

# IMPLEMENTING THE RIGHT TO KEEP AND BEAR ARMS AFTER *BRUEN*

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*For a wide range of individual rights, the government can justify certain restrictions on the right in at least four kinds of ways: (1) by showing that the restriction is outside the scope of the right, as defined by text, original meaning, and other factors; (2) by showing that it only modestly burdens the exercise of the right; (3) by showing that it serves sufficiently strong countervailing government interests; or (4) by showing that the government has special power as proprietor when it comes to behavior that uses its property.*

*Bruen rejected countervailing-government-interests arguments for the Second Amendment, and focused on scope arguments. But it also seemed to endorse some kinds of modest burden arguments, and didn't foreclose the possibility of government-as-proprietor arguments. This Article discusses these matters broadly, and also applies the analysis to various particular kinds of gun restrictions.*

INTRODUCTION: THE GRAMMAR OF CONSTITUTIONAL RIGHTS LAW . . .	1951
I. <i>BRUEN</i> ALLOWS RESTRICTIONS ROOTED IN THE SECOND AMENDMENT'S SCOPE . . . . .	1954
II. <i>BRUEN</i> REJECTS A COUNTERVAILING GOVERNMENT INTEREST INQUIRY . . . . .	1955
III. <i>BRUEN</i> LEAVES ROOM FOR UPHOLDING RESTRICTIONS THAT ONLY MODESTLY BURDEN THE RIGHT TO BEAR ARMS . . . . .	1956
IV. <i>BRUEN</i> DID NOT OPINE ON THE GOVERNMENT AS PROPRIETOR, EMPLOYER, OR CONTRACTOR. . . . .	1962
V. IMPLICATIONS FOR PARTICULAR GUN CONTROLS: WHAT, WHO, WHERE, HOW, WHEN . . . . .	1964
A. "What" Bans: Bans on Categories of Weapons or Weapons-Related Items . . . . .	1964
1. Bans on Guns Without Serial Numbers, Guns Without Enough Metal Parts, Etc. . . . .	1966
2. Bans on "Assault Weapons" . . . . .	1966
B. "Who" Bans: Bans on Possession by Certain Classes of People . . . . .	1969
1. Felons . . . . .	1970

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- 2. *Subjects of Restraining Orders and “Red Flag” Orders* . . . . . 1971
- 3. *The Mentally Ill* . . . . . 1972
- 4. *Illegal Drug Users*. . . . . 1973
- C. *“Where” Bans: Prohibition on Possession in Certain Places*. . . . . 1973
- D. *“How” Restrictions: Rules on How Guns Are To Be Stored or Carried* . . . . . 1973
- E. *“When” Restrictions: Rules on When People Are Temporarily Barred from Possessing Guns*. . . . . 1974
  - 1. *Restrictions on Possession While Intoxicated* . . . . 1974
  - 2. *Waiting Periods*. . . . . 1974
- F. *Taxes, Fees, and Other Expenses*. . . . . 1975
- G. *Restrictions on Sellers* . . . . . 1976
- H. *Restrictions on Training*. . . . . 1976
- I. *“Who Knows” Restrictions: Nondiscretionary Licensing, Background Checks, Registration, and Ballistics Tracking Databases* . . . . . 1977
- J. *Restrictions on Gun Use* . . . . . 1977
- CONCLUSION. . . . . 1978

INTRODUCTION:  
THE GRAMMAR OF CONSTITUTIONAL RIGHTS LAW

When does a restriction on guns violate the right to keep and bear arms? When does a restriction on speech violate the freedom of speech? When does a restriction on religious practice violate a presumptive right to religious exemptions?

Generally speaking, there are at least four kinds of ways that the government can justify some such restrictions; these categories offer a sort of grammar of constitutional rights law:

- *Scope*: A restriction might be consistent with the constitutional text, the original meaning of the text, the traditional understanding of what the text covers, or the background legal principles establishing who is entitled to various rights.
- *Modest Burden*: A restriction might be justified because it only slightly interferes with rightholders’ ability to enjoy the benefits of the right, and thus might be a burden that doesn’t unconstitutionally “infringe[]”<sup>1</sup> the right.

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<sup>1</sup> U.S. CONST. amend. II.

- *Countervailing Government Interests*: A restriction might serve sufficiently important government interests, which justify even a substantial burden. When such interests are considered, that is usually done through intermediate scrutiny or strict scrutiny.<sup>2</sup>

- *Government as Proprietor*: The government might have special power stemming from its authority as proprietor, employer, or subsidizer to control behavior on its property or by recipients of its property.<sup>3</sup>

Consider, for instance, free speech law (which the Court has sometimes used as an analogy in its right-to-bear-arms cases). For content-based speech restrictions, the Court has generally held the following:

- *Scope*: The scope of the freedom of speech excludes some traditionally recognized exceptions, such as for incitement, libel, fighting words, and the like.<sup>4</sup>

- *Modest Burden*: Even modest content-based restrictions on speech (e.g., relatively low content-based taxes,<sup>5</sup> or content-based restrictions that restrict only the time, place, and manner of speech<sup>6</sup>) are presumptively unconstitutional.

