

**KEEPING *HELLER* OUT OF THE HOME: HOMEOWNERS
ASSOCIATIONS AND THE RIGHT TO KEEP AND BEAR ARMS**

Christopher J. Wahl^{*}

The homeowners association (“HOA”) of Nashboro Village in Nashville, Tennessee, adopted a rule in 2007 prohibiting the possession of guns in the neighborhood’s homes.¹ The rule was passed in response to an increase of crime in the area, but residents responded furiously, claiming in the local media that the rule was unconstitutional and a threat to their safety.² The HOA retracted by saying that it would change the rule, apparently before any legal challenge was undertaken,³ but it is telling that, even before the Supreme Court ruled in 2008 in *District of Columbia v. Heller* that the Second Amendment protected the individual right to keep a handgun for defense of the home,⁴ homeowners believed that this right was entitled to constitutional protection.

The legality of an HOA ban on handguns⁵ remains an unsettled question. No litigation on the issue has surfaced in the courts.⁶ One

* Managing Editor of *Heightened Scrutiny*, *University of Pennsylvania Journal of Constitutional Law*, Volume 15. J.D. Candidate, 2013, University of Pennsylvania Law School; B.A., 2009, University of Florida. I would like to thank Professor Sophia Z. Lee for her mentorship and guidance, Professor Louis S. Rulli for his helpful suggestions, and Professor Sarah Barringer Gordon for inspiring my interest in property law.

1 See *Community Suggests Gun Possession Is Illegal For Residents*, NEWSCHANNEL5, Mar. 18, 2007, <http://www.newschannel5.com/story/6242822/community-suggests-gun-possession-is-illegal-for-residents?> (for date of publication, see <http://forums.officer.com/forums/archive/index.php/t-63481.html>).

2 See *id.*

3 See *id.* The author’s research did not uncover any indication that legal action was undertaken with regard to this controversy.

4 554 U.S. 570, 628–29 (2008).

5 For evidence of the existence of HOA gun prohibitions, see *Community Suggests Gun Possession Is Illegal For Residents*, *supra* note 1; *New Bills Introduced in 2012*, ARIZ. CITIZENS DEF. LEAGUE MEMBERSHIP NEWSL., Feb. 2012, at 1 available at <http://www.azcdl.org/AzCDL201202b.pdf> (“Still embedded in many governing documents are requirements that residents must be unarmed as a condition of living in the community.”); SETHA LOW, BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA 162 (2003) (identifying a firearm prohibition in Bear Creek, an HOA in Washington state); Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL’Y 479, 526 (2009) (“[M]ost HOAs reportedly hold restrictions against firearms in homes . . .” (citing LOW, *supra*)).

6 The author’s research did not uncover any court documents related to the issue. It would be interesting to know to what extent the National Rifle Association (“NRA”) and other

academic commentator has argued, before *Heller* appeared on the horizon, that HOA servitudes banning firearm possession in the home are both invalid under property law and unconstitutional.⁷ Yet for the most part this topic has been ignored in academic discussion.⁸ Professor Paul Boudreaux briefly conceded that an HOA handgun ban would likely be valid, but he argued that legislation should protect the right to bear arms against infringement by HOAs.⁹ Representatives in the Arizona state legislature have taken this approach by introducing a controversial bill that would prohibit HOAs from banning handgun possession anywhere in an HOA-governed community except for the HOA management office.¹⁰

This Comment accelerates the discussion of HOA handgun bans by assessing the constitutional and property law arguments relevant to a legal determination of the validity of an HOA handgun ban. Part I of the Comment provides a brief historical overview of the HOA as a modern phenomenon of property law. This Part also explains the legal standards governing HOAs by addressing the constitutional problem of state action as

interest groups have used their political influence to thwart HOA attempts to restrict the right to bear arms. In one instance in which an HOA in California passed a rule banning the discharge of firearms within its equestrian community, the NRA and its lawyers persuaded the HOA board to rescind the rule. *See NRA Helps California Homeowners Convince HOA to Drop Gun Ban Plan*, AMMOLAND (Mar. 3, 2011), <http://www.ammoland.com/2011/03/03/nra-helps-california-homeowners-convince-hoa-to-drop-gun-ban-plan>. Although in that instance opponents to the rule argued that the rule was invalid in part because the HOA board failed to observe proper procedure in enacting the rule, see *id.*, a legal challenge to the rule most likely would have raised the question of the right to bear arms.

7 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, 576 (2007) (“[C]ourts should invalidate restrictive covenants that completely ban firearms in the home as violating constitutional rights and good public policy.”).

8 For one off-handed reference, see Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 954 (2011) (citing Fritz, *supra* note 7) (“A home buyer who covenants not to possess firearms is a respectful neighbor; a village of private covenants not to possess firearms is a zoning regulation.”).

9 See Boudreaux, *supra* note 5, at 526 (arguing that the right to bear firearms is a “relatively strong candidate for inclusion in an HOA resident bill of rights”). See also Fritz, *supra* note 7, at 576 (“[S]tate legislatures should enact laws to statutorily safeguard this right.”).

10 H.B. 2095, 15th Leg., 2d Reg. Sess. (Ariz. 2012). See *New Bills Introduced in 2012*, *supra* note 5, at 1 (“HB 2095 was drafted to allow the residents of HOA governed communities the same constitutionally protected right to bear arms they enjoy once they leave the boundaries of their neighborhood.”). But see HOA Admin, *Arizona HOA Industry Upset About HB2095*, SPECTRUM ASS’N MGMT. (Jan. 16, 2012), <http://www.spectrumam.com/blog/2012/01/16/arizona-hoa-industry-upset-about-hb2095/> (“If a guest of a resident of a community wants to bring a gun to the playground in a planned community HB2095 would block the neighborhood from having any policy against it. It’s pure insanity.”). This Comment does not address the question of whether such legislation is valid.

well as the common law test for validity of an HOA servitude. Part II examines the right to keep and bear arms at both the federal and state levels to orient the reader to the constitutional policy issues implicated by an HOA servitude that bans handgun possession in the home. The constitutional and common law arguments both for and against HOA prohibitions on handguns are presented in Part III. In Part IV, this Comment concludes that the post-*Heller* HOA landscape will be characterized by a patchwork approach to the validity of HOA handgun bans.

I. HOMEOWNERS ASSOCIATIONS

A. *Historical Development of the Homeowners Association*

Before the Industrial Revolution, the detached, single-family residence owned in fee simple absolute was the chief residential property arrangement in the Anglo-American tradition.¹¹ Eschewing private contractual restrictions, homeowners exercised their property rights freely, subject only to the law of nuisance and to the occasional land-use regulation imposed by a city government.¹² Even real estate developers took a hands-off approach to selling property by imposing few, if any, restrictions on land use.¹³

The character of the privately owned residence transformed when more heavily populated and polluted cityscapes developed in the wake of the Industrial Revolution. Zoning laws restructured the contours of cities and gave some relief to private homeowners, but the more intricate facets of residential neighborhoods remained untouched by government action.¹⁴ The land-use covenant thus proved to be the solution for homeowners who sought to exercise control of their surroundings: this form of contractual agreement contained in residential deeds bound homeowners to use, or not to use, their property in accordance with terms set forth in the agreement.¹⁵ Because these covenants were binding on future purchasers and enforceable by injunctive relief, the agreements gave homeowners assurance that their

¹¹ See Boudreaux, *supra* note 5, at 483–84.

¹² See *id.* This tradition is embodied by William Blackstone's observation that "[e]very man's house is looked upon by the law to be his castle . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES 288. For a list of sources describing the role of the home in the development of the Anglo-American legal system, see Thomas G. Sprankling, Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 113 n.12 (2012).

¹³ See Boudreaux, *supra* note 5, at 483 & n.17.

¹⁴ See *id.* at 485 (citing the precedent-setting case recognizing zoning as a constitutional use of the state-government police power, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)).

¹⁵ See *id.* at 484.

residential environs would not change without their consent.¹⁶ This assurance, in turn, increased property values while inducing other homeowners to join in the covenants, thereby establishing more stable and aesthetically pleasing (or racially homogenous) neighborhoods.¹⁷ Real estate developers, at least initially, were restrained from capitalizing on this legal innovation because of the requirement that the enforcer of a covenant contemporaneously be an owner of the property subject to the covenant.¹⁸ Yet before long, developers began to establish HOAs, which were authorized to enforce the agreements contained in the residential property deeds sold by the developers, even after the original contracting homeowners sold their homes to new homeowners.¹⁹

By the late 1920s, subdivisions governed by HOAs were an established luxury in the United States, and by the 1960s the market for HOA-governed communities expanded to the middle class.²⁰ Today, the HOA model for residential community development has evolved into a variety of forms, including planned-unit developments, condominiums, and cooperatives.²¹ The number of individuals living in association-governed communities in the United States has been rising since the 1970s, reaching an estimated 62.3 million individuals as of 2011.²² Of these communities, about 52% are planned unit developments,²³ defined as “single-family detached homes built according to a master plan, generally in the suburbs.”²⁴ The popularity of these communities today is due to their potential to improve residents’ quality of life by controlling the community environment and by providing residents with easy access to amenities by spreading costs for the amenities among all members of the HOA.²⁵ An HOA maintains its ideal environment

16 *See id.* at 484–85 (citing the seminal case upholding land-use covenants, *Tulk v. Moxhay*, (1848) 41 Eng. Rep. 1143).

17 *See id.*

18 *See id.* at 485.

19 *See id.* HOA-governed communities are also known as “common-interest communities.” *See* RESTATEMENT (THIRD) OF PROPERTY: SERVICITUDES § 6 (2000) [hereinafter RST SERVICITUDES].

20 *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 9–10 (1994).

21 *See id.* at 19.

22 *Industry Data*, CMTY ASS’NS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Oct. 9, 2012).

