussing the “many” questions Justice Scalia’s call for historical analysis leaves open).

<sup>264</sup> *McDonald*, 561 U.S. at 815–16; *Heller*, 554 U.S. at 570.

<sup>265</sup> *Heller*, 554 U.S. at 626–27.

<sup>266</sup> See BLOCHER & MILLER, *supra* note 17, at 130; see also Rostron, *supra* note 11, at

arguments about history,” the Court was clear that it, too, plays an elevated role in a court’s analysis.<sup>267</sup>

A “central” feature of *Heller*’s holding was the constitutional guarantee of self-defense.<sup>268</sup> Indeed, the Court noted that at the Second Amendment’s “core” is the common law right to defend one’s self—a right that pre-figures ratification.<sup>269</sup> This right was based in a common law background principle, one that was “fundamental,” “inherited from our English ancestors.”<sup>270</sup> Justice Alito’s controlling opinion echoed this basis in *McDonald* when he observed that this “fundamental” right is “deeply rooted” in our “Nation’s history and tradition.”<sup>271</sup> Thus, the Court signaled in both instances in which it has interpreted the Second Amendment, that it constitutionalized at least some of the right to self-defense at common law into the right to keep and bear arms.<sup>272</sup>

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715. For an example of how a court may rely upon tradition to assist its framing of the Second Amendment right in a particular case, see *United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019) (discussing the role of tradition in *Heller*’s “presumptively lawful” regulations).

<sup>267</sup> BLOCHER & MILLER, *supra* note 17, at 132. As previously mentioned, the precise weight to accord history and tradition is debated across the pages of the Federal Reporter and law reviews across the country. Even at its most formal, though, adherents to a strict “text, history, and tradition” approach still rely upon analogy or borrowing to settle cases. *See, e.g., Heller II*, 670 F.3d 1244, 1271, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (stating that both *Heller* and *McDonald* called for “a test based wholly on text, history, and tradition” but also permitting reasoning by analogy for modern considerations).

<sup>268</sup> *Heller II*, 670 F.3d at 1252.

<sup>269</sup> *See McDonald*, 561 U.S. at 767–70; *see also Heller I*, 554 U.S. at 593, 628. For additional discussion on the self-defense right that the Second Amendment guarantees, see generally Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020).

<sup>270</sup> *Heller I*, 554 U.S. at 593, 599; *cf. McDonald*, 561 U.S. at 820 (Thomas, J., concurring) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230)) (describing property rights as “fundamental”).

<sup>271</sup> *McDonald*, 561 U.S. at 767; *cf. Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897) (describing the property right protected by the Takings Clause as “universal” and incorporating it onto the states via the Due Process Clause of the Fourteenth Amendment).

<sup>272</sup> *See* Samuel C. Kaplan, *Grab Bag of Principles” or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C.L. REV. 463, 466–67 (1998); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 237–38 (2008); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1413 (2009) (“The majority . . . read the Second Amendment to preserve the militia by codifying the common law right of self-defense, and declared that the Amendment ‘elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”). While no one disputes whether the Court constitutionalized at least *some* common law, scholars debate the exact boundaries. *Compare* David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 641 (2008) (“The Court held that the Second Amendment gives individuals a right not only to get a gun but also to use it for certain purposes, especially self-defense.

Similarly, the Court has constitutionalized the common law into its takings jurisprudence. Like sensitive places and other exceptions to the Second Amendment, the nuisance exception analysis is based on the Court's historical inquiry. Scalia found the exception based upon "the historical inquiry recorded in the Takings Clause that has become part of our constitutional culture."<sup>273</sup> *Lucas* constitutionalized the common law of nuisance when the Court held that if the challenged law "inheres . . . [in the] background principles of the State's law of property and nuisance[,] it is constitutional."<sup>274</sup> Specifically, these background principles "inhere in the title itself," meaning they were baked into the property when the owner purchased it.<sup>275</sup> Thus, the particular use had always been outside the scope of their rights.<sup>276</sup> This doctrinal move constitutionalized the common law of private and public nuisance into the Takings Clause as an exception to an "immutable" right that—like the right to self-defense—pre-figured ratification.<sup>277</sup>

As discussed, a regulatory takings analysis begins with history and tradition.<sup>278</sup> At Step One the judge must determine whether the underlying property use was traditionally within the owner's property right or whether it was deemed a nuisance. If the use is outside the owner's right then the court will uphold the regulation. However, if the use is within the owner's property right then the analysis proceeds to Step Two: a multifactor test.<sup>279</sup>

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And if the Constitution protects the right to use a gun for self-defense, then it follows that the Constitution must also protect the underlying right to self-defense itself."), with Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (showing *Heller* only constitutionalized the right to self-defense in the home).

<sup>273</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992).

<sup>274</sup> *Id.* at 1029.

<sup>275</sup> *Id.*

<sup>276</sup> Federal courts have long deferred to state courts on questions of whether a particular property interest exists. See Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435 (1977).

<sup>277</sup> DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774) ("[T]he inhabitants of the English Colonies in North-America, by the immutable laws of nature. . . . are entitled to life, liberty and property."); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*129 (describing "the right of personal security, the right of personal liberty, and the right of private property" as the "natural libert[ies]").

<sup>278</sup> See *Lucas*, 505 U.S. at 1027.

<sup>279</sup> See *supra* notes 181–84 and accompanying text. If a case proceeds to "step two" of the analysis then a court will consider the three *Penn Central* factors in making its determination. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The factors include (1) the character of the government action, (2) the regulation's economic effect on the landowner, and (3) the regulation's interference with the landowner's reasonable investment-backed expectations. *Id.* For examples of what this two-part takings analysis looks like in practice, see *Hendler v. United States*, 38 Fed. Cl. 611 (1997) (ruling the government's drilling of wells on plaintiff's property to assess groundwater contamination was not a taking as groundwater contamination was historically a nuisance under California law), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032 (Colo. App. 1996)

History and tradition are thus central to both takings and Second Amendment analyses. The Court has shown that both rights have their respective common law traditions at their core.<sup>280</sup> Borrowing from a takings framework for the Second Amendment both adheres to the analysis of history and tradition that *Heller* suggested, and provides judges with a more categorical, formalistic framework for Second Amendment cases. Such a framework supports consistency in decisions and helps legitimize the underlying doctrine by minimizing judicial discretion that can sometimes come with more flexible tests.<sup>281</sup> However, such an analytical framework will require an inquiry into the history and tradition of regulations governing self-defense at common law. The next Section will briefly discuss that.