- *Countervailing Government Interests*: Such content-based restrictions can be upheld but only if they are necessary to serve a compelling government interest.

- *Government as Proprietor*: There are generally more government-friendly rules for restrictions imposed on government employees,<sup>7</sup> K-12 students, public university students, people visiting the government's non-public-forum property,<sup>8</sup> and more.

But the rules differ for other kinds of speech restrictions. For viewpoint-based speech restrictions, for instance, the Court has suggested that no "countervailing government interest" justifications are available, so such restrictions are categorically unconstitutional<sup>9</sup> (unless

<sup>2</sup> See, e.g., *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 443 (2015) (strict scrutiny of content-based speech restrictions); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (intermediate scrutiny of content-neutral speech restrictions).

<sup>3</sup> See, e.g., *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 662 (2010) (government as proprietor or subsidizer restricting speech that uses its property); *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454 (1995) (government as employer restricting its employees' speech).

<sup>4</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing First Amendment exceptions).

<sup>5</sup> See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

<sup>6</sup> See, e.g., *Carey v. Brown*, 447 U.S. 455, 460–62 (1980) (treating a content-based restriction as presumptively unconstitutional, though it was limited to residential picketing).

<sup>7</sup> See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

<sup>8</sup> *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

<sup>9</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (stating that, in a traditional public forum, "any restriction based on the content of the speech must satisfy strict scrutiny, . . . and restrictions based on viewpoint are prohibited"); *Minn. Voters All.*, 138 S. Ct. at 1885

they fall outside the scope of free speech, or perhaps are justified by the government's role as employer<sup>10</sup> or K-12 educator<sup>11</sup>).

For content-neutral speech restrictions, there is a “burden” inquiry: If the content-neutral restriction “leave[s] open ample alternative channels for communication of information”<sup>12</sup> (i.e., doesn't burden speech too much), then the restriction can be upheld on a countervailing-interest rationale under intermediate scrutiny. But if the content-neutral restriction doesn't leave open such ample alternative channels (i.e., gravely burdens speech), for instance when it “foreclose[s] an entire medium of communication,” then the restriction would have to be evaluated under strict scrutiny.<sup>13</sup>

The important point here is that the different kinds of justifications are separate. A court may reject any possibility of a right being overcome by countervailing government interests, for instance, but conclude that a particular regulation of the right is valid because it imposes only a minor burden. Conversely, concluding that even modest burdens are sufficient to trigger the right doesn't tell us whether such burdens can be justified by countervailing government interests, or by the government's special proprietary powers.

In this Article, I try to apply this framework to the Second Amendment right to keep and bear arms in self-defense after *New York State Rifle & Pistol Association v. Bruen*.<sup>14</sup> *District of Columbia v. Heller*,<sup>15</sup> *McDonald v. City of Chicago*,<sup>16</sup> and *Bruen* all focus on the right to keep and bear arms for self-defense, so this Article will as well,

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(“In a traditional public forum . . . restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”).

<sup>10</sup> *Compare, e.g.,* Sczygelski v. U.S. Customs & Border Prot. Agency, 419 F. App'x 680, 680–81 (8th Cir. 2011) (upholding firing of law enforcement officer for expressing racist views, and citing other cases that so allowed), *with* Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty., 39 F.4th 95 (3d Cir. 2022) (stating that “viewpoint-based government regulations on speech are nearly always presumptively suspect,” and this is generally “no less true” for government-as-employer restrictions).

<sup>11</sup> *Compare, e.g.,* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 780 (9th Cir. 2014) (“Schools may, under *Tinker*, ban certain images, for example images of the Confederate flag on clothing, even though such bans might constitute viewpoint discrimination.”), *with* Nurre v. Whitehead, 580 F.3d 1087, 1095 n.6 (9th Cir. 2009) (“We note that this is not a case involving viewpoint discrimination, which would be impermissible no matter the forum.”).

<sup>12</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>13</sup> *E.g.,* *State v. DeAngelo*, 963 A.2d 1200, 1207 (N.J. 2009) (“Ordinances that foreclose an entire medium of expression often are the subject of concern as such an ordinance will be upheld only if narrowly drawn to accomplish a compelling governmental interest.”) (cleaned up); *Doe v. Kentucky ex rel. Tilley*, 283 F. Supp. 3d 608, 612 n.4 (E.D. Ky. 2017) (likewise).

<sup>14</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>15</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>16</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

leaving other possible purposes, such as “hunting and recreation[]” or deterring government tyranny,<sup>17</sup> to others. I discuss how regulations that are justified by the Amendment’s scope (Part I) or that impose only minor burdens on the exercise of the right to bear arms (Part III) generally remain constitutional, though regulations that impose serious burdens can no longer be justified by a strong countervailing government interest (Part II). Whether the government has special power to impose additional regulations as proprietor or employer (Part IV) remains uncertain. Finally, Part V applies this framework to some particular kinds of firearm regulations.