23 *Id.*

24 MCKENZIE, *supra* note 20, at 19.

25 *See* RST SERVICITUDES, *supra* note 19, § 6, intro. note, at 68. The notoriety of these communities, on the other hand, is reflected in criticisms that the communities cultivate social and racial exclusivity, homogeneity, and paranoia. *See, e.g.*, Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for “the Nice.”* 37 URB. LAW. 335, 338 (2005) (“[N]iceness’ as a goal does not tend to inspire great originality, depth or tolerance. Nor does it allow much room for heterogeneity of a sort that might rock the ‘nice’ boat. The homogeneity (which some might cast as

chiefly by enforcing the HOA's rules, which can govern a wide range of homeowner activity, including architectural and landscape design (from house colors to mailbox sizes), use of common property, kinds of pets that can be kept in homes, and number of guests that homeowners may accommodate at any given time.²⁶

Three fundamental legal characteristics allow HOAs to achieve their defining character: (1) common ownership of the "common area" property (including streets, parks, and recreation centers); (2) mandatory membership in the HOA; and (3) the bundle of servitudes in the land deeds.²⁷ The HOAs are typically organized as non-profit corporations and are established by the real estate developer of the community before any homes are sold.²⁸ A board of directors, elected by members of the HOA, is primarily responsible for managing the community's affairs and therefore is vested with various powers, including the power to collect fees for upkeep of the common area and the power to enforce the servitudes of the HOA by exacting penalties or taking judicial action.²⁹ The success of HOAs in achieving their desired goals is due in part to the rigidity of the rule system. Directors are often restrained in their discretion to enforce the rules of the HOA, since HOA members can bring suit against directors for inaction.³⁰ Accordingly, HOA rules are often enforced even when prudence would dictate otherwise, and exceptions to the rules are rarely granted.³¹

blandness) that common interest communities promote can reach beyond the merely aesthetic into the realm of the patently exclusionary, as 'the other,' however defined, finds itself shut out." (footnote omitted)); Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1679 (2001) (identifying "several theories as to how [common-interest developments] attenuate the social contract: (1) they cultivate property owners rather than citizens; (2) they harness economic and racial homogeneity; and (3) they predominate in new, outer-ring suburban developments, thereby contributing to an existing phenomenon of regional polarization").

26 See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1384–85 (1994) (surveying the various kinds of HOA covenants). Some HOA rules have reached so far as to prohibit placing political signs in yards, parking trucks overnight in driveways, piling up magazines in living rooms, wearing flip-flops, and kissing in the condominium building's elevator. See Boudreaux, *supra* note 5, at 492–93. For even more examples of HOA restrictions, such as restrictions on "the propriety of wok-cooking" and the prohibition of "cooking that could produce less than 'desirable' aromas," see Franzese, *supra* note 25, at 336–37, 339–40.

27 See MCKENZIE, *supra* note 20, at 19–20. These servitudes are also known as "covenants, conditions, and restrictions," or "CC&Rs." See *id.* at 20. This Comment also refers to these servitudes as "rules."

28 See *id.* at 20.

29 See *id.* See also RST SERVITUDES, *supra* note 19, § 6, intro. note, at 70.

30 See MCKENZIE, *supra* note 20, at 21.

31 See *id.*

Moreover, a change in the rules often requires supermajority consent of all HOA members.³²

A homeowner who does not wish to comply with an HOA rule, such as a restriction on handgun possession in the home, thus has few attractive options: accede to the rule; violate the rule and suffer the consequences (including accrued penalties for repeated violations); sell one's home and move away, thereby relinquishing membership in the HOA; or challenge the rule in court, waging a costly legal battle against the highly deferential law of servitudes.³³

B. Legal Standards Governing the Servitudes of Homeowners Associations

1. The State Action Problem

An HOA servitude that would ban handgun possession in the home could implicate the constitutional right to bear arms, but the validity of a constitutional claim against such a ban is delimited largely by the state action doctrine.³⁴ The Restatement recognizes that HOAs “are created by private contract and [thus], absent other circumstances, the associations’ actions are not state action sufficient to subject them to challenge under the United States Constitution”³⁵ These “other circumstances” that the Restatement refers to are two Supreme Court decisions that, despite their fame (or notoriety), are viewed by most authorities as outliers.

The first extraordinary circumstance in which state action could arise from private legal affairs was established in the 1946 case *Marsh v. Alabama*.³⁶

³² See *id.*

³³ For other accounts of the historical development of HOAs, see, for example, MCKENZIE, *supra* note 20; Boudreaux, *supra* note 5, at 483–94; Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 235–40 (2006); Brian Jason Fleming, Note, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 576–77 (2006).

³⁴ This Comment will assume that the Second Amendment has a state action requirement. See also Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 36 n.185 (2012) [hereinafter Blocher, *Right Not To*] (“I am of course assuming that the Second Amendment, like most constitutional guarantees, has a state action requirement.”).

³⁵ RST SERVITUDES, *supra* note 19, § 6, intro. note, at 70–71. *Accord* Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. H-05-3197, 2005 U.S. Dist. LEXIS 25597, at *14 (S.D. Tex. Oct. 19, 2005), *aff'd*, 235 F. App’x 227 (5th Cir. 2007) (holding that plaintiff failed to state a claim because none of the defendants is a state actor); Barr v. Camelot Forest Conservation Ass’n, 153 F. App’x 860, 862 (3d Cir. 2005) (holding that plaintiff must allege state action in order to make out a constitutional claim under the First and Fourteenth Amendments); Reh fuss v. Northpoint Homeowner’s Ass’n, No. 93-15203, 1993 U.S. App. LEXIS 14847, at *2 (9th Cir. June 15, 1993) (holding that no jurisdiction exists because defendant is not a state actor).

³⁶ 326 U.S. 501 (1946).

In *Marsh*, the Court applied the constitutional standards of the First and Fourteenth Amendments to the arrest and prosecution of a Jehovah's Witness who had, without permission, distributed religious literature in the community shopping center of Chickasaw, a town in Alabama owned entirely by the Gulf Shipbuilding Corporation.³⁷ The Court predicated its recognition of state action on the finding that the operation of the company-owned shopping center was "essentially a public function": the center was open to the public and was "built and operated primarily to benefit the public."³⁸ Although the Court extended the reasoning of *Marsh* to a privately owned shopping center not located in a company-owned town in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,³⁹ the Court soon thereafter reined back its reach, overruling *Logan Valley* and limiting *Marsh* to the particularities of the company-owned town.⁴⁰ The Court made it clear that *Marsh* would apply only where "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."⁴¹

The other circumstance in which a court found state action in the context of a private agreement arose in *Shelley v. Kraemer*,⁴² a case decided two years after *Marsh*. In *Shelley*, the Court invalidated a racially restrictive covenant as a violation of equal protection upon a finding that a court's enforcement of such a covenant is state action and thus subject to constitutional restraint.⁴³ Although the reasoning of *Shelley* has been extended beyond the context of racially discriminatory servitudes,⁴⁴ most

37 *Id.* at 502–03.

38 *Id.* at 506.

39 391 U.S. 308, 317–21 (1968) (finding that a privately owned shopping center was the "functional equivalent" of the business district in *Marsh*, and giving First Amendment protection to protestors' picketing).

40 *See* *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569–70 (1972) (rejecting the extension of *Marsh* to a privately owned shopping center). *See also* *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) ("[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." (footnote omitted)).

41 *Lloyd*, 407 U.S. at 569.

42 334 U.S. 1 (1948).

43 *Id.* at 20–21.

44 *See, e.g.*, *Gerber v. Longboat Harbour N. Condo., Inc.*, 724 F. Supp. 884, 885–86 (M.D. Fla. 1989) (invalidating a servitude that severely restricted display of the American flag because First Amendment standards applied to the court's state action of enforcing the private agreement), *vacated in part on other grounds*, 757 F. Supp. 1339, 1339, 1341 (M.D. Fla. 1991); *W. Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 202 (Ohio Ct. C.P. 1969) (refusing to enforce servitudes that prohibited property owners from constructing places of worship because judicial enforcement of such servitudes would be state action in violation of the First Amendment).

courts and commentators have interpreted *Shelley* so narrowly as to render the case an anomaly.⁴⁵

“In the absence of state action, there may be no constitutional protection,” but in the rare case that the court finds state action in the context of an HOA servitude, the question becomes a matter of constitutional law.⁴⁶ The viability of the state actor argument in the context of an HOA ban on handgun possession will be explored further in Part III.A.

2. *The Common Law Presumption of Validity*

Even absent state action, constitutional law may influence an HOA servitude’s validity via the public policy exception to the common law standard for validity of a servitude. Under this standard, servitudes are subject to a presumption of validity but can be declared invalid under particular circumstances. Various authorities articulate the test in slightly differing ways. The Restatement further provides that a servitude is considered “valid unless it is illegal or unconstitutional or violates public policy.”⁴⁷ State courts recognize variations of this test.⁴⁸ The Restatement

⁴⁵ See, e.g., *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (noting that *Shelley* “has not been extended beyond the context of race discrimination” and that “the concept of state action has since been narrowed by the Supreme Court”); *In re Adoption of K.L.P.*, 763 N.E.2d 741, 751 (Ill. 2002) (refusing to find state action “on the mere fact that a state court is the forum for the dispute”); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 453, 458–70 (2007) (surveying the post-*Shelley* case law and arguing that the vast majority of courts have not extended *Shelley* beyond the context of racial discrimination, that the Supreme Court has even refused to apply *Shelley* in the context of racial discrimination, and that those few decisions made on the basis of *Shelley* can be “better explained by alternative rationales”). One commentator has even deemed *Shelley* the *Finnegans Wake* of constitutional law. See Philip B. Kurland, *The Supreme Court 1963 Term, Foreward: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 148 (1964).

⁴⁶ RST SERVITUDES, *supra* note 19, at § 3.1 cmt. d.

⁴⁷ *Id.* at § 3.1. An “illegal” servitude is defined as “one that is prohibited by a statute or governmental regulation,” such as “[f]air housing acts and other anti-discrimination statutes and ordinances.” *Id.* at § 3.1 cmt. c. This Comment will assume the absence of any such law prohibiting HOA restrictions on handguns. There is, however, a bill pending in the Arizona legislature that would make illegal almost all HOA restrictions on handguns. See H.B. 2095, 15th Leg., 2d Reg. Sess. (Ariz. 2012), *supra* note 10 and accompanying text.

