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BOSTON UNIVERSITY

THE SECOND AMENDMENT AND PRIVATE LAW

CODY J. JACOBS*

The Second Amendment, like other federal constitutional rights, is a restriction on government power. But what role does the Second Amendment have to play—if any—when a private party seeks to limit the exercise of Second Amendment rights by invoking private law causes of action? Private law—specifically, the law of torts, contracts, and property—has often been impacted by constitutional considerations, though in seemingly inconsistent ways. The First Amendment places limitations on defamation actions and other related torts, and also prevents courts from entering injunctions that could be classified as prior restraints. On the other hand, the First Amendment plays almost no role in contractual litigation, even when courts are called on to enforce contractual provisions that directly restrict speech. The Equal Protection Clause was famously interpreted to bar the enforcement of a racially restrictive covenant in Shelley v. Kraemer*, but in the years since, courts have largely limited that case to its facts.*

This Article reconciles these disparate outcomes to develop a coherent theory of the role constitutional rights play in private law. The Article argues that three guideposts inform whether constitutional rights are applied to limit private law: (1) whether the private law cause of action threatens the core of a constitutional right, (2) whether placing a constitutional limitation on private law would impair other constitutional rights, and (3) whether the private law imposition on constitutional rights was freely bargained for. The Article then applies this framework to the individual Second Amendment right recognized in District of Columbia v. Heller *by examining several areas where the right to keep and bear arms could intersect with private law, including negligent entrustment, products liability, and trespass.*

*. Visiting Assistant Professor, Chicago-Kent College of Law. I would like to thank Rick Greenstein and Tom Lin for their helpful comments on this article.

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INTRODUCTION

Dick Heller wanted to keep a handgun in his house for self-defense but was prevented from doing so by a District of Columbia law banning handguns. Believing that the law was unconstitutional, he sued the District and ultimately won a landmark decision at the Supreme Court in *District of Columbia v. Heller*, which held that the Second Amendment contains an individual right to keep and bear arms for self-defense.[1] But what if Mr. Heller had lived in an apartment subject to a restrictive covenant banning guns? What if he wanted to carry his handgun onto an unwilling business owner's property? What if the manufacturer of Mr. Heller's handgun was sued for selling a defective product? While at first blush it may seem that the Second Amendment would have no bearing on these "private" restrictions on guns, every single one of them requires the involvement of a pubic actor—the court—to give force to these restrictions.

Does the involvement of a court in enforcing these "private law" restrictions on guns automatically mean that each of these restrictions is subject to Second Amendment scrutiny?[2] Again, the answer is not as clear cut as it might seem. The cases dealing with the relationship between other constitutional rights and private law have not embraced an across the board "court-as-state-actor" theory. Instead, they have produced an inconsistent and confusing patchwork of results with no overarching theory to explain the different approaches employed when dealing with different constitutional rights and different areas of private law.

This Article will attempt to fill in that gap by developing an explanatory theory of the relationship between private law and constitutional rights. A close examination of the case law reveals three "guideposts" that underlie the courts' determinations of whether to place constitutional limitations on private law in any given context. First, courts will only apply constitutional constraints to private law when the private law action threatens the core of the constitutional right at issue. Second, courts are more reluctant to apply constitutional constraints to private law when the application of such a constraint would threaten the constitutional

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

2. Private law is "the body of law dealing with private persons and their property and relationships." BLACK'S LAW DICTIONARY (10th ed. 2014). Of course, the question of what constitutes private law as opposed to public law is a fraught one. *See, e.g.*, Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1703 (2014). This article defines private law as concerning tort, contract, and property law doctrines, irrespective of whether the source of those doctrines in any given situation happens to be common law or statute. *See also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 517 (1985).

rights of others. Third, courts rarely apply constitutional constraints to contracts and other voluntary agreements. This Article will use the Second Amendment to demonstrate how these guideposts might be applied in several areas where Second Amendment rights and private law are likely to intersect.

Part I of this Article explores the way other individual constitutional rights have played a role in private law litigation. Part II proposes a theoretical framework—the Core Right Theory—that explains the seemingly disparate ways other rights have been incorporated into private law litigation. Part III elucidates what the core of the Second Amendment right is through a discussion of the Supreme Court's decision in *Heller* and of the Second Amendment doctrine that has developed in the lower courts following that decision. Part IV discusses several potential areas where the Second Amendment could be implicated in private law litigation and applies the Core Right Theory to sketch out how courts might approach those issues.

I. INDIVIDUAL CONSTITUTIONAL RIGHTS AND PRIVATE LAW: A TANGLED PATCHWORK

The relationship between individual constitutional rights and private law has always been a messy one. Individual constitutional rights were traditionally thought to serve only as checks on direct exercises of government power, and had no bearing whatsoever on private law litigation.[3] However, starting in the middle of the twentieth century, the Supreme Court began to expand the scope of constitutional rights to place limits on private law in some areas. But this expansion has been far from uniform. Torts imposing liability based on speech and injunctive relief that targets speech have been given serious constitutional limitations. Nevertheless, contractual obligations limiting speech have remained relatively free from First Amendment scrutiny. Likewise, although a few prominent cases have suggested otherwise, courts have been fairly reluctant to find that the First Amendment or the Equal Protection Clause contain consequential limitations on private property rights.

A. FREE SPEECH, DEFAMATION, AND RELATED INTENTIONAL TORTS

Perhaps the most famous area where the Supreme Court has explicitly placed constitutional limitations on litigation between private parties is in

3. *Cf.* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (noting that in the *Lochner* era, the common law was thought of as a "part of nature rather than a legal construct").

the context of actions for defamation.[4] The torts of libel and slander existed at common law long before the First Amendment was ratified.[5] And, for over a century after the First Amendment was ratified, there was no suggestion that the Amendment did anything to alter these torts even though liability was triggered by the defendant's speech.[6]

The Supreme Court changed that dramatically in *New York Times Co. v. Sullivan*.[7] In that case, a public official in Alabama sued the New York Times and several civil rights leaders for libel in Alabama state court based on an allegedly defamatory advertisement the Times published, which criticized the official's handling of civil rights protests in Montgomery.[8] The jury returned a hefty verdict for the plaintiff after being instructed by the trial judge that the statements in the advertisement were libel per se and that no proof of intentional falsity was required.[9] The Supreme Court of Alabama upheld the jury verdict and rejected the defendants' argument that the jury instructions violated the First Amendment.[10]

The Supreme Court reversed and held that the First Amendment limited libel actions by requiring that—when the plaintiff is a public figure—the plaintiff must prove that the allegedly defamatory material was published by the defendant with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[11] The Court rejected any distinction between libel actions between private parties and other kinds of state action:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action . . . . The test

4. Defamation refers to two separate torts: libel and slander. RESTATEMENT (SECOND) OF TORTS § 568 (AM. LAW. INST. 1977).

5. *See, e.g.*, Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 42 (1985).

6. *See, e.g.*, Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1656 (2009). *But see* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 251 (2010) (arguing that courts and commentators did understand tort actions as state action for purposes of the First Amendment and state constitutional analogues at the time of the founding, but that they simply considered defamation to be outside the scope of the First Amendment).

7. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 254 (1964).

8. *Id.* at 256–65.

9. *Id.* The jury awarded $500,000 in damages against the defendants, which is nearly $4 million in today's dollars. *See* U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com (last visited Aug. 11, 2017).

10. N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 40 (Ala. 1962).

11. *Sullivan*, 376 U.S. at 280.

> is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. . . . What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.[12]

In the years following *Sullivan*, the Court extended the protection of the actual malice requirement to situations where the defamation plaintiff is any "public figure," even if they are not a public official.[13] Although the Court declined to extend the full protection of *Sullivan* to suits involving non-public-figure plaintiffs, it did hold that the First Amendment requires such plaintiffs to prove some sort of fault on the part of the defendant in publishing the defamatory statement where the statement involves a matter of public concern,[14] displacing the common law rule of strict liability.[15] The Court also held that non-public-figure plaintiffs could not recover punitive or presumed damages[16] for defamation unless they satisfied the *Sullivan* actual malice standard.[17] The Court also required that where the allegedly defamatory speech deals with a matter of public concern, the burden of proof for showing falsity must be on the plaintiff.[18] Finally, the Court established that the First Amendment requires appellate courts to undertake an independent examination of whether the actual malice test is satisfied when reviewing a trial court's judgment in a defamation case where that standard applies.[19]

The scope of other intentional torts involving speech has also been limited by the First Amendment. In *Hustler Magazine, Inc. v. Falwell*, the Court held that a public figure plaintiff could not recover damages for intentional infliction of emotional distress based on speech unless the underlying speech contained a false statement of fact made with actual malice.[20] Similarly, in *Time, Inc. v. Hill*, the court held that actual malice was also required in false light type actions involving issues of public concern.[21] And, in *Snyder v. Phelps*, the court refused to allow recovery on claims for intentional inflection of emotional distress and intrusion upon

12. *Id.* at 265, 277 (citations omitted).

13. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 & n.7 (1974).

14. *See id.* at 347.

15. *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. c (AM. LAW INST. 1977).

16. Presumed damages are damages that are recoverable for defamation without any proof of actual loss. *See Gertz*, 418 U.S. at 349.

17. *See id.* at 348–50.

18. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

19. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685–86 (1989); Bose Corp. v. Consumers Union, 466 U.S. 485, 510–11 (1984).

20. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

21. Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

seclusion based on activities associated with picketing in a public space.[22] The Court has also limited the use of the tort of public disclosure of private facts, foreclosing the imposition of liability where the facts disclosed appear in a public record.[23]

However, not all torts involving speech have been subject to First Amendment restrictions. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the First Amendment placed no limitation on actions for the appropriation of the right of publicity.[24] The Court noted that while actions for defamation and false light sought to silence speech, actions for appropriation of the right of publicity were simply about "who gets to do the publishing."[25] Thus, the Court concluded that the performer of a human cannonball act could recover against a news station that broadcast his entire act without compensating him.[26]

B. FREE SPEECH AND INJUNCTIVE RELIEF

The First Amendment also places limits on the kinds of equitable relief available to prevailing parties in private law litigation. Injunctions that prohibit defendants from engaging in speech can, in some circumstances, be classified by courts as prior restraints, and therefore be subjected to exacting First Amendment scrutiny.[27] "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[28] Although the Supreme Court has never established the specific standard that applies to the review of prior restraints,[29] it has held that such restraints carry "a 'heavy presumption' against [their] constitutional validity" and that the party attempting to justify the restraint "carries a heavy burden."[30]

In the private law context, concerns about prior restraints most often

22. Snyder v. Phelps, 562 U.S. 443, 456, 460 (2011).

23. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496–97 (1975).

24. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).

25. *Id.* at 573. The court also noted that these actions preserved similar economic interests to actions for copyright infringement, which posed no First Amendment problem. *See id.* at 575–77.

26. *Id.* at 578.

27. *See, e.g.*, Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1241 (2000) ("[Court] [o]rders which restrict or preclude a citizen from speaking in advance are known as 'prior restraints,' and are disfavored and presumptively invalid.") (citing Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

28. *E.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993) (emphasis, citation, and internal quotation marks omitted).

29. *See, e.g.*, J.Q. Office Equip. of Omaha, Inc. v. Sullivan, 432 N.W.2d 211, 213 (Neb. 1988).

30. *Keefe*, 402 U.S. 415, 419 (1971) (citations omitted).

arise in lawsuits involving defamation, harassment, or trade secrets where the plaintiff seeks injunctive relief to prevent the defendant from continuing to engage in offending conduct that involves at least some element of speech. The level of scrutiny courts apply to such injunctions varies depending primarily on two factors: (1) whether the injunction is content-based, and (2) whether the injunction forbids speech on a matter of public concern. Speech restrictive injunctions which are content-based are subject to strict scrutiny,[31] while injunctions that are not content-based are subject to a lesser standard akin to intermediate scrutiny.[32] Although the role it plays in the analysis is less clear, courts are also less likely to grant injunctive relief that would suppress speech on matters of public concern.

The court's purpose in adopting the injunction is the controlling consideration in determining content neutrality.[33] If the injunction was adopted for a purpose other than suppressing the message the speaker intended to convey, it is content neutral.[34] In *DVD Copy Control Association, Inc. v. Bunner*, the Supreme Court of California upheld an injunction preventing the publication of proprietary computer code that was found to be a trade secret of the plaintiff.[35] The court reasoned that the communication of the computer code was singled out not because of its message, but because of the plaintiff's property interest in the code.[36] The court went on to find that the injunction served a significant government interest—allowing trade secret owners to "reap the fruits of [their] own labor"—and that the injunction burdened no more speech than necessary to further that purpose, since the only way to protect trade secrets is to prevent them from becoming public.[37] Similarly, in *Rew v. Bergstrom*, the Minnesota Court of Appeals justified a protective order barring the defendant from contacting the plaintiff, a domestic violence victim, "because it restrict[ed] contact with the abuse victim initiated by the abusing party without regard for the message the abusing party intend[ed]

31. Strict scrutiny requires that the injunction be narrowly tailored to achieve a compelling governmental interest. *See, e.g.*, 16B AM. JUR. 2D *Constitutional Law* § 862 (2009).

32. *See* DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 877 (2003). The standard for reviewing content-neutral injunctions that burden speech asks whether the injunction "burden[s] no more speech than necessary to serve a significant government interest." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted).

33. *See Bunner*, 31 Cal. 4th at 877.

34. *See Madsen*, 512 U.S. at 763; *Bunner*, 31 Cal. 4th at 877.

35. *See Bunner*, 31 Cal. 4th at 864, 885.

36. *See id.* at 877. *See also In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 423 (E.D.N.Y. 2007) (upholding injunction preventing the dissemination of proprietary company documents illegally retained after discovery because "[t]he injunction [was] justified not by reference to the content of the covered documents, but rather by their unlawful acquisition.").

37. *Bunner*, 31 Cal. 4th at 880–81 (citations omitted).

to express."[38] Courts have been similarly willing to enter content-neutral injunctions restricting speech in the copyright context[39] and in the context of harassment by protesters.[40]

By contrast, in *Franklin Chalfont Associates v. Kalikow*, a Pennsylvania court refused to uphold an injunction preventing home owners who were dissatisfied with the real estate developer who sold them their homes from criticizing his business through picketing, leafleting, and displaying signs in other ways.[41] The developer alleged that the home owners' activities constituted tortious interference with his business and that the injunction was necessary to prevent that interference and to protect the developer and his customers from the defendants' "offensive" signage.[42] The court rejected those arguments noting that "the injunction . . . was directed at the content rather than the manner of appellants' speech" because it only prevented the home owners from engaging in "speech and other expressive conduct which [was] critical of [the developer]. It [was] directed against the ideas expressed because of the detrimental impact which the communication of those ideas . . . had upon [the developer]."[43] Similarly, in *Shang Jen Lo v. Shu Ping Chan*, the California Court of Appeals reversed an injunction preventing disgruntled former church parishioners "from approaching, yelling out, or calling out to parishioners concerning respondent or other church officials from [a nearby] parking lot on any day church services are held" because the court found it to be a content-based restriction on speech, since it solely restricted speech that concerned the church.[44]

38. Rew v. Bergstrom, 812 N.W.2d 832, 838 (Minn. Ct. App. 2011) *aff'd in part, rev'd in part*, 845 N.W.2d 764 (Minn. 2014).