## I

### *BRUEN* ALLOWS RESTRICTIONS ROOTED IN THE SECOND AMENDMENT’S SCOPE

*Bruen* expressly focused on the “scope” inquiry, stating that arms restrictions would be constitutional if justified by the Second Amendment’s text and history.<sup>18</sup> Restrictions on gun ownership by people who aren’t seen as “law-abiding” and “responsible” are one example.<sup>19</sup> Restrictions on carrying guns in “sensitive places”<sup>20</sup> are another, as are restrictions on possessing “dangerous and unusual” weapons.<sup>21</sup> Restrictions on concealed carry that allow open carry as an alternative are yet another,<sup>22</sup> though in current practice states that want to regulate gun carrying would likely also prefer that people carry concealed rather than openly.<sup>23</sup>

In this respect, *Bruen* shaped Second Amendment law in the image of the modern law of the Confrontation Clause, the Criminal Jury Trial

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<sup>17</sup> For provisions expressly mentioning hunting and recreation, see DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11(1); N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25.

<sup>18</sup> See *Bruen*, 142 S. Ct. at 2126 (“[T]he government may justify its regulation by ‘establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.’” (citation omitted)).

<sup>19</sup> *Id.* at 2131.

<sup>20</sup> *Id.* at 2133.

<sup>21</sup> *Id.* at 2128.

<sup>22</sup> *Id.* at 2150.

<sup>23</sup> Many people are made uncomfortable, rightly or not, by visibly present deadly weapons, even if in the abstract they know that during a busy day they will likely pass many people who are carrying concealed weapons. See, e.g., *State v. Ross*, 573 S.W.3d 817, 841 & n.4 (Tex. Crim. App. 2019) (Slaughter, J., dissenting); *Norman v. State*, 215 So. 3d 18, 45–46 (Fla. 2017) (Canady, J., dissenting). “In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.” *Peruta v. County of San Diego*, 824 F.3d 919, 955 (9th Cir. 2016) (Callahan, J., dissenting) (quoting Volokh, *supra* note \*). Legislation naturally tends to reflect such sentiments, and the few courts that have recently considered the issue have upheld open carry bans, so long as concealed carry is allowed. See, e.g., *Norman*, 215 So. 3d at 37–38.

Clause, the Seventh Amendment, the Double Jeopardy Clause, and the like: a highly historical inquiry into late colonial and early American legal practices, based on the theory that these were the practices that the Framers constitutionalized in enacting the Bill of Rights.<sup>24</sup> And in this respect, it has crafted a different path for the Second Amendment from the much less history-focused modern Free Speech Clause law and Equal Protection Clause law.

The key difference between Second Amendment law and the Confrontation Clause and similar provisions, of course, is that there is so little recent precedent about the Second Amendment—just *District of Columbia v. Heller*,<sup>25</sup> *McDonald v. City of Chicago*,<sup>26</sup> *Caetano v. Massachusetts*,<sup>27</sup> and now *Bruen*. Because of this, the Second Amendment scope inquiry, at least for now, is much more focused on the early history called for by inquiries into original meaning and tradition, and less on whatever precedents might have said about the right's scope.<sup>28</sup>

## II

### *BRUEN* REJECTS A COUNTERVAILING GOVERNMENT INTEREST INQUIRY

*Bruen* expressly rejected a countervailing-government-interest inquiry, and thus disallowed “any means-end test such as strict or intermediate scrutiny” that could justify restrictions.<sup>29</sup> This approach differs from how the Court has dealt with some rights, such as the rights to be free from content-neutral restrictions and from many kinds of content-based restrictions.<sup>30</sup> But the approach is similar to how the Court has dealt with some other rights.<sup>31</sup>

Consider, for instance, the Jury Trial Clauses. There are limits on the right to jury trial in criminal cases, based on history (such as the exception for petty offenses).<sup>32</sup> Likewise, there is a limit on the right to

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<sup>24</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Gamble v. United States*, 139 S. Ct. 1960 (2019).

<sup>25</sup> 554 U.S. 570 (2008).

<sup>26</sup> 561 U.S. 742 (2010).

<sup>27</sup> 577 U.S. 411 (2016).

<sup>28</sup> See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition* (Jan. 26, 2023) (unpublished manuscript) (on file with the Northwestern University Law Review), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4338811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811) [<https://perma.cc/4LHC-NQ55>].

<sup>29</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129 (2022).

<sup>30</sup> See *supra* notes 4–8 and accompanying text.

<sup>31</sup> For an early reading of *Heller* along these lines, which anticipated *Bruen*'s analysis, see *State v. Sieyes*, 225 P.3d 995, 1005 (Wash. 2010).

<sup>32</sup> See *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937).

jury trial in civil cases, based on the text: Lawsuits seeking only equitable relief aren't "[s]uits at common law" to which the right attaches.<sup>33</sup>

But there's generally no possibility of a strict scrutiny justification for limiting jury trials: Even if the government, for instance, concludes that in some places juries wouldn't fairly decide hate crime cases or drug cases, it can't just deny jury trials on the grounds that the denial is narrowly tailored to serve a compelling government interest. It must instead honor the jury trial right, on the theory that the Sixth and Seventh Amendments embody the results of the Framers' balancing of the interests, and legislatures and courts can't now rebalance those interests.