#### *D. The Second Amendment's Background Principles*

This Section will briefly discuss the common law history and statutory tradition that comprise the Second Amendment's background principles. In addition to the reasons already discussed, we know to look to such sources because the Court's Second Amendment precedent tells us common law history and statutory tradition are germane to sketching the scope of the Second Amendment right. In his concurring opinion in *McDonald*, Justice Scalia stated that the "scope of the right" is shown not by Blackstone's musings, old dictionaries, or old newspaper clippings, but by "the traditional restrictions."<sup>282</sup> To the extent Justice Scalia is correct, a proper sensitive places analysis should engage with the statutes and common law that traditionally governed the right to keep and bear arms.

The common law is the "canvas on which our Founding Fathers drafted the Second Amendment."<sup>283</sup> As demonstrated by subsequent litigation and scholarship, the Second

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(finding no taking when a state environmental agency entered plaintiff's mine to help a federal agency move a detritus pile because, under principles of state nuisance law, the plaintiffs had no property right to use the site in a way that created environmental harm); and *Brown v. Thompson*, 979 P.2d 586, 595, 598 (Haw. 1999) (denying a takings claim challenge to a state impoundment of a sinking vessel because it was a public nuisance under state's common law).

<sup>280</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 767–70 (2010); *Aztec Minerals*, 940 P.2d at 1032.

<sup>281</sup> See Geoffrey Schotter, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241, 1310 (2010); see also *Heller I*, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

<sup>282</sup> *McDonald*, 561 U.S. at 802 (Scalia, J., concurring). At least some federal courts have subsequently interpreted Scalia's opinion as prescribing an investigation into Second Amendment's common law and statutory history. See, e.g., *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 348–49 (3d Cir. 2016); *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1151, 1156–66 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919, 939 (9th Cir. 2016).

<sup>283</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012).

Amendment right recognized by *Heller* and *McDonald* has a robust history at common law.<sup>284</sup> In both cases, the majority analyzed writings from leading founding-era legal thinkers and concluded that the right to arms during that period was “conceived of . . . as necessary for self-defense.”<sup>285</sup> But the right at that period was a common law right.<sup>286</sup> Indeed, though state constitutions provided for a right to arms, the precise scope was defined by the common law—a legal tradition inherited from England.<sup>287</sup> The common law tradition at the time both guaranteed and restrained the right.<sup>288</sup>

The legal regime that regulated the right at the founding and Reconstruction was highly localized.<sup>289</sup> The common law regimes at those times meant that the weapons laws one was subject to looked different depending on where one lived.<sup>290</sup> For example, generally speaking, the slave South in the Antebellum Era was governed by a more permissive firearm regulatory regime than the one in New England.<sup>291</sup> In fact, most of the country viewed laws prohibiting arms in certain places (i.e., sensitive places) as coexisting with the common law right the *Heller* and *McDonald* courts read into the Second Amendment.<sup>292</sup>

The limits on the Second Amendment right were, historically, defined by the legislature and enforced by justices of the peace, sheriffs, and constables.<sup>293</sup> These common law regulations governed where people could exercise their right.<sup>294</sup> For

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<sup>284</sup> Kaplan, *supra* note 272, at 466–67; Kopel, *supra* note 272, at 237–38; Siegel, *supra* note 272, at 1413.

<sup>285</sup> *Heller I*, 554 U.S. at 606.

<sup>286</sup> Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1144, 1148–49 (2006).

<sup>287</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887 (1996); cf. James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 3, 5–6 (2008) (discussing the role the common law of both nuisance and property play in defining the scope and content of property rights post-*Lucas*).

<sup>288</sup> Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 501–02 (2004).

<sup>289</sup> See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 122–24 (2015).

<sup>290</sup> *Id.*; WINKLER, *supra* note 145, at 163–65, 172–73 (discussing the strict gun laws in the nineteenth century west).

<sup>291</sup> Compare Ruben & Cornell, *supra* note 289, at 126–27, with WINKLER, *supra* note 145, at 128–34.

<sup>292</sup> See WINKLER, *supra* note 145, at 134; Cornell & DeDino, *supra* note 288, at 502–03; Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What It Tells Us About Firearm Regionalism*, 40 CAMPBELL L. REV. 335, 353–58 (2018); see also SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 29 (2006) (“The natural right of self-defense had evolved slowly into the more limited right embodied in the common law. These changes reflected the accumulated wisdom of countless judges who had struggled with the difficult task of balancing the right of self-defense with the need to protect public safety.”).

<sup>293</sup> Cornell & DeDino, *supra* note 288, at 502.

<sup>294</sup> See, e.g., *id.* at 505; Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth*

example, early American towns such as Gloucester, Massachusetts recognized the right to armed self-defense, but also observed that this right was subject to regulation through the common law and the state's police power.<sup>295</sup> Gloucester's balanced approach permitting the people to exercise their right, subject to specified location-based exceptions, was typical of the common law tradition at the time.<sup>296</sup>

Common law regulations governing the right to keep and bear arms for self-defense were most often enforced through the crime of affray.<sup>297</sup> Due to the flexible, evolving nature of common law reasoning affray has more than one definition.<sup>298</sup> However, one leading founding-era legal thinker defined affray as an offense at "common law . . . for persons to go or ride armed with dangerous weapons."<sup>299</sup> Liability was based upon multiple factors, including location (i.e., where the offender was bearing arms), but also time and manner.<sup>300</sup>

The Alabama Supreme Court's reasoning in *Carwile v. State* characterizes how affray was applied in a location-based challenge in the nineteenth century.<sup>301</sup> In

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*Century Second Amendment*, 123 YALE L.J. 1486, 1507–08, 1512–13 (2014). The relationship between the state's ability to regulate firearms and the right the Court read into the Second Amendment can be traced to the often-invoked Statute of Northampton. Indeed, *Heller* discussed the Statute extensively. Its precise meaning and import are the subject of a robust literature. See, e.g., Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 FORDHAM URB. L.J. CITY SQ. 10, 10, 26–27 (2013) (criticizing Cornell and stating that the Statute played a significant role influencing perceptions of what constituted permissive public carriage of arms in the eighteenth century), <https://ssrn.com/abstract=2256081> [<https://perma.cc/MKL9-Z2GG>]; Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1696, 1707–19 (2012) (concluding that the Statute was subject to several interpretations that could have resulted in a "range of views" as to its prosecutorial scope in the eighteenth century); David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127 (2010) (reading the scope of the Statute's historical restrictions narrowly and of limited import). Scholarly consensus suggests the Statute was at least persuasive in shaping common law arms regulations in the founding era. See Cornell, *supra*, at 1707–19; Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 391–92 (2016).

<sup>295</sup> See Charles, *supra* note 103, at 34.

<sup>296</sup> See *id.* at 35 n.183 (discussing and citing additional schemes).

<sup>297</sup> Cornell & DeDino, *supra* note 288, at 501.

