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ESSAY

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Glenn Harlan Reynolds*

I. INTRODUCTION

The Second Amendment to the Constitution[1] is now part of "normal constitutional law,"[2] which is to say that the discussion about its meaning has moved from the question of whether it means anything at all, to a well-established position that it protects an individual right, and is enforceable as such against both states and the Federal Government in United States courts. The extent of that individual right has not yet been fully fleshed out, and, of course, will (like other items of normal constitutional law) occasion disagreement on one issue or another into the foreseeable future.

Nonetheless, now that the right has achieved a measure of concreteness, it has begun, like other parts of the Bill of Rights, to cast its shadow across the law. And if the core of the shadow—or umbra—remains a bit unclear, what of the edge or penumbra?[3]

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1. U.S. CONST. amend. II ("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.").

2. *See* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 274–77 (2011) (describing new status of Second Amendment as normal constitutional law).

3. *See* Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENT. 251, 252 (1989). As Greely points out, the term "penumbra" originates with the astronomer Johannes Kepler, who observed that during an eclipse there is a dark shadow, or "umbra," surrounded by a less distinct shadow or "penumbra"—from the Latin "paene" (almost) and "umbra" (shadow).

In this brief Essay, I will discuss some possible penumbral aspects of the Second Amendment, as it may be applied in the future. I will also discuss its possible interaction with other (up to now, at least) "underenforced" constitutional rights, and consider whether the normalization of the Second Amendment might imbue those rights with additional force. I will conclude with some guidelines, or at least suggestions, for further research.

II. PENUMBRAS

The question of "penumbras" in constitutional law is a long and somewhat thorny one, and the term is used in two different fashions. Sometimes the term is used to describe auxiliary protections for a core constitutional right. At other times, it is used to describe the process of interpolating additional rights based on the provisions of rights that are explicitly spelled out in the Constitution.[4] I will offer some thoughts on both.

A. AUXILIARY PROTECTIONS

When talking about constitutional rights' penumbras, speakers are sometimes describing auxiliary protections for the core right—for example, those provided in the First Amendment realm by "chilling effect" considerations, overbreadth, or prior restraint doctrine. These auxiliary protections ensure that the core right is genuinely protected by creating a buffer zone that prevents officious government actors from stripping the right of real meaning through regulations that indirectly—but perhaps fatally—burden its exercise. Such an approach seems particularly appropriate with regard to the Second Amendment, which plainly commands that the right to keep and bear arms shall not be "infringed"—and what is a penumbra, after all, but a kind of fringe?

What would such auxiliary protections look like in the context of the Second Amendment? If the core right is, as indicated in *District of Columbia v. Heller*, the right to possess firearms for defense of self, family,

4. *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1997) (describing penumbral reasoning in this fashion); Glenn Harlan Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992) (same). *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 43 (3d ed. 2000) (describing approaches that "reveal that the gaps between the rights-defining provisions enumerated in the Bill of Rights are only apparent and do not represent substantively empty space but instead serve to juxtapose, in an almost Impressionist fashion, individual commitments in combinations also showing additional guarantees").

and home,[5] then the auxiliary protections that might matter most would be those that would make that right practicable in the real world. That would include such auxiliaries as the right to buy firearms and ammunition, the right to transport them between gun stores, one's home, and such other places—such as gunsmith shops, shooting ranges, and the like—that are a natural and reasonable part of firearms ownership and proficiency.

Such protections are already a part of state constitutional law relating to firearms ownership. For example, the Tennessee Constitution's right to arms has been interpreted in this fashion:

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
>
> But further than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.[6]

Does such reasoning, developed for the Tennessee Constitution's right to arms, apply to the Second Amendment? There seems no reason why it should not. Fortunately, we do not have to look far, as the 2011 Seventh Circuit case of *Ezell v. City of Chicago* provides an illustration.[7] *Ezell* demonstrates that the Second Amendment's right to arms extends significantly beyond the simple aspect of self-defense in the home that played a key role in the Supreme Court's *Heller*[8] decision.