Indeed, the Civil Rights Act of 1964 initially authorized only equitable remedies and denied plaintiffs compensatory and punitive damages, likely because Congress thought that many juries wouldn't fairly decide discrimination cases;<sup>34</sup> but Congress couldn't have avoided this by just authorizing damages awards without juries. Likewise, some other rights, such as the privilege against self-incrimination, cannot be restricted on compelling government interest grounds.<sup>35</sup> The same now applies to the right to keep and bear arms.

### III

#### *BRUEN* LEAVES ROOM FOR UPHOLDING RESTRICTIONS THAT ONLY MODESTLY BURDEN THE RIGHT TO BEAR ARMS

*Bruen* did not foreground the burden threshold for right-to-bear-arms violations the way it stressed the scope inquiry. But the Court did suggest that some arms restrictions would indeed be constitutional on the grounds that they impose only modest burdens. This is particularly clear in footnote nine of the majority's opinion, which upheld licensing requirements for carrying guns:

Because [forty-three states' "shall-issue"] licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." And they likewise appear to contain only "narrow, objective, and definite standards" guiding licensing officials . . . . That said, because any permitting scheme can be

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<sup>33</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989).

<sup>34</sup> George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 738 (2015).

<sup>35</sup> See, e.g., *Elliott v. State*, 824 S.E.2d 265, 295 (Ga. 2019).



put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.<sup>36</sup>

Of course, licensing requirements do interfere in some measure with the right to carry guns: They impose at least *some* “wait times” and *some* “fees.” Nor did the Court suggest that longstanding tradition or history supported such licensing requirements.

Rather, the Court apparently reasoned that a modest burden, which does not “prevent” the exercise of the right, would be constitutional, at least so long as it serves the traditionally recognized government interest in “ensur[ing] . . . that those bearing arms . . . are . . . ‘law-abiding, responsible citizens.’” Modest, “[non-]exorbitant fees” would be constitutional, as would “[non-]lengthy wait times.”<sup>37</sup>

And this inquiry into the magnitude of the burden is reflected in the Court’s more general discussion. The Court stressed that restrictions on public carrying significantly burden the right to keep and bear arms for self-defense: “After all, the Second Amendment guarantees an ‘individual right to possess and carry weapons in case of confrontation,’ and confrontation can surely take place outside the home.”<sup>38</sup> Self-defense has to take place where the “self” happens to be;<sup>39</sup> because of this, restrictions on carrying outside the home concretely burden the right, and that concrete burden (coupled with the right’s historical scope) helps explain why the right to bear arms extends outside the home.

Yet the Court distinguished some historically recognized gun controls on the grounds that “[n]one of these restrictions imposed a substantial burden on public carry analogous to the burden created by New York’s restrictive licensing regime.”<sup>40</sup> “[T]he burden these surety statutes may have had on the right to public carry was likely too insignificant to shed light on New York’s proper-cause standard.”<sup>41</sup> Indeed, the burden inquiry might be part of the historical scope of Second Amendment protection: American right-to-bear-arms law has reasoned that

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<sup>36</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138 n.9 (2022) (citations omitted).

<sup>37</sup> *Id.* (citation omitted).

<sup>38</sup> *Id.* at 2135 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

<sup>39</sup> Sixty-five percent of all rapes and other sexual assaults, for instance, happen outside the victim’s home, and half outside anyone’s home. The percentages are even greater for robberies and assaults. U.S. DEP’T OF JUST. BUREAU OF JUST. STATS., NATIONAL CRIME VICTIMIZATION SURVEY, 2008 STATISTICAL TABLES tbl. 61, <https://bjs.ojp.gov/content/pub/pdf/cvus08.pdf> [<https://perma.cc/6VEL-ELN7>].

<sup>40</sup> *Bruen*, 142 S. Ct. at 2145.

<sup>41</sup> *Id.* at 2149.



not all regulations amount to unconstitutional prohibitions for over 150 years,<sup>42</sup> with only a few departures.<sup>43</sup>

In considering the magnitude of the burden, *Bruen* builds on the analysis in *Heller*, where the Court struck down the handgun ban in part because of how burdensome it was: “Nothing about [Framing-era] fire-safety laws”—the laws that the dissent points to as evidence that the right to bear arms should be read as allowing handgun bans—“undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”<sup>44</sup> Likewise, in distinguishing the handgun ban from colonial laws that imposed minor fines for unauthorized discharge of weapons, the *Heller* Court pointed out that the colonial laws “provide no support for the severe restriction in the present case.”<sup>45</sup>