<sup>298</sup> *Id.*

<sup>299</sup> CHARLES JAMES, A NEW AND ENLARGED MILITARY DICTIONARY (1805); see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*148–49; 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 87–95. Affray often included an additional element of causing "terror" or "fear" in the people. E.g., *id.* at 487; JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147 (1683).

<sup>300</sup> 1 HAWKINS, *supra* note 299, at 491–92.

<sup>301</sup> 35 Ala. 392 (1860); see also Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61, 88 (2018) (discussing *Carwile*).

*Carwile*, Zachariah Carwile challenged his affray conviction. Witnesses observed Carwile defending himself with a knife against two other individuals—both armed.<sup>302</sup> The question for the court was whether the field in which the fight took place was a “public place” for the purposes of an affray offense.<sup>303</sup> Though the opinion is a mere two pages, the court was clearly engaged in a multifactorial analysis. Importantly, in reaching its affirmative conclusion, the court looked at how easily the field could be seen from the street, how the relatively close proximity could potentially entangle passersby, and how this could potentially result in collateral “terror.”<sup>304</sup> *Carwile*’s analysis is typical.<sup>305</sup> This suggests that at common law, the early right to self-defense was subject to a flexible, evolving “context-bound judgment.”<sup>306</sup>

In addition to a tradition of common law regulation, the right to keep and bear arms has a long history of statutory regulation. Indeed, states regulated the carriage and use of firearms in particular places since before ratification.<sup>307</sup> These laws often proscribed firearms in places that were commonly populated (e.g., markets and fairs), where individuals could reasonably expect peace (e.g., schools, churches, and theaters), or places that have a significant nexus to government operations (e.g., courthouses, town halls, and polling locations).<sup>308</sup> The exact locations that were subject to regulation varied widely. Professor Joseph Blocher has observed that this regional tailoring was a product of the unique characteristics that divide urban from rural areas.<sup>309</sup>

<sup>302</sup> *Carwile*, 35 Ala. at 392.

<sup>303</sup> *Id.* at 392–93; *cf.* *United States v. Masciandaro*, 638 F.3d 458, 465 (4th Cir. 2011) (presenting the question of whether the park where Masciandaro was arrested is “sensitive place” for the purposes of the Second Amendment).

<sup>304</sup> *See Carwile*, 35 Ala. at 393–95. An additionally important feature of *Carwile* is its express rejection of any requirement that Carwile intended to terrorize the people by exercising his right to armed self-defense. *See id.* at 394 (“It must be admitted, that there was no actual terror . . . It is not so much the terror actually produced, as the liability of fighting in a public place to produce it, which the law regards. Terror to the people is presumed from the fighting in a public place.”). Reading an intentionality requirement into the common law crime of affray is generally associated with a reading of legal history that favors gun rights. *See* Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 HASTINGS CONST. L.Q. 531, 535 (2019). For an example of such a reading, see Kopel & Greenlee, *supra* note 11, at 222, 228, 241–44.

<sup>305</sup> *See* Frassetto, *supra* note 301, at 86–89 (discussing cases).

<sup>306</sup> Cornell & DeDino, *supra* note 288, at 501.

<sup>307</sup> *Id.* at 505; Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 113 (2013) (“Many local regulations at the time echoed the Statute of Northampton’s focus on weapons possession in populated areas.”); Mark Anthony Frassetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century* 88–98 (Jan. 15, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2200991> [<https://perma.cc/WN2W-VMSB>].

<sup>308</sup> *See Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS LAW, <https://web.law.duke.edu/gunlaws/> [<https://perma.cc/4FAT-5HPK>] (search “Sensitive Places and Times” as subject) (last visited Oct. 22, 2020).

<sup>309</sup> *See* Blocher, *supra* note 307, at 91, 93–103; *see also* An Act to Prohibit the Discharging of Fire Arms in Certain Places Therein Named, chap. 170, § 1, 1866 Tex. Gen. Laws

Consider some examples. In 1795, New Hampshire prohibited the use of firearms on public roads.<sup>310</sup> Relatedly, Indiana passed a law in 1855 prohibiting guns on trains.<sup>311</sup> In 1870, Texas prohibited individuals from carrying firearms in churches, schools, libraries, and at “social gathering[s]” and public assemblies.<sup>312</sup> And in 1879 Missouri made it “unlawful” for anyone to use any firearms within the “immediate vicinity” of “any court house, church or building used for school or college purposes.”<sup>313</sup> These cursory examples show that states have historically subjected firearms to location-based regulations.

As with any formalist test in constitutional law, boundary questions are inevitable. The Second Amendment is no different. The history and tradition that matters for Second Amendment analysis is a mix of Anglo-American sources.<sup>314</sup> This Section endeavored to show that that particular mix would provide a rich universe of background principles for judges to rely upon. Importantly, these background principles are a source the Court has stated demonstrate the “scope of the right.”<sup>315</sup> Borrowing from the Court’s takings doctrine would import a categorical rule to the Second Amendment that is “derived from text, history, and tradition.”<sup>316</sup> Such a move would introduce a more rigorous categorical inquiry to Second Amendment analysis, enabling judges to answer questions of law that are more familiar to them as opposed to engaging in law office history or “history lite.”<sup>317</sup>

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210 (expressly drawing the urban/rural divide by prohibiting firearms in every “city or town in [the] State,” unless deemed an “outer town” by the legislature). Blocher notes that the variation did not track a simple North-South divide, but rather the difference in how strict regulations were tracked much closer to the urban/rural divide. *See* Blocher, *supra* note 307, at 117. Nor was the distinction localized to northern states; some of the strictest gun regulations in American history were in towns associated with the “wild” West. *Id.*

<sup>310</sup> *See* An Act for Regulating the Militia Within This State, ch. 13, 1795 N.H. Laws 525.

<sup>311</sup> 1855 Ind. Laws, ch. 79.

<sup>312</sup> An Act Regulating the Right to Keep and Bear Arms, ch. 46, § 1, 1870 Tex. Gen. Laws 63.

<sup>313</sup> An Act to Prohibit the Discharge of Firearms in the Immediate Vicinity of Any Court-house, Church or Building Used for School or College Purposes, § 1, 1879 Mo. Laws 90.

<sup>314</sup> *See* Miller, *supra* note 261, at 910.

<sup>315</sup> *McDonald v. City of Chicago*, 561 U.S. 741, 802 (2010).

<sup>316</sup> Brief of Nat’l Rifle Ass’n Am. as Amicus Curiae Supporting Petitioners at 12, *N.Y. State Rifle and Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) [hereinafter Brief of Nat’l Rifle Ass’n Am.] (referring to the Court’s current nuisance exception doctrine).