In *Ezell*, the question revolved around a Chicago ordinance banning firing ranges within city limits.[9] This was controversial for two reasons. First, Chicago residents wished to be able to practice shooting without having to leave the city. Second, in a particularly heavy-handed catch-22, the City mandated that citizens who wanted a gun license must practice on

5. District of Columbia v. Heller, 554 U.S. 570 (2008).
6. Andrews v. State, 50 Tenn. 165 (3 Heisk), 178–79 (1871).
7. Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).
8. *Heller*, 554 U.S. 570.
9. *Ezell*, 651 F.3d at 690.

a firing range even as it outlawed firing ranges within its jurisdiction.[10]

In tones reminiscent of the Tennessee case quoted above, the Seventh Circuit opined:

> The plaintiffs challenge only the City's ban on firing ranges, so our first question is whether range training is categorically unprotected by the Second Amendment. *Heller* and *McDonald* suggest to the contrary. The Court emphasized in both cases that the "central component" of the Second Amendment is the right to keep and bear arms for defense of self, family, and home. The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective. Several passages in *Heller* support this understanding. Examining post-Civil War legal commentaries to confirm the founding-era "individual right" understanding of the Second Amendment, the Court quoted at length from the "massively popular 1868 Treatise on Constitutional Limitations" by judge and professor Thomas Cooley: "[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . . ; it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order."[11]

The right to practice at a firing range, then, is at the very least one of the aspects of the Second Amendment right to arms that reinforces its core purpose. On similar logic, what other rights might be protected?

If citizens have the right to own guns, presumably they have the right to buy them—since, unlike the pornography in *Stanley v. Georgia*,[12] the right to have guns in the home is constitutionally protected, not simply a byproduct of privacy law.[13] This presumably means that they have a right to expect that gun shops will be permitted to operate in their jurisdiction, and, of course, that they will be permitted to transport guns that they purchase freely from the gun shops to their homes or other places (businesses, perhaps) where they possess them for the purpose of self-defense. Indeed, the District of Columbia—which, perhaps because of political hostility, or the legacy of its prohibitive gun laws, has only a

10. *Id.* at 691.

11. *Id.* at 704 (citations omitted).

12. Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the right of privacy extends to possession of pornography in home, even if its sale could be barred under obscenity law).

13. *But cf.* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (arguing for a somewhat *Stanley*-like treatment of firearms). This approach is high academic cleverness, but unlikely to persuade either courts or voters. For a response, see Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009).

single, nonoperational federally licensed firearms dealer—has, in a tacit recognition of this aspect of Second Amendment protection, moved to facilitate the dealer's entry into operation, even offering space in a police station to overcome zoning issues.[14]

Likewise, punitive controls on ammunition, designed to make gun ownership or shooting prohibitively expensive or difficult, would be unlikely to pass constitutional muster. If firing-range regulations that impose burdens on target practice violate the Second Amendment, then restrictions with a similar effect—such as the dollar-per-bullet tax proposed by a Baltimore mayoral candidate[15]—would also constitute violations, it seems. Making it "difficult to buy bullets in the city"—the avowed purpose of the tax—would seem to be precisely the sort of purposeful discrimination that would violate the Second Amendment. It might even be analogized to discriminatory taxes on newsprint, or the licensing of newsracks, both of which have been found to constitute excessive burdens on First Amendment rights.[16]

First Amendment analogies, in fact, suggest another doctrine that might apply: chilling effect. Traditionally, violation of gun laws was treated as mere malum prohibitum, and penalties for violations were generally light.[17] During our nation's interlude of hostility toward guns in the latter half of the twentieth century, penalties for violations of gun laws, especially in states with generally anti-gun philosophies, became much stiffer. Gun ownership was treated as a suspect (or perhaps "deviant" is a better word) act—one to be engaged in, if at all, at the actor's peril.

But with gun ownership now recognized as an important constitutional right belonging to all Americans, that deviant characterization cannot be correct. Regulation of firearms cannot now justifiably proceed on an in

14. Tom Sherwood & Matthew Stabley, *D.C. Gun Dealer Could Operate Out of Police Headquarters*, NBC WASH. (July 20, 2011, 7:42 PM), http://www.nbcwashington.com/news/ local/DC-Gun-Dealer-to-Operate-Out-of-Police-Headquarters-125900203.html?dr.

15. *Bullet Tax Proposed By Mayoral Candidate*, WBAL TV (July 19, 2011, 11:21 AM), http://www.wbaltv.com/print/28595846/detail.html ("'This is not a revenue enhancement tool,' [mayoral candidate Otis] Rolley said of the tax idea. 'It's a make it difficult for you to buy bullets in the city tool.'").

16. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (discriminatory tax on newsprint violative of First Amendment); Minneapolis Star Tribune Co. v. Comm'r, 460 U.S. 575 (1983) (same); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (city licensing scheme for newsracks violated First Amendment by vesting excessive discretion in mayor).