Earlier in the *Heller* opinion, the Court similarly justified striking down the handgun ban on the grounds that the ban was a “severe restriction.”<sup>46</sup> In the process, the Court favorably quoted an old case distinguishing permissible “regulati[on]” from impermissible “destruction of the right” and from impermissible laws that make guns “wholly useless for the purpose of defence.”<sup>47</sup> And the Court’s explanation of why the handgun ban is unconstitutional even if long guns are allowed is likewise consistent with an inquiry into how substantially a law burdens the right to bear arms:

It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is

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<sup>42</sup> See, e.g., *Owen v. State*, 31 Ala. 387, 388 (1858) (“That section was not designed to destroy the right, guarantied by the constitution to every citizen, ‘to bear arms in defense of himself and the State’; nor to require them to be so borne, as to render them useless for the purpose of defense. It is a mere regulation of the manner in which certain weapons are to be borne . . . .”); *Aymette v. State*, 21 Tenn. 154, 159 (1840) (“[A]lthough this right must be inviolably preserved, yet it does not follow that the Legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.”).

<sup>43</sup> For one such departure, see *Bliss v. Commonwealth*, 2 Litt. 90, 91–92 (Ky. 1822), which struck down a ban on concealed carry even though open carry was allowed, reasoning that “whatever restrains the full and complete exercise of [the right to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the constitution.”

<sup>44</sup> *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008).

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

<sup>46</sup> *Id.* at 629.

<sup>47</sup> *Id.*

readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>48</sup>

The Court is pointing out that handguns are popular for a reason: They are often the optimal self-defense tool, so bans on handguns make self-defense materially more difficult. The handgun ban, then, materially burdens the right to bear arms in self-defense. Such burden thresholds are common for other constitutional rights, such as the right to marry,<sup>49</sup> the right to expressive association,<sup>50</sup> the right to abortion (back when that right was recognized),<sup>51</sup> the right to religious exemptions,<sup>52</sup> the right to strong protection against even content-neutral speech restrictions,<sup>53</sup> and more.

In *Bruen*, the Court also said that the Second Amendment inquiry must focus on (1) “whether modern and historical regulations impose

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<sup>48</sup> *Id.* (citations omitted).

<sup>49</sup> *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (holding that heightened scrutiny must be applied “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right”).

<sup>50</sup> *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 683 (2000) (“The relevant question is whether the mere inclusion of the person at issue would ‘impose any serious burden,’ ‘affect in any significant way,’ or be ‘a substantial restraint upon’ the organization’s ‘shared goals,’ ‘basic goals,’ or ‘collective effort to foster beliefs.’” (citations omitted)).

<sup>51</sup> *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (O’Connor, Kennedy & Souter, JJ., plurality opinion) (holding that the right to abortion was violated when a law imposes “an undue burden . . . shorthand for the conclusion [it] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

<sup>52</sup> *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990) (“[T]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Gorsuch, J., concurring in the judgment); *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 761 N.W.2d 230, 232 (Mich. Ct. App. 2008).

<sup>53</sup> Content-neutral restrictions on speech are generally allowed, subject only to intermediate scrutiny, when they regulate only the “time, place, or manner” of speech and leave open “ample alternative channels” for speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The availability of ample alternative channels makes the restrictions into lesser burdens than a broader ban would be. *See generally* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 *HASTINGS L.J.* 867 (1994). Many of the cases recognizing First Amendment exceptions also reason partly that restrictions on certain speech only slightly burden the values that the Free Speech Clause protects. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (libel); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

a comparable [and comparably justified] burden on the right of armed self-defense,” and on (2) “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”<sup>54</sup> This too suggests that the magnitude of the burden matters.

But not just the magnitude of the burden matters, it appears—the reason for the burden also matters, which may end up reincorporating some sort of heightened scrutiny means-ends analysis into Second Amendment law, once the burden is found to be modest enough. Footnote nine, after all, stressed that the shall-issue laws burden the right for good reason: to support enforcement of constitutionally valid restrictions on gun ownership.<sup>55</sup>

The Court had earlier concluded, based on its understanding of the Second Amendment’s historical scope, that the right was limited to “law-abiding, responsible citizens.”<sup>56</sup> The “background check[s]” required by “these shall-issue regimes” support that limitation by making sure that the owners are indeed law-abiding and responsible in that sense.<sup>57</sup> And the “firearms safety course[s]” promote the limitation by training licensees to be “responsible” in the sense of being able to use concealed weapons safely, should the need arise; indeed, such courses also often teach people how to be “law-abiding,”<sup>58</sup> for instance, by discussing the often complicated rules related to when lethal self-defense is permitted.<sup>59</sup> These restrictions thus impose burdens that are both modest and justified by the scope of the right secured by the Second Amendment.

By way of comparison, fees that are higher than needed to administer the permitting system may be unconstitutional either (1) because they are “exorbitant” as an absolute matter or (2) because they are *not* “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens,’”<sup>60</sup> but might instead be designed simply to raise money or deter gun ownership.<sup>61</sup> Likewise, they would not be “comparably justified” to fees that are tailored just to the administration of the system.<sup>62</sup>

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<sup>54</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

<sup>55</sup> *Id.* at 2138 n.9.