⁴⁸ Florida law provides that servitudes found in the HOA declaration are “clothed with a very strong presumption of validity” and “will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.” *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981). *Accord* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners Ass’n, 929 A.2d 1060, 1075 (N.J. 2007); *Noble v. Murphy*, 612 N.E.2d 266, 270–71 (Mass. App. Ct. 1993). The California test is remarkably similar: “An equitable servitude will be enforced unless it violates public policy; it bears no rational

provides that “a servitude that unreasonably burdens a fundamental constitutional right” is one kind of servitude that violates public policy.⁴⁹ Invalidation of a servitude on these grounds is an invalidation distinct from an invalidation made on the grounds that the servitude is unconstitutional. In the latter case, the HOA necessarily would be subject to the state action doctrine for constitutional standards to apply.⁵⁰ In the former case, the state actor doctrine would not be considered, and the servitude would be subject to a public policy analysis, informed in part by the policy concerns evinced by the appropriate constitutional provisions.⁵¹ The California courts also take this approach: in *Nahrstedt v. Lakeside Village Condominium Association*, the California Supreme Court recognized that “a land-use restriction in violation of a state constitutional provision presumably would conflict with public policy.”⁵² Although the plaintiff in that case claimed that the servitude violated her right to privacy under the state constitution, the Court, due to a lack of state action in the facts of the case, construed plaintiff’s argument not as a constitutional claim, but rather “as a claim that the [HOA] pet restriction violate[d] a fundamental public policy and for that reason [could not] be enforced.”⁵³ Other state courts are in accord with this distinction.⁵⁴

The public policy analysis is based on a balancing of interests, and a servitude will be held in violation of public policy if the “risks of societal harm . . . outweigh the benefits of validating the servitude.”⁵⁵ A court will look to judicial decisions, legislation, and the federal or state constitution as

relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction’s beneficial effects that the restriction should not be enforced.” *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1287 (Cal. 1994). Notably, the Florida courts apply a different test if the HOA rule is not contained in the declaration of the HOA, but rather is created solely by the board of directors of the HOA. In such an instance, the rule enacted must be “reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.” *Hidden Harbour*, 393 So. at 640. The purpose of this heightened standard is to “fetter the discretion of the board of directors.” *Id.* This Comment will assume that HOA servitudes banning handgun possession in the home are contained in the declaration of the HOA and thus subject to the lower standard of review.

49 RST SERVITUDES, *supra* note 19, at § 3.1(2).

50 *Id.* at § 3.1 cmt. d. A servitude of an HOA that did not qualify as a state actor would therefore not be subject to constitutional scrutiny.

51 *Id.* at § 3.1 cmt. h.

52 878 P.2d at 1290.

53 *Id.*

54 For example, if the language of the Florida case law is compared to that of California and of the Restatement, then the Florida courts, in referring to servitudes that “abrogate some fundamental constitutional right,” seem to be referring to unconstitutional servitudes as distinct from servitudes in violation of a public policy evinced by a fundamental constitutional right. *See supra* note 48.

55 RST SERVITUDES, *supra* note 19, at § 3.1 cmt. h.

sources of public policy.⁵⁶ The court will balance interests as a matter of property law, and not necessarily of the substantive law expressed within the sources of public policy.⁵⁷ For example, in determining whether a servitude unreasonably burdens a fundamental constitutional right, “[c]onstitutional-law decisions may be useful, but are not controlling.”⁵⁸ Property law policies typically considered when balancing interests include freedom of contract, protection of expectation interests, and promotion of socially productive uses of land.⁵⁹

The Restatement identifies various other factors relevant in a public policy analysis when a servitude is alleged to pose an unreasonable burden on a fundamental constitutional right. These factors include the geographical scope of the servitude;⁶⁰ the extent to which the purpose of the servitude is related to the use or value of the land; the extent to which the servitude interferes with the exercise of the fundamental right, including the existence of reasonable alternatives for exercising the right; and the importance of the beneficiaries’ interest in validating the servitude.⁶¹ Finally, if a servitude impinges an individual’s freedom to exercise his or her fundamental rights on his or her individually owned property, then a court will give considerably less deference to the servitude unless the targeted activity produces negative externalities, or “spill-over effects,” upon the rest of the community.⁶²

Given the variety of interests potentially implicated, and the sensitive nature of the act of balancing such interests, the public policy test is “necessarily imprecise.”⁶³ While this imprecision may lead one to fear that a

56 See *id.* at § 3.1 cmt. f. See also, e.g., *Nahrstedt*, 878 P.2d at 1291 (“[W]e discern no fundamental public policy that would favor the keeping of pets in a condominium project. There is no federal or state constitutional provision or any California statute that confers a general right to [do so]”); *Crane Neck Ass’n v. New York City/Long Island Cnty. Servs. Grp.*, 460 N.E.2d 1336, 1339–43 (N.Y. 1984) (relying upon a body of state legislation to evince a public policy that warranted refusing to enforce a servitude that prevented the establishment of a residence for mentally handicapped individuals).

57 RST SERVITUDES, *supra* note 19, at § 3.1 cmt. h.

58 *Id.* The fact that certain rights are protected by a federal or state constitution against governmental action “suggests that there is also a public interest in protecting them against private action.” *Id.*

59 *Id.* at § 3.1 cmt. i.

60 *Id.* at § 3.1 cmt. h. While a government’s power extends throughout the entirety of its jurisdiction, the power of an HOA extends only throughout the properties that are part of the HOA. *Id.* As such, an individual does not necessarily need to leave a jurisdiction to avoid the unwanted influence of an HOA, but an individual must leave a jurisdiction to avoid the power of that jurisdiction’s laws. *Id.* The broader the geographical scope covered by a servitude, however, the more that a servitude’s intrusion upon an individual’s autonomy approximates the intrusion imposed by a law. *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at § 3.1 cmt. i.

court may have too much leeway, the fact that servitudes are protected with a presumption of validity works against the potential bias or prejudice of a court applying the flexible public policy test to a servitude.⁶⁴

An HOA servitude that bans handgun possession in the home would thus be subject to a balancing test based on a state court's interpretation of the state's public policy. Given that such a ban touches upon the right to bear arms, a fundamental right under the United States Constitution,⁶⁵ the balancing of policies underlying the servitude would need to weigh in favor of validity more strongly than would the policies underlying a servitude that does not touch upon a fundamental right. The HOA handgun ban might also be subject to constitutional scrutiny if the HOA were deemed to be a state actor. Yet regardless of whether a court addresses a constitutional claim or a property law claim against an HOA ban on handgun possession in the home, the constitutional standards and policies underlying the right to keep and bear arms will be relevant to the court's analysis.

II. THE RIGHT TO KEEP AND BEAR ARMS

A. *Heller*, *McDonald*, and the *Second Amendment*

The U.S. Supreme Court's recent decisions in *District of Columbia v. Heller*⁶⁶ and *McDonald v. City of Chicago*⁶⁷ have reinvigorated the Second Amendment doctrine and inspired a new wave of Second Amendment

⁶⁴ Public policy balancing tests are also employed in contexts outside of the law of servitudes. A court may declare a contract term unenforceable as a violation of public policy, notwithstanding the public interest in freedom of contract. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). There also is a public policy exception to the at-will employment doctrine: while generally employers are free to fire their employees for any or no reason, a discharged employee can recover damages against his employer if the employer's reasons for discharging the employee violate public policy. See, e.g., *Rothrock v. Rothrock Motor Sales, Inc.*, 883 A.2d 511, 515 (Pa. 2005) (“[I]f a violation of a clear mandate of public policy results in the termination of an at-will employee, that employee would have a right of action for wrongful discharge.”); *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987) (recognizing “an exception to the employment-at-will doctrine limited to discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general” (emphasis omitted)). See also Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 (1983) (discussing the public policy exception to the employment at-will doctrine). This Comment leaves open to question the validity of a contract term (but not a servitude) that requires a party to the contract to waive his right to keep a handgun in the home, or the validity of a claim that an employer's discharge of an employee based on the fact that the employee kept a handgun at home is a violation of public policy.

⁶⁵ See *infra* notes 77–82 and accompanying text.

⁶⁶ 554 U.S. 570 (2008).

⁶⁷ 130 S. Ct. 3020 (2010).

litigation. On June 26, 2008, the Supreme Court struck down a District of Columbia law that had effectively prohibited the possession of handguns in residents' homes.⁶⁸ In so holding, the Court recognized for the first time in over two hundred years that the Second Amendment⁶⁹ codifies and protects the individual "right to possess a handgun in the home for the purpose of self-defense."⁷⁰ The Court's originalist interpretation⁷¹ of the language of the Amendment rejected the long-disputed notion that the Amendment "protects only the right to possess and carry a firearm in connection with militia service."⁷² Instead, the Court's interpretation focused on three core components of the right to bear arms, as understood by the ratifiers of the Second Amendment. First, the "defense of self, family, and property" is the purpose of the right to bear arms.⁷³ Second, the home is where the need for this right is "most acute."⁷⁴ Third, the handgun, out of all firearms, is considered by the American people "to be the quintessential self-defense

68 *Heller*, 554 U.S. at 574–75. The law, in relevant part, criminalized the carrying of unregistered firearms; prohibited the registration of handguns; and required owners of licensed firearms to keep the firearms nonfunctional when at home, "even when necessary for self-defense." *Id.* at 574–76.

69 "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.

70 *McDonald*, 130 S. Ct. at 3050 (summarizing the holding in *Heller*).

71 In interpreting the text, the Court was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Heller*, 554 U.S. at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). There is an ample body of literature discussing the Court's interpretation of the Second Amendment in *Heller*. For an extensive discussion of the role of originalism in *Heller*, see, for example, Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 926 (2009) ("[T]he Court embraced what has been called 'original public meaning originalism'—the view that the original meaning of a constitutional provision is the conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified."). The majority's originalist interpretation in *Heller* has also been subject to much criticism. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (criticizing *Heller* for "four major shortcomings: an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism"); 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) (criticizing plain-meaning originalism in *Heller* as "little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft"); Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, at 32 (criticizing the majority in *Heller* for having "exercise[d] a freewheeling discretion strongly flavored with ideology," since "the 'originalist' method would have yielded the opposite result").

72 *Heller*, 554 U.S. at 577. For a chronicle of the so-called "collectivist" interpretation of the Second Amendment right, see David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011).

73 *Heller*, 554 U.S. at 628.

74 *Id.*

weapon.”⁷⁵ Because the law being challenged essentially eradicated all core aspects of the Second Amendment right, the Court held that the law violated the Second Amendment.⁷⁶

Because the Court in *Heller* was faced with a law of the District of Columbia, the Court did not reach the question of whether the Second Amendment was applicable to the states through the Fourteenth Amendment. Two years later, however, the Court in *McDonald* held that the Second Amendment applies with equal force against the state governments as it does against the federal government.⁷⁷ The Court therefore invalidated a Chicago ordinance that “effectively bann[ed] handgun possession” in the home.⁷⁸ In finding that the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition”⁷⁹ and “fundamental to our scheme of ordered liberty,”⁸⁰ and therefore incorporated against the states through the Due Process Clause of the Fourteenth Amendment,⁸¹ the Court declared that the right to keep and bear arms is a fundamental right.⁸²

Heller and *McDonald* were historical decisions, and their legal ramifications are now playing out in the lower courts.⁸³ For HOAs, *Heller* and *McDonald* mean that, if an HOA imposing a handgun restriction is a state actor, disaffected homeowners may bring a constitutional claim for violation of the Second Amendment.⁸⁴ Moreover, by virtue of the fact that the Second Amendment right is now a fundamental right, an HOA servitude that restricts the right triggers the elevated policy concerns of the test for validity of HOA servitudes.⁸⁵ A court may look not only at *Heller* and *McDonald* when conducting a public policy analysis, but also to the broader contours of the Second Amendment currently manifesting in the lower courts.