39. *See, e.g.*, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 536 (1987) (upholding injunction prohibiting certain uses of the word "Olympic" because any "restrictions on expressive speech" were "incidental" to the primary purpose of "encouraging and rewarding the [U.S. Olympic Committee's] activities.").

40. *See, e.g.*, Ne. Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991) ("The injunction at issue here is content-neutral. . . . The challenged sections of the injunction make no mention whatsoever of abortion or any other substantive issue—they merely restrict the volume, location, timing, and violent or intimidating nature of his expressive activity."); Murray v. Lawson, 649 A.2d 1253, 1263 (N.J. 1994) (upholding an injunction preventing picketing near the home of a doctor who provided abortions on the ground that "the court granted it to protect the [doctor and his family] from targeted picketing that inherently and offensively interfered with their residential privacy" rather than to suppress the message of the protesters).

41. Franklin Chalfont Assocs. v. Kalikow, 573 A.2d 550, 550–52, 557–58 (Pa. Super. Ct. 1990).

42. *Id.* at 554–57.

43. *Id.* at 557 (emphasis omitted).

44. Shang Jen Lo v. Shu Ping Chan, Nos. B261883, B261885, 2015 Cal. App. Unpub. LEXIS 9426, at *15 (Dec. 30, 2015). *See also, e.g.*, Ass'n for L.A. Deputy Sheriffs v. L.A. Times Commc'ns LLC, 239 Cal. App. 4th 808, 824 (2015) (finding proposed injunction against the release of allegedly

Courts have also shown a reluctance to enter or uphold injunctions that burden speech on matters of public concern. In *Rain CII Carbon, LLC v. Kurczy*, for example, a federal district court refused to enjoin the release by a journalist of certain financial information that the plaintiff—a major chemical company—alleged were trade secrets.[45] The court rejected the plaintiff's argument that trade secrets were inherently matters of purely private concern, finding that the financials of a major chemical company were a matter in which the public would have important interests.[46] By contrast, in *Evilsizor v. Sweeney*, the California Court of Appeal upheld an injunction preventing a man from publishing text messages obtained from his wife's phone in order to harass her.[47] The court faulted the defendant for failing to "identif[y] any public concern in [his wife's] text messages and other information that he surreptitiously took from her phones."[48]

The focus on whether speech restricting injunctions in private law litigation are content-neutral and whether they involve matters of public concern mirrors the focus on these issues in other aspects of First Amendment doctrine. The practice of distinguishing between content-neutral and content-based restrictions on speech and applying greater scrutiny to the latter has been called "the keystone of First Amendment law."[49] This is because "the fundamental rule of protection under the First Amendment" is that "a speaker has the autonomy to choose the content of his own message," and content-based restrictions on speech threaten that choice.[50] Similarly, the question of whether a restriction impacts speech on

confidential information about police department employees not "'content-neutral' at all); Animal Rights Found. of Fla., Inc. v. Siegel, 867 So. 2d 451, 457 (Fla. Dist. Ct. App. 2004) (reversing injunction in tortious interference with business relationships case that prevented an animal rights group from making certain specific statements criticizing the plaintiff).

45. Rain CII Carbon, LLC v. Kurczy, No. 12-2014, 2012 U.S. Dist. LEXIS 116865, at *8–9 (E.D. La. Aug. 20, 2012).

46. *Id.* at *5. *See also* New.net, Inc. v. Lavasoft, 356 F. Supp. 2d 1071, 1085–86 (C.D. Cal. 2003) (finding that a software company's labeling of another company's product as spyware was speech on a matter of public concern—internet privacy—and refusing to enjoin that speech in an action alleging libel and several business torts); VI 4D, LLLP v. Crucians in Focus, Inc., 57 V.I. 143, 160 (Super. Ct. 2012) (refusing to enjoin the release of trade secrets obtained from a confidential executive summary submitted to a government agency in connection with an application for tax benefits, on the grounds that the application dealt with an issue of public concern).

47. Evilsizor v. Sweeney (*In re* Marriage of Evilsizor & Sweeney), 237 Cal. App. 4th 1416, 1428 (2015).

48. *Id.*

49. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996). *See also* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1263 n.2 (2014) (collecting sources making similar claims).

50. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995). *See*

matters of public concern has often been important to the Supreme Court in determining the validity of speech restrictions under the First Amendment. As the Court has observed on several occasions, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" because "[s]peech on matters of public concern . . . is at the heart of the First Amendment's protection."[51] By contrast, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous" because such restrictions pose less of a "threat to the free and robust debate of public issues."[52]

C. FREE SPEECH AND CONTRACTS

In stark contrast with the robust role the First Amendment plays in tort actions, the Supreme Court has said relatively little about the role the First Amendment may play, if any, in regulating contractual obligations.[53] In *Cohen v. Cowles Media Co.*, the Supreme Court held that a cause of action for promissory estoppel based on a newspaper's decision to break a promise by revealing the identity of a confidential source could constitute state action subject to First Amendment restrictions.[54] The Court reasoned:

> [I]f Cohen could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties. These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute "state action" for purposes of the Fourteenth Amendment.[55]

The Court's reasoning here is a bit cryptic in terms of what it means for the broader universe of contractual claims that may implicate the First Amendment. Some have argued that claims of promissory estoppel and breach of contract are sufficiently similar to justify extending the logic of *Cohen* to contract claims.[56] Others have argued that the Court's dicta mentioning the "absence of a contract" means that the logic of *Cohen* does not extend to contract claims where there are contractual obligations

also Kreimer, *supra* note 49, at 1316 ("[S]trong content neutrality provides robust political bulwarks for free expression.").

51. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (citations and internal quotation marks omitted).

52. *Id.* (citation omitted).

53. *See, e.g.*, Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 350 (1998).

54. Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991).

55. *Id.*

56. *See* Garfield, *supra* note 53, at 350–52.

"explicitly assumed by the parties."[57]

The argument over the meaning of this passage is largely irrelevant in practice because *Cohen*'s purported "application" of the First Amendment was so toothless as to render it virtually irrelevant in contract actions.[58] The Court found that since the doctrine of promissory estoppel is "a law of general applicability" that "does not target or single out the press" the First Amendment did not "forbid its application to the press."[59] Thus, the Court found no constitutional issue with the promissory estoppel action in that case.[60]

This explanation is less than satisfying since the common law causes of action for defamation and other torts are also laws of general applicability.[61] Why then, does the First Amendment place such strict restrictions on torts that impact speech but take such a hands-off approach to contracts? One plausible explanation for this differential treatment is that the consensual nature of a contractual agreement operates essentially as a waiver of whatever First Amendment rights would otherwise be implicated by lawsuits arising out of contracts. In other words, lawsuits to enforce contracts may constitute state action, but the state is free to suppress speech where the defendant has consented to the suppression of that speech through a contract (or, as in *Cohen*, through a legally enforceable promise).

Many scholars and courts have embraced this approach to understanding the distinction between *Cohen* and cases like *Sullivan*.[62]

57. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 63–65 (1995). *See also* JW & JJ Entm't, LLC v. Sandler, No. 8:13-CV-01609-AW, U.S. Dist. LEXIS 138107, at *10 (D. Md. Sept. 26, 2013) ("Although court enforcement of state law doctrines in a manner alleged to violate the First Amendment may constitute governmental action, a court's adverse enforcement of contractual obligations that a party explicitly assumes does not constitute governmental action.").

58. *See* Solove & Richards, *supra* note 6, at 1661–63.

59. *Cohen*, 501 U.S. at 669.

60. *Id.* at 671–72.

61. *See* Solove & Richards, *supra* note 6, at 1675 ("[T]he generally applicable law approach does not explain the difference in treatment between tort and contract, because the approach provides no explanation why some bodies of law are defined at a greater level of generality than others."). Indeed, some courts have taken *Cohen* as an invitation to subject activities that would ordinarily be subject to First Amendment protection to non-defamation tort liability, on the theory that such torts are also "generally applicable laws." *See, e.g.*, Risenhoover v. England, 936 F. Supp. 392, 404 (W.D. Tex. 1996) (applying the *Cohen* "law of general applicability" standard to a negligence action against media defendants arising out of newsgathering activities); Eric B. Easton, *Two Wrongs Mock A Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1191–1200 (1997) (collecting cases relying on the "law of general applicability" language to subject newsgathering activities to tort liability).

62. *See, e.g.*, Perricone v. Perricone, 972 A.2d 666, 681–82 (Conn. 2009); Garfield, *supra* note 53, at 354–55; Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and*

However, some have questioned this reasoning on the grounds that it is inconsistent with Supreme Court doctrine dealing with contracts private parties make directly with the government that involve the waiver of constitutional rights.[63] In what has become known as the unconstitutional-conditions doctrine, the Court has repeatedly held that the First Amendment places limits on the government's ability to extract waivers of constitutional rights in agreements it makes with private parties, even when a private party would voluntarily agree to such a waiver.[64] If First Amendment rights cannot be completely waived in a contract with the government, why can they be waived in other contracts?

The best answer to this question is that the government has unique powers that give it an inherent bargaining advantage that other parties simply do not have.[65] As the Court has put it in explaining the unconstitutional-conditions doctrine, "[i]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."[66] This is not true of other contracting parties, who can simply find someone else to bargain with if the terms are not agreeable. Of course, there are certainly arguments to be made against that distinction, especially in situations where the private party seeking the waiver of free speech rights has a vast bargaining power advantage over the other private party.[67] Nevertheless, the coercion rationale does explain why the Court on the one hand subjects private contracts involving speech to virtually no constitutional scrutiny, while on the other hand carefully restricts the government's ability to extract speech-limiting concessions from the

the Limitations of Current First Amendment Doctrines, 78 B.U. L. REV. 507, 557–58 (1998); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057, 1061 (2000). *See also* Solove & Richards, *supra* note 6, at 1675–76 ("One of the most widely accepted approaches for determining when civil liability triggers the First Amendment is to look to whether a person has consented to the waiver of her First Amendment rights.").

63. *See* Solove & Richards, *supra* note 6, at 1678.

64. *See id.* at 1678–79 & n.154 (collecting cases).

65. *See, e.g.*, Solove & Richards, *supra* note 6, at 1679 ("Treating the government and private parties as equivalent overlooks the danger that the government could use its vast resources to buy up constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1451 (1989) ("In several respects, government poses greater danger than private parties of coercion, however defined.").

66. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 717 (1996) (quotations and citations omitted).

67. For example, companies often force employees to sign non-disclosure agreements as a condition of employment—a situation where most potential employees have little, if any, bargaining leverage. *See* Garfield, *supra* note 53, at 285–86.

private parties with which it bargains.

D. FREE SPEECH AND TRESPASS

Like in the tort context, in the property context the Court took a seemingly radical step toward placing First Amendment restrictions on private law in a famous mid-twentieth-century case, *Marsh v. Alabama*.[68] However, unlike the watershed decision in *Sullivan*, *Marsh* proved to be the high-water mark of the Court's willingness to limit private property owners' ability to curtail free speech.

In *Marsh*, the Court reviewed the criminal trespass conviction of a member of the Jehovah's Witnesses who was distributing literature on the sidewalks of Chickasaw, Alabama.[69] Chickasaw was a "company town" where all the property, including the streets, sidewalks, and utilities, were owned by the Gulf Shipbuilding Company.[70] The Court held that, despite the town's status as private property, the defendant's conduct was nevertheless protected by the First Amendment.[71] The Court reasoned that:

> The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[72]

Although *Marsh* involved a prosecution for criminal trespass, the restrictions it announced on the exclusion of disfavored speakers from certain kinds of private property applied equally to efforts to do so through civil trespass suits.[73]

The Court built on *Marsh* twenty-four years later in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[74] In that

68. Marsh v. Alabama, 326 U.S. 501, 502 (1946).

69. *Id.* at 502–04.

70. *Id.*

71. *Id.* at 506–09.

72. *Id.* at 506.

73. *See, e.g.*, Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31, 394 P.2d 921, 924 (Cal. 1964) (relying on *Marsh* to deny relief to the owner of a shopping center in a trespass action against union protesters); Blue Ridge Shopping Ctr., Inc. v. Schleininger, 432 S.W.2d 610, 616 (Mo. Ct. App. 1968) (same).

74. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 308 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

case, the Court reversed an injunction preventing a union from picketing in front of a privately owned shopping center containing a grocery store the union felt was treating workers unfairly.[75] The Court held that the shopping center bore "striking similarities" to the company town in *Marsh* in that both were relatively large commercial areas to which the general public had unrestricted access.[76] However, just a few years later, the Court backed away from *Marsh* and *Logan Valley*. In *Lloyd Corp. v. Tanner*, the Court reversed an injunction allowing groups opposed to the Vietnam War to pass out leaflets at a privately owned shopping center against the will of the owners.[77] The Court distinguished *Logan Valley* on the grounds that the picketing in that case involved a matter directly related to the operation of the store.[78] However, the Court's language made clear that it was skeptical of the entire premise of *Logan Valley*. For example, it noted with alarm that the "open to the public" rationale "would apply in varying degrees to most retail stores and service establishments across the country" and that private property does not "lose its private character merely because the public is generally invited to use it for designated purposes."[79]

A few Terms later, in *Hudgens v. NLRB*, the Court took the next step and explicitly overruled *Logan Valley*.[80] The Court did not overrule *Marsh* but instead distinguished the company town in *Marsh* from the shopping centers in these later cases because "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State" while the shopping center owners were not.[81] Since *Hudgens*, it has been well settled that there are essentially no federal[82] constitutional limits on what speakers and messages private property owners can exclude from their property, whether the exclusion is accomplished through criminal or civil means.[83]

75. *Id.* at 325.

76. *Id.* at 318–19.

77. Lloyd Corp. v. Tanner, 407 U.S. 551, 561–62, 569 (1972).

78. *Id.*

79. *Id.* at 565–66, 596.

80. Hudgens v. NLRB, 424 U.S. 507, 518 (1976).

81. *Id.* at 519 (quotations and citation omitted).

82. A few state constitutional free speech provisions have been interpreted to follow some version of the *Logan Valley* rule. *See, e.g.*, Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994).