<sup>317</sup> *See* Martin S. Flaherty, *Can the Quill be Mightier than the Uzi? History “Lite,” “Law Office,” and Worse Meets the Second Amendment*, 37 *CARDOZO L. REV.* 663, 675 (2015) (reviewing MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY*) (“To channel Brandeis, often the only cure for bad history is more history.”); David T. Hardy, *Lawyers, Historians, and “Law-Office History,”* 46 *CUMB. L. REV.* 1, 3 (2015); *cf.* Blumm & Ritchie, *supra* note 179, at 328 (“Adopting the threshold inquiry enables courts to avoid *Penn Central* balancing—regarded by many legal observers as a “bewildering mess”—and reduce the amount of information that they must process.”).

## IV. A NEW SENSITIVE PLACES TEST

The preceding Sections have discussed the what and the why; this Part will touch on the how. Here I will briefly outline what a sensitive places analysis might look like based on the takings doctrine.

*A. The Framework*

The first step of the existing Second Amendment “decision-making structure” frames the scope of the right.<sup>318</sup> In a location-based challenge the court is inquiring as to whether the place at issue is “sensitive” such that it falls into *Heller*’s exception. It is a categorical, threshold inquiry. If the location is sensitive, then the Second Amendment right does not extend to that place, and the regulation is upheld. If the place is not sensitive, then the regulation passes to a protection analysis, which asks when and how can the right be regulated in the location at issue.<sup>319</sup>

Borrowing from the nuisance exception doctrine, a court would conduct the “logically antecedent inquiry into the nature of” the plaintiff’s right to keep and bear arms in the location at issue.<sup>320</sup> To do this, the court must look to the state’s history and tradition of weapons regulation to determine whether or not the challenged law is of the kind that would have traditionally governed the right to keep and bear arms.<sup>321</sup> However, this formalist “text, history, and tradition” test is flexible enough to accommodate new knowledge and circumstances.<sup>322</sup>

In *Lucas*, Scalia observed that traditional concerns—like safety—may justify new regulations,<sup>323</sup> such as a prohibition on firearms inside civilian spacecraft. Importing this dynamic feature of the *Lucas* test to the Second Amendment is likely an instance

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<sup>318</sup> BLOCHER & MILLER, *supra* note 17, at 117.

<sup>319</sup> *See id.* at 110.

<sup>320</sup> *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>321</sup> *See id.* at 1030–31.

<sup>322</sup> Brief of Nat’l Rifle Ass’n Am., *supra* note 316, at 12 (discussing *Lucas*’s nuisance exception test as “text, history, and tradition” focused); *see also Heller II*, 670 F.3d 1244, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (referring to reasoning by analogy from history and tradition as the “proper interpretive approach”).

<sup>323</sup> *See Lucas*, 505 U.S. at 1022–23; *see also Starship, SPACEX*, <https://www.spacex.com/vehicles/starship> [<https://perma.cc/6PQX-4L3J>] (last visited Oct. 22, 2020). Justice Scalia similarly shed light on how to analogize modern situations and conduct to historical understandings of a constitutional right in *Jones*. Justice Alito’s concurring opinion was highly skeptical of the idea that the Fourth Amendment, as it was “originally understood,” could be analogized to determine whether placing a GPS tracking device on a car constitutes a search. *See United States v. Jones*, 565 U.S. 400, 419–21 (2012) (Alito, J., concurring) (“[I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.”). Scalia responded in the majority opinion by analogizing the facts in *Jones* to a historical scenario he observed “is not far afield”: “a constable’s concealing himself in the target’s coach in order to track its movements.” *Id.* at 406 n.3 (majority opinion). The relevant similarity he focused on was the effect of the government action on the challenger. This example, in addition to his discussion in *Lucas*, could assist courts in calibrating an analogy in the sensitive places context.

of both substantive and methodological borrowing, as it falls towards the middle of the borrowing continuum.<sup>324</sup> Though *Heller* suggests courts should emphasize history and tradition (methodological) in their analyses, it implies they may consider contemporary factors (substantive), as well.<sup>325</sup> Thus, the Second Amendment has at least some airspace for a doctrinal move like the one I propose here.

One of *Heller*'s many lessons is that the precise role of historical inquiry is an open question subject to much debate.<sup>326</sup> Though the nuisance exception-type analysis slightly constrains the ability of parties to misuse history, familiar challenges that attend history-in-law nevertheless remain.<sup>327</sup> One possible solution would be to rely only on consensus history of the relevant Second Amendment background principles when conducting the analysis.<sup>328</sup> Under this methodology, the sources would be those that have garnered historical consensus, rather than sources with competing accounts.<sup>329</sup>

But history is not dispositive in a takings or Second Amendment analysis. Both *Heller* and *Lucas* make clear there are additional considerations.<sup>330</sup> In *Lucas*, Justice Scalia observed that, in addition to the jurisdiction's background principles, courts will "ordinarily" look to the (1) risk of harm to surrounding property; (2) suitability of the plaintiff's use to the location at issue; and (3) balance of the difficulty to the plaintiff versus the state to avoid the harm.<sup>331</sup> A sensitive places inquiry would similarly consider additional factors. Consider again the analysis in some of the recent sensitive places cases.

In *GeorgiaCarry.Org, Inc. v. Army Corps. of Engineers*, the Eleventh Circuit implied that the factors important in a sensitive places analysis include the particular geographical details—like how large and readily accessible the place is to the public—how frequently people visit the place, and its national security implications.<sup>332</sup>

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<sup>324</sup> See Charles, *supra* note 83, at 12–21 (discussing the distinction between substantive and methodological borrowing and that it is best understood as a continuum rather than a dichotomy).

<sup>325</sup> See BLOCHER & MILLER, *supra* note 17, at 88–89, 144–46; FRANKS, *supra* note 222, at 72–73; SEGALL, *supra* note 72, at 144–45; WINKLER, *supra* note 145, at 285–86 (discussing how *Heller* used history and tradition as well as modern considerations in its analysis).

<sup>326</sup> See Miller, *supra* note 261, at 852.

<sup>327</sup> See *id.* at 876–86, 907–17.

<sup>328</sup> See Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy—Symposium: History and Meaning of the Constitution*, 63 CLEV. ST. L. REV. 23, 48 (2014) (defining and discussing consensus history). Consensus history is preferred to conflicting history because such a method is ripe for abuse. See *id.*; see also *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring) (calling for a historical inquiry that is based on bodies of evidence that are "less subjective").

<sup>329</sup> See Charles, *supra* note 328, at 48.

<sup>330</sup> In addition to affirming that the Court's historical analysis was not exhaustive, Justice Scalia incorporated additional, non-historical considerations into his analysis of whether the laws at issue were unconstitutional. See *Heller I*, 554 U.S. 570, 629 (2008) (resting the Court's holding on the current popularity of the modern handgun).