⁷⁵ *Id.* at 629.

⁷⁶ *Id.* at 635.

⁷⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

⁷⁸ *Id.* at 3026 (describing ordinances enacted by the City of Chicago and the nearby village of Oak Park that are substantively similar to the D.C. law struck down in *Heller*).

⁷⁹ *Id.* at 3036 (internal quotation marks omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁸⁰ *Id.* (emphasis omitted) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

⁸¹ This is the “process of ‘selective incorporation’” employed by the Supreme Court to determine whether “the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.” *Id.* at 3034.

⁸² *Id.* at 3042 (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

⁸³ *See infra* Part II.B–C.

⁸⁴ *See supra* Part I.B.1.

⁸⁵ *See supra* Part I.B.2.

B. The Post-Heller Second Amendment Doctrine in the Lower Federal Courts

As groundbreaking as the *Heller* and *McDonald* decisions were, the Court left many questions unanswered. Among these are the role of categorical exceptions, the means-end scrutiny to apply to challenged laws, and how the answers to the former two questions will form a framework for addressing Second Amendment claims. The lower federal courts have responded to these questions with some converging results.

In *Heller*, the Court identified several categorical exceptions to the Second Amendment—categories of laws upon which “nothing in [the] opinion should be taken to cast doubt.”⁸⁶ The first category consisted of laws prohibiting certain individuals from possessing firearms: “felons and the mentally ill.”⁸⁷ The second category concerned laws prohibiting individuals from carrying firearms in “sensitive places”: “schools and government buildings.”⁸⁸ The third category included laws that imposed “conditions and qualifications on the commercial sale of arms.”⁸⁹ The Court also identified a protected category of laws that prohibit the carrying of “dangerous and unusual weapons.”⁹⁰ The Court further stated that their “list [of categorical exceptions] does not purport to be exhaustive”⁹¹ and refused “to expound upon the historical justifications for the exceptions.”⁹²

The *Heller* Court was guided by a means-end analysis. The Court did not identify the precise form of the analysis, but it did set some boundaries. The Court rejected rational basis review because the Second Amendment is a “specific, enumerated right.”⁹³ The Court also rejected Justice Breyer’s proposal for an “interest-balancing inquiry,” since there is “no other enumerated constitutional right whose core protection has been subjected to [such an] approach.”⁹⁴ What the Court did clarify is that the kind of law challenged in both *Heller* and *McDonald*—one that infringes upon the core of the Second Amendment right—is unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”⁹⁵ Just as the Court refused to provide an explanation for the

86 *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

87 *Id.* at 626.

88 *Id.*

89 *Id.* at 626–27.

90 *Id.* at 627.

91 *Id.* at 627 n.26.

92 *Id.* at 635. The Court in *McDonald* approved of these categories, but again failed to provide any guidance thereto. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010).

93 *Heller*, 554 U.S. at 628 n.27.

94 *Id.* at 634.

95 *Id.* at 628–29.

categorical exceptions, the Court deferred establishing a particular level of scrutiny for Second Amendment claims.⁹⁶

The lower federal courts have picked up on these stray threads and weaved a Second Amendment doctrine that incorporates both the categorical exceptions and the means-ends analysis identified by the Supreme Court in *Heller*.⁹⁷ In *Ezell v. City of Chicago*,⁹⁸ the Seventh Circuit articulated a two-step inquiry that already has been employed by the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits.⁹⁹ The threshold inquiry is whether the activity regulated by the challenged law falls into the “scope” of the Second Amendment right.¹⁰⁰ Consistent with the Court’s originalist approach,¹⁰¹ the scope question demands “a textual and historical inquiry into [the] original meaning” of the right as understood by the people at the time of adoption of the relevant amendment.¹⁰² Thus, if a federal law is challenged, the court must look to the people’s understanding of the right as of 1791, the time of the adoption of the Second Amendment; if a state or local law is challenged, the court must look to the people’s understanding of the Second Amendment right as of 1868, the time of adoption of the Fourteenth Amendment (through which the Second Amendment is incorporated against the states).¹⁰³ According to the Third Circuit, this first step of the analysis tracks *Heller*’s identification of categorical exceptions to Second Amendment scrutiny¹⁰⁴: felons and the mentally ill,¹⁰⁵ sensitive

96 *Id.* at 635 (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”).

97 For a more in-depth examination of the developing Second Amendment doctrine in the lower federal courts, see Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 725–56 (2012).

98 651 F.3d 684, 701–04 (7th Cir. 2011).

99 *See* Nat’l Rifle Ass’n of Am., Inc., v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 2012 WL 5259015, at *6–9 (5th Cir. Oct. 25, 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *GeorgiaCarry.org v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

100 *Ezell*, 651 F.3d at 701.

101 *See supra* notes 71–72 and accompanying text.

102 *Ezell*, 651 F.3d at 701–02 (citing *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010)).

103 *Ezell*, 651 F.3d at 702–03 (citing *McDonald*, 130 S. Ct. at 3038–47). For a discussion of the Second Amendment’s incorporation against the states, see *supra* notes 77–82 and accompanying text.

104 *Marzzarella*, 614 F.3d at 91 (citing *Heller*, 554 U.S. at 626–27). The Third Circuit did not include regulations on the sale of firearms amongst these exceptions, despite the fact that the Court in *Heller* indicated that they were “presumptively lawful,” 554 U.S. at 627 n.26, because if conditions on the sale of arms were protected from judicial examination, then “there would be no constitutional defect in prohibiting the commercial sale of firearms,” a result “untenable under *Heller*.” *Marzzarella*, 614 F.3d at 92 n.8.

places,¹⁰⁶ and dangerous and unusual weapons.¹⁰⁷ If the restricted activity falls outside the scope of the right (for example, falling within one of the categorical exceptions), then the “activity is categorically unprotected, and the law is not subject to further Second Amendment review.”¹⁰⁸

If the law passes the threshold inquiry, either because there is insufficient historical evidence for a categorical exception or because there is no other kind of exception, then the court, pursuant to the Seventh Circuit’s framework, applies a means-ends analysis.¹⁰⁹ Modeled after First Amendment jurisprudence, the level of heightened scrutiny to be employed depends upon “how close the law comes to the core of the Second

¹⁰⁵ The Third Circuit suggested that these two exceptions could be part of a category of “presumptively dangerous individuals,” such as substance abusers, who fall outside of the protection of the Second Amendment. *Id.* at 92–93. Undocumented immigrants and persons convicted of misdemeanor crimes of domestic violence could also be added to a potential category of individuals who have committed certain illegal acts. See *United States v. Booker*, 644 F.3d 12, 24–26 (1st Cir. 2011) (finding that individuals convicted of misdemeanor crimes of domestic violence “fit[] comfortably among” *Heller*’s categorical exclusions); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (finding that “the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States”); *United States v. Boffil-Rivera*, No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633, at *21–22 (S.D. Fla. Aug. 12, 2008) (finding that undocumented immigrants are not entitled to the protection of the Second Amendment due to their lack of membership in the “political community”). *But see* *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010) (finding a lack of sufficient evidence to support a finding that a misdemeanant convicted of domestic violence fell outside the scope of protection of the Second Amendment and therefore setting intermediate scrutiny as the appropriate standard). One court has found that lawful permanent resident aliens, in contrast, “are among ‘the people’” whose right to bear arms the Second Amendment protects. *Fletcher v. Haas*, 851 F. Supp. 2d 287, 288, 301 (D. Mass. 2012).

¹⁰⁶ Some courts have declined to identify certain locations as “sensitive” given that the Supreme Court did not give guidance as to why a certain place might be “sensitive.” See *GeorgiaCarry.org v. Georgia*, 764 F. Supp. 2d 1306, 1316–17, 1319 (M.D. Ga. 2011) (declining to classify a “place of worship” as a “sensitive place” but still finding that a law prohibiting the possession of firearms in places of worship passes intermediate scrutiny), *aff’d*, 687 F.3d 1244 (11th Cir. 2012).

¹⁰⁷ Included among these are short-barreled shotguns, *Heller*, 554 U.S. at 625 (citing *United States v. Miller*, 307 U.S. 174 (1939)), and machine guns, *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008).

¹⁰⁸ *Ezell*, 651 F.3d at 702–03. The threshold “scope” inquiry is modeled after the Court’s free-speech jurisprudence under the First Amendment. See *id.* at 702; *Marzarella*, 614 F.3d at 89 n.4 (noting that “*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment”). For an in-depth comparison of the doctrines of the First and Second Amendments, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 401–04, 413–14, 416 (2009). For a longer discussion of *Heller*’s categorical exclusions, see Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1247–60 (2009).

¹⁰⁹ *Ezell*, 651 F.3d at 703.

Amendment right and the severity of the law's burden on the right."¹¹⁰ Thus, "broadly prohibitory" laws, such as those in *Heller* and *McDonald* that banned handgun possession in the home, are "categorically unconstitutional," whereas less restrictive laws can be subject to varying degrees of scrutiny.¹¹¹

Other courts have taken somewhat different approaches to Second Amendment claims. The First Circuit analyzes laws both by comparing the laws to the categorical exclusions and by subjecting the laws to means-ends scrutiny.¹¹² The Ninth Circuit in *Nordyke* at first required that laws pass a "substantial burden" threshold test before receiving heightened scrutiny, but refused to identify which form of heightened scrutiny would apply.¹¹³ Upon rehearing en banc, however, the majority did not articulate a Second Amendment test because a change in the case's underlying facts did not require it.¹¹⁴ Another alternative approach proposed by one scholar is to confine Second Amendment protection exclusively to possession in the home, "subject to nearly plenary restriction" elsewhere.¹¹⁵

A variety of other questions have been posited by commentators in the wake of *Heller* yet remain untested by litigation. One commentator has questioned the validity of laws that prohibit firearms in public housing.¹¹⁶ Another has argued that bans on firearms in the residence halls of public colleges and universities should withstand constitutional scrutiny.¹¹⁷

110 *Id.* at 703.

111 *Id.* For example, if the law imposes a "severe burden on the core Second Amendment right of armed self-defense," then the government must demonstrate "an extremely strong public-interest justification and a close fit between the government's means and its end." *Id.* at 708. However, if the law regulates "activity lying closer to the margins" of the scope of the right, then "modest burdens on the right may be more easily justified." *Id.*

112 *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

113 *Nordyke v. King*, 644 F.3d 776, 786 & n.9 (9th Cir. 2011).