<sup>56</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

<sup>57</sup> *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

<sup>58</sup> *Id.* at 2138 n.9 (majority opinion) (quoting *Heller*, 554 U.S. at 635).

<sup>59</sup> *See, e.g.*, N.C. GEN. STAT. ANN. § 14-415.12(a)(4) (2022) (requiring such courses to involve “instructions in the laws . . . governing the carrying of a concealed handgun and the use of deadly force”).

<sup>60</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

<sup>61</sup> *See infra* Section V.F.

<sup>62</sup> *Bruen*, 142 S. Ct. at 2133.

Of course, people will disagree about which burdens should normatively count as substantial — just as they have disagreed about which burdens on abortion rights count as substantial,<sup>63</sup> or about how ample the alternative channels left open by content-neutral time, place, or manner speech restrictions must be.<sup>64</sup> Indeed, some courts have tried to minimize the burden imposed by very substantial restrictions: For instance, the Fifth Circuit upheld a ban on 18-to-20-year-olds acquiring guns from licensed dealers in part on the grounds that this was “an age qualification with temporary effect. Any 18-to-20-year-old subject to the ban will soon grow up and out of its reach.”<sup>65</sup> Yet whatever one might say of a waiting period of a few days, a waiting period of nearly three years, even if literally “temporary,” is surely a serious burden.

It may also be hard to empirically determine just how burdensome a particular restriction might be. And of course restrictions that impose small burdens, when viewed individually, could end up amounting to a large burden.<sup>66</sup> The Court’s skepticism of even modest content-based speech restrictions may stem from this concern.<sup>67</sup> But the Court nonetheless does consider the substantiality of a burden in many cases, by focusing, for instance, on whether a content-neutral restriction “leaves open ample alternative channels”<sup>68</sup> for communication; the same might be feasible for gun controls, where courts can ask whether the restriction leaves open ample alternative means for effective armed self-defense.<sup>69</sup> And more broadly, *Bruen* and its toleration of some regulations, such as shall-issue licensing requirements, suggest that some inquiry into the magnitude of a given burden is indeed part of the Second Amendment test.

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<sup>63</sup> Compare, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886–87 (1992) (O’Connor, Kennedy & Souter, JJ., plurality opinion) (holding that a 24-hour waiting period for abortions is not a substantial burden on the right to abortion), *with id.* at 937 (Blackmun, J., dissenting).

<sup>64</sup> Compare, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 & n.30 (1984) (holding that a ban on posting leaflets on city-owned utility poles left open ample alternative channels, though the alternatives were likely considerably more expensive), *with id.* at 819 (Brennan, J., dissenting).

<sup>65</sup> *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012).

<sup>66</sup> See Volokh, *supra* note \*, at 1460.

<sup>67</sup> See *id.*

<sup>68</sup> E.g., *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (cleaned up).

<sup>69</sup> See Volokh, *supra* note \*, at 1460. Cf. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (acknowledging that “the city . . . would have violated [the right to bear arms] if it had banned *all* firearms,” and concluding that there is no reason to think “that by banning certain firearms [so-called ‘assault weapons’] ‘there is no stopping point’ and legislative bodies will have ‘the green light to completely ignore and abrogate an Ohioan’s right to bear arms’”).

## IV

*BRUEN* DID NOT OPINE ON THE GOVERNMENT AS PROPRIETOR,  
EMPLOYER, OR CONTRACTOR

*Bruen* dealt with a law that restricted gun carrying nearly everywhere in the state of New York.<sup>70</sup> Because the law wasn't limited to government property, the Court had no occasion to decide whether special rules should apply to such property, or to the government imposing rules on employees or contractors.

But the Court has long recognized that individual rights claims may play out differently when government property is involved (setting aside property traditionally open to the public, such as streets, sidewalks, and parks). That doctrine is especially well-developed for the freedom of speech, where there are special rules for nonpublic forum property, as well as for government employees, contractors, and public-school students.<sup>71</sup> Likewise, Fourth Amendment law gives the government greater authority to search government employees' offices and the property that K-12 students bring to school.<sup>72</sup>

When the Court recognized a right to abortion, it similarly concluded that the right didn't extend to government-owned hospitals or even hospitals built on land leased from the government.<sup>73</sup> And when the Court recognized a Free Exercise Clause right to religious exemptions from generally applicable laws, it likewise treated government property differently: Just as the Free Speech Clause doesn't protect a right to solicit a state fair, so the Free Exercise Clause did not protect a right to do so for religious purposes.<sup>74</sup>

This might offer an alternative justification for some of the "sensitive places" restrictions on gun carrying mentioned in *Bruen*, since the most often discussed "sensitive places" tend to be government property, such as "legislative assemblies, polling places, . . . courthouses," and

<sup>70</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122–23 (2022).

<sup>71</sup> *See* *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021).

<sup>72</sup> *See* *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

<sup>73</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989).

<sup>74</sup> *See* *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 652–53 (1981); *see also* *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022) (Thomas, J., concurring) (noting that "the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public"); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. REV.* 1465, 1495 n.85 (1999) (citing lower court cases that read the Free Exercise Clause as providing less protection from neutral, generally applicable employment rules than would be provided as to neutral, generally applicable laws).