17. Bill Winter, *NY Gun Law: Aiming at Local Controls?*, 66 AM. B. ASS'N J. 1060 (1980). (joining other major jurisdictions, New York's adoption of minimum sentencing for repeat offenders for carrying unlicensed guns marked the beginning of what some observers predicted would "boost the local approach to controlling handguns" with increased penalties and new laws).

terrorem approach, in which the underlying goal is to discourage people from having anything to do with firearms at all. Laws treating fairly minor or technical violations as felonies must be regarded with the same sort of suspicion as pre–*New York Times v. Sullivan* laws on criminal libel: as improper burdens on the exercise of a constitutional right.[18]

This change has important penumbral implications. At present, Americans face a patchwork of gun laws that often vary unpredictably from state to state, and sometimes from town to town. Travelers must thus either surrender their Second Amendment rights, or risk prosecution. Two recent cases from the state of New Jersey illustrate the risks.

Brian Aitken visited his mother while traveling cross-country with three unloaded handguns in the trunk of his car.[19] Though the guns had been legally purchased in Colorado, they were not registered in New Jersey, and Aitken was tried and sentenced to seven years in prison (though the federal Firearm Owners' Protection Act[20] immunizes those in transit from local laws, the trial court did not apply it to Aitken). According to one news account,

> Aitken had purchased the guns legally in Colorado, and he passed an FBI background check when he bought them, his father said. And he said Brian also contacted New Jersey State Police before moving back home to discuss how to properly transport his weapons. But despite those good-faith efforts, he said, Brian was convicted on weapons charges and sent to prison in August.[21]

Aitken was subsequently released after New Jersey's governor commuted his sentence to time served,[22] but there is no doubt that such risks are likely to create (and were intended to create) a chilling effect with regard to firearms ownership. Nor are such cases limited to those traveling by automobile.

Utah resident Greg Revell was traveling by air, with a change of

18. *Cf.* David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEG. J. 737 (1995) (arguing for Second Amendment protections in lawsuits filed against firearms manufacturers analogous to those announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

19. Chris Megerian, *Gun Owner Brian Aitken Is Released from Prison After Gov. Christie Commutes Sentence*, NJ.COM, (Dec. 22, 2010, 12:15 PM), http://www.nj.com/news/index.ssf/2010/12/gun_owner_brian_aitken_is_rele.html.

20. Firearms Owners' Protection Act, 18 U.S.C. § 926A (2006).

21. Joshua Rhett Miller, *New Jersey Gun Case Exposes "Patchwork" of State Laws, Experts Say*, FOXNEWS.COM (Dec. 2, 2010), http://www.foxnews.com/us/2010/12/02/new-jersey-gun-case-highlights-patchwork-state-gun-laws-relatives-experts-say/.

22. Megerian, *supra* note 19.

planes at New Jersey's Newark Airport, when his flight was canceled.[23] He wound up in jail when the airport misdirected his luggage:

> Revell was flying from Salt Lake City to Allentown, Pa., on March 31, 2005, with connections in Minneapolis and Newark, N.J. He had checked his Utah-licensed gun and ammunition with his luggage in Salt Lake City and asked airport officials to deliver them both with his luggage in Allentown.
>
> But the flight from Minneapolis to Newark was late, so Revell missed his connection to Allentown. The airline wanted to bus its passengers to Allentown, but Revell realized that his luggage had not made it onto the bus and got off. After finding his luggage had been given a final destination of Newark by mistake, Revell missed the bus. He collected his luggage, including his gun and ammunition, and decided to wait in a nearby hotel with his stuff until the next flight in the morning.
>
> When Revell tried to check in for the morning flight, he again informed the airline officials about his gun and ammunition to have them checked through to Allentown. He was reported to the TSA, and then arrested by Port Authority police for having a gun in New Jersey without a New Jersey license.
>
> He spent 10 days in several different jails before posting bail. Police dropped the charges a few months later. But his gun and ammunition were not returned to him until 2008.
>
> Revell said he should not have been arrested because federal law allows licensed gun owners to take their weapons through any state as long as they are unloaded and not readily accessible to people. He said it was not his fault the airline stranded him in New Jersey by making him miss his flight and routing his luggage to the wrong destination.
>
> Prosecutors said it doesn't matter whose fault it was: Revell was arrested in New Jersey with a readily accessible gun in his possession without a New Jersey license.[24]