<sup>331</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992).

<sup>332</sup> 788 F.3d 1318, 1328 (11th Cir. 2015); *cf.* *Carwile v. State*, 35 Ala. 392 (1860).

Similarly, in *Class*, the D.C. Circuit expressed that a sensitive places inquiry might consider the types of individuals who frequent the place.<sup>333</sup> And in *DiGiacinto* the Virginia Supreme Court stated that a proper sensitive places inquiry might, in addition to history and tradition, consider whether the place at issue typically features large numbers of people who reasonably expect peace and safety.<sup>334</sup>

A distilled version of the test I propose looks like this:

- A. The court will first look to Second Amendment background principles, including both the particular state's historical statutes and judge-made law.<sup>335</sup>
  - B. If the court is unable to find consensus sources in its historical inquiry into the background principles, or in addition to that inquiry, the court will "ordinarily"<sup>336</sup> consider additional factors, such as:
    1. How large and readily accessible the place is to the public;
    2. Whether the place poses national security concerns;
    3. How often people frequent the place;
    4. The types of individuals that frequent the place (e.g., children); or
    5. Whether the place typically features large numbers of people with a reasonable expectation of peace or safety.
- Step One
- A. If, after a principled and rigorous inquiry at Step One, the Second Amendment right is found to extend to the place at issue, then the analysis moves to Step Two. This step typically involves the court applying some form of scrutiny above rational basis to the government's justification for the law at issue.<sup>337</sup>
- Step Two

A test like the one briefly sketched here could provide courts with familiar legal, rather than historical, tools to decide cases in a way that still adheres to *Heller's* prescription. One need not be a so-called "originalist" to analyze Second Amendment

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<sup>333</sup> 930 F.3d 460, 464 (D.C. Cir. 2019).

<sup>334</sup> *DiGiacinto v. Rector and Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011); *see also* *S.B. v. Seymour Cmty. Schs.*, 97 N.E.3d 288 (Ind. Ct. App. 2018) (finding no Second Amendment violation when school system prohibited plaintiff from bringing an AK-47 to school because it would violate the expectation of peace and safety that reasonably attend school grounds).

<sup>335</sup> *See supra* Section III.D.

<sup>336</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

<sup>337</sup> *See supra* note 19 and accompanying text; *cf. supra* note 279 and accompanying text.

questions in line with the Court’s jurisprudence. Though the Court decided the case according to what it stated was the Amendment’s original public meaning, the Court cautioned that its historical analysis was not exhaustive, and that subsequent cases might further our understanding of the right’s full scope.<sup>338</sup> Thus, the Court made clear that original meaning was important, but that historical practice is the North Star of a proper Second Amendment analysis. And “[h]istorical practice is not quite the same as originalism, either, because it frequently looks to what has happened in the generations *after* a text was originally written.”<sup>339</sup> By borrowing from a familiar, more developed area of constitutional jurisprudence that guarantees a similar right, courts could foster the informed development of Second Amendment doctrine.

### *B. How Might the Test Work?*

With the preceding Section’s outline in mind, this Section will now discuss its application. To see what the framework could look like in action, consider a brief example. Many states prohibit firearms in public transportation facilities, such as a metro station.<sup>340</sup> Analyzing a challenge to such a regulation could work as follows:

The first question for a court is whether the metro station is “sensitive” for the purposes of the Second Amendment. The initial burden falls on the government to show the regulation is lawful because it falls into *Heller*’s location-based exception.<sup>341</sup> The question that guides that showing is whether or not the jurisdiction’s background principles would have made it unlawful for the plaintiff to carry a firearm in a metro station in 1868.<sup>342</sup> Thus, at Step One, the burden falls on the government

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<sup>338</sup> *Heller I*, 554 U.S. 570, 626–27 (2008).

<sup>339</sup> William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019); *see also* Charles, *supra* note 294, at 226 (“[O]riginalism is not history. It is a fact that originalism’s chief proponents openly concede.”).

<sup>340</sup> *See, e.g.*, 20 Ill. Comp. Stat. 5/24-1(c)(1.5) (2020) (making it a felony to knowingly carry or possess “any pistol, revolver, stun gun or taser or other firearm” in a “public transportation facility”).

<sup>341</sup> *Heller I*, 554 U.S. at 626–27 n.26. This burden sequence proceeds according to how many courts currently preside over Second Amendment cases—it is descriptive. Perhaps subsequent research will examine whether such a scheme is doctrinally proper or normatively desirable.

<sup>342</sup> Whether the correct guidepost for a historical inquiry in a challenge to a state or local ordinance is 1868 (when the Fourteenth Amendment was ratified) or 1791 (when the Second Amendment was ratified) is an ongoing debate, particularly among originalist scholars. *See* *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (analyzing the scope of the right in 1791 but considering late nineteenth century sources), *rev’d en banc*, 824 F.3d 919, 939 (9th Cir. 2016); *Ezell I*, 651 F.3d 684, 702 (7th Cir. 2011) (“[W]hen state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified [in 1868.]”); *see also* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 15 (2008) (looking to state constitutional rights in 1868 to understand unenumerated

to show that a metro station is “sensitive”—i.e., outside the plaintiff’s Second Amendment right.<sup>343</sup>

As discussed, the government can accomplish this by establishing that the state’s Second Amendment background principles deemed going armed in a metro station outside the scope of the Second Amendment right. One important question when analyzing historical evidence is what level of generality or tailoring controls the inquiry.<sup>344</sup> For the framework I propose, litigants and courts might consider the Fifth Circuit’s approach in *National Rifle Ass’n v. Bureau of Alcohol, Firearms, & Tobacco*.<sup>345</sup> There, the court found a federal regulation that prohibited firearm access and purchases by persons under twenty-one years old was outside the scope of the Second Amendment at Step One.<sup>346</sup> To frame the level of abstraction for its historical analysis, the court read nineteenth century evidence, such as court decisions and treatises, at both the general and granular level.<sup>347</sup> The court found the law was outside the scope of the right at both levels of abstraction.<sup>348</sup> It framed the law as an “age and safety bound restriction[]” (more granular) as well as “targeting select groups’ ability to access and use arms for the sake of public safety” (more general).<sup>349</sup>

Returning to our hypothetical, the law prohibiting arms in a metro station could be framed as a restriction on arms in transportation stations (more granular) as well as a prohibition on arms in locations that feature tight quarters and are often crowded (more general).<sup>350</sup> However, as Justice Scalia observed in both *Heller* and *Lucas*, history and tradition are not dispositive in either Second Amendment or takings analysis.<sup>351</sup> Thus, if a public transportation facility is not expressly mentioned in a

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rights protected by the Fourteenth Amendment’s Due Process and Privileges and Immunities Clauses); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1099–1100 (1995) (discussing whether the 1868 understanding of the Establishment Clause is controlling). Without endorsing one side of that debate, I will adopt 1868 as the appropriate marker for the purposes of this hypothetical.