83. The only exceptions have come in cases where the private property at issue was specifically designated for public use independent of its business-related use, either by historical practice or by explicit agreement with government authorities. *See, e.g.*, Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 943–44, 947–48 (9th Cir. 2001) (extending First Amendment protection to protesters on a privately owned sidewalk that the owner was required to open to the public

Why did First Amendment restrictions on defamation actions become entrenched while First Amendment restrictions on trespass actions proved so fleeting? Part of the answer may lie in the Court's concern that recognizing a First Amendment right to speak on others' property threatens other constitutional interests—namely the rights of property owners under the Fifth Amendment.[84] The Court's desire to provide breathing space for the exercise of another constitutional right—a concern not present in the defamation context[85]—at least partially explains why it was more reluctant to use the First Amendment to limit trespass actions.[86] However, the continuing validity of *Marsh* and the Court's willingness to allow state constitutional free speech guarantees to limit trespass actions[87] show that concern for property rights does not provide a complete explanation.

Another factor that helps fill this gap are the important differences between the First Amendment interests threatened by defamation torts and trespass actions. As discussed in Part I.B, First Amendment doctrine has long made a distinction between mere "time, place, and manner" restrictions that simply tell speakers where and when they can speak and "content-based" restrictions, which restrict what a speaker can speak about.[88] Laws falling into the latter category are generally subject to much more rigorous scrutiny than laws in the former category.[89] Defamation actions are, in essence, content-based restrictions on speech; they punish a speaker for speaking about a particular subject—the person being

as a condition of constructing its business, and collecting similar cases).

84. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567–68 (1972) (noting that the Fifth Amendment's Due Process Clause and prohibition on taking "private property . . . for public use, without just compensation" were "relevant to this case," and that "[a]lthough accommodations between the values protected by [the First, Fifth, and Fourteenth Amendments] are sometimes necessary . . . this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.").

85. Although some countries have a constitutional right associated with reputational harm, the United States does not. *See* Mark Tushnet, New York Times v. Sullivan *Around the World*, 66 ALA. L. REV. 337, 352–53 (2014) ("As a result, in other constitutional systems, libel law involves a conflict between constitutional rights, and the courts' task is to achieve the best accommodation of rights that exist on the same conceptual plane. In contrast, in the United States the right to reputation is a mere social interest, no different from any other legislatively-favored value but conceptually always subordinated to constitutional rights.")

86. *See Lloyd*, 407 U.S. at 570 ("[T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other.").

87. *See Robins*, 447 U.S. at 80–85.

88. *See, e.g.*, 16B C.J.S. *Constitutional Law* § 957 (2017).

89. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

defamed.[90]

By contrast, the content neutrality question is more complex in a trespass action. A property owner may use trespass actions to exclude speakers with a particular message while allowing other speakers to remain. In that sense, trespass actions look like content-based restrictions on speech. However, because a private property owner can only control his or her own property, excluded speakers are left with plenty of other places to get their message out, making trespass actions seem much more like a time, place, and manner restriction.[91] In a defamation action, by contrast, the speaker will be punished for speaking about the person being defamed no matter where the speech occurs.

To be sure, time, place, and manner restrictions imposed by the government ordinarily cannot discriminate based on subject matter even if they leave ample alternative channels for speech about that subject.[92] But, when combined with the Court's concern for the constitutional rights of private property owners, the fact that trespass actions do not completely snuff out speech based on its content provides a helpful explanatory tool for understanding the Court's approach.

E. EQUAL PROTECTION, COVENANTS, WILLS, AND TRUSTS

As described above, the Court's application of the First Amendment to private law has been—at best—somewhat inconsistent. Things get even more convoluted when the Court's approach to applying the Equal Protection Clause to private law is considered. In *Shelley v. Kraemer*,[93] the Court confronted the issue of how the Equal Protection Clause of the Fourteenth Amendment applies to racially restrictive covenants—that is, covenants that prevent the sale of land to, or occupation of land by, racial minorities.[94] The Court's answer was surprising: the covenant itself is a private matter that does not implicate the Fourteenth Amendment, but any attempt to enforce the covenant in court does implicate the Fourteenth Amendment. This rationale would potentially implicate the Fourteenth Amendment (and perhaps other constitutional provisions) in virtually every

90. *See supra* Part I.B.

91. A key factor in the Court's test for evaluating time, place, and manner restrictions imposed by the government in public forums is whether or not the restrictions "leave open ample alternative channels of communication." *E.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) (citation omitted).

92. *See* 16B C.J.S. *Constitutional Law* § 957.

93. Shelley v. Kraemer, 334 U.S. 1, 1 (1948).

94. The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

contract, since contracts are only effective to the extent they are enforceable.[95] However, as discussed below, the Supreme Court and lower courts have declined to take *Shelley* nearly so far—leaving generations of scholars to attempt to rationalize this apparent outlier.

In *Shelley*, white landowners in two consolidated cases were attempting to enforce racially restrictive covenants against black people who purchased land allegedly subject to the covenants.[96] The black purchasers argued that the enforcement of the covenants violated the Equal Protection Clause, while the land owners argued that the private covenants were not subject to any constitutional restrictions.[97] The Court first held, that "[s]o long as [racially restrictive covenants are] effectuated by voluntary adherence to their terms . . . there has been no action by the State and the provisions of the Amendment have not been violated."[98] However, the Court found that here, there was "action by the state" in the form of the court orders the landowners sought to enforce the covenants.[99]

The Court reasoned that "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."[100] The Court rejected the argument that the discriminatory policy's source—a private agreement—had any impact on the analysis, finding that the Fourteenth Amendment is not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement."[101] The Court ended its analysis by noting that:

> Whatever else the framers [of the Fourteenth Amendment] sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.[102]

As many scholars have pointed out, the apparent breadth of *Shelley*'s

95. *See, e.g.*, Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 453 (2007) ("Shelley's approach, 'consistently applied, would require individuals to conform their private agreements to constitutional standards whenever individuals might later seek the security of judicial enforcement, as is often the case.'") (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (2d ed. 1988)).

96. *Shelley*, 334 U.S. at 4–8.

97. *Id.* at 7–8, 14.

98. *Id.* at 13.

99. *Id.* at 19.

100. *Id.*

101. *Id.* at 20.

102. *Id.* at 23.

holding is striking and perhaps even disturbing.[103] Virtually all private decisions are in some way or another, only possible because of the threat of some kind of judicial enforcement of those decisions.[104] Thus, taken to its logical conclusion, *Shelley*'s rationale would subject nearly all private decision-making to constitutional constraints.[105]

Of course, as the discussion above of the First Amendment's application to contract and trespass actions demonstrates, the Supreme Court and lower courts have not followed *Shelley* to its logical conclusion in all areas of constitutional law.[106] In fact, courts have not taken this broad view of *Shelley* even in the limited context of private law cases involving the Equal Protection Clause.[107] Although a few years later, in *Barrows v. Jackson*, the Court applied its holding in *Shelley* to bar a lawsuit for damages against a white person for violating a racially restrictive covenant by selling his home to a non-white person, in subsequent years the Court has all but ignored *Shelley*, even in cases involving racial discrimination.[108] In fact, the Court has not applied *Shelley* to any private law dispute at all in the more than sixty years since *Barrows* was decided.

Lower courts have also been reluctant to expand *Shelley* or even take its reasoning at face value.[109] For example, in *Shapira v. Union National Bank*, an Ohio court found no constitutional problem with the enforcement of a will provision conditioning the receipt of certain property on the testator's son marrying a Jewish person.[110] The court reasoned that unlike the complete deprivation of the ability to buy the property in *Shelley*, the

103. *See, e.g.*, Erwin Chemerinsky, *supra* note 2, at 524–25; Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 442–43 (1984); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1109 (1960); Rosen, *supra* note 95, at 453; Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; A Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 82–84 (1998). *See also* Darrell A.H. Miller, *State Domas, Neutral Principles, and the Möbius of State Action*, 81 TEMP. L. REV. 967, 972 & n.28 (2008) ("The problem with *Shelley*—as noted even by those who agreed with its result—was the potentially intolerable breadth of the reasoning.") (collecting sources).

104. *See* Saxer, *supra* note 103, at 101 ("For example, if I decide to invite only women to my house for a Tupperware party and three men walk into my house uninvited, I cannot call the sheriff to have them removed as trespassers without risking liability for violating their rights under the Equal Protection Clause.").

105. *See, e.g.*, Chemerinsky, *supra* note 2, at 524–25.

106. *See, e.g.*, Rosen, *supra* note 95, at 459–60.

107. *See, e.g.*, Guernsey, *supra* note 103, at 442 (noting "the Supreme Court's reluctance since *Shelley* to expand its holding beyond restrictive covenants having racial overtones").

108. *See* Barrows v. Jackson, 346 U.S. 249, 254, 260 (1953); Rosen, *supra* note 95, at 462–66 (describing the Court's reluctance to apply *Shelley*'s rationale in several cases involving racial discrimination).

109. *See* Rosen, *supra* note 95 at 469.

110. Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 825–28 (Ohio Ct. Com. Pl. 1974).

court's decision to enforce the will would not completely deprive the son of the right to marry.[111] The court observed that "[i]f the . . . aid of this court were sought to enjoin [the son's] marrying a non-Jewish girl, then the doctrine of *Shelley v. Kraemer* would be applicable . . . ."[112] However, this reasoning makes little sense. Just as the *Shapira* court noted the son had no right to inherit anything at all, neither did the property purchasers in *Shelley* have any right to purchase or own property.[113] Rather, the right that was violated in *Shelley* was the right to have an *equal opportunity* to purchase property—a right which enforcing the covenant would clearly have violated. Similarly, the right at issue in *Shapira* was the son's right to the same *opportunity* to inherit his father's property irrespective of his choice of who to marry. Nevertheless, *Shapira* expresses the majority rule that discriminatory will or trust provisions are generally valid.[114] Other courts have been similarly skeptical of using *Shelley* to apply the Equal Protection Clause in private law disputes, including in cases involving the use of restrictive covenants to bar the construction of churches and the construction of group homes for the elderly and disabled.[115]

The few courts that have applied *Shelley* have done so primarily in situations involving race discrimination or where a neutral covenant is enforced in a discriminatory manner.[116] In *Spencer v. Flint Memorial Park*

111. *Id.* at 827–28.

112. *Id.*

113. *See id.* at 828.

114. *See* Aaron H. Kaplan, Note, *The "Jewish Clause" and Public Policy: Preserving the Testamentary Right to Oppose Religious Intermarriage*, 8 GEO. J.L. & PUB. POL'Y 295, 311 (2010).

115. *See, e.g.*, Casa Marie, Inc. v. Superior Court of P.R., 988 F.2d 252, 259–60 (1st Cir. 1993) (refusing to apply *Shelley* to the enforcement of a restrictive covenant barring anything other than single family homes against a group home for the elderly because the covenant was "facially neutral"); Gordon v. Gordon, 124 N.E.2d 228, 234–35 (Mass. 1955) (upholding will provision barring son from receiving property if he marries a non-Jewish person); Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477, 481–82 (N.Y. App. Div. 1974), (upholding the use against religious institutions of a restrictive covenant barring non-residential property use), *aff'd*, 325 N.E.2d 876 (1975); Shaver v. Hunter, 626 S.W.2d 574, 579 (Tex. App. 1981) (upholding "single family home" covenant since allowing the construction of a group home for the disabled would give "preferred treatment to the handicapped"); Ireland v. Bible Baptist Church, 480 S.W.2d 467, 470 (Tex. Civ. App. 1972) (upholding restrictive covenant barring the construction of churches because it "applied equally to churches of all denominations and faiths"). *But see* Riley v. Stoves, 526 P.2d 747, 751–53 (Ariz. Ct. App. 1974) (upholding restrictive covenant barring persons under twenty-one from a development but only after concluding that the restriction was "reasonably related to a legitimate purpose").

116. *See, e.g.*, Spencer v. Flint Mem'l Park Ass'n, 144 N.W.2d 622, 628–30 (Mich. Ct. App. 1966); W. Hill Baptist Church v. Abbate, 261 N.E.2d 196, 202 (Ohio Ct. Com. Pl. 1969). *See also* White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 351–52 (Fla. 1979) ("[W]e find the restriction against children under the age of twelve reasonably related to a lawful objective, but under the circumstances of this case the selective and arbitrary manner of enforcement is another issue."); Preston Tower Condo. Ass'n v. S.B. Realty, Inc., 685 S.W.2d 98, 103 (Tex. Ct. App. 1985) (upholding

Association, the court refused to enforce a cemetery's rule that would have prohibited the holder of burial rights from burying a non-white person in the cemetery.[117] The court found that *Shelley*'s analysis applied with equal force to the enforcement of this discriminatory restriction as it did to restrictive real property covenants.[118] Interestingly, the court went out of its way to note that it is "absolutely clear that [the court's] conclusion in no way prevents cemeteries maintained by a particular religious faith from restricting burial rights to members of that faith," since "[f]rom time immemorial cemeteries and interment in them have had a close identification with religion."[119] In *West Hill Baptist Church v. Abbate*, the court refused to enforce a covenant forbidding the non-residential use of certain property against a church where the holders of the covenant had attempted to enforce the covenant only against certain churches and not others.[120]

Scholars who maintain that *Shelley* was correctly decided[121] have struggled for decades to rationalize *Shelley* and the cases that followed.[122] As Mark Rosen describes it, "[s]cholarly explanations of *Shelley* fall into two broad camps. . . . [one which] understands *Shelley*'s problematic analytics as a reflection of the inherent weakness of the distinction between public and private action," and therefore further evidence of the need to eliminate that distinction, and another group which has "sought to justify *Shelley*. . . in a way that preserves the public/private distinction."[123] This Article is largely unconcerned with the first group, since courts have continued to enthusiastically embrace a public/private distinction in constitutional law[124] and this Article's goal is explanatory rather than normative.[125]

condominium age limitation, but remanding for a determination of whether the enforcement of the limitation was arbitrary).

117. *Spencer*, 144 N.W.2d at 628–30.

118. *Id.* at 628–29.

119. *Id.*

120. *Abbate*, 261 N.E.2d at 196–202.

121. Some take the position that it was not correctly decided (or at least should not have been decided on constitutional grounds). *See, e.g.*, Saxer, *supra* note 103, at 119–20.

122. *See, e.g.*, Rosen, *supra* note 95, at 454.

123. *Id.* at 470.

124. *See, e.g.*, Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1267 (2000) ("[C]ourts show no sign of discarding the [state-action] doctrine."); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427 (1982) ("[T]he public/private dichotomy [is still] alive and, if anything, growing in influence.").