“schools.”<sup>75</sup> But the rationale would be less about the history and tradition of gun regulation and more about the broader history and tradition of recognizing the government’s right to exercise some (though not all) of the rights of ordinary property owners. And in at least some situations—for instance, when it comes to government employers’ restrictions on the conduct of their employees—the rationale may also stem from a judgment that the government may often require one to surrender some part of one’s constitutional rights (though again not the entirety of those rights) as a condition of getting a government paycheck.<sup>76</sup>

At the same time, on one type of government property the interest in having guns for self-defense may be especially strong: public housing. Though *Bruen* held that the right to keep and bear arms extends beyond the home, that right certainly extends into the home, and the case for it seems at least as strong for government-owned homes as for privately owned homes. Indeed, the First and Fourth Amendments likely apply to the inside of public housing, much the same way as they apply to privately owned homes.<sup>77</sup> Any concern about bullets lethally penetrating walls would be best satisfied by requirements that firearms in public apartment buildings use ammunition that doesn’t substantially risk this—the shot used in many shotguns, or special frangible ammunition in handguns.<sup>78</sup>

Similarly, while the government likely has considerable power to control what employees and contractors do while performing government functions, that power might not be unlimited, especially when the

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<sup>75</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022). Even privately owned polling places are loaned out for a government function on election day, and are thus treated as government property. *See, e.g., Minn. Voters All.*, 138 S. Ct. at 1886.

<sup>76</sup> *See, e.g., Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion); *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

<sup>77</sup> *See, e.g., Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (striking down ban on gun possession in common areas of public housing, which *a fortiori* would invalidate bans on gun possession in the resident’s own apartment); *Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (holding that the Fourth Amendment barred warrantless sweeps through public housing projects); *Resident Action Council v. Seattle Hous. Auth.*, 174 P.3d 84 (Wash. 2008) (evaluating restriction on public housing residents’ posting materials on the outside of their apartment doors the same way the U.S. Supreme Court had evaluated restriction on private residents’ rights to post materials in their windows). *Resident Action Council* involved the outside of public housing units, but its reasoning would apply at least as forcefully to speech inside such units. As to universities, compare *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 155 (Fla. Dist. Ct. App. 2015) (upholding ban on possession on university campuses under a “sensitive places” rationale), *Wade v. Univ. of Mich.*, No. 330555, 2023 WL 4670440, at \*8–10 (Mich. Ct. App. July 20, 2023) (likewise), and *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d. 365, 370 (Va. 2011) (likewise), with *La. Op. Att’y Gen. No. 94-131* (1994) (suggesting that the Second Amendment protects university students’ right to possess guns in dorm rooms).

<sup>78</sup> *See Volokh, supra note \**, at 1531 n.365.

employees and contractors are working away from government property. Consider, for instance, restrictions on gun possession by foster parents: On the one hand, they are paid by the government to take care of children who are wards of the state; on the other, they do this in their own homes, and in other places where defending themselves (and the children) may be required. Thus, the Seventh Circuit remanded a case involving restrictions on foster parents for consideration of both the historical scope of the right to bear arms post-*Bruen* and “the interaction of *Bruen* and the unconstitutional conditions doctrine, including but not limited to the employment context.”<sup>79</sup>

## V

### IMPLICATIONS FOR PARTICULAR GUN CONTROLS: WHAT, WHO, WHERE, HOW, WHEN

The justification categories described above play out differently for different restrictions; for the sake of brevity, I will only touch on a few—I discuss others at greater length in *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*<sup>80</sup> (the analysis of which largely remains applicable after *Bruen*).

#### A. “What” Bans: Bans on Categories of Weapons or Weapons-Related Items

Whether a ban on possessing a particular item is constitutional is, after *Bruen*, generally a matter of *scope*. The Court has continued to take the view that “dangerous and unusual weapons” that are not “in common use” are outside the scope of the Second Amendment,<sup>81</sup> though it has not resolved some of the recurring questions that arise about what counts as “common use,” e.g.:

- Does “typically possessed by law-abiding citizens for lawful purposes”<sup>82</sup> require that the typical possessor of the weapon be a law-abiding citizen with lawful purposes, or that possession of the weapon be a typical (that is, common) practice? A rare weapon that’s

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<sup>79</sup> *Miller v. Smith*, No. 22-1482, 2023 WL 334788, at \*1 (7th Cir. Jan. 20, 2023); *see also* *Lafferty v. Amundson*, No. 2021AP1958, 2023 WL 3487819, at \*1 (Wis. Ct. App. May 17, 2023) (vacating and remanding, based on *Bruen*, a lower court’s rejection of two foster parents’ constitutional challenge to “firearm storage requirements” specifically placed on foster parents).

<sup>80</sup> Volokh, *supra* note \*.

<sup>81</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

<sup>82</sup> *Heller*, 554 U.S. at 625.



overwhelmingly used for lawful purposes (e.g., an expensive or antique hunting rifle) would fit the first definition but not the second.