Cases like this are common enough to give gun owners pause, and to support the publication of various guides to compliance. Legal approaches like New Jersey's seem intended to stigmatize and denormalize firearms possession generally, and to produce an in terrorem effect that will make gun ownership less common. The question is, does this chilling effect run afoul of the Second Amendment? If, as noted above, the right to keep and

23. Jesse J. Holland, *High Court Denies Man's Gun Arrest Appeal*, HUFFINGTON POST (Jan. 18, 2011, 11:20 AM), http://www.huffingtonpost.com/huff-wires/20110118/us-supreme-court-gun-arrest/. Despite the headline, this was not an "appeal," but a civil-rights lawsuit against the New Jersey authorities, as criminal charges against Revell were eventually dropped.

24. *Id.*

bear arms implies the right to use them in ordinary ways, these burdens would seem problematic.

Certainly one could argue that in today's highly mobile society, travelers with firearms should be treated as ordinary Americans, rather than deviants, and violations that do not involve some sort of genuinely criminal activity should be treated more like violations of traffic laws, rather than as felonies.[25] When gun ownership was not recognized as a normal, constitutionally protected act, these sorts of laws might have been on firmer footing, but with that right now established, they would seem ripe for close judicial scrutiny.[26]

One might also ask if the right to bear nonlethal arms is protected by the Second Amendment, and if not, why not? Had the Supreme Court hewed closer to the "insurrectionist theory" approach to the Second Amendment—in which the primary, if not sole, justification for the right to arms is to allow the overthrow of the federal government should it become tyrannical[27]—then questions involving the treatment of tasers, pepper spray, and the like might be avoided: such weapons have limited military utility, and their presence among the populace probably does little to deter tyranny. But since the *Heller* and *McDonald v. City of Chicago*[28] cases have stressed the importance of individual self-defense under the Second Amendment, it is difficult to see why that right should be protected only when lethal means are employed.

Indeed, nonlethal self-defense may allow those unable, for reasons of age or other incapacity, to defend themselves with firearms to nonetheless

25. Turning citizens exercising constitutional rights into felons over technicalities would seem to be not only a Second Amendment violation but perhaps a due process violation as well—that is a subject for another paper.

26. One might even imagine an overlap between Second Amendment penumbras and those of the right to travel. *See* Saenz v. Roe, 526 U.S. 489 (1999) (finding a durational residency waiting period for welfare benefits an unacceptable burden on the constitutional right to travel).

27. *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464–89 (1995) (describing Second Amendment scholarship and its relationship to the right of revolution). Note, however, Don Kates's point that the Framers regarded violent resistance to criminals and violent resistance to tyrants as essentially the same, since tyrants and their servants, whatever badges of office they might possess, were nonetheless acting outside the law, and hence outside its proper protection. Thus, modern distinctions between self-defense against tyrants and self-defense against criminals are something of an anachronism. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 89 (1992) ("[E]xploring the numerous and protean ways in which the concept of self-protection relates to the amendment in the minds of its authors.").

28. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment).

partake of the right to self-defense protected by the Second Amendment. The reasons for not entrusting sixteen-year-olds with handguns for self-defense, after all, may not apply with nearly the same strength where pepper spray is concerned.[29]

There are, one suspects, many other opportunities for such scrutiny where the penumbra of the Second Amendment is concerned.[30] As a full-fledged constitutional right that until recently was regulated as if it were not a right at all, the right to bear arms is likely to raise questions in numerous contexts as activists and litigants continue to explore its boundaries. This will provide considerable grist for courts and, happily, for constitutional law professors for years to come.

B. SECOND AMENDMENT PENUMBRAS AND UNENUMERATED RIGHTS

Penumbras and penumbral reasoning, as mentioned earlier, are also frequently used to describe the sort of reasoning-by-interpolation used in cases like *Griswold v. Connecticut*,[31] among many others. Which raises the question: Now that the Second Amendment has been firmly enshrined as normal constitutional law, does the recognition of an individual right to arms shed any light on how courts should address the question of rights not enumerated under the Constitution?

29. For a pre-*McDonald* view of this subject, see Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009). One might also imagine penumbral protection for other nonlethal implements, such as cameras, which—while of limited use for physical self-defense—may be of considerable use in legal self-defense. *See generally* Morgan Manning, *Less Than Picture Perfect: The Relationship Between Photographers' Rights and Law Enforcement*, 78 TENN. L. REV. 105 (2010) (describing importance of photography in legal self-defense). *See also* Glenn H. Reynolds & John Steakley, A Due Process Right to Record the Police (unpublished work in progress) (on file with author).