125. It would be worth considering, however, what the complete abandonment of the public/private distinction would mean in a post-*Heller* world, since a lot of the scholarship arguing for

Scholars arguing for limiting *Shelley* in a way that preserves the public/private distinction have come up with a number of limiting principles.[126] Thomas Lewis and others have argued that *Shelley* can be understood as a case where the power of zoning—a state function—was delegated to private parties through the enforcement of the restrictive covenants.[127] In other words, *Shelley* is just an extension of the principle announced in *Marsh*: when private actors step into the government's shoes, constitutional restrictions apply to those actors.[128] However, given the Court's reluctance to extend *Marsh*, discussed in Part I.D, the result in *Shelley* seems more anomalous. Moreover, this theory fails to account for courts' reluctance to expand *Shelley* to other restrictive covenants where private parties have stepped into the role of zoning authorities at least as much as the covenant enforcing parties were attempting to do in *Shelley*.[129]

Others have argued that the result in *Shelley* can be explained by the impact the covenant there had on persons who were not parties to the original covenant.[130] However, while this may be a partial explanation, this account also proves too much: nearly all covenants will affect people not subject to them; that is the whole point—they run with the land. Also, the same thing is true of many private agreements that courts have not subjected to constitutional constraints. For example, settlement agreements barring a party from speaking about litigation have generally been upheld despite their impact on the rights of potential listeners who were not parties to those agreements.[131]

Another theory is that *Shelley* is essentially limited to its facts—that it only concerns racially restrictive covenants. This theory is—at least implicitly—the most widely adopted by courts[132] and therefore correct as a descriptive matter. However, as *Spencer* shows, at least where race

the abandonment of that distinction predates *Heller*.

126. *See* Rosen, *supra* note 95, at 474–83.

127. *See, e.g.*, Lewis, *supra* note 103, at 1115–16; Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 849–50 (1983).

128. *See* Lewis, *supra* note 103, at 1115–16.

129. If anything, the cases discussed above involving "residential property" restrictions are much more analogous to zoning regulations than the covenants in *Shelley*, since they concern the use of the land rather than who is allowed to occupy it.

130. *See* Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37, 68 (2007); Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 194–96 (2015).

131. *See* Rosen, *supra* note 95, at 458–59.

132. *See, e.g.*, Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461, 493 & n.140 (1998) (collecting cases).

discrimination is involved, courts have occasionally followed *Shelley* in contexts outside of restrictive covenants. And *Abbate* demonstrates that courts will also apply *Shelley* where a covenant not involving racial discrimination is applied in an overtly discriminatory manner to other groups. More fundamentally, this theory really just begs the question—it does not offer an explanation of *why Shelley* has been limited to its facts.

Finally, some have argued that the Court's decision in *Shelley* represents the result of balancing different constitutional rights—the property rights of the covenant holders and the equal protection rights of the prospective purchasers.[133] This view makes sense and dovetails well with the Court's concern for property rights in the trespass cases discussed above. Its main shortcoming is that it does not offer a complete explanation of why courts find the balance tips in favor of equal protection rights in *Shelley* and similar cases but tips in favor of private property rights in most other cases.

Combining the latter two theories provides the best explanatory framework for understanding *Shelley* and its progeny. Courts are generally willing to enforce private agreements without subjecting them to equal protection scrutiny out of respect for the private property rights that those agreements represent. However, when an agreement explicitly requires racial discrimination or is enforced against other groups in a discriminatory manner, courts will not enforce it.

The reason for the more hostile attitude towards racial discrimination than other kinds of discrimination is that the Fourteenth Amendment was specifically concerned with eradicating racial discrimination. Although the Equal Protection Clause is written in broad terms and has been interpreted to prohibit many kinds of discrimination, as the *Shelley* Court explicitly noted, the prevention of discrimination on the basis of race was the primary goal of the framers of the amendment.[134] This concern is also reflected in

133. *See* Chemerinsky, *supra* note 2, at 551; Louis Henkin, Shelley v. Kraemer*: Notes for A Revised Opinion*, 110 U. PA. L. REV. 473, 487–88 (1962).

134. Shelley v. Kraemer, 334 U.S. 1, 23 (1948). *See e.g.*, David S. Elkind, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 661 (1974) ("[T]he fourteenth amendment's foremost purpose was the eradication of certain types of racial discrimination, as is well-documented by scholarly investigation and judicial opinion."); Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One*," 89 KY. L.J. 69, 71 (2001) ("[I]t is widely accepted that the principal aim of the drafters and ratifiers of the Fourteenth Amendment was to eradicate official antebellum discrimination against blacks . . . ."). *See also* Weise v. Syracuse Univ., 522 F.2d 397, 406 (2d Cir. 1975) ("Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race. It should hardly be surprising, then, that in race discrimination cases courts have been particularly vigilant in requiring the states to avoid support of

Equal Protection doctrine, which subjects discrimination on the basis of race to strict scrutiny while applying lesser scrutiny to almost all other forms of discrimination.[135]

Similarly, courts' willingness to apply the *Shelley* rationale to stop the enforcement of facially neutral restrictive covenants in a discriminatory manner—even when the discrimination is not racial—ties in well with the Supreme Court's harsh treatment of the discriminatory application of neutral laws in equal protection cases.[136] As the Court has noted, "'Equal protection' . . . emphasizes disparity in treatment . . . between classes of individuals whose situations are arguably indistinguishable."[137] While the Court has found no equal protection problem with facially neutral laws that have a discriminatory impact,[138] the Supreme Court and lower courts closely scrutinize *applications* of facially neutral laws that treat similarly situated people differently, particularly when the differential treatment appears to be based on group traits such as religion or age.[139] Thus, it makes sense that courts would be reluctant to enforce neutral restrictive covenants in a discriminatory manner.

II. THE CORE RIGHT THEORY

All the outcomes described above seem quite disparate at first glance and, indeed, they are. However, there are some consistent themes which recur again and again when courts are asked to use individual constitutional rights to limit private law. Taken together, these themes provide a framework for understanding how courts approach these cases. Courts have shown the most willingness to place constitutional limitations on private law when (1) the application of private law would undermine the core of the right at issue, (2) placing constitutional limitations on private law would not unduly threaten the constitutional rights of the parties seeking

otherwise private discrimination . . . .").

135. *See* WILLIAM J. RICH, 1 MODERN CONSTITUTIONAL LAW § 11:3 (3rd ed.), Westlaw (database updated Dec. 2016).

136. *See* Washington v. Davis, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.").

137. Ross v. Moffitt, 417 U.S. 600, 609 (1974). *See also* Zick, *supra* note 134, at 72 (noting that non-discrimination between similarly situated groups "has remained the core principle" animating equal protection doctrine).

138. *See Washington*, 426 U.S. at 239.

139. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *See also* LeClair v. Saunders, 627 F.2d 606, 609–10 (2d Cir. 1980) (finding a violation of the Equal Protection Clause whenever a person "compared with others similarly situated, was selectively treated; and . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person").

the private law remedy, and (3) the parties seeking constitutional protection did not consent to the private law limitation on their conduct. While the first factor—the level of the threat private law presents to the core of the right—is the most critical, the other two factors operate as important limiting principles. Although these indicators do not create a bright line rule or explicit balancing test, they do provide guideposts that explain the courts' willingness to place constitutional constraints on private law in some cases but not others. I will call this framework the Core Right Theory. In the subsections that follow I will explain the justification for each of the three guideposts of the Core Right Theory and then close this section with a rebuttal to a potential critique of this theory and a response to one alternative approach that has been proposed.

A. THE CORE RIGHT THEORY GUIDEPOSTS

1. The Core Right Guidepost

The idea of courts making distinctions between "more important" exercises of rights and less important ones seems quite off-putting because of the apparent value judgments inherent in such an exercise.[140] But such distinctions have long been a major part of constitutional law and are evident across doctrines associated with several different constitutional rights. For example, Fourth Amendment rights against unreasonable searches and seizures are at their height in a person's home where, subject to a few limited exceptions, police may not conduct a search without a warrant and a showing of probable cause.[141] On the other hand, once a person leaves the home, some kinds of searches are allowed with a lower standard of suspicion and no warrant.[142] Similarly, the Sixth Amendment right to counsel guarantees a criminal defendant in any case the right to hire a lawyer of his or her choice because the ability to hire a lawyer of the defendant's choice is "the root meaning of the constitutional guarantee."[143]

140. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004) (criticizing the criteria the Supreme Court has used for determining which types of class legislation are "suspect" under the Equal Protection Clause); Anne Salzman, Comment, *On the Offensive: Protecting Visual Art with Sexual Content Under the First Amendment and the "Less Valuable Speech" Label*, 55 U. PITT. L. REV. 1215, 1220–21 (1994) (arguing that assigning some speech greater protection than other speech "necessarily reflects the adjudicating body's moral judgment of an expression's value" and thereby undermines the First Amendment's goals).

141. *See, e.g.*, Shafer v. City of Boulder, 896 F. Supp. 2d 915, 928–29 (D. Nev. 2012) ("Both 'the home and its traditional curtilage [are] given the highest protection against warrantless searches and seizures.'") (quoting United States v. Romero–Bustamente, 337 F.3d 1104, 1107 (9th Cir. 2003)).

142. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

143. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006).

By contrast, the Sixth Amendment only guarantees indigent defendants access to appointed counsel in cases where the defendant is sentenced to incarceration.[144]

This greater concern for violations of the core purpose of individual rights is a big factor in explaining when the Constitution does and does not place limitations on private law. As the discussion in the preceding section demonstrates, courts have been much more willing to impose these limitations when the central purpose of a right is threatened than when more ancillary exercises of the right are burdened.

The *Sullivan* line of cases places strict limitations on defamation and related torts because those torts threaten to control speech based on its content. Content-based controls on speech have long been subject to strict First Amendment scrutiny because "[g]overnment action that stifles speech on account of its message . . . contravenes th[e] essential right" at "the heart of the First Amendment."[145] Thus, it makes sense that a tort that punishes a person for speech on a particular topic—e.g., defamatory speech about the plaintiff—would at least be subject to some First Amendment restrictions. Likewise, the post-*Sullivan* line of cases giving greater protection to speech about public figures and issues of public importance makes sense in light of the Court's view that speech about these topics is a central concern of the First Amendment.[146] Courts' skepticism of speech-restricting injunctions that are content-based or which restrict speech on matters of public concern also fits well with this theme.[147]

By contrast, the Court has moved away from placing any serious constitutional limitation on the use of trespass actions to remove speakers from private property, even when that property is open to the public. Although speech is certainly limited in these cases, courts are not enlisted to directly enforce a content-based restriction, as they are in defamation cases. While a property owner could choose to use the trespass laws only on speakers she disagrees with, the court is not being used to regulate the content of speech to the same degree as it is in a defamation action. In defamation actions, the court specifically adjudicates whether the content of speech is liability-triggering, whereas in trespass actions, the court simply adjudicates where the speaker was located in order to determine liability. In this sense, trespass actions are much more analogous to "time,

144. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979).
145. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994).
146. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983).
147. *See supra* Part I.B.

place, and manner" restrictions on free speech, which have received lesser scrutiny than content-based restrictions.[148] In "time, place, and manner" cases, it has long been a requirement that the government show that any such restriction leaves open "ample alternative channels of communication."[149] In most trespass cases, there are ample alternative channels for a speaker to broadcast a message. Thus, the only time the Court has sanctioned First Amendment limitations on trespass—in *Marsh*—application of the trespass laws within the unique circumstances of a company town would have left the speaker with no alternative avenue to get his message to local residents.

In the context of the Equal Protection Clause and restrictive covenants, the same pattern exists. Courts have refused to enforce only those covenants that strike at the heart of the Equal Protection Clause—the prohibition on racial discrimination and disparate treatment of similarly situated groups. Other covenants and similar private agreements have largely survived without equal protection scrutiny, even when they draw distinctions that would receive at least some scrutiny if the government had drawn them directly.

The determination of what constitutes the central purpose of a right is at the center of how courts have constructed the doctrine enforcing those rights. Courts have simply imported these judgments about what parts of each right are really important into the private law context. The difference is that in the private law context, *only* these core parts of each constitutional right are protected. The ancillary applications of each right that ordinarily receive at least some protection in other contexts—e.g., discrimination on bases other than race; time, place, and manner restrictions on speech—receive no protection in the private law arena.

2. The Buffer Zone Guidepost

The desire to protect core constitutional values does not provide a complete explanation for courts' treatment of constitutional rights in private law litigation. There are times when constitutional rights do not limit private law causes of actions even when the application of private law would result in the deprivation of a core constitutional right. The most obvious example is in the selective application of trespass laws to discriminate based on viewpoint. Although as discussed above, courts have less involvement in content regulation there than they do in the defamation

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

149. *See id.* at 802.

context, the result is still the enforcement of a viewpoint-based speech restriction. Speech restrictions that discriminate based on viewpoint, even ones that are limited to a particular location, are ordinarily viewed very skeptically by courts because they are "an egregious form of content discrimination."[150] However, ever since its retreat from *Logan Valley*, the Supreme Court has explicitly allowed such viewpoint discrimination on private property.

The reluctance to enforce even the core meaning of constitutional provisions in some private law cases can be explained by another factor: the constitutional rights of private law plaintiffs. By placing limits on private law causes of action, courts risk infringing the rights of private law plaintiffs. For example, the courts' unwillingness to place First Amendment limitations on trespass actions is likely motivated at least in part by a desire to provide breathing space for the constitutional rights of landowners—specifically the landowners' property and free speech rights.

The right to own property is not specifically guaranteed by the Constitution, but the Fifth Amendment does forbid the taking of property without just compensation.[151] If a court prevents a property owner from excluding persons that he wishes to exclude, the court is in essence taking a portion of the property owner's interest in the property.[152] Similarly, if courts required private property owners to allow certain speakers on their property, the property owners might be viewed as endorsing the speakers' messages even if they did not agree with them; such forced endorsements of particular messages have long been understood to violate the First Amendment.[153] This solicitude for protecting other constitutional rights may also explain courts' reluctance to use the Equal Protection Clause to invalidate wills and trusts that place religious restrictions on testamentary gifts. Refusing to enforce such restrictions could burden the First Amendment right to free religious exercise of those making the

150. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

151. U.S. CONST. amend. V.

152. *See* Kaiser Aetna v. United States, 444 U.S. 164, 180 n.11 (1979) ("[A]n essential element of individual property is the legal right to exclude others from enjoying it.") (citation omitted). *Cf.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010) ("[T]he Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking."). The Court was clearly mindful of this concern when it limited *Logan Valley* in *Lloyd*. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (noting that the due process clause and takings clause were "also relevant to this case").

153. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977). *See also* Rosen, *supra* note 95, at 473–74 ("[I]gnoring the distinction between public and private threatens what many consider to be the core concern of the First Amendment: the protection against a government-created orthodoxy.").

restrictions.[154]

This is not to say that the ability to make religiously restrictive testamentary gifts or use trespass laws to keep out disfavored speakers is constitutionally protected.[155] In fact, the Supreme Court specifically rejected the latter idea in *Pruneyard Shopping Center v. Robins*, upholding a California court ruling extending the California Constitution's free speech guarantee to prevent the ejection of disfavored speakers from a private shopping center.[156] However, the desire to leave a buffer zone to avoid having to adjudicate conflicts between competing constitutional interests is a major factor that influences courts' willingness to apply constitutional rights to private law disputes.[157]

3. The Contract Guidepost

Another important limitation on constitutional rights in private law disputes is most prominent in a particular kind of private law—contracts. As described above, courts have been particularly reluctant to apply constitutional limitations to agreements freely entered into by private parties. Through contracts, parties may limit their speech, including by subject matter, with no constitutional problem. As also discussed above, this is likely rooted in the waivable nature of First Amendment rights.[158] It is also a reflection of the special role that the freedom to contract plays in American society.[159]

Shelley arguably runs counter to this principle; restrictive covenants are essentially a species of contract and yet received no similar solicitude in that case. However, there are at least two key differences between ordinary contracts and restrictive covenants. First, restrictive covenants run with the land, and therefore bind parties who may not have been involved in the

154. *See In re* Estate of Laning, 339 A.2d 520, 526 (Pa. 1975) (noting that through a testamentary condition requiring church membership, "the testatrix sought by this bequest to further her own free-exercise interest in seeking adherents to her faith"). *Cf.* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 89 (2012) (arguing "that testation is communicative" and thus "some restrictions on testamentary freedom [should] trigger First Amendment scrutiny.").

155. *See In re Laning*, 339 A.2d at 526 ("[W]e need not say that the testatrix had a constitutional right to have the condition enforced, for a state may accommodate a free exercise interest which does not amount to a constitutional right.").

156. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

157. *See* Elkind, *supra* note 134, at 662.

158. *See, e.g.*, Charter Commc'ns, Inc. v. County of Santa Cruz, 304 F.3d 927, 935 n.9 (9th Cir. 2002).

159. *See, e.g.*, G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 504 n.451 (1993) (noting "the special place that contract enforcement occupies in the Court's hierarchy of common law principles, a position that helps explain the result in *Cohen*").

initial bargain that led to their creation.[160] Second, the enforcement of racially restrictive covenants has effects on people who are not parties to those agreements or even current owners of land subject to the covenants, because they prevent prospective buyers of particular races from purchasing those properties.[161] Thus, while the consensual nature of restrictive covenants may provide a further reason why courts usually do not subject them to constitutional scrutiny, the aspects of restrictive covenants that are nonconsensual explain why courts have made some exceptions.

B. LIMITATIONS, POTENTIAL CRITIQUES, AND AN ALTERNATIVE

Although these guideposts are far from precise, the Core Right Theory offers the best explanatory model for understanding the courts' treatment of constitutional challenges to private law. However, it is important to understand the limitations of the claim I am making. Most importantly, this framework is intended to be explanatory, not normative. There may be many powerful normative critiques of the Core Right Theory, including that it affords courts too much discretion, it overly relies on the private/public distinction, or that it privileges contractual and private property rights over equal protection and speech rights without justification. An assessment of those critiques is beyond the scope of this Article. Instead, my claim is simply that this is the approach courts have taken and that it represents the best starting point in thinking about how courts might assess similar claims in the context of the Second Amendment.

Perhaps the most obvious explanatory critique of the Core Right Theory is that it ignores the role that notions of state action play in these decisions. Some scholars have argued that the courts' application of the Constitution to private law cases is driven by an assessment of how much the private party attempting to enforce a private law right is taking on a government-like role.[162] The strongest example of this kind of analysis in these cases is in *Marsh* where the Court noted the government-like role that the private entity played in running the company town. Although the Court did not make the point explicit, scholars have also pointed to *Shelley* as an

160. Indeed, that was exactly the case in *Shelley*. *See* Shelley v. Kraemer, 334 U.S. 1, 5 (1948) ("The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.").

161. *See* Belmas & Larson, *supra* note 130, at 68 ("The Court suggested that this case affects outside parties; it is not merely the state enforcing a contract voluntarily entered into by private parties.").

162. *See, e.g.*, sourced cited *supra* note 127.

example of this phenomenon, since restrictive covenants operate much the same way as municipal zoning laws do in controlling certain uses of property.[163]

However, the question of whether a particular actor is actually an arm of the government or acting in close concert with the government is analytically distinct from the question of how constitutional rights apply to private law. If a private party is actually not private, but a governmental actor, then its actions must be subjected to constitutional scrutiny whether or not they involve the use of private law. For example, if a publicly funded school is a state actor, it will be unconstitutional for it to remove disfavored speakers from its public forums whether or not that removal is accomplished through trespass suits or through the enforcement of the policy by school officials. Therefore, while a question about whether a party is a state actor may be raised in a private law case, that question is analytically distinct from the more general question about whether particular private law causes of action must be subject to constitutional restrictions.

While understanding and critiquing the courts' approach to "state action" is a worthwhile endeavor, such theories have little to tell us about how courts approach the problem of constitutional rights and private law. After all, in cases that clearly *do not* involve a private party exercising public functions, a state action theory should yield the same results regardless of which constitutional right is at issue and which kind of private law is involved because the level of state involvement is always the same: the court is enforcing the common-law right of one private individual against another. A court adjudicating a trespass claim that suppresses speech is (or is not) a state actor just as much as one adjudicating a libel claim that suppresses speech, yet the latter is subject to severe constitutional restrictions while the former is not. Thus, courts are not making judgments in these cases about state action at all. Rather, they are making a judgment that is tied to the constitutional right asserted in each case and its relationship to the particular private law dispute at issue.

In the only other article so far to directly address the issue of the Second Amendment's application to private law, Joseph Blocher and Darrell A.H. Miller make an alternative proposal.[164] Their article—which concerns the broader universe of "generally applicable laws" imposing

163. *See id.*

164. *See* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 296–303 (2016).

incidental burdens on the use of guns, including but not limited to private law—disclaims any attempt "to synthesize . . . a transsubstantive approach for evaluating the constitutional salience of incidental burdens" on constitutional rights.[165] Instead, Blocher and Miller draw on constitutional doctrine in other areas to outline four "main forms of argument" that are relevant to the question of whether incidental burdens on gun rights are subject to Second Amendment scrutiny: history and tradition, the degree of the burden imposed, the impact on the court system and on private rights of imposing constitutional scrutiny on the incidental burden at issue, and the purpose and design of the incidental burden.[166] As they explain in their article, each of these four modalities has some basis in the treatment of incidental burdens in other areas of constitutional doctrine.[167]

While these four modalities may be helpful in understanding the way courts treat incidental burdens generally, they are less helpful in the specific context of private law. As an initial matter, Blocher and Miller improperly categorize all private law burdens on constitutional rights as incidental, when that is not always true. Private law burdens on constitutional rights can be incidental, such as the burden neutral contract law imposes on speech when it is used to enforce a contract limiting a party's speech. But private law burdens can also be direct. For example, defamation torts directly assign liability based on the content of the defendant's speech. Blocher and Miller do not make this distinction, and in failing to do so they miss the courts' unique treatment of private law as a distinct category of constitutional burdens (whether direct or indirect).[168]

I agree with Blocher and Miller that the degree of the burden on the right at issue and the potential for interference with private rights are factors that are relevant to courts in determining whether constitutional scrutiny is appropriate in private law cases.[169] However, their first and fourth proposed modalities—history and tradition and the purpose of the regulation, respectively—in my view are merely aspects of the core right

165. *Id.* at 331.

166. *Id.* at 331–33.

167. *See id.* at 331–347.

168. *See id.* at 343 (discussing *New York Times Co. v. Sullivan* as an example of how the court treats civil suits between private parties in discussing the third modality).

169. Although in my view the relevant consideration is whether other private *constitutional* rights are implicated, whereas Blocher and Miller argue for a more general consideration of the impact of the proposed constitutional limitation on "the division between public and private regulation" which "preserve[s] a private sphere in which individuals can govern themselves." *See id.* at 342. For the reasons described *supra* in section II.B, I think specific constitutional rights are of more concern to courts than general structural considerations, though structural considerations may be part of the reason constitutional scrutiny is limited to private law burdens on *core* constitutional values.

question. These factors are only relevant insomuch as they play a role in determining the core of the constitutional right at issue. For example, history and tradition played little role in the court's decision in *Sullivan*, which completely upended centuries of common law. Similarly, although the purpose of the regulation does play a role in many of these cases, it only does so because purposeful discrimination and purposeful suppression of speech are *always* subject to extra scrutiny, whether courts are dealing with public or private law. The importance the distinction between purposeful and non-purposeful constitutional violations takes on in these cases is simply another example of courts' willingness to protect only the core of constitutional rights in private law cases.

III. THE SECOND AMENDMENT'S CORE

The Supreme Court's decision in *Heller*, which for the first time recognized that the Second Amendment contained an individual right to own firearms, was a doctrinal earthquake that essentially created a new area of constitutional law overnight. It evoked plenty of criticism[170] and praise,[171] both for its reasoning and its result, but for courts and scholars it also gave rise to a plethora of questions about the scope of this newly recognized right. Where does an individual have a right to use a firearm? What kind of firearms are protected by the Second Amendment? Who can be excluded from firearm ownership?[172] The intensity of the debate about these questions is not just a product of the controversial subject matter of gun control, but also of the lack of clarity about the scope of the Second Amendment right provided by *Heller* and the Court's unwillingness to meaningfully revisit the Second Amendment subsequently. However, even with all these important lingering questions, one thing that *Heller* and lower courts' subsequent efforts to apply it have made clear is that the core of the Second Amendment right is the right of (most) individuals to keep firearms in their homes for self-defense.

In *Heller*, the Court struck down the District of Columbia's ban on handguns and its requirement that other guns be disassembled and locked

170. *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History* in District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626 (2008); Paul Finkelman, *It Really Was About A Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 267–69 (2008).

171. *See, e.g.*, Robert J. Cottrol, *Second Amendment: Not Constitutional Dysfunction but Necessary Safeguard*, 94 B.U. L. REV. 835, 830–40 (2014); Joyce Lee Malcolm, *The Supreme Court and the Uses of History:* District of Columbia v. Heller, 56 UCLA L. REV. 1377, 1378 (2009).

172. *See generally* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (outlining Second Amendment doctrinal questions raised by *Heller*).

away when not in use.[173] As the Court framed it, the case presented the question of whether the Second Amendment[174] protected "only the right to possess and carry a firearm in connection with militia service" or "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[175] In choosing the latter interpretation, the Court argued at length that the Second Amendment was understood at the time it was ratified as conferring an individual right to keep and bear arms unconnected with militia service.[176] The Court held that the right to keep and bear arms was a preexisting natural right that the Second Amendment merely codified.[177] The Court described this right as an "individual right to possess and carry weapons in case of confrontation."[178]

The Court did not go into great detail about the content of this newly recognized right, but did note that the right to use firearms for self-defense was the "central component" of the Second Amendment right.[179] The Court also clarified that this self-defense-oriented right was most important in the home, "where the need for defense of self, family, and property is most acute."[180] The Court also noted that the Second Amendment did not confer a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[181] Accordingly, the Court cautioned that nothing in its "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," which the Court described as "presumptively lawful."[182]

Since *Heller*, the Supreme Court has only decided one significant

173. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

174. The Second Amendment reads: "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." U.S. CONST. amend. II.

175. *Heller*, 554 U.S. at 577.

176. *See id.* at 576–619.

177. *See id.* at 592.

178. *Id.*

179. *See id.* at 599, 628. *See also id.* at 630 (referring to self-defense as the "core lawful purpose" of the Second Amendment's protection of firearm ownership).

180. *Id.* at 628. *See also id.* at 635 ("[The Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

181. *Id.* at 626.

182. *Id.* at 626–27 & n.26.

Second Amendment case: *McDonald v. City of Chicago*.[183] In *McDonald*, the Court held that the Second Amendment was applicable to state and local governments by virtue of the Fourteenth Amendment's Due Process Clause.[184] In describing the right, the Court reiterated *Heller*'s conclusion "that individual self-defense is 'the central component' of the Second Amendment right" and that "'the need for defense of self, family, and property is most acute' in the home . . . ."[185] Aside from *McDonald*, though, the Supreme Court has said almost nothing about how Second Amendment claims should be analyzed in the near-decade since *Heller*.[186]

Despite the lack of guidance from the Supreme Court, lower courts have developed a relatively uniform way of looking at Second Amendment cases that confirms the core purpose of the Second Amendment as the preservation of a right to armed self-defense in the home. Most federal courts of appeal have adopted a two-part test that first asks whether the law at issue burdens conduct protected by the Second Amendment.[187] If the law is found to burden such conduct, courts will then apply an "appropriate" level of scrutiny to the law, depending upon the severity of the burden on Second Amendment rights.[188] In the first step of this analysis, courts usually look to history to determine if the conduct at issue was within the scope of the Second Amendment right as it was understood at the time of ratification.[189] At the second step, courts decide on an appropriate level of scrutiny based on "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right."[190] When employing this approach, courts have consistently defined the "core" of the Second Amendment as "the right of law-abiding, responsible citizens

183. McDonald v. City of Chicago, 561 U.S. 742, 742 (2010).

184. *Id.* at 791 (plurality opinion). Only four Justices believed that the Due Process Clause incorporated the Second Amendment. *Id.* Justice Thomas also believed that the Second Amendment was incorporated against the states by the Fourteenth Amendment, but through its Privileges and Immunities Clause, not the Due Process Clause. *Id.* at 806 (Thomas, J., concurring).

185. *Id.* at 767, 787 (quoting *Heller*, 554 U.S. at 599, 628).

186. In *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016), in a very brief opinion, the Court summarily revived a challenge to Massachusetts's ban on certain stun guns. *Id.* at 1027–28. The Court noted that in *Heller* it had rejected the assertion that the Second Amendment only protects weapons in existence at the time of the founding—an argument the lower court had erroneously adopted in *Caetano*—but provided no further guidance on how to analyze such claims. *Id.*

187. *See* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 248 & n.74 (2015) (collecting cases applying this approach).

188. *See id.*

189. *See id.* at 249.

190. *E.g.*, Jackson v. City & County of San Francisco, 746 F.3d 953, 960–61 (9th Cir. 2014) (quotations and citations omitted), *cert. denied*, 135 S. Ct. 2799 (2015).

to use arms in defense of hearth and home."[191]

The extra scrutiny given to laws burdening the right of "law-abiding" citizens to employ armed self-defense in the home is evident in how different kinds of firearm restrictions have fared since *Heller* was decided. For example, courts have looked very skeptically at laws forbidding or severely restricting the commercial sale of firearms and thus keeping people from owning guns in their homes.[192] Similarly, in *Ezell v. City of Chicago*, the Seventh Circuit found that a Chicago ordinance banning the operation of firing ranges warranted heightened "if not quite strict" scrutiny because, when combined with another ordinance requiring gun owners to have firing range training, it was a significant burden on "the core right to possess firearms for self-defense."[193] By contrast, even relatively strict restrictions on carrying firearms outside the home have been upheld as long as they fall short of a complete ban on the practice.[194] Likewise, laws restricting the ownership of firearms by people who are not law-abiding or for purposes other than self-defense have almost uniformly been upheld.[195] Thus, despite the continuing uncertainty about the full scope of the Second Amendment's coverage, *Heller* and the lower courts applying it are fairly clear on what the core right is that the Second Amendment protects.