114 *Nordyke v. King*, 681 F.3d 1041, 1045 (9th Cir. 2012) ("Should the County add new requirements or enforce the ordinance unequally, or should additional facts come to light, Plaintiffs or others similarly situated may, of course, bring a new Second Amendment challenge to the relevant laws or practices. But in the present case, they cannot succeed, no matter what form of scrutiny applies to Second Amendment claims."). In his concurring opinion joined by three other judges, Judge O'Scannlain stated that he "would expressly adopt the measured, calibrated approach developed in the original three-judge panel majority opinion." *Id.* at 1045–46.

115 See Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1280 (2009) (proposing that the Second Amendment be treated as protecting "a robust right to possess [a firearm] in the home, subject to nearly plenary restriction by elected government officials everywhere else." (footnotes omitted)).

116 See Jamie L. Wershba, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995, 996–97 (2010).

117 See Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 238 (2011).

Professor Blocher has raised the question of whether “the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all.”¹¹⁸ The extent to which corporations possess rights under the Second Amendment, a question posed by Professor Miller,¹¹⁹ may also weigh into a court’s consideration of an HOA ban on handguns, especially since HOAs are often organized as non-profit corporations. The answers to all of these questions, together with the contours of the Second Amendment doctrine as currently being developed by the lower federal courts, could bear on the policy analysis of a court confronted with a challenge to an HOA servitude banning handgun possession in the home.

C. State Constitutional Law and the Right to Bear Arms

Another piece to the puzzle of the right to bear arms is the status of this right under state constitutions and in state courts. Of the fifty states, six do not have any kind of provision in their state constitutions protecting the right to bear arms.¹²⁰ This means that forty-four states have a provision in their constitutions that in some way protects the right to bear arms.¹²¹ About thirty of these state provisions explicitly identify the right in terms of the purpose of self-defense,¹²² while three explicitly define the right in terms of “common defense.”¹²³ Five of the state constitutions, like the U.S.

118 See Blocher, *Right Not To*, *supra* note 34, at 4.

119 See Miller, *supra* note 8, at 954–55.

120 These states are California, Iowa, Maryland, Minnesota, New Jersey, and New York. See Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. KAN. L. REV. 867, 881 & n.67 (2011). Notably, a proposed right to bear arms amendment to the Iowa constitution has already been approved by the Iowa House of Representatives but is currently stalled in the Iowa Senate. See Rod Boshart, *Gun-law changes likely stalled in the Iowa state Senate*, STOUXCITYJOURNAL.COM (Mar. 5, 2012, 5:09 PM), http://siouxcityjournal.com/news/local/govt-and-politics/gun-law-changes-likely-stalled-in-the-iowa-state-senate/article_812868bf-8961-5762-9d93-ab2621802f50.html. The proposed amendment provides that:

The right of an individual to acquire, keep, possess, transport, carry, transfer, and use arms to defend life and liberty and for all other legitimate purposes is fundamental and shall not be infringed upon or denied. Mandatory licensing, registration, or special taxation as a condition of the exercise of this right is prohibited, and any other restriction shall be subject to strict scrutiny.

H.R.J. Res. 2009, 84th Gen. Assemb., Reg. Sess. (Iowa 2012), available at http://coolice.legis.state.ia.us/linc/84/external/HJR2009_Reprinted.pdf.

121 See McAllister, *supra* note 120.

122 See *id.* at 881 & n.68. The proposed right to bear arms amendment to the Iowa constitution does contain self-defense language. See H.R.J. Res. 2009, *supra* note 120.

123 These states are Arkansas, Massachusetts, and Tennessee. See McAllister, *supra* note 120, at 881 & n.69.

Constitution, have language in the provision relating to a militia,¹²⁴ and six do not specify any purpose for the right.¹²⁵

Naturally, state courts play a central role in interpreting these provisions. A major question before state courts now that the Second Amendment has been incorporated against the states is how, if at all, state courts will continue to interpret their own state constitutional right to bear arms provisions.

It is a fundamental principle that state supreme courts are the final arbiters of state constitutional law.¹²⁶ While the predominant trend of state courts today is to interpret state constitutional law “in lockstep” with federal constitutional law,¹²⁷ state courts still have the authority to exercise interpretive independence.¹²⁸ What this means for the right to bear arms is that a state might interpret its constitution to allow more government restrictions on the right to bear arms than the Second Amendment allows. In the context of constitutional law, of course, the state’s higher tolerance for firearm regulation will have little practical import because federal law, by providing a higher “floor” of constitutional protection, will preempt state law.¹²⁹

124 These states are Alaska, Hawaii, North Carolina, South Carolina, and Virginia. *See id.* at 881 & n.64

125 These states are Georgia, Idaho, Illinois, Louisiana, Maine, and Rhode Island. *See id.* at 881 & n.70.

126 *See* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 334 (2011) [hereinafter Blocher, *Reverse Incorporation*] (citing *Michigan v. Mosley*, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting) (“Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.”); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000) (“State supreme courts have the unquestioned, final authority to interpret their state constitutions.”).

127 *See id.* at 339 (citing Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 47 (1992); Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1850 (2004); Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1467 (1997)). For a brief historical overview of the changing dynamics between the federal and state constitutions, see Blocher, *Reverse Incorporation*, *supra* note 126, at 329–33.

128 *See* Blocher, *Reverse Incorporation*, *supra* note 126, at 334 (citing James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1030 (2003)). In principle, a state court can interpret a state constitutional provision differently than a federal constitutional provision “even if the two are identically worded and even though the state itself cannot violate the federal standard.” *Id.* at 332 (citing Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1127 (1992)).

129 *See* McAllister, *supra* note 120, at 876 (“[A] state constitutional interpretation giving lesser rights than the U.S. Constitution cannot have legal effect so long as the federal constitutional ‘floor’ remains in effect.” (citing Dorothy Toth Beasley, Essay, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 GA. ST. U. L. REV. 681, 695–96 (1995))).

But a significant practical difference might exist when a state court conducts a public policy analysis under the law of servitudes. The state constitution has been declared the highest source of a state's public policy,¹³⁰ and so a state court conducting a public policy analysis of an HOA ban on handguns may give more weight to the policy evinced by the state right to bear arms provision than to the policy evinced by the federal Second Amendment. Furthermore, if the policy evinced by a state right to bear arms provision conflicts with the policy evinced by the Second Amendment, the state policy might trump the federal policy in the analysis, given the weight accorded to state constitutions in public policy analysis.

Thus, even where federal law might preempt state law in the context of a constitutional claim, state law has the potential to be more influential than federal law in the context of a public policy analysis under the law of servitudes. For example, in 1984, the Illinois Supreme Court in *Kalodimos* upheld a ban on handguns as constitutional under the Illinois Constitution's right to bear arms provision because the law prohibited only one "discrete categor[y]" of firearms.¹³¹ While this handgun prohibition obviously would be struck down as unconstitutional under *Heller* and *McDonald*,¹³² the Illinois courts today have not explicitly overruled *Kalodimos* when confronted with right to bear arms claims. Illinois appellate courts have recognized that under *Kalodimos*, the Illinois right to bear arms provision may provide less protection than the Second Amendment, suggesting that *Kalodimos* could be invalidated.¹³³ Yet the courts have relied only upon the federal Second

¹³⁰ See, e.g., *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 17 (N.J. 1992) ("[T]his Court is not likely to perceive the state's highest source of public policy, namely, its constitution, as irrelevant."); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 924 (Pa. 1989) (Zappala, J., concurring) ("No more clear statement of public policy exists than that of a constitutional amendment.")

¹³¹ *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 272–73 (1984).

¹³² See David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1120–21 (2010) (giving various reasons why this law would be unconstitutional under *Heller* and *McDonald*). Before *Heller*, many state courts analyzed claims of infringements of the right to bear arms under a "reasonable regulation" standard, which, while not as lenient as rational basis review, asked simply "whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense." See Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC., Oct. 2010, at 6, available at <http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf> (explaining the "reasonable regulation" standard). But see Kopel & Cramer, *supra* at 1119 (pointing out that some state courts had used other kinds of tests).

¹³³ See *People v. Aguilar*, 944 N.E.2d 816, 828 (Ill. App. Ct. 2011) ("We agree with defendant that in light of the holdings in *Heller* and *McDonald*, *Kalodimos*' interpretation of [the Illinois right to bear arms provision] appears to provide less protection than does the second amendment."). Accord *People v. Robinson*, 964 N.E.2d 551, 556–57 (Ill. App. Ct. 2011) (finding "no reason to depart from *Aguilar* in this case"). But see *People v. Mimes*,

Amendment in adjudicating claims and have refused to rule upon *Kalodimos* on the grounds that only the Supreme Court of Illinois would have the power to do so.¹³⁴ One Illinois appellate court faced with the issue stated that *McDonald* made it unnecessary even to address the Illinois right to bear arms again.¹³⁵

Yet the Illinois right to bear arms is not necessarily irrelevant and may continue to exert an influence in Illinois courts as long as *Kalodimos* is not overruled. As the doctrine in Illinois now stands, the Illinois right to bear arms, as interpreted in *Kalodimos*, exhibits a higher degree of tolerance for firearm regulation than does the federal Second Amendment.¹³⁶ And although the Second Amendment preempts the Illinois provision in the context of a constitutional claim, the Illinois provision might nevertheless exert a stronger influence in the context of a public policy analysis under the law of servitudes.

The policy underlying state constitutional law therefore can play an independent and significant role in a court's determination of the validity of

953 N.E.2d 55, 73 (Ill. App. Ct. 2011) (“We note, however, that the analysis and holding in *Kalodimos* have been impliedly overruled by *Heller* and *McDonald*.”).

134 See *Aguilar*, 944 N.E.2d at 828 (“[O]nly our supreme court may change its holding . . . Accordingly, we must decline defendant’s invitation to ‘revisit’ *Kalodimos*.” (citations omitted)). Accord *People v. Williams*, 962 N.E.2d 1148, 1151 (Ill. App. Ct. 2011) (“Any reexamination of *Kalodimos* would be the task of the Illinois Supreme Court.”); *People v. Montyce H.*, 959 N.E.2d 221, 229 (Ill. App. Ct. 2011) (“[E]ven if [*Kalodimos*] should be revisited in light of *Heller* and *McDonald*, ‘only our [Illinois] supreme court may change its [own] holding.’” (internal citation omitted)). The Supreme Court of Illinois has not ruled upon this question.

135 *Williams*, 962 N.E.2d at 1151 (“[I]n light of the application of the second amendment to the states by *McDonald*, there is no need to resort to constructions of the Illinois Constitution’s provision applicable to the right to bear arms.”).