<sup>343</sup> Cf. *supra* notes 181–83 (describing Step One in a takings challenge).

<sup>344</sup> See Miller, *supra* note 261, at 922–25; Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1929 (2016).

<sup>345</sup> 700 F.3d 185, 204 (5th Cir. 2012), *cert. denied*, 571 U.S. 1196 (2014).

<sup>346</sup> *Id.* at 204.

<sup>347</sup> See *id.* at 203.

<sup>348</sup> *Id.* at 204.

<sup>349</sup> *Id.* at 203.

<sup>350</sup> However even this approach can present challenges for some modern social developments. But Justice Scalia provided some guidance for courts to navigate such scenarios. In both *Lucas* (the nuclear power plant) and *Jones* (a GPS tracking device), Scalia showed how to calibrate an analogy in a way that respects the underlying right as well as places an emphasis on history and tradition. The path laid by Scalia in both these cases could assist courts when they encounter challenges as to how to calibrate an analogy or to read a state’s Second Amendment background principles in the face of such technological or social developments. See *United States v. Jones*, 565 U.S. 400 (2012); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>351</sup> See *Lucas*, 505 U.S. at 1030; see also *Heller I*, 554 U.S. 570, 625 (2008).

historical decision or statute because, for example, there was no public transportation in the jurisdiction until the twentieth century, then the government can also meet its Step One burden by showing that the various additional factors, such as the national security implications of the place, indicate the place is “sensitive.”

The factors in *Lucas* were specific to nuisance, but factors in the test I propose here might look like those the *DiGiacinto*, *GeorgiaCarry.Org, Inc. v. Army Corps. of Engineers*, and *Class* courts applied. These factors do not look so different from the *Lucas* factors. Thus, a court might consider how close the place is to important government infrastructure or whether the location typically carries a presumption of peace and tranquility. Such factors might, like the Court’s nuisance exception inquiry, help determine whether carrying arms in the particular place is within or outside the plaintiff’s Second Amendment right. If the government is able to meet its burden, and show that the metro station is sensitive at Step One—either by establishing state background principles, via additional factors, or both—then the inquiry ends, and the law is upheld.

However, if the government is unable to show any Second Amendment background principles indicate the place at issue was traditionally outside the Second Amendment right, and the additional factors are either not implicated or disfavor the law at issue, then the inquiry moves to Step Two. Importing the *Lucas* test to the Second Amendment would help ensure judges engage in a more rigorous and nuanced analysis. Thus, courts only reach Step Two after a meaningful and principled inquiry at Step One.

In the takings context, if a nuisance exception is found to lack support in a state’s background principles, then the regulation is subject to a balancing test. In the Second Amendment context, the existing two-part framework already provides for similar analysis at Step Two. The scrutiny applied at Step Two, though, is arguably more respectful of the underlying right than takings doctrine, as courts apply some form of heightened scrutiny to weapons regulations, as opposed to a “freestanding ‘interest-balancing’ approach” as is applied in takings cases under *Penn Central*.<sup>352</sup> At Step Two, courts generally require the government make a strong showing that the regulation “reasonably advances some important or legitimate government interest.”<sup>353</sup>

To calibrate its scrutiny analysis, a court will generally look to the burden on the plaintiff’s right imposed by the inability to carry a firearm in a metro station. It will

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<sup>352</sup> *Heller I*, 554 U.S. at 634–35; see also Gary Lawson, Katharine A. Ferguson & Guillermo Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks, 81 NOTRE DAME L. REV. 1, 32–33, 37–38 (2005) (describing *Penn Central* test and criticizing as not being protective enough of property rights).

<sup>353</sup> BLOCHER & MILLER, *supra* note 17, at 110; see also Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 512–13 (2012); Brief for the United States as Amicus Curiae at 8, *Heller I*, 554 U.S. 570 (2008) (No. 07-290) (suggesting courts apply “heightened” scrutiny).

also consider the government's justification supporting the regulation.<sup>354</sup> Thus, the burden would shift to the government to produce evidence supporting its contended purpose behind the regulation, and the evidence would be analyzed according to the level of scrutiny determined by the burden the law imposed on the plaintiff's right.<sup>355</sup>

### C. Evaluating the Borrowing

This Section will briefly evaluate the borrowing I propose. It will examine whether using the Court's takings doctrine as a source for courts to analyze sensitive places challenges could be a successful instance of borrowing.<sup>356</sup>

As previously discussed,<sup>357</sup> since the Court decided *Heller* and *McDonald* property-like principles have plausibly been a part of Second Amendment jurisprudence. That is to say, there is some "synergy" between the Court's Fifth Amendment and Second Amendment doctrines.<sup>358</sup> Moreover, this relationship between property rights and the right to keep and bear arms is recognized by scholars, practitioners, and judges alike.<sup>359</sup>

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<sup>354</sup> Of course, there is much discussion about whether the two-part framework is even workable. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (referring to the framework as a quagmire). Similar criticisms attend the Court's *Penn Central* test, as well. *See, e.g.*, Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 118 (1993) ("Takings jurisprudence was a muddle before the Supreme Court handed down *Yee* and *Lucas*, and a muddle it remains."). However, if one takes Justice Scalia, in addition to others advocating for a formalist conception of constitutional interpretation, at their word then a doctrinal test can adhere to the text, history, and tradition readings of *Heller* and *Lucas* and include some form of balancing. *See* Joseph Blocher, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 132 (2019); Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1240 n.175 (2009).

<sup>355</sup> *See supra* Section IV.B. As discussed, the scrutiny prong—Step Two—of the existing decision-making structure is the subject of much debate by scholars, judges, and practitioners across the ideological spectrum. One important feature of that debate is whether the judiciary is best equipped to assess a legislature's policy analysis. If the people's elected officials marshal evidence and find firearms are best kept outside public transportation facilities, should judges be able to second-guess their work? Of course, this question pervades all of constitutional law.

<sup>356</sup> For a less successful instance of borrowing see Laurin, *supra* note 193, at 672–76, 730–41 and Nelson Tebbe & Robert L. Tsai, *Notes on Borrowing and Convergence*, 111 COLUM. L. REV. SIDEBAR 140, 142–44 (2011).

<sup>357</sup> *See supra* Section III.B.

<sup>358</sup> *See* Tebbe & Tsai, *supra* note 186, at 495.