Despite this doctrinal consensus, Blocher and Miller argue that there is no "clear theory of the Second Amendment's values," and without such a theory, there is no way to determine how burdensome any given law is to the Second Amendment right.[196] Although they concede that *Heller* and *McDonald* establish the central component of the Second Amendment right

191. *See, e.g.*, Kolbe v. Hogan, 813 F.3d 160, 180 (4th Cir. 2016), *aff'd*, 849 F.3d 114 (4th Cir. 2017) (en banc); United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013).

192. *See* Teixeira v. County of Alameda, 822 F.3d 1047, 1059 (9th Cir. 2016), *reh'g granted*, 854 F.3d 1046 (9th Cir. 2016) (finding a zoning ordinance that made it very difficult to open new gun stores burdened conduct "close" to the core of the Second Amendment and therefore warranted heightened scrutiny); Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 947 (N.D. Ill. 2014) (striking down a total ban on gun sales in the City of Chicago).

193. Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011).

194. *See, e.g.*, Peruta v. County of San Diego, 824 F.3d 919, 924 (9th Cir. 2016) (upholding law requiring "good cause" for the issuance of a permit to carry a concealed weapon); Drake v. Filko, 724 F.3d 426, 434–35 (3d Cir. 2013) (same); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (same); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (same).

195. *See, e.g.*, Hunters United for Sunday Hunting v. Pa. Game Comm'n, 28 F. Supp. 3d 340, 346 (M.D. Pa. 2014) (finding "no legal support for Plaintiffs' argument that Second Amendment protections extend to recreational hunting"); Jacobs, *supra* note 187, at 251 n.83 (collecting cases upholding the federal prohibition on domestic violence misdemeanants possessing firearms). *See also* Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 137 (2015) ("[T]he case for Second Amendment coverage of hunting and recreation is tenuous.").

196. Blocher & Miller, *supra* note 164, at 341, 347–48.

as self-defense, they argue that a larger theory is necessary to understand the purpose or value of having such a self-defense right.[197] Accordingly, they propose three theoretical approaches to the Second Amendment that are purportedly consistent with a self-defense oriented right: (1) an approach based on personal autonomy that is primarily concerned with "the liberty of self-reliance rather than instrumental ends like preventing tyranny or even promoting personal safety," (2) an approach based on the idea that the Second Amendment preserves a right to self-defense against the government—that is, it acts as a bulwark against tyranny, and (3) an approach based on personal safety—the idea that the government should not be able to decide who can use violence to protect themselves.[198]

While these theories are all intriguing as potential competing justifications for the desirability of gun ownership, only the third is consistent with *Heller*. The autonomy approach explicitly disclaims the importance of personal safety, which of course is at the heart of *Heller*'s description of the right protected. As described above, *Heller* declared that the Second Amendment protects a right to armed confrontation *for self-defense*, and explicitly rejected the idea that the Second Amendment protects a right to bear arms for any purpose whatsoever. Moreover, an autonomy theory of the Second Amendment is not consistent with the emphasis *Heller* and subsequent lower court opinions place on the use of firearms in the home.[199] The need for personal autonomy is the same outside the home as it is inside of it.[200] Thus, as Blocher and Miller ultimately concede themselves, this theory is not very consistent with a "constitutional right predicated on self-defense."[201]

Blocher and Miller's second theory fares no better in this regard. Although *Heller* acknowledged that the prefatory clause of the Second Amendment announced a purpose to maintain state militias in order to protect against a tyrannical federal government, it also emphasized that this was merely the purpose for codifying a pre-existing right whose central component was *personal* self-defense, not defense against a tyrannical

197. *Id.* at 347–48.

198. *Id.* at 348–54.

199. Indeed, Miller himself has argued that "[t]he home is a fault line that runs deep within the text, context, and history of the Second Amendment . . . ." *See* Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1310–11 (2009).

200. Blocher and Miller critique this theory as overly expansive at least in part for this reason. *See* Blocher & Miller, *supra* note 164, at 349–50 (noting that an autonomy theory might suggest Second Amendment scrutiny is applicable to a store owner's desire to exclude a gun carrier from his store).

201. *Id.* at 350.

government.[202] This is confirmed further by *McDonald*, which noted that by the time the Fourteenth Amendment was ratified, "the fear that the National Government would disarm the universal militia . . . had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense."[203] Moreover, such a conception of the right would be inconsistent with *Heller*'s express exclusion of weapons "most useful in military service" from the Second Amendment's coverage[204] and with lower courts' repeated rejection of challenges to bans on assault weapons and large capacity ammunition magazines.[205]

The only one of Blocher and Miller's proposed theories that is consistent with the Second Amendment right recognized in *Heller* and expounded upon by the lower courts since then is the one premised on personal safety. This theory accounts for the Second Amendment's central concern with self-defense, the exceptions to the right that *Heller* recognized, and the interest-balancing "level of scrutiny" analysis that lower courts have applied. In essence, *Heller*'s conception of the Second Amendment embraces the theory that a populace with the choice to arm themselves is safer than one where the government is solely responsible for choosing who is armed. The balance can be tipped in the other direction, however, where the cost of allowing firearm use or ownership becomes higher than the gains to public safety. For example, while under this view a typical law-abiding citizen with a gun generates more safety, a convicted felon with a gun does not.

Therefore I think, contrary to Blocher and Miller, that the courts have already made a choice between the competing theoretical justifications for

202. *See* District of Columbia v. Heller, 554 U.S. 570, 595–600 (2008). *See also* Hollis v. Lynch, 827 F.3d 436, 447 (5th Cir. 2016) ("[S]elf-defense, not revolution, 'is the *central component* of the Second Amendment.'") (citation omitted). The Court also noted "modern developments have limited the degree of fit between the prefatory clause and the protected right" since "it may be true that no amount of small arms could be useful against modern-day bombers and tanks." *Heller*, 554 U.S. at 627–28.

203. McDonald v. City of Chicago, 561 U.S. 742, 770 (2010). *See also* Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. 89, 98 (2013) ("[T]he right to keep and bear arms underwent a reinterpretation in light of the Civil War and Reconstruction. . . . Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self-regarding privileges of discrete citizens to individual self-protection.").

204. *See Heller*, 554 U.S. at 627.

205. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 247–48 (2d Cir. 2015), *cert. denied sub nom.* Shew v. Malloy, 136 S. Ct. 2486, 2486 (2016); Fyock v. Sunnyvale, 779 F.3d 991, 1001 (9th Cir. 2015); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

an individual Second Amendment right.[206] I agree with Blocher and Miller, however, that this theoretical understanding can help provide a basis for a better understanding of how courts might approach the questions about the Second Amendment and private law which I will discuss in the next section.

IV. THE CORE RIGHT THEORY APPLIED TO THE SECOND AMENDMENT

Issues related to private law and the Second Amendment have rarely been litigated and have produced virtually no published opinions since *Heller*.[207] However, it is not hard to imagine a few areas of private law where the Second Amendment could have a significant impact. Although this is not an exhaustive list, below I will discuss five areas where the Second Amendment is likely to intersect with private law: self-defense, products liability, nuisance, negligent entrustment, and property rights. For each area, I will discuss how the Second Amendment and private law might come into conflict and how the Core Right Theory suggests courts might analyze these issues.

A. SELF-DEFENSE

One area where the Second Amendment may be raised as an issue in private law litigation is in cases involving self-defense itself. As described above, the concept of self-defense is at the core of the Second Amendment right recognized in *Heller*, and a few scholars have already suggested that *Heller* necessarily implies an independent constitutional right to self-defense.[208] In civil cases, self-defense is understood as a person's privilege to use reasonable force to defend herself when she "reasonably believes" she is threatened with "bodily harm, offensive bodily contact, or

206. This is not to say that the personal safety theory is normatively correct or more coherent than the other theories Blocher and Miller offer. Rather, I simply claim that it is the only one of the three theories that is consistent with the Second Amendment right as it is currently understood by the courts.

207. The Eleventh Circuit's decision in GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1248 (11th Cir. 2012) is a notable exception which is discussed *infra* in Part IV.E.

208. *See, e.g.*, 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, 1231 (2009); Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 257 (2012). Of course, many have argued that the Constitution contains a right to self-defense independent of the Second Amendment. *See, e.g.*, Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547, 585 (2009); Anders Kaye, Comment, *Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence*, 63 U. CHI. L. REV. 693, 709 (1996).

confinement," even if the use of such "reasonable force would otherwise amount to a tort such as a battery or assault . . . ."[209] When deadly force is involved, some states require a person to retreat if an opportunity to do so is available instead of using deadly force unless that person is being attacked in his or her home.[210] *Heller* raises two questions about the use of the self-defense defense in civil cases: (1) must the definition of "reasonable force" always, or at least more often, include the use of arms; and (2) is a duty to retreat consistent with *Heller*?[211]

What is defined as reasonable force in any particular case is a highly fact-bound inquiry that turns on what a reasonable person under the circumstances "would regard as permissible in view of the danger threatening" her.[212] Usually, the determination of whether force was reasonable in a particular case is a question of fact for the jury.[213] The addition of the malice requirement in *Sullivan* was at least partially motivated by concerns that juries were more likely to find negligence in defamation cases where the underlying speech was controversial.[214] A defendant claiming self-defense might argue that juries in some places will be similarly skeptical about the use of firearms as a means of self-defense and that some *Sullivan*-like alteration of the common law is necessary to preserve Second Amendment rights.

The Core Right Theory, however, shows that this argument is not likely to hold much water. While self-defense is certainly at the core of the Second Amendment, the reasonableness requirement is simply part of the definition of what self-defense *is* rather than a limitation on self-defense. The use of force which is not reasonable is, by definition, not self-defense, but rather an offensive use of force that *Heller* would not sanction.[215] Self-

209. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 7.1 (2d ed. 2000).

210. *See* Jason W. Bobo, Comment, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 346–47, 351–52 (2008).

211. There are also some interesting questions outside the private law context about how a constitutional right to self-defense might apply in places such as schools or prisons, where the state might restrict or eliminate self-defense as a defense to disciplinary action. *See* Brett N. v. Cmty. Unit Sch. Dist. No. 303, No. 08 C 3092, 2009 U.S. Dist. LEXIS 12444 (N.D. III. Feb. 18, 2009) (finding no such right in the school context).

212. RESTATEMENT (SECOND) OF TORTS § 63 (AM. LAW. INST. 1965).

213. *See, e.g.*, Calvillo-Silva v. Home Grocery, 968 P.2d 65, 77 (Cal. 1998).

214. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974) (Brennan, J., dissenting) ("[T]he flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into 'an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.'") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971)).

215. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("[W]e do not read the Second

defense has always had a proportionality requirement, including at the founding and earlier.[216] Moreover, the buffer zone guidepost comes into play here since sanctioning purportedly defensive violence that lacks proportionality threatens the bodily integrity rights of others.[217] Although there may be no constitutional right to be protected from attacks by private parties,[218] the buffer zone guidepost serves to ensure that constitutional encroachments on private law leave open ample space for the exercise of other rights, even when the content of that space is not independently constitutionally protected. As discussed above, courts refused to employ the First Amendment to substantially limit trespass actions in order to provide breathing space for the exercise of property rights, despite the lack of a freestanding constitutional right to use trespass actions to keep out protesters.[219] Similarly, refusing to employ the Second Amendment to limit the self-defense proportionality requirement would provide breathing space for the exercise of bodily integrity rightsm even though there is no freestanding right to be free from private violence. Thus, it seems unlikely that *Heller* will ultimately be read to require any change to the self-defense proportionality requirement.

Heller may figure more prominently in cases dealing with the duty to retreat. The duty to retreat requires a person who is being physically attacked to retreat instead of using deadly force against an attacker if an opportunity to retreat is available.[220] An exception to this requirement, called the castle doctrine, allows the use of deadly defensive force without a duty to retreat when a person is attacked inside his or her home.[221] A defendant asserting a self-defense claim may argue that the duty to retreat is inconsistent with a Second Amendment right based on a "right of self-preservation . . . permitting a citizen to repel force by force when the intervention of society in his behalf, may be too late to prevent an injury."[222]

Amendment to protect the right of citizens to carry arms for *any sort* of confrontation . . . .").

216. *See* Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 332 & n.1 (2006).

217. *See, e.g.*, Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) ("The right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."), *abrogated on other grounds by* Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993).

218. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

219. *See supra* Part II.A.3.

220. *See* Bobo, *supra* note 210, at 351–52.

221. *See id.*

222. District of Columbia v. Heller, 554 U.S. 570, 595 (2008). *See* Madison Fair, Note, *Dare Defend: Standing for Stand Your Ground*, 38 L. & PSYCHOL. REV. 153, 155–59 (2014) (arguing that the duty to retreat is inconsistent with the Second Amendment). *See also* Joshua Prince & Allen Thompson,

Unlike the proportionality requirement, the duty to retreat is not inherent in the concept of self-defense itself and lacks the proportionality requirement's clear historical pedigree.[223] But does the duty to retreat really burden the core right to armed self-defense in the home? Not to a significant degree. The duty to retreat places some limitations on *where* a person can defend themselves with deadly force—they can only do so either (1) in the home, or (2) outside the home in places where there is no opportunity to retreat. But limiting (and by no means eliminating) self-defense outside the home while leaving it unburdened inside the home tracks nicely with the core right protected by *Heller*. Since the need for self-defense is "most acute" in the home[224] and the duty to retreat does not apply there, that duty does not burden the core Second Amendment right.[225]

Still, there are situations when the duty to retreat could require Second Amendment scrutiny. In particular, although every state recognizes some version of the castle doctrine,[226] some states still require a person to retreat when she is attacked in her own home if the aggressor is also a resident of the same home.[227] Unlike the general duty to retreat, a duty to retreat while in the home, even if the attacker is also at home, strikes at the core of the Second Amendment right to armed self-defense in the home. *Heller*'s description of the importance of using firearms "in defense of hearth and home"[228] is in tension with the idea of requiring a person to retreat from her own home simply because she happens to share a home with the person who is attacking her. The buffer zone concern is not applicable here since a

The Inalienable Right to Stand Your Ground, 27 ST. THOMAS L. REV. 32, 36–46 (2015) (arguing that the duty to retreat is inconsistent with the "natural right" of self-defense).

223. *See* Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEM. L. REV. 383, 388 (2015) ("The majority of the new states did not adopt the English duty to retreat before using deadly force to defend against deadly force and instead allowed those confronted with deadly force to stand their ground and not retreat.").