30. In particular, two other areas suggest themselves: The relationship between the Second Amendment and the Commerce Clause, and whether Second Amendment penumbras might justify a narrower view of Congress's regulatory authority where firearms are concerned, and the extent to which states and the federal government may regulate the wearing of weapons in public places. Both are now under pressure from gun rights activists. *See, e.g.*, Jess Bravin, *A Gun Activist Takes Aim At U.S. Regulatory Power*, WALL ST. J. (July 14, 2011), http://online.wsj.com/article/SB10001424052702304584404576442440490097046.html (describing state legislative challenges to federal gun regulation under commerce clause); Ashby Jones, *Bearing Arms In Public Is Next Legal Battlefield*, WALL ST. J. (Aug. 1, 2011), http://online.wsj.com/article/SB10001424053111903635604576474660122080894.html?mod=googlenews_wsj ("Gun-ownership advocates are filing lawsuits in courts across the U.S., hoping to get rulings that people have a constitutional right not only to keep firearms in their homes, but to carry them in public."). These issues will be addressed in a future paper, Brannon P. Denning & Glenn H. Reynolds, Heller and McDonald in The Lower Courts: A Progress Report (unpublished work in progress).

31. Griswold v. Connecticut, 381 U.S. 479 (1965).

It is perhaps worth noting that the term "penumbra," though famously used in the *Griswold* opinion,[32] has a much longer history in legal usage. In particular, Karl Llewellyn used the term in his *The Constitution as an Institution*, writing:

> The discussion above with reference to the nature of an institution and the inevitable character of its gradual shading off into surrounding complexes of ways (be they complementary, competing, or merely cross-currents fulfilling other needs) will have made clear my belief that, whatever one takes as being this working Constitution, he will find the edges of his chosen material not sharp, but penumbra-like. And the penumbra will of necessity be in constant flux. New patterns of action develop, win acceptance (sometimes suddenly), grow increasingly standardized among an increasing number of the relevant persons, become more and more definitely and consciously "the thing to do," proceed to gain value as honored in tradition—i.e., become things to be accepted in and of themselves without question of their utility—until they take on finally, to more and more of their participants, the flavor of the "Basic."[33]

But if penumbral reasoning means using the enumerated rights as guidepoints in determining the shape of unenumerated rights, as the Court did in *Griswold*,[34] how does the Supreme Court's recognition of the Second Amendment's right to arms affect the analysis? It is true, of course, that even before *Heller*, the Supreme Court mentioned the right to arms in the course of penumbral analysis, as in Justice Harlan's famous *Poe v. Ullman* dissent:

> This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . . Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.[35]

32. *Id.* at 484.

33. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 26–27 (1934); Burr Henly, "*Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83–92 (1987). As Henly points out, the term "penumbra" had been used by such well known authorities as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, and Learned Hand, as well as Justice Douglas himself and Professor H.L.A. Hart, before the *Griswold* opinion came down.

34. For an extensive discussion of the methodology in *Griswold* and a response to a leading critic of the decision, see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold, *and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

35. Poe v. Ullman, 367 U.S. 497, 543–44 (1961) (Harlan, J., dissenting).

But though Harlan mentions the right to arms, presumably the explicit recognition provided by *Heller* and *McDonald* amplifies the importance of the Second Amendment in penumbral analysis of unenumerated rights. But how? Given the uncertainties involved in penumbral reasoning (as with most other kinds of legal reasoning), absent a concrete dispute, it is difficult to answer this question completely, but here are some thoughts.

The core of *Heller* is a constitutionalization of the right of self-defense. The right of individuals to protect themselves against violence is, in this analysis, so important that it is, in many ways, beyond the power of the state to regulate. Though the state might prefer to sacrifice citizens' lives in order to limit gun ownership, such a sacrifice is not permitted. This indicates that individual citizens' lives and autonomy are themselves, in some significant respects, beyond the power of the state to sacrifice. Does that have implications for other, unenumerated rights? It just might.

In addressing this question, one area that comes to mind involves an individual's right to control his or her medical treatment. Eugene Volokh has even, suggestively enough, termed this a right of "medical self-defense."[36] If, as *Heller* and *McDonald* indicate, the right of an individual to use firearms to defend his or her life is constitutionally protected even where the exercise of that right might frustrate, or at least inconvenience, regulatory schemes favored by state or federal officials, might that strengthen the right of individuals to engage in medical self-defense?