136 The Colorado courts, in contrast, have exhibited a lower degree of tolerance for firearm restrictions, both before and after *Heller*. See Eugene Volokh, *Colorado Courts Continue to Protect Felons’ Rights to Keep and Bear Arms*, THE VOLOKH CONSPIRACY (Mar. 1, 2012, 3:55 PM), <http://volokh.com/2012/03/01/colorado-courts-continue-to-protect-felons-rights-to-keep-and-bear-arms> [hereinafter Volokh, *Felons’ Rights to Keep and Bear Arms*] (citing *State v. Carbajal*, 2012 Colo. App. LEXIS 303 (Colo. Ct. App. Mar. 1, 2012)); Eugene Volokh, *Felons’ Right to Keep and Bear Arms in Colorado*, THE VOLOKH CONSPIRACY (Sep. 16, 2011, 6:41 PM), <http://volokh.com/2011/09/16/felons-right-to-keep-and-bear-arms-in-colorado> (citing *People v. DeWitt*, 2011 Colo. App. LEXIS 1523 (Colo. Ct. App. 2011)). Each of these cases reaffirmed a prior Colorado Supreme Court decision that permitted felons charged with a felony firearm possession to raise the affirmative defense that the felon possessed the firearm for the purpose of defense of home, person, and property. See *People v. Ford*, 568 P.2d 26, 28 (Colo. 1977). Although Professor Volokh notes that “felons in Colorado get only limited benefit from this ruling, because they are still generally barred by federal law from possessing a gun, and the Colorado Constitution doesn’t affect the application of that federal law,” this divergence from federal law nevertheless evinces a distinct state constitutional policy that could weigh into a public policy analysis. Volokh, *Felons’ Right to Keep and Bear Arms in Colorado*, *supra*.

an HOA ban on handguns, in which case the federal policy emanating from *Heller* may not have the last say in a court's adjudication.

III. VALIDITY OF HOA SERVITUDES THAT PROHIBIT HANDGUN POSSESSION IN THE HOME

A. HOA Handgun Bans and the State Action Doctrine

An HOA ban on handgun possession could implicate the right to bear arms, but because HOAs are organizations formed by private agreement, a court would very likely not subject an HOA servitude to constitutional scrutiny.¹³⁷ Under rare circumstances, however, a plaintiff might be able to bring a constitutional claim against an HOA.

If the HOA governs a community that is a company town or that at least approximates a municipality by “performing the full spectrum of municipal powers and st[anding] in the shoes of the State,”¹³⁸ the HOA might be deemed a state actor under *Marsh* and thus subject to the federal or state constitution.¹³⁹ The California Court of Appeal, however, has indicated that *Marsh* is a high hurdle to clear:

[A] homeowners association is not a quasi-municipality. It does not perform most of the functions of a municipality (such as providing police and fire services, schools, libraries and utility services), and those limited functions it performs that resemble municipal functions (levying assessments, maintaining common areas, enforcing rules) are also performed by entities (such as corporations or private recreational clubs) that are not governmental entities. Moreover, a municipality enjoys¹⁴⁰ privileges and immunities not available to a homeowners association.

One commentator put a spin on *Marsh* by positing that the state action doctrine could apply where consumer choice in housing is severely limited to HOA-governed developments.¹⁴¹ The potential for this state of affairs is found in the increasing prevalence of HOA-governed developments and of zoning regulations that effectively mandate that new homes be built in HOA-governed developments.¹⁴² If all of the HOAs in a given area ban some kind of constitutional right, leaving an individual with no reasonable

137 RST SERVITUDES, *supra* note 19, § 6, at intro. note (“[A]bsent other circumstances, the associations’ actions are not state action sufficient to subject them to challenge under the United States Constitution . . .”).

138 *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972). *See also supra* Part I.B.1.

139 *Marsh v. Alabama*, 326 U.S. 501 (1946).

140 *Sher v. San Diegueno Hills Homeowners Ass’n*, 2006 Cal. App. Unpub. LEXIS 2960, at *16 (Apr. 11, 2006).

141 *See* Chadderdon, *supra* note 33, at 239–40.

142 *Id.*

residential option that would allow the exercise of such right, then a constitutional challenge could arise under the state action doctrine.¹⁴³

Another vehicle for application of the state action doctrine to an HOA ban on handgun possession is through *Shelley*, although this doctrinal passage is extremely narrow.¹⁴⁴ At least one court has rejected the argument that *Shelley* could subject an HOA to constitutional standards,¹⁴⁵ and although *Shelley* has been applied in the context of HOAs' infringement of First Amendment rights,¹⁴⁶ most judges and academics have concluded that the state-action rule in *Shelley* should not be used to adjudicate disputes.¹⁴⁷ Thus, it is unlikely that a court would expand the reasoning of *Shelley* to find that a court's enforcement of a servitude banning possession of handguns in the home violates the Second Amendment.

In the rare event that state action is found, an HOA ban on handgun possession in the home would be unconstitutional. Just like the laws invalidated in *Heller* and *McDonald*, the ban would eradicate the core of the Second Amendment right: self-defense in the home with a handgun. But in the likely absence of state action, an HOA handgun ban would be better challenged as a violation of public policy under the law of servitudes.

B. HOA Handgun Bans Under the Law of Servitudes

It is quite possible that an HOA ban on handgun possession in the home would be valid under property law.¹⁴⁸ First, the servitude is subject to a presumption of validity, as all servitudes are. Second, it is possible that a court would find that the servitude does not violate public policy because the servitude does not unreasonably burden the fundamental constitutional right to keep and bear arms: a balancing of the interests and public policies implicated by the servitude, including federal and state constitutional law policy and property law policy, would indicate that the benefits of enforcing the servitude far outweigh the risks of societal harm posed by the servitude. Yet given the flexibility of the public policy analysis, it is also possible that a court would find that the servitude is an unreasonable burden on the fundamental right to bear arms, and thus invalid. If this issue were litigated in state courts, the likely result would be a patchwork of decisions (some upholding the servitudes, some invalidating them) that vary by state and possibly by region.

143 *Id.*

144 *See supra* Part I.B.1.

145 *See Hutton v. Shamrock Ridge Homeowners Ass'n*, No. 3:09-CV-1413-O, 2009 U.S. Dist. LEXIS 115953, at *16 (N.D. Tex. Dec. 14, 2009).

146 *See supra* note 44.

147 *See supra* note 45.

148 For an explanation of the reasonableness test for servitudes, see *supra* Part I.B.2.

1. Federal Constitutional Law Policy

While constitutional law is useful to a public policy analysis, especially an analysis that concerns a fundamental constitutional right, it does not control the analysis. The most obvious federal constitutional policy against an HOA ban on handgun possession in the home is *Heller*.¹⁴⁹ *Heller*'s definition of the core of the Second Amendment right as self-defense of the home with a handgun¹⁵⁰ certainly evinces a public policy disfavoring a ban on handgun possession in the home. The core of the Second Amendment right, as defined by *Heller*, and the fundamental nature of the right, as determined by *McDonald*, might be sufficient for a court to declare an HOA ban on handguns invalid, especially if the state right to bear arms has been interpreted in "lockstep" with the Second Amendment or if the court is inherently biased toward gun rights.

Yet a more nuanced approach to the Second Amendment might dull the perceived severity of an HOA's infringement upon this right. As an initial consideration, the Second Amendment is applicable to federal government action through *Heller* and to state and local government action through *McDonald*, but not to private action; to this extent the Second Amendment evinces a policy to protect individuals from government impositions on their right to bear arms but to remain neutral with regard to voluntary restrictive agreements between private individuals.

Additionally, the federal courts of appeals employ a means-end analysis when adjudicating Second Amendment claims.¹⁵¹ This inquiry is concerned in part with how restrictive a regulation is on the right to bear arms. *Heller* and *McDonald*, by invalidating handgun bans that covered an entire city, suggest that "broadly prohibitory" laws are "categorically unconstitutional."¹⁵² The Seventh Circuit in *Ezell*, guided by this reasoning, entered a preliminary injunction against a law banning all firing ranges within a city.¹⁵³ Yet while a law that bans handgun possession in all homes in a city is unconstitutionally broad, an HOA servitude prohibiting handgun possession in a specific tract of homes within a city is nowhere near as broad: the law extends throughout the entirety of a jurisdiction, but the servitude is

149 *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (finding that a law that banned handgun possession in the home was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights").

150 *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (summarizing the holding in *Heller*).

151 *See supra* Part II.B (describing how the lower federal courts use a means-end analysis derived from the majority opinion in *Heller*).

152 *Ezell v. City of Chicago*, 651 F.3d 684, 703 (2011).

153 *Id.* at 710 ("Perhaps the City can muster sufficient evidence to justify banning firing ranges everywhere in the city, though that seems quite unlikely. As the record comes to us at this stage of the proceedings, the firing-range ban is wholly out of proportion to the public interests the City claims it serves.").

enforceable only against action occurring on properties that are subject to the HOA. If a homeowner does not wish to live in a neighborhood that bans handguns, then the homeowner can pack up and move to a more agreeable neighborhood without necessarily having to leave the jurisdiction.¹⁵⁴ Moreover, property law policy favors servitudes that cover no more than a reasonable amount of land area.¹⁵⁵ So while Second Amendment policy may disfavor broad restrictions on the right to bear arms, such as a law banning handgun possession throughout an entire city, a court might view an HOA servitude banning handgun possession in just one residential development as hardly an unreasonable burden.

Although the Seventh Circuit in *Ezell* ruled that it is a “profoundly mistaken assumption” that “the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction,” this principle may not apply in a public policy challenge to an HOA handgun restriction.¹⁵⁶ A court might simply decide that this is a principle of constitutional law, which does not control in a public policy analysis. A court might even recognize that property law policies cut the other way by lending deference to servitudes that prospective homeowners can reasonably avoid. An HOA ban on handgun possession in the home still leaves reasonable alternatives to individuals who wish to own firearms. In addition to moving out of the HOA-governed community, under a strict reading of a servitude banning handgun possession, an individual can keep a firearm other than a handgun at home. An individual who still wishes to own a handgun can store it in an off-site storage unit, at a firing range, or at another residence. If a family is concerned for its self-defense, the family can rely on the HOA’s security personnel (gated communities, for example, often have guards at the entrance), their home-security system, other weapons of self-defense,¹⁵⁷ or the police. A court could conclude that if none of these reasonable alternatives is agreeable to a homeowner challenging the handgun ban, then the homeowner should not have purchased a home in the HOA. A court thus could decide not to disrupt the

154 A homeowner can therefore “vote with his feet” amongst various HOAs (or neighborhoods not governed by HOAs) in the same way that homeowners vote with their feet amongst municipalities. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.”).

155 See RST SERVITUDES, *supra* note 19 and accompanying text (describing how the “geographical scope of a private party’s power to impose servitudes on an unwilling purchaser” should be considered).

156 *Ezell*, 651 F.3d at 697 (analogizing to First Amendment jurisprudence).