<sup>359</sup> *See, e.g.*, Blocher, *supra* note 28, at 372 n.352 (comparing plaintiff success rates in Second Amendment challenges to those in takings challenges); *id.* at 312–13, 317–18, 343–51; Symposium, *Heller in the Lower Courts*, 40 CAMPBELL L. REV. 399, 419–22 (2018) (discussing takings as a likely analog for Second Amendment challenges); Nicholas Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1273–74 (2010) (proposing the Court's regulatory takings jurisprudence as a doctrinal model for the hard analytical questions *Heller* and *McDonald* left unanswered); Brief of Second Amendment

Indeed, some originalist scholars contend that the most “plausible”<sup>360</sup> historical source for the Second Amendment is a jurisdiction’s common law tradition—the same source used in *Lucas*’s nuisance exception test.

This makes a great deal of sense. First, both rights are fundamental, natural rights that prefigure the Constitution’s drafting.<sup>361</sup> Second, borrowing to inform nascent Second Amendment doctrine has two practical bases. One, *Heller* endorsed such a move when the Court looked to the First, Fourth, and Ninth Amendments to frame and rationalize its decision.<sup>362</sup> Two, because Second Amendment doctrine is so underdeveloped, it is ripe for an infusion from another more developed area of the Constitution.<sup>363</sup> The Takings Clause could be one such source. The Court’s doctrine in this area has existed for almost two centuries, which has allowed the doctrine to percolate and benefit from the accumulation of voices and precedents over time.<sup>364</sup> Additionally, a propertized Second Amendment is similarly endorsed by justices of varying ideological views.<sup>365</sup> Thus, borrowing from takings is not thrusting a one-sided doctrinal test onto the right to keep and bear arms.

However, a successful import of the takings clause would require the judge be “open and notorious” in their borrowing from the Fifth Amendment.<sup>366</sup> They might begin their analysis by observing their inquiry into a state’s background principles

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Law Professors as Amici Curiae in Support of Neither Party at 22, N.Y. State Rifle & Pistol Ass’n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

<sup>360</sup> See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1354 (2009). Any historical analysis endeavoring to interpret a constitutional provision’s meaning or how it was understood must look to the common law. See Kunal M. Parker, *Law “In” and “As” History: The Common Law in the American Polity*, 1 U.C. IRVINE L. REV. POL’Y 587 (2011); Toler et al., *supra* note 255.

<sup>361</sup> See Larkin, *supra* note 113, at 3 (citing JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 17 (3d ed. 2008)); see also *Heller I*, 554 U.S. 570, 592, 612 (2008) (referring to the Second Amendment right as the “pre-existing” “natural right of self-defense”).

<sup>362</sup> See *Heller I*, 554 U.S. at 579, 582, 595, 635 (relying on the First Amendment); *id.* at 579, 582, 592 (Fourth Amendment); *id.* at 579, 580 n.6, 582 (Ninth Amendment).

<sup>363</sup> See Morgan, *supra* note 30, at 199. Indeed, the current understanding of the Second Amendment has existed for merely five percent of the life of federal constitutional law. Compare *Heller I*, 554 U.S. at 570 (*Heller* was decided June 26, 2008), with U.S. CONST. amend. II (the Second Amendment was ratified, along with the other first ten Amendments, on December 15, 1791).

<sup>364</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010); see also *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (considering the multitude of international sovereign voices that have contributed to the Court’s understanding of “cruel and unusual punishment”); cf. TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE* 236–37 (2018) (“Although it is a part of a system of rights, the Second Amendment will need breathing space to develop on its own, just as the Free Speech Clause has done over the past century.”). The Court’s takings doctrine has benefited from contributions from justices across ideological spectrum.

<sup>365</sup> See *supra* notes 201 & 202 and accompanying text.

<sup>366</sup> See Tebbe & Tsai, *supra* note 186, at 499.

as being based on *Heller*'s commitment to history and tradition, a commitment shared by the Court's well-established and longstanding takings doctrine. Judge Scirica's opinion in *Marzzarella* is instructive.<sup>367</sup> His import from the First Amendment's two-part analytical structure was "open and notorious."<sup>368</sup> He cites to some of the Court's First Amendment cases, and discusses how that doctrine's structure frames his analysis.<sup>369</sup> A judge would adopt a similarly transparent approach in borrowing from the Court's takings doctrine.

As previously discussed, Second Amendment doctrine is underdeveloped.<sup>370</sup> Lower courts have only just taken their "first steps" in developing Second Amendment jurisprudence.<sup>371</sup> Borrowing from the Court's takings doctrine is meant to support and further that development.<sup>372</sup> Finally, because current Second Amendment doctrine is largely the product of borrowing—from the Supreme Court as well as courts below—the right is likely more conducive to successful borrowing than others.<sup>373</sup>

## V. COUNTERARGUMENTS

No instance of borrowing is perfect. However, I caution the reader to consider that this Article's contribution is intended for the judicial—not aspirational—Second Amendment.<sup>374</sup> There are legitimate arguments as to why the Takings Clause in

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<sup>367</sup> See *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

<sup>368</sup> *Id.* at 89.

<sup>369</sup> See *id.* at 88, 96–99.

<sup>370</sup> Ruben & Blocher, *supra* note 35, at 1451.

<sup>371</sup> *Id.*

<sup>372</sup> Professors Tebbe and Tsai refer to such borrowing as "offensive." Tebbe & Tsai, *supra* note 186, at 507.

<sup>373</sup> See *id.* at 469–71 (discussing instances when borrowing is less successful).

<sup>374</sup> Too often the Second Amendment is subject to a polarized, rancorous debate. The Aspirational Second Amendment typically casts an ideological valence over either side in the debate: gun rights versus gun control, conservative versus progressive, Democrats versus Republicans, etc. Professor Adam Winkler attributes the ideologically bifurcated Second Amendment—the one judges read when they settle cases presenting a question regarding the constitutional right versus the one referred to in common discourse—as being driven largely by public interest groups. See Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 257–61 (2018); see also DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 102–39 (1st ed. 2016) (describing the successful efforts of the National Rifle Association to persuade the Court to reinterpret the "dusty" Second Amendment as protecting an *individual* right to bear arms); MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 96–102, 117–29 (2014) (describing how the NRA's grassroots activism captured the five votes needed to change constitutional law). Importantly, Winkler observes, this bifurcated right works as a one-way ratchet; views associated with the Aspirational Second Amendment move the needle associated with the Judicial Second Amendment—not the other way around. See Winkler, *supra*, at 253–54, 258. See generally COLE, *supra*, at 102–39 (examining the role of civil society groups in achieving constitutional change).

general and nuisance exception in particular make for an imperfect doctrine to import to the Second Amendment. This Part will attempt to address them.