Though his analysis precedes *Heller* and *McDonald*, Volokh, drawing on Supreme Court treatment of life-saving abortion procedures, suggests that a right to medical self-defense might permit individuals to make use of unapproved medical treatments in order to save their own lives, including a right to purchase and sell organs for transplant.[37] Volokh makes a persuasive case that these results follow from the common law right of self-defense, but this position is certainly strengthened by the explicit endorsement of a constitutional right of self-defense under the Second Amendment.[38]

36. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).

37. *See id.* at 1815–17.

38. Self-defense need not involve humans, of course. For example, a man charged in 2011 with a violation of the Endangered Species Act for shooting a grizzly bear that was threatening his child would presumably benefit from a reweighting of the individual versus social-policy calculus. Becky Kramer, *Not Guilty Plea Entered in Federal Case of Shot Grizzly*, SPOKESMAN-REV. (Wash.) (Aug. 24, 2011), http://www.spokesman.com/stories/2011/aug/24/not-guilty-plea-entered-in-federal-case-of-shot/. *See also* David Cole, *Grizzly Shooter Garners Support*, COEUR D'ALENE PRESS (Idaho) (Aug. 24, 2011, 12:00 AM), http://www.cdapress.com/news/local_news/article_65972651-9003-5b14-b4e6-730e29

On a broader scale, the incorporation of a strong Second Amendment into penumbral analysis strengthens the role of the citizen against the interests of the state more generally. It is arguable, in fact, that we have already seen some penumbral influence from the Second Amendment at the Supreme Court level. Though not explicitly mentioned in the majority opinion, it seems likely that Second Amendment concerns led to the majority's heightened sensitivity to federalism questions in *Printz v. United States*, where the Supreme Court struck down a federal gun-control law that would have commandeered state and local officials to enforce a federal regulatory scheme aimed at gun purchasers.[39] Though only Justice Thomas's concurrence specifically addressed Second Amendment questions,[40] the majority opinion does give the impression of additional care based on the subject matter involved. One might expect that a similar case today would be treated with even more circumspection, and perhaps even with an explicit invocation of Second Amendment concerns.

But the penumbral influence of the Second Amendment may go farther still. As Sanford Levinson observed in the early days of the Second Amendment scholarship boom:

> Such analyses provide the basis for Edward Abbey's revision of a common bumper sticker, "If guns are outlawed, only the government will have guns." One of the things this slogan has helped me to understand is the political tilt contained within the Weberian definition of the state—i.e., the repository of a monopoly of the legitimate means of violence—that is so commonly used by political scientists. It is a profoundly statist definition, the product of a specifically German tradition of the (strong) state rather than of a strikingly different American political tradition that is fundamentally mistrustful of state power and vigilant about maintaining ultimate power, including the power of arms, in the populace.
>
> We thus see what I think is one of the most interesting points in regard to the new historiography of the Second Amendment—its linkage to conceptions of republican political order.[41]

The Second Amendment is, indeed, linked to "conceptions of republican political order," and the notion that an individual's right to his or her own life is prior to any claim that the state might have constitutes a dramatic departure from any number of Continental political philosophies.

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

40. *Id.* at 936–39.

41. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989).

Precisely how this may play out in future cases is unclear, but to the extent that penumbral reasoning incorporates this aspect of the right to arms, the result is likely to be a more strongly individualistic approach in general. Further research on this topic might profitably focus on the implications of these conceptions of republican political order for both state power and individual autonomy, the role of the judiciary in policing the resulting boundaries, and the likely evolution of conventional wisdom on the Second Amendment toward a new version of Karl Llewellyn's sense of the "basic."

III. CONCLUSION

Where interpretation and application of the Second Amendment is concerned, we have reached the end of the beginning. Though numerous specific questions regarding Second Amendment application remain to be resolved, the existence and general outline of the right to arms has now been established. Less clear, still, is how this right will influence the interpretation of other constitutional rights, both existing and yet to be identified. But if the Constitution can be described, as it frequently is, as a web of rights and powers, then the addition (or recognition) of a new textual right can be expected to generate a tug on the strands that will be felt elsewhere. I hope that this brief essay has at least been sufficient to spur further thought regarding what those changes might be.