157 For a discussion of non-lethal self-defense in the context of the right to keep and bear arms, 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) (arguing that non-lethal weapons bans may interfere with certain constitutionally protected rights).

expectation interests of the other HOA members or undermine the other valuable public policy considerations of the HOA ban by vindicating the home purchaser who willfully puts himself in a dissenting position.

Another relevant dimension to the Second Amendment, suggested recently by the Eleventh Circuit, is that the Second Amendment must be interpreted in harmony with private property rights. In *GeorgiaCarry.Org v. Georgia*, the Eleventh Circuit upheld the constitutionality of a state law that prohibited the carrying of firearms in places of worship without the permission of the owner of the place of worship.¹⁵⁸ In so holding, the Court rejected the proposition “that the Second Amendment in any way abrogated the well established property law, tort law, and criminal law that embodies a private property owner’s exclusive right to be king of his own castle.”¹⁵⁹ Thus, if an individual owner of private property has the right to exclude firearms from the property because the right to bear arms “must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land,”¹⁶⁰ then it arguably should follow that a group of owners of private property organized as an HOA also should have the right to exclude firearms, including handguns, from the HOA properties.

Answers to certain unresolved questions may suggest that Second Amendment policy favors an HOA ban on handgun possession in the home. For instance, if the Second Amendment contains a right *not* to keep or bear arms,¹⁶¹ then this policy strongly favors the collective action of homeowners to agree by contract to keep firearms, handguns included, out of their neighborhoods. Also, if prohibitions on handgun possession in public housing¹⁶² or college dormitories¹⁶³ withstand constitutional scrutiny, then such a ruling would evince a Second Amendment policy to consider the particular nature of the community or residence affected by the ban. A private community of individuals voluntarily agreeing to restrict their right to possess a handgun at home could be favored by such a policy.

158 687 F.3d 1244 (11th Cir. 2012).

159 *Id.* at 1264.

160 *Id.* at 1265. A right to exclude guns from one’s private property is tied to the broader question of whether there exists a right not to keep or bear arms. See Blocher, *Right Not To*, *supra* note 34, at 4 (proposing that “the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all”).

161 See Blocher, *Right Not To*, *supra* note 34.

162 See Wershbale, *supra* note 116 (exploring the Second Amendment in the context of public housing).

163 See Miller, *supra* note 117 (claiming that *McDonald* grants universities the constitutional permission to prohibit firearms on campus).

Finally, if corporations have Second Amendment rights,¹⁶⁴ then the many HOAs that are organized as not-for-profit corporations could possess Second Amendment rights. The recognition of the right to bear arms in HOAs themselves could be irrelevant if the HOA ban on handguns targets only individual homeowners, and not the HOA as a distinct entity. But recognition of the right in HOAs could also complicate the analysis if an HOA handgun ban targets the HOA itself. For example, such a ban might prevent the HOA from employing armed security guards. Disarming the HOA in this manner could undermine the justification for disarming individual residents, since residents reasonably could want security guard protection in exchange for the residents' agreement to be bound by the HOA handgun ban. On the other hand, city police would remain available to ensure residents' safety, and so an HOA ban targeting both residents and the HOA itself might be a reasonable burden and thus valid.

2. State Constitutional Law Policy

Like federal constitutional law, state constitutional law does not control a public policy analysis, but unlike the federal constitution, the state constitution is the most important source of public policy that can be considered in the analysis.¹⁶⁵ Some states might interpret their state right to bear arms provisions in lockstep with federal law. For these states, the policy evinced by the Second Amendment, as discussed above, may be equally evinced by their own state provisions. However, some states might assert their power to interpret their state constitutions independently of federal law, even though the Second Amendment may preempt state constitutional claims. If these states reach different understandings of their right to bear arms provisions, then the state can develop more policy reasons to favor HOA bans on handgun possession in the home.

Six states do not have any sort of state constitutional provision protecting the right to bear arms,¹⁶⁶ which suggests a policy of relative neutrality of the state vis à vis HOA handgun bans. Moreover, there are five states whose provisions contain clauses relating to a militia purpose for the right.¹⁶⁷ Although the Court in *Heller* did not read the Second Amendment's Militia Clause as limiting the purpose of the right to bear arms, a state court, relying

¹⁶⁴ See Miller, *supra* note 8 (analyzing Second Amendment rights in the context of the corporate form after *McDonald* and *Citizens United v. FEC*).

¹⁶⁵ See *supra* note 130 and accompanying text.

¹⁶⁶ These states are California, Iowa, Maryland, Minnesota, New Jersey, and New York. See McAllister, *supra* note 120, at 881 & n.67; see also *supra* note 120 (describing the recently proposed right to bear arms amendment to the Iowa constitution).

¹⁶⁷ These states are Alaska, Hawaii, North Carolina, South Carolina, and Virginia. See McAllister, *supra* note 120, at 881 n.64.

on legal considerations particular to its own state constitution, might read its own clause as imposing such a limitation or might disagree with the interpretation of the Second Amendment's Militia Clause in *Heller*.¹⁶⁸ This reading could suggest that the policy of the right to bear arms is to promote militia service, which would not be harmed by an HOA's ban on handguns. Three other states explicitly define the right to bear arms as for the purpose of "common defense."¹⁶⁹ This collectivist approach suggests a policy more in line with a militia-purpose approach, and to that extent public policy is not threatened by an HOA ban, since militias need not necessarily store their arms in homes.

Nevertheless, a large remainder of the states have right to bear arms provisions much more similar to the Second Amendment. As previously mentioned, if these states interpret their state provisions in lockstep with the Second Amendment, then this parallel could weigh in favor of invalidating an HOA ban on handguns.

The legal standards that states apply to alleged infringements of state right to bear arms provisions also weigh into the analysis. Most states traditionally employed the "reasonable regulation" standard, which is concerned only with absolute infringement of the right to bear arms.¹⁷⁰ This standard reveals a policy of tolerance towards all but the most excessive of prohibitions. Since an HOA ban on handguns would ban only handguns, and only on properties subject to the HOA, the ban would likely be consonant with these states' constitutional policies. And while *Heller* might lead some state courts to adopt a more restrictive legal standard for a state right to bear arms, the current position of the Illinois appellate courts suggests that state courts may pursue adjudication of Second Amendment claims alone, and thus either leave state right to bear arms doctrines frozen in pre-*Heller* condition¹⁷¹ or develop the doctrines independently. The Colorado courts, on the other hand, have interpreted their state right to bear arms as even more protective than the Second Amendment,¹⁷² which

168 See, e.g., Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 174-78 (2008) (suggesting that the Court in *Heller* misapplied the Militia Clauses of the U.S. Constitution when interpreting the Second Amendment).

169 These states are Arkansas, Massachusetts, and Tennessee. See McAllister, *supra* note 120, at 881 & n.69.

170 See Mehr & Winkler, *supra* note 132.

171 See *supra* notes 131-35 and accompanying text (explaining how Illinois state courts have refused to change the state right to bear arms doctrine in spite of *Heller* and *McDonald*).

172 See *supra* note 136 (describing how the Colorado state courts have recognized a felon's affirmative defense under the state right to bear arms provision that likely would not be recognized under the Second Amendment).

evinces a policy that would exhibit less tolerance for an HOA ban on handguns.

State courts may interpret their state constitutions in still other distinct ways. For example, *Heller* and *McDonald* asserted that the handgun was the “quintessential” self-defense weapon, but what if a rural state considered the rifle or the shotgun to be the “quintessential” self-defense weapon?¹⁷³ In such a case, a state court might not consider an HOA ban on handgun possession to be a violation of public policy, even though an HOA ban on rifle possession would be.

3. Property Law Policy

A variety of property law policies weigh in favor of enforcing an HOA ban on handgun possession.¹⁷⁴ The primary justification for imposing such a servitude most likely is safety¹⁷⁵: the keeping of guns in the home has been linked to unintentional gun injuries,¹⁷⁶ suicide,¹⁷⁷ and homicide.¹⁷⁸ One study found that “for every time a household gun was used for self-defense, there were 4 unintentional shootings, 7 criminal assaults or homicides, and 11 attempted or completed suicides.”¹⁷⁹ Not surprisingly, a large majority of

173 While “a mere 20 percent of gun-owning individuals have only handguns[,] 44 percent have both handguns and long guns, reflecting the fact that most people who have acquired guns for self-protection are also hunters and target shooters.” Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1047 (2009).

174 See *supra* Part I.B.2.

175 See Cook et al., *supra* note 173, at 1049 (“The threat of being shot prompts private citizens and public institutions to undertake a variety of costly measures to reduce this risk, and many people live with anxiety arising from the lingering chance that they or a loved one could be shot.”).

176 Matthew Miller et al., *Firearm storage practices and rates of unintentional firearms deaths in the United States*, 37 ACCIDENT ANALYSIS & PREVENTION 661, 661–67 (2005) (finding an increased risk of unintentional firearm death in states where gun owners were more likely to store loaded guns and an even higher risk in states where the loaded guns were more likely to be unlocked).

177 Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992) (finding that the risk of suicide is five times greater in homes with guns and two times greater in homes with handguns than in homes with long guns only).

178 Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1087 (1993) (finding that individuals who keep firearms at home are about three times more likely to be murdered and about eight times more likely to be murdered by a family member or intimate acquaintance).

179 *Studies and Reports*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/studies/view/102> (last visited Mar. 11, 2012) (summarizing Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. OF TRAUMA: INJURY, INFECTION & CRITICAL CARE 263, 263–67 (1998)).

Americans today do not possess a gun.¹⁸⁰ The empirical literature on the effect of guns on safety is, however, inconclusive,¹⁸¹ and while “the statistics should be largely irrelevant as a constitutional matter,”¹⁸² the validity of an HOA servitude is a matter of state property law, not only constitutional law. Residents’ mere belief that handgun bans lead to safer communities,¹⁸³ even if empirically untrue or inconclusive, implicates fundamental policies of property law that would favor validating the ban.

First, if the ban on handguns has been in place long enough, the HOA residents will have developed an expectation interest in the servitude, and a court could respect the peace of mind that the servitude has brought to the community. Moreover, if prospective purchasers of HOA homes also believe that handgun bans increase safety, then these purchasers may be willing to pay a safety premium on the price of the home, which in turn supports the policies of promoting the productive use of land and of supporting servitudes that relate to the value of the land. To the extent that prospective purchasers pay less for homes that are not protected by handgun bans,¹⁸⁴ declaring an HOA handgun ban invalid as against public policy actually undermines the public policy that favors the enhancing of home values.