224. *See Heller*, 554 U.S. at 628.

225. This is not to say that the Second Amendment has no application outside the home. Most courts that have examined the issue have either concluded that it does or assumed as much. *See* Drake v. Filko, 724 F.3d 426, 445 (3d Cir. 2013) (Hardiman, J., dissenting) (collecting cases). As discussed above, the relevant question in analyzing the intersection of constitutional rights and private law is whether the *core* of the constitutional right is implicated, not whether the application of private law burdens *any* aspect of a constitutional right.

226. *See, e.g.*, Lydia Zbrzeznj, Note, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 274 (2012).

227. *See* Weiand v. State, 732 So. 2d 1044, 1051 n.8 (Fla. 1999). *See also* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 658–59 (2003) ("[D]ivergent opinions have emerged on the Castle Doctrine's applicability to cohabitants").

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

person has no constitutional right to physically attack someone even in his own home; nor does he have a constitutional right to be free from violent self-defensive measures taken by the victim (assuming those measures meet the proportionality—and other—requirements for self-defense). Thus, *Heller* likely requires that some Second Amendment scrutiny be applied to laws placing a duty to retreat on persons who are attacked in their own home by a cohabitant.[229]

B. PRODUCTS LIABILITY

Advocates for reducing gun violence have often proposed bringing products liability lawsuits against gun manufacturers.[230] One theory for such lawsuits is that gun manufacturers should have integrated certain features into their guns to make them safer, such as chamber load indicators,[231] trigger locks, or "smart gun" technologies that prevent use by people other than the owner.[232] Another theory is that weapons with particular characteristics—such as assault weapons[233]—are so dangerous that it is negligent to market them at all.[234] The ability to bring suits under these kinds of theories has been severely limited by the federal Protection of Lawful Commerce in Arms Act (PLCAA), which immunizes gun manufacturers from suits relating to the "criminal or unlawful misuse" of their products.[235] However, that law is quite controversial, and bills have frequently been introduced to repeal it.[236] Moreover, the PLCAA is subject to a few narrow but important exceptions that may still allow some litigation based on these kinds of theories.[237]

229. The Core Right Theory does not necessarily predict how such requirements would fare under Second Amendment scrutiny, only that they would likely receive such scrutiny.

230. *See, e.g.*, Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1583 (2014). Such suits have been attempted before. *See* RICHARD C. MILLER, 4 LITIGATING TORT CASES § 51:40, Westlaw (database updated June 2017) (describing one such case involving a lawsuit against a major handgun manufacturer for design defect and failure to warn).

231. A chamber load indicator is a device on a gun that provides a clear indication when a round is in the firing chamber. Jacobs, *supra* note 187, at 268–69.

232. *See* 84 AM. JUR. TRIALS 109 §§ 2–5, Westlaw (database updated August 2017); Luff, *supra* note 230, at 1595;

233. For a discussion of the controversy surrounding this phrase, *see* Jacobs, *supra* note 187, at 235–36 nn.9, 19.

234. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 119 (Cal. 2001) (rejecting a lawsuit against a gun manufacturer brought under this kind of theory because of a statutory bar on products liability lawsuits against gun manufacturers).

235. 15 U.S.C. §§ 7902, 7903(5)(a) (2012).

236. *See, e.g.*, Equal Access to Justice for Victims of Gun Violence Act, H.R. 4399, 114th Cong (2016).

237. For example, the PLCAA has an exception for negligent entrustment actions, as well as for actions that occur when a defendant violates a state law applicable to firearm manufacturers. *See* 15

If and when such litigation is able to move forward, a question that will likely arise is whether the Second Amendment provides any kind of defense for manufacturers being sued under such theories.[238] *Heller* said little about the types of guns that were protected by the Second Amendment, except that it protects arms that are in "common use" and that "handguns" qualified as such.[239] The Court also noted that one of the limitations of the Second Amendment right was that it did not extend to "dangerous and unusual" weapons.[240] Lower courts have largely interpreted this test to mean that weapons that are commonly owned—those that are owned by large raw numbers of people—are protected.[241] A gun manufacturer in a products liability case who is being sued on a theory either that a gun is simply too dangerous to market to the public or that a gun should have incorporated a better alternative design (i.e., certain safety features) could argue that it cannot be held liable for marketing a gun that is commonly owned and, thus, protected by the Second Amendment.

A threshold question under either theory is whether the Second Amendment guarantees some right to manufacture and sell firearms. Although few courts have dealt with the issue, those that have analyzed it have almost all concluded that the Second Amendment does guarantee some right to sell firearms.[242] While no court so far has examined the manufacturing issue, Josh Blackman has made a compelling argument that a corresponding manufacturing right exists.[243] These conclusions make sense. Without a right to sell or manufacture firearms, the government

U.S.C. § 7903(5)(ii)–(iii). Some victims of the Sandy Hook Elementary School shooting have used these exceptions to craft a lawsuit against the manufacturer of the gun involved in that shooting, based on a theory that marketing such a lethal assault rifle to the general public constituted negligent entrustment and a violation of the Connecticut Unfair Trade Practices Act. *See* Soto v. Bushmaster Firearms Int'l, LLC, No. FBTCV156048103S, 2016 Conn. Super. LEXIS 1270, at *1–2 (Super. Ct. Apr. 14, 2016).

238. *See* Hamilton v. Accu-tek, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996) (rejecting an argument that the Second Amendment provided a defense to an action against gun manufacturers for negligent marketing of handguns based on a militia-centric understanding of the Second Amendment).

239. District of Columbia v. Heller, 554 U.S. 570, 581–82, 624, 628–29 (2008).

240. *Id.* at 627 (citations omitted).

241. Jacobs, *supra* note 187, at 263–64. As I have argued elsewhere, this test raises many questions and seems somewhat at odds with a self-defense based right. *Id.* at 263–78.

242. *See* Teixeira v. County of Alameda, 822 F.3d 1047, 1059 (9th Cir. 2016), *reh'g granted*, 854 F.3d 1046 (9th Cir. 2016); United States v. Marzzarella, 614 F.3d 85, 92 n.8 (3rd Cir. 2010); Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 947 (N.D. Ill. 2014). *But see* United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. 2011) ("Chafin has not pointed this court to any authority, and we have found none, that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm.").

243. Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 496 (2014).

could get around the Second Amendment entirely by banning the sale or production of guns. For the same reason, the right to sell and manufacture firearms must be part of the core of the Second Amendment right, since it would be impossible for citizens to keep arms for self-defense in the home without the ability to purchase firearms. However, the Court specifically noted in *Heller* that "laws imposing conditions and qualifications on the commercial sale of arms" were presumptively lawful.[244] Thus, while the core of the Second Amendment right does include the right to sell and manufacture firearms, the state has at least some ability to regulate that aspect of the right.

How the Core Right Theory would apply to a products liability suit depends upon the theory of liability that is being pursued against a gun manufacturer. On the theory that a particular gun is simply too dangerous on the whole to market to the general public (i.e., that its risk outweighs its utility), whether the right to that particular gun is at the core of the Second Amendment right would probably depend on whether the gun at issue is commonly owned.[245] If it is, then a gun manufacturer would be able to claim that some form of Second Amendment scrutiny should apply. Of course, the fact that the Second Amendment would apply to such a suit does not necessarily mean that the suit would fail. Rather, the plaintiffs would have to satisfy some additional burden to show that holding the company liable for marketing this particular weapon is consistent with the Second Amendment, perhaps through the application of means-end scrutiny.[246] On the other hand, if the gun at issue was not common, then no Second Amendment scrutiny would be likely, as the suit would not threaten core Second Amendment rights.

A safer alternative design theory presents more complex questions. *Heller* never specified the level of generality to be applied in determining whether a weapon is "common," and few lower courts have expounded upon the question.[247] Is a court supposed to look to just the general class of weapon (handguns), to the specific model (Glock 27), or to the specific feature at issue in the litigation (handguns without chamber load

244. *Heller*, 554 U.S. at 626–27.

245. Determining whether a gun falls into this category is much easier said than done, however. *See* Jacobs, *supra* note 187, at 264 n.148, 272–75.

246. For example, almost all courts to have considered challenges to bans on assault weapons have concluded that those bans burden conduct protected by the Second Amendment but have still upheld them under the applicable form of means-end scrutiny. *See, e.g.*, *N*.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 247–48 (2d Cir. 2015); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

247. Jacobs, *supra* note 187, at 264 n.148.

indicators)? In the absence of further guidance on this issue, the Core Right Theory suggests that courts should look at whether the proposed alternative design feature would significantly impact the gun's utility for self-defense purposes. If it does, then Second Amendment scrutiny may be warranted; the core of the Second Amendment right might be implicated if tort law required the gun to be significantly less helpful for self-defense. Conversely, if the proposed alternative design would have little or no impact on self-defense, core Second Amendment rights would not be implicated and the court could evaluate the proposed alternative design in the same manner as it would in any design-defect case.[248]

C. NUISANCE

Nuisance law could also intersect with the Second Amendment. An action for nuisance can either be based on a public nuisance or a private nuisance.[249] "A public nuisance consists of an unreasonable interference with the exercise of a right common to the general public,"[250] whether or not the defendant's creation of the nuisance arises from the use of real property, whereas a "private nuisance is confined to situations where one person's property use interferes with another's use of neighboring or adjoining property."[251] Both types of nuisance actions may implicate the Second Amendment. Public nuisance actions have been brought against gun manufacturers and dealers under the theory that they have either deliberately or negligently allowed guns to fall into the hands of people who are prohibited from owning them, such as juveniles and felons.[252] Private nuisance actions have sometimes been brought against firing ranges

248. Lawsuits brought by gun owners involving breaches of warranty or implied warranty are less likely to be subject to Second Amendment scrutiny, even if the breach of warranty involves a common gun or a gun feature that implicates self-defense. That is because such an action would arise under a contractual relationship into which the gun manufacturer willingly entered. As the contract guidepost shows, when a party willingly enters a contract, it has far less ground to complain that the contract violates its constitutional rights. *See supra* Part II.A.3. Moreover, suits for breaches of warranty are less likely to burden core Second Amendment rights since such suits do not target particular guns as completely unfit for the marketplace, nor are such suits likely to impact the self-defense utility of a gun. *See* 77A C.J.S. *Sales* § 443 (2017) ("A manufacturer's liability for product defects under implied warranty may not be premised on the existence of an obvious hazard in a product which functions properly for its intended purpose.").

249. 66 C.J.S. *Nuisances* § 7 (2017).

250. *Id.* § 8.

251. *Id.* § 9.

252. *See* 84 AM. JUR. TRIALS 109 § 21 (2002). Often, these public nuisance actions have been brought by municipalities. *See* David Kairys, *Public Nuisance Claims of Victims of Handgun Violence*, 43 ARIZ. L. REV. 339, 339–40 (2001). However, my focus is on private plaintiffs, since actions by municipalities are not really applications of private law but rather are more analogous to direct government regulatory action.

because of excessive noise and other potential hazards associated with such establishments.[253]

Actions for public nuisance against gun manufacturers and dealers based on those manufacturers and dealers allowing weapons to fall into the wrong hands are unlikely to warrant Second Amendment scrutiny. Although, as discussed above, the Second Amendment does likely contain at or near its core a right to manufacture and sell weapons, that core right is specifically limited to people who are law-abiding and responsible.[254] An action based on an allegation that manufacturers and gun dealers are selling guns to people who are not law-abiding (like convicted felons) or otherwise responsible (like minors) thus does not target conduct at the core of the Second Amendment right. Although some types of criminal record based prohibitions on gun ownership may be inconsistent with *Heller*, these prohibitions nevertheless fall outside the *core* of the Second Amendment right,[255] and therefore a public nuisance lawsuit based on a manufacturer or dealer circumventing those provisions is unlikely to warrant Second Amendment scrutiny.

Actions based on private nuisance against gun ranges present a more difficult question. In *Ezell*, discussed *supra* in Part III, the Seventh Circuit held that the ability to train to use firearms at a firing range is protected under the Second Amendment, and that Chicago's restrictions on such firing ranges placed a significant burden on the core of the Second Amendment right.[256] Although it is true that Chicago also required range training in order to obtain a license to own a firearm in the city, the court's conclusion was not entirely based on that requirement. The court specifically found that "the right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."[257] Thus, like the right to sell and

253. *See, e.g.*, Yates v. Kemp, 979 N.E.2d 678, 680 (Ind. Ct. App. 2012) (private nuisance suit based on the manner in which the defendant operated a gun range); Vermillion v. Pioneer Gun Club, 918 S.W.2d 827, 830 (Mo. Ct. App. 1996) (suit against a gun club for private nuisance based on "bullets . . . straying onto [the plaintiffs'] property"); Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 228 P.3d 1134, 1137 (Mont. 2010) (private nuisance suit against a shooting range based upon the danger posed by its "close proximity to a subdivision and an elementary school"); Shaw v. Coleman, 645 S.E.2d 252, 258 (S.C. Ct. App. 2007) (finding a shooting range to be a nuisance because of, among other factors, excessive noise).

254. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

255. Indeed, almost no prohibitions against firearm possession based on criminal conduct have been struck down since *Heller*. *See* LAW CTR. TO PREVENT GUN VIOLENCE, POST-*HELLER* LITIGATION SUMMARY 14–16 (2017), http://smartgunlaws.org/post-heller-litigation-summary.

256. *See* Ezell v. City of Chicago, 651 F.3d 684, 704–06, 708–09 (7th Cir. 2011).

257. *Id.* at 708.

manufacture firearms, the right to maintain proficiency in firearm use through range training is probably part of the core Second Amendment right.

Since nuisance actions often seek the end of the activity targeted, a nuisance action against a gun range may trigger some kind of Second Amendment scrutiny. The Second Amendment concerns would likely be incorporated into the existing framework for nuisance analysis. A private nuisance only exists where the conduct complained of is "unreasonable:" the conduct's utility is outweighed by the harm it causes to the plaintiff.[258] In determining the utility of particular conduct, courts look to "(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion."[259] In the case of firing ranges, courts could consider the value of firing ranges as "an important corollary" to the exercise of Second Amendment rights when determining their social value. Courts could also consider the availability of other firing ranges in the area when thinking about the suitability of a firing range to the character of the locality.[260] And courts could also avoid Second Amendment problems by requiring remedial measures to make firing ranges less bothersome to surrounding property owners, or using the remedy of damages instead of an injunction.

The buffer zone guidepost may come into play here since the right to be free from nuisances is arguably a stick in the bundle of rights associated with ownership of a piece of property.[261] However, the limitations on nuisance actions described above merely incorporate Second Amendment interests into existing (and longstanding) nuisance doctrine. The Second Amendment may change some of the considerations that courts look at in determining the public utility of firing ranges, but the overall calculus of utility versus harm (and the right to bring a nuisance action) remains the same. The utility side of the nuisance inquiry changes with the times as

258. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 826 (AM. LAW. INST. 1979).