One criticism might focus on the text of the two constitutional provisions. Recall, the Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>375</sup> The Fifth Amendment states, in relevant part, that “[P]rivate property [shall not] be taken for public use, without just compensation.”<sup>376</sup>

Thus, one might find that “infringed” and “taken” are too linguistically distinct to support an instance of borrowing. But any criticisms based upon the text likely fall away after considering the interpretation that surrounds the text. It is a truism of constitutional law that very few individual rights are read literally. Certainly, the Takings Clause and Second Amendment fall outside the subset of literal readings. *Heller* made clear that the Second Amendment’s guarantee that the right “shall not be infringed” does not mean *cannot be regulated*.<sup>377</sup> A distinct feature of *Heller*’s holding is that there is play in the text’s joints to regulate or restrict the right.

The Fifth Amendment’s text is similarly pliable. The Takings Clause reads: “[P]rivate property [shall not] be taken for public use, without just compensation.”<sup>378</sup> But the Court’s takings doctrine makes clear that “taken” is flexible enough to allow the government to regulate a property owner’s use without triggering compensation.<sup>379</sup> Despite the plain text implying *all* takings trigger compensation, its interpretation counsels otherwise.<sup>380</sup> Thus, both constitutional provisions accord a level of elasticity that does not foreclose borrowing from one to inform the other due to the level of protection the provisions confer on their respective rights.<sup>381</sup>

Another text-based critique would center on the Takings Clause’s “just compensation” phrase.<sup>382</sup> The argument might be that because a violation expressly calls for damages, whereas the Second Amendment does not, the framers clearly viewed the

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<sup>375</sup> U.S. CONST. amend. II.

<sup>376</sup> *Id.* amend. V.

<sup>377</sup> *Id.* amend II; *see also Heller I*, 554 U.S. 570, 626 (2008).

<sup>378</sup> U.S. CONST. amend. V.

<sup>379</sup> *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 797–98 (2009).

<sup>380</sup> *See* Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 647–48, 660–61 (2015) (“A regulatory taking exists only when a regulatory law imposes an uncompensated burden on an owner that cannot be justified as legitimate in a free and democratic society that treats each person with equal concern and respect.”).

<sup>381</sup> It is true that an infringement cannot be found if a law regulates something that was never part of the Second Amendment right. Similarly, as *Lucas* made plain, a “taking” cannot exist if the plaintiff never had an interest in the property at issue. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Thus, relying upon a more robust inquiry, such as the one proposed in this Article helps ensure courts explore the scope of the Second Amendment right before jumping straight to a scrutiny analysis.

<sup>382</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, *without just compensation.*”) (emphasis added).

rights as sufficiently different such that borrowing is not permissible. However, the history of the Second Amendment right the *Heller* Court conceived of indicates otherwise. Federal courts have found that “[t]he Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment.”<sup>383</sup> Further, research by Professor Saul Cornell and Nathan DeDino suggests the right to keep and bear arms at the founding may have actually been *subordinate* to the property right, as, for example, some state constitutions exempted arms from their takings provisions.<sup>384</sup> Thus, though the text may infer otherwise, history shows that the rights the two provisions guarantee are at least coordinate.

Still another critic might argue that if any property principles exist in the Second Amendment, they are *specific* rather than *general*. Meaning, to the extent that the Second Amendment contains property-like principles, those principles are restricted to the protection the Amendment confers on a particularized form of property—i.e., chattels, and handguns in particular. And because the Takings Clause applies to *general* property interests, it is a poor source for borrowing.<sup>385</sup>

But to the extent that criticism carries any weight, it has been answered by the courts. Indeed, courts have held that the Second Amendment does not protect the right to a specific weapon.<sup>386</sup> Moreover, the Supreme Court has made clear that though *Heller*’s holding was centered around firearms—and handguns in particular—its subsequent decision in *Caetano* confirmed that the sweep of Second Amendment “arms” is more capacious. Handguns are but one stick in the Second Amendment bundle. Though the precise boundaries are less than clear, under current case law, “arms” for the purposes of constitutional protection extends beyond handguns.<sup>387</sup> In that sense, then, there is no clear line to what is deserving of protection and what is not. As Professor Sprankling has argued, the Second Amendment is more akin to a general

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<sup>383</sup> See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012).

<sup>384</sup> See Cornell & DeDino, *supra* note 288, at 496; cf. Class Action Complaint, *Lane v. United States*, No. 19-01492 (N.D. Tex. June 24, 2019) (challenging Department of Justice rule classifying bump stocks as machine guns, as machine guns are banned under the Firearm Owners Protection Act of 1986); Joseph Blocher & Eric Ruben, “*The Second Amendment is Not a Second-Class Right*”: *A Case Study in Constitutional Rhetoric and Doctrinal Change* (Feb. 3, 2020) (unpublished manuscript) (on file with author) (examining the use of rhetorical devices to frame the Second Amendment as a second-class right to achieve heightened constitutional protection).

<sup>385</sup> Sprankling, *supra* note 28, at 6.

<sup>386</sup> Courts have found that a litigant’s specific firearm is not protected by the Second Amendment. See, e.g., *Walters v. Wolf*, 660 F.3d 307, 318 (8th Cir. 2011) (holding no Second Amendment violation when plaintiff’s firearm was not returned after court dismissed criminal charge against him); see also Schwab & Sprankling, *supra* note 28, at 170.

<sup>387</sup> See, e.g., *Maloney v. Singas*, 351 F. Supp. 3d 222 (E.D.N.Y. 2018) (finding the Second Amendment protects nunchaku); *City of Seattle v. Evans*, 366 P.3d 906 (Wash. 2015) (defendant carried a paring knife for self-defense).

property right, like the Fifth Amendment, than a specific property right like, say, the Fourth Amendment's protection of "houses, papers, and effects."<sup>388</sup>

This Part endeavored to identify and address some of the more likely counter-arguments to the claims made in this Article. To the extent I addressed those arguments, the framework I advance here is still by no means a panacea. Rather, I sought to show that the Supreme Court provided lower courts few tools to apply *Heller*'s novel holding in future challenges to location-based weapons laws. Subsequent cases evince courts' struggles. However, all is not lost. This Article attempted to show that courts have existing doctrinal tools available to them that accord with Second Amendment precedent and provide a more rigorous way to examine such cases by way of more familiar doctrine.

#### CONCLUSION

Lower courts' current approach to analyzing sensitive places challenges in Second Amendment litigation is inconsistent, lacks nuance, and is wholly consistent with *Heller*. Fortunately, the doctrinal tools to ameliorate this discontinuity already exist. The test I propose recognizes the limits of the Court's current Second Amendment doctrine and the challenges it presents for lower courts, as well as the potential solutions more established areas of constitutional law present. Second Amendment doctrine can be better, and this Article sketches a path forward in an attempt to show how.

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<sup>388</sup> Sprankling, *supra* note 28, at 6.