A court might be suspicious of the ban because it restricts the exercise of a fundamental right on an HOA resident’s individually owned property, but this suspicion could be allayed by the fact that guns, even if stored on individually owned property, produce negative externalities on the neighborhood.¹⁸⁵ These spill-over effects include potential violence, even if accidental, to neighbors visiting the home where the gun is stored as well as

180 See Cook et al., *supra* note 173, at 1045 (“[A]bout 75 percent of all adults do not own any guns.” (citing PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A NATIONAL COMPREHENSIVE SURVEY ON FIREARMS OWNERSHIP AND USE 12 (1996))).

181 Blocher, *Right Not To*, *supra* note 34, at 3 n.11 (comparing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 151–52 (1995) (concluding that victims who use a gun or other weapon to resist crime are less likely to be harmed than those who do not resist or resist unarmed), with Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003) (arguing that shall-issue gun laws more likely increase rather than decrease crime)).

182 Blocher, *Right Not To*, *supra* note 34, at 3–4 (pointing out that *Heller* allows an individual to make his or her own decision whether or not to own a gun).

183 In one national survey, respondents were asked whether, if more people in their neighborhood began carrying guns, they would “feel more safe, the same, or less safe.” See DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 98 (2004). Sixty-two percent of respondents said they would feel “less safe,” whereas only 12% said they would feel “more safe.” See *id.*

184 See Cook et al., *supra* note 173, at 1049 (“[T]he threat of gun violence in some neighborhoods is an important disamenity that depresses property values and economic development.”).

185 See *supra* notes 176–79 (describing how guns in the home have been linked to unintentional gun injuries, suicide, and homicide).

potential violence to neighbors when the gun is removed from its home and brought to other parts of the neighborhood. Although the data underlying this belief is disputed,¹⁸⁶ a court may find the data in support of the handgun ban sufficient at least to weigh this policy concern amongst the others.

Finally, a court might give weight to the policy of freedom of contract—that is, the fact that a homeowner voluntarily agreed to be bound by the HOA’s rules when the homeowner bought his or her home.¹⁸⁷ While this factor is case-specific and does little to answer the broader question of whether an HOA ban on handguns is valid in principle, a court might consider various dimensions of this policy, including whether the servitude existed when the homeowner purchased the home or whether the servitude was enacted after the home was purchased; whether the homeowner was prevented from learning about the servitude or whether the homeowner knew or should have known about the servitude; and, if the servitude was enacted after the homeowner purchased the home, whether the procedure used to enact the servitude was valid.¹⁸⁸

4. Other Sources of Public Policy

Another source of public policy upon which an opponent to an HOA ban on handguns might rely is the fact that his or her state attorney general (“SAG”) was among the thirty-eight SAGs that, on behalf of their respective states, signed an amicus brief in *McDonald* arguing for incorporation of the Second Amendment.¹⁸⁹ A court could arguably interpret this action as the state’s adoption of federal Second Amendment policy.¹⁹⁰ However, a court might view the signing of an amicus brief as a poor indicator of public policy when compared to the traditional sources of public policy, since the state

186 See *supra* note 181 and accompanying text (showing the disagreement over whether gun safety laws are effective).

187 See RST SERVITUDES, *supra* note 19, at § 3.1 cmt. i.

188 See *id.*

189 See Brief of the States of Tex. et al. as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521). Thirty-one states did so in *Heller*. See Brief of the States of Tex. et al. as Amici Curiae in Support of Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

190 The plurality in *McDonald* considered the states’ amicus brief in its reasoning. See *McDonald*, 130 S. Ct. at 3049 (citing the brief as evidence of a “popular consensus” that the right to bear arms is fundamental). But see Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108, 112 (2008) [hereinafter Blocher, *Popular Constitutionalism*] (“[I]ncorporation is extremely difficult to justify on the federalism grounds [the SAGs] invoked.”). Obviously *McDonald* was not a case that involved a public policy analysis, but courts do consider state amicus briefs in deciding cases. See Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355 (2012) (discussing the role of state amicus briefs in cases involving issues of federalism).

and federal constitutions, state legislation, and state court judicial decisions all bear the imprimatur of the democratic will of the people or, in the case of judicial decisions, the neutrality of a judge. While the actions of most SAGs are, like legislation and constitutions, politically influenced,¹⁹¹ the people of a state are not nearly as involved in government attorneys' decisionmaking. Moreover, government attorneys are not impartial decisionmakers like judges, but rather are partial advocates entrusted with protection of state government in legal disputes.¹⁹² Even assuming that SAG action is an appropriate source of public policy, an SAG's signing of the amicus brief in *McDonald* may nevertheless have only marginal effect on the analysis, since "all the states that signed the *McDonald* amicus brief (and all but a handful of the states that did not) already guarantee an 'individual' right to keep and bear arms in their own constitutions, often in terms more expansive than those of the Second Amendment."¹⁹³

One rare but emerging source of public policy that strongly disfavors, if not invalidates, HOA bans on handgun possession are local laws that require all residents to possess handguns at home.¹⁹⁴ The constitutionality of these laws is open to question,¹⁹⁵ but it seems likely that an HOA servitude prohibiting handgun possession in the home would violate these laws and thus be invalid as illegal and not merely in violation of public policy.

A final consideration is that a court may be biased toward gun rights and invalidate the HOA handgun ban, notwithstanding the servitude's presumption of validity and the federal constitutional, state constitutional,

191 Forty-three states elect their SAGs by popular vote. See *About NAAG*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Mar. 11, 2012). Additionally, "many [SAGs] go on to seek other elected offices, so they have strong incentives to be seen as representing the will of the people." Blocher, *Popular Constitutionalism*, *supra* note 190, at 110.

192 See, e.g., Blocher, *Popular Constitutionalism*, *supra* note 190, at 111 (pointing out that SAGs are advocates for their states).

193 *Id.* at 111 (citing Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006)).

194 These laws have been passed in Kennesaw, Georgia; Greenleaf, Idaho; Geuda Springs, Kansas; and Virgin, Utah. See Blocher, *Right Not To*, *supra* note 34 at 37–38 (citing Anna Fifield, *Kennesaw, where everyone is armed by law*, FIN. TIMES (Sept. 25, 2010), <http://www.ft.com/cms/s/2/5c1b6a72-c5eb-11df-b53e-00144feab49a.html#axzz16d4dQ5T3>; Glenn Reynolds, *A Rifle in Every Pot*, N.Y. TIMES, Jan. 16, 2007, at A21; *Kansas community requires households to have guns*, USA TODAY (Nov. 23, 2003), http://www.usatoday.com/news/nation/2003-11-23-kansas-guns_x.htm; *Town in Utah Requires Owning Guns*, ABC NEWS (Nov. 5, 1994), <http://abcnews.go.com/US/story?id=95092&page=1>).

195 See Blocher, *Right Not To*, *supra* note 34, at 37–40 (addressing the constitutionality of mandatory possession laws in the context of a posited "right not to keep or bear arms").

and property law policies favoring the servitude.¹⁹⁶ Given that public policy analysis is, by its nature, a flexible exercise of judicial decision making, judges might exercise their discretion in a manner that withstands appeal. Furthermore, given the political susceptibility of a judiciary comprised of elected judges,¹⁹⁷ a state court that once validated an HOA handgun ban may, in a different political climate, invalidate the ban, especially if the state's supreme court has not yet ruled on the issue.

IV. A PATCHWORK APPROACH TO THE VALIDITY OF HOA HANDGUN BANS

A court will validate an HOA servitude that prohibits handgun possession in the home as long as a public policy analysis indicates that the servitude does not unreasonably burden the right to keep and bear arms. The policy behind the Second Amendment articulated by *Heller* can be construed to strongly disfavor such a servitude, and a court may have the discretion to invalidate the servitude based on this policy alone. A court may be so inclined especially if the state's courts interpret the state right to bear arms provision in lockstep with the Second Amendment. Other states, however, have traditionally been skeptical of extensive gun rights, exhibiting a high degree of tolerance for firearm regulation.¹⁹⁸ The incorporation of the Second Amendment against these states infringes considerably upon their ability to effectuate their state's traditional policy on the right to bear arms, especially due to federal preemption of state right to bear arms claims.

Property law and state constitutional law, however, provide a venue for both individual citizens and states to manifest their opposition to federal Second Amendment policy. State courts have the power to interpret their constitutions without regard to any consideration of federal constitutional law. State courts therefore are free to interpret their own right to bear arms policies in a manner inconsistent with, or even contrary to, federal Second Amendment policy, and thereby validate HOA servitudes that ban handgun

¹⁹⁶ See Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511, 518 (2010) (suggesting that "our cultural orientations will cause us to resist historical or social facts that point towards a competing risk assessment").

¹⁹⁷ See generally Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411 (2001) (discussing positive aspects of political party involvement in judicial elections). Cf. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> (reporting on Iowa voters' ouster of three Iowa Supreme Court justices who ruled in the unanimous decision recognizing same-sex marriage in Iowa).

¹⁹⁸ For a comparison of the states' tolerances of gun control, see *Brady 2011 State Scorecards*, BRADY CAMPAIGN TO PREVENT VIOLENCE, <http://www.bradycampaign.org/stategunlaws/scorecard> (last visited Nov. 10, 2012).

possession in the home. The tables thus can be turned against conservative voices that advocate both states' rights and gun rights.

It is therefore likely that a patchwork approach will emerge amongst the states. While some states may invalidate an HOA handgun ban, other states may not.¹⁹⁹ Perhaps this distinction will fall along regional lines.²⁰⁰ More likely, however, given the flexibility of the public policy test, even a complex analysis based on the variable arguments identified in Part III of this Comment could fail to predict how state courts will rule on the issue. The normative value of such a patchwork approach is a question for another day. It is enough at this juncture to recognize that HOA bans on handgun possession—or invalidation of such bans by courts or by legislatures—will allow states and citizens to order their constitutional values and build communities in accordance with their own ideas of safety and defense. Time will tell how far the looming penumbra of *Heller* will reach, but for now the narrow slice of our legal system occupied by HOAs remains fertile soil on which to experiment with limits on our right to keep and bear arms.

199 A patchwork might also emerge within a state if the issue never reaches the state court of last resort.

200 Gun ownership traces geographic patterns, so perhaps the validity of HOA handgun bans will follow suit. See Deborah Azrael, Philip J. Cook & Matthew Miller, *State and Local Prevalence of Firearms Ownership: Measurement, Structure, and Trends*, 20 J. QUANTITATIVE CRIMINOLOGY 43, 58–60, Table AIV (2004) (finding that 60% of Mississippi households keep a gun whereas 13% of Massachusetts households keep a gun); COOK & LUDWIG, *supra* note 180, at 31–32, 50 (finding that residents of rural areas and small towns are substantially more likely to be gun owners than residents of large cities).