259. *Id.* § 828.

260. *Cf. Ezell*, 651 F.3d at 711 ("[T]he City may promulgate zoning and safety regulations governing the operation of ranges not inconsistent with the Second Amendment rights of its citizens."); *id.* at 714–15 (Rovner, J., concurring) ("The City has a right to impose reasonable time, place and manner restrictions on the operation of live ranges in the interest of public safety and other legitimate governmental concerns.").

261. *See* Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 218–19 (Mich. Ct. App. 1999) ("[P]ossessory rights to real property include as distinct interests the right to exclude and the right to enjoy, violations of which give rise to the distinct causes of action respectively of trespass and nuisance.").

activities that once had utility no longer do, and vice versa.[262] The changes to the inquiry to protect Second Amendment interests would simply be a continuation of that tradition, rather than a new limitation on private property rights. Thus, applying the Core Right Theory here suggests that the Second Amendment would likely have some application in private nuisance actions against gun ranges,[263] albeit in a form that would likely leave plenty of room for such actions to continue unabated.

D. NEGLIGENT ENTRUSTMENT

Negligent entrustment and related actions are also an area where the Second Amendment could arguably have private law implications.[264] Negligent entrustment occurs when the defendant permits a third person to use a thing and the defendant knows or should know that the third person is likely to use it to create an unreasonable risk of harm to others.[265]

There are two theories of negligent entrustment actions involving guns that likely have different implications under the Core Right Theory. One theory is that a defendant consciously gave or (more often) sold a firearm to a person who later hurt someone with it, when the defendant should have known that the recipient would do something bad with the firearm.[266] Another theory is that a defendant failed to safely secure a firearm, allowing it to fall into the hands of someone who used it to cause harm.[267]

As to the first theory, the analysis would probably be fairly similar to

262. *See* George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 682, 692–94 (1995).

263. Similar logic would likely apply to private nuisance actions against gun stores and manufacturers.

264. Actions for negligent entrustment are specifically exempt from the PLCAA. *See* 15 U.S.C. § 7903(5)(A)(ii) (2012).

265. RESTATEMENT (SECOND) OF TORTS § 308 (AM. LAW. INST. 1965).

266. *See, e.g.*, Shirley v. Glass, 308 P.3d 1, 9–10 (Kan. 2013) (allowing a plaintiff to proceed with a negligent entrustment action based on a pawn shop's sale of a firearm to a convicted felon who subsequently used the firearm to murder the plaintiff's son); Splawnik v. Di Caprio, 540 N.Y.S.2d 615, 335–36 (N.Y. App. Div. 1989) (allowing negligent entrustment action to proceed where the defendant "had reason to know [the recipient of a gun] was likely, because of her depressed mental state, to use it in a manner involving unreasonable risk of physical harm to herself").

267. *See* Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1190 (2000). There is some dispute about whether this theory technically qualifies as negligent entrustment or is an analytically distinct "negligent storage" theory. *Compare id.* at 1214 n.193 ("Although there is a potential for overlap, the theory of negligent storage must be distinguished from the theory of negligent entrustment."), *with* 94 C.J.S. *Weapons* § 78 (2017) ("Negligent entrustment can include both affirmative entrustment of a firearm to an unsuitable person and failure to properly secure a firearm . . . ."). The distinction is not particularly important for this Article's purposes. However it is classified, the tort requires a failure to adequately store a firearm, resulting in someone gaining access to the firearm and injuring themselves or someone else.

public nuisance actions based on negligent marketing—there is likely no Second Amendment issue if a lawsuit merely targets a dealer for selling to someone who is not law-abiding or responsible. Unlike most public nuisance actions though, negligent entrustment actions may involve transfers to persons who, though not legally barred by a criminal conviction from owning firearms, are nevertheless persons who the defendant should have known would be likely to do harm with a firearm. For example, in *Angell v. F. Avanzini Lumber Co.*, a Florida court found the plaintiff had stated a claim for negligence when the defendant sold a gun to the plaintiff's attacker, even though when the attacker entered the defendant's store, "[h]er eyes were glazed and she was laughing and giggling as she hugged and kissed one of the employees who was a total stranger to her" and she "repeatedly aimed [a gun] at [an employee's] head, pulling the trigger."[268] In cases like this, although the attacker may have been otherwise law-abiding, she arguably was not responsible. Moreover, restricting gun stores from selling to people exhibiting strange behavior arguably also falls under *Heller*'s exception for "conditions and qualifications on the commercial sale of arms."[269] Thus, negligent entrustment actions based on deliberate transfers of a firearm to another person are unlikely to implicate the Second Amendment.

The Second Amendment is likely to be more relevant in actions based on a theory of failure to secure a firearm that was then taken by someone who should not have had access to it. In these cases, tort law imposes a duty on gun owners to lock their guns away in a particular manner—the same objective as the safe storage law struck down in *Heller*. The Court found that law "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense."[270] As Blocher and Miller point out, if courts were to hold that negligence law created the same duty of care for gun owners as that required by the law in *Heller*, that would plainly implicate, and likely be inconsistent with, the Second Amendment.[271] Thus, whatever duty of care gun owners have to keep their weapons secured, it must be consistent with the ability to use those weapons for self-defense.[272]

268. Angell v. F. Avanzini Lumber Co., 363 So. 2d 571, 572 (Fla. Dist. Ct. App. 1978).

269. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). *See also* Colo. Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1074 (D. Colo. 2014) (expressing "grave doubt" that a law requiring background checks on all firearm transfers "implicates the Second Amendment's guarantee at all"), *vacated*, 823 F.3d 537 (10th Cir. 2016).

270. *Heller*, 554 U.S. at 630.

271. Blocher & Miller, *supra* note 164, at 296–97.

272. By contrast, there would likely be no Second Amendment issue with lawsuits aimed at gun *dealers* who fail to adequately secure firearms. *See generally* Michael T. Pedone, Note, Valentine v. On Target, Inc.*: It Is Time to Hold Gun Dealers Accountable for the Negligent Storage of Firearms*, 60

The treatment of safe-storage provisions by courts since *Heller* provides some insight into how courts might harmonize the Second Amendment with the duty of care in "failure to secure" negligent entrustment cases. The two major cases to have analyzed safe storage requirements after *Heller* both upheld laws requiring firearms to be equipped with a trigger lock or put in a safe when not under the owner's immediate control.[273] In both cases, the courts distinguished those laws from *Heller* on the grounds that they had an exception for when the firearm was in the owner's immediate control, and therefore allowed the owner to use guns for self-defense in the home.[274] Using these cases as a guide, courts would likely find that negligent entrustment actions could place a duty on gun owners to secure their weapons as long as that duty did not extend to times when the weapon was in use or under the owner's direct control.[275]

E. PROPERTY RIGHTS

Private property rights were often at the center of disputes over the applicability of other constitutional provisions to private law, and the Second Amendment will likely be no different.[276] Two different contexts for these kinds of disputes have received some attention from the courts and in scholarship. First, does the Second Amendment limit the ability of property owners to keep guns off their property, even when that property is otherwise open to the public? Second, does the Second Amendment place any limitations on the ability of homeowners to enforce restrictive covenants or homeowners' association rules prohibiting firearms in

MD. L. REV. 441 (2001) (discussing such claims). Placing a duty on gun dealers to store their weapons in a particular way does not impact the right to use arms for self-defense in the home.

273. *See* Jackson v. City & County of San Francisco, 746 F.3d 953, 963–66 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015); Commonwealth v. McGowan, 982 N.E.2d 495, 502–04 (Mass. 2013).

274. *See Jackson*, 746 F.3d at 963–65; *McGowan*, 982 N.E.2d at 502–04.

275. At least two Supreme Court Justices have voiced concern with the holdings in these cases, because safe storage requirements create a delay in a gun owner's ability to access a firearm in an emergency and therefore burden the right to self-defense in the home. *See Jackson*, 135 S. Ct. at 2800 (Thomas, J., dissenting from the denial of certiorari) (Justice Scalia joined Justice Thomas's dissent). However, *Heller* specifically mentioned that some safe storage provisions could pass muster under the Second Amendment. *See Heller*, 554 U.S. at 632 ("[O]ur analysis [does not] suggest the invalidity of laws regulating the storage of firearms to prevent accidents."). Since "[a]ny law regulating the storage of firearms will delay to some degree the ability of a firearm owner to retrieve and fire the firearm in self-defense," it must be that at least some delay is acceptable under the Second Amendment. *McGowan*, 982 N.E.2d at 503. In any case, it is doubtful that the *core* of the Second Amendment right is implicated by a requirement that guns be kept locked up except when under the owner's control, even if such requirements may implicate non-core aspects of the Second Amendment right (e.g., the speed of retrieval).

276. *See supra* Parts I.D & I.E.

housing developments?

The conflict between the Second Amendment and private property rights is one of the few areas where a court has actually weighed in on *Heller*'s impact on private law. In *GeorgiaCarry.Org, Inc. v. Georgia*, the Eleventh Circuit considered a challenge to a state law preventing people from carrying guns into places of worship without the explicit permission of the owner of the place of worship.[277] In rejecting that challenge, the buffer zone guidepost loomed large in the court's analysis. The court described the well-established colonial and pre-colonial history of the private property right to exclude trespassers, and concluded that "[a]n individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land."[278] Much like in the *Logan Valley* line of cases, although business owners may not have an affirmative constitutional right to keep guns off their property,[279] by refusing to employ the Second Amendment to require property owners to allow guns on their property, the court protected a breathing space for private property rights.

The core right guidepost further reinforces the Eleventh Circuit's conclusion. As discussed above in several other contexts, the right to carry firearms outside of the home, whatever its scope, likely falls outside of the core of the Second Amendment right. Even if the right to carry outside the home did implicate the core of the Second Amendment, it does not automatically follow that a right to carry on *private property* is a part of that core. Moreover, forcing a business to have a gun on its property that it does not want there may itself violate the Second Amendment's core principles. Blocher has argued that the Second Amendment protects a right "not to keep and bear arms," because such a right would further the core Second Amendment value—self-defense—by allowing people to choose whether to accept the personal safety risk associated with a gun's presence on their property.[280] Forcing business owners to allow guns on their property may or may not violate that right,[281] but if the Second Amendment contains some right not to bear arms, it likely does not *require* private businesses to allow guns on their property. Finally, the consent guidepost

277. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1248–49 (11th Cir. 2012).

278. *Id.* at 1261–63, 1265.

279. *See, e.g.*, Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009) (upholding an Oklahoma law requiring businesses to allow employees to keep guns in their cars).

280. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 26–31 (2012).

281. *See id.* at 41–45.

plays a role here as well, since businesses often post notices on their property indicating that anyone who enters must agree to not carry firearms on the premises. If a person freely agrees to bargain away his or her Second Amendment rights in exchange for being allowed into a business, courts will be unlikely to find a violation of those rights.

Many housing developments have used restrictive covenants or homeowners' association (HOA) rules to prohibit the possession of firearms in homes in those developments.[282] Although not yet litigated,[283] a gun owner challenging such a restriction might argue that it is analogous to the restrictions struck down in *Shelley*.[284] The Core Right Theory points towards such restrictions receiving some constitutional scrutiny. Such restrictions—at least where they completely ban possession of all guns in the home—undoubtedly burden the core of Second Amendment. On the other hand, a restrictive covenant or an HOA agreement is a property right, and any application of the Second Amendment would threaten that property right.[285] Moreover, HOAs and restrictive covenants are voluntary agreements, and they generally receive the deference courts pay to such agreements when determining whether to apply the Constitution to private law. But, as *Shelley* demonstrates, when a restrictive covenant or HOA directly burdens the core of a right, it may be subject to constitutional scrutiny despite the property rights involved and the consensual nature of these agreements. As discussed in Part I.E, HOAs and restrictive covenants are not like most ordinary contracts because they—by design—impact non-parties to the original agreement.[286]

However, the fact that an attempt to enforce such a "no guns" restriction would be subject to constitutional scrutiny is not the end of the

282. *See* John-Patrick Fritz, Comment, *Check Your Rights and Your Guns at the Door: Questioning the Validity of Restrictive Covenants Against the Right to Bear Arms*, 35 SW. U. L. REV. 551, 551–52 (2007); Christopher J. Wahl, Comment, *Keeping* Heller *Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U. PA. J. CONST. L. 1003, 1003 n.5 (2013).

283. The pressure of threatened litigation may have forced some HOAs to withdraw proposed gun bans. *See* Wahl, *supra* note 282, at 1003 & n.6.

284. *See* Fritz, *supra* note 282, at 551–52 & 565 (making a version of this argument pre-*Heller*).

285. *See, e.g.*, Leigh v. Village of Los Lunas, 108 P.3d 525, 529 (N.M. 2004) ("Restrictive covenants constitute valuable property rights.") (citation and internal quotation marks omitted). Although some jurisdictions do not consider a restrictive covenant to be a property right for takings purposes, because they consider them to be contractual rights, *see id.* at 530, contractual rights are still an important interest with constitutional dimensions. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

286. A similar restriction in a lease, by contrast, would likely not be subject to constitutional scrutiny. Unlike a restrictive covenant or HOA rule, a lease provision would not have adverse impacts on third parties beyond those who negotiated the lease. Instead, a lease would be much more like an ordinary contract, and therefore unlikely to receive constitutional scrutiny.

inquiry. A court looking at such a restriction would have to conduct a full Second Amendment analysis, including selecting an appropriate level of scrutiny and applying that level of scrutiny to the restriction at issue (which would necessarily include considering the justifications for the restriction in that particular development). It may seem obvious that strict scrutiny should apply to these restrictions, given their similarity to the law struck down in *Heller*. However, the fact that these restrictions emanate from an agreement among private parties, and that a prospective home purchaser who wishes to use firearms for self-defense may simply choose to live elsewhere, may lessen the burden on the Second Amendment and counsel in favor of a lower level of scrutiny, even though these same factors would probably not be sufficient to shield such restrictions from all scrutiny. Thus, while the Second Amendment would likely apply to such restrictions, that does not automatically mean they would be unenforceable in all circumstances.

CONCLUSION

The Core Right Theory provides a sound framework for understanding courts' approach to questions about the intersection of private law and constitutional rights generally. Consequently, applying that theory guides our understanding of how courts may address these intersections in the Second Amendment context. However, the Core Right Theory is only explanatory; I make no claims about its normative value. The Second Amendment's post-*Heller* development presents courts and scholars with a unique opportunity to look at old doctrines in a new light, and the way that constitutional rights and private law are integrated may be one area that deserves a fresh look. But in order for that to happen, we must first develop a coherent understanding of what courts have done in this area up to this point. The Core Right Theory provides an important tool for moving in that direction.