- Just who is the typical possessor of the weapon, given that one can hardly do a survey of owners of a particular kind of weapon, asking them whether they possess it for lawful purposes?

- How specifically should the weapon category be defined? Handguns, shotguns, rifles, and knives, for instance, are each in common use, but particular brands of each are less common, and some are uncommon, simply because they come from small companies or are of unusual caliber or design.<sup>83</sup>

The Court has also recognized that the scope of Second Amendment protection extends not just to firearms but to “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” including stun guns.<sup>84</sup> The same principle would apply to many edged weapons,<sup>85</sup> blunt weapons,<sup>86</sup> and even nunchaku.<sup>87</sup> And body armor should also qualify, given *Heller*’s favorably citing Samuel Johnson’s definition of “arms” as including both “[w]eapons of offence” and “armour of defence.”<sup>88</sup>

Bans on particular categories of weapons or items might also be justified on the theory that they impose a low *burden*, if they leave people ample and pretty much equally effective alternatives for self-defense.<sup>89</sup> More on that below.

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<sup>83</sup> For more, see Volokh, *supra* note \*, at 1479–80.

<sup>84</sup> *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (quoting *Heller*, 554 U.S. at 582); *see also Ramirez v. Commonwealth*, 94 N.E.3d 809, 809 (Mass. 2018) (striking down state statute barring possession or carrying of stun guns).

<sup>85</sup> *Teter v. Lopez*, No. 20-15948, 2023 WL 5008203, at \*8 (9th Cir. Aug. 7, 2023); *Zaitzeff v. City of Seattle*, 484 P.3d 470, 475–76 (Wash. 2021). *Zaitzeff* ultimately upheld a restriction on public carrying of edged weapons under intermediate scrutiny, partly because it only applied outside the home, *id.* at 478, but that aspect of *Zaitzeff* appears to be no longer good law given *Bruen*.

<sup>86</sup> *But see Fouts v. Bonta*, 561 F. Supp. 3d 941, 945 n.7 (S.D. Cal. 2021) (concluding that the Second Amendment “protects non-firing arms such as electronic stun guns, nunchakus, and cavalry swords,” but holding that bans on billy clubs were sufficiently longstanding to be constitutional), *vacated and remanded*, No. 21-56039, 2022 WL 4477732 (9th Cir. Sept. 22, 2022) (remanding for consideration in light of *Bruen*).

<sup>87</sup> *Maloney v. Singas*, 351 F. Supp. 3d 222, 234 (E.D.N.Y. 2018).

<sup>88</sup> *Heller*, 554 U.S. at 581. *Contra United States v. Davis*, 906 F. Supp. 2d 545, 557 n.6 (S.D. W. Va. 2012) (holding that, despite the definitions cited in *Heller*, “the assertion that [the Second Amendment] right extends to body armor is, at best, a novel reach and, at worst, a potential diminution of the cherished right itself”); *Bell v. United States*, No. CIV.A. 13-5533, 2013 WL 5763219, at \*4 (E.D. Pa. Oct. 24, 2013) (“It is not clear whether body armor constitutes ‘arms’ as used in the Second Amendment.”), *aff’d*, 574 F. App’x 59 (3d Cir. 2014).

<sup>89</sup> Several cases, for instance, have upheld bans on certain kinds of knives by noting that the bans covered only narrow categories of knives. *See People v. Williams*, 106 N.Y.S.3d 738, 740 (Columbia Cnty. Ct. 2019) (“metal knuckle knives”); *People v. Taylor*, 99 N.Y.S.3d 596, 600 (N.Y. Crim. Ct. 2019) (“gravity knives”); *Teter v. Connors*, 460 F. Supp. 3d 989, 1003–04

## 1. *Bans on Guns Without Serial Numbers, Guns Without Enough Metal Parts, Etc.*

Such restrictions appear to be likely constitutional because they don't materially burden the right to keep and bear arms in self-defense. As with the shall-issue licensing rules that *Bruen* said are constitutional, these restrictions "do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right[s]"<sup>90</sup> and are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'"<sup>91</sup> because they make illegal uses of the guns easier to identify.<sup>92</sup>

To be sure, the rules apply to otherwise law-abiding people as well as others. Some people might want to possess such guns for privacy reasons, or because they enjoy manufacturing their own guns in particular ways. But of course, shall-issue licensing requirements burden law-abiding people as well. It is enough, under *Bruen*, that regulations impose a light burden and are designed to prevent non-law-abiding or irresponsible use.<sup>93</sup>

## 2. *Bans on "Assault Weapons"*

So-called "assault weapons" are not materially more dangerous than other semiautomatic firearms:

The AR-15's rate of fire is virtually identical to non-banned semiautomatic handguns, rifles, and shotguns. Its accuracy is better than some firearms but worse than others. Like any rifle, its bullets typically cause more serious wounds than handguns, but not as serious wounds as larger-caliber hunting and target rifles. And while the AR-15 has features that make it well-suited for home defense, those features do not necessarily make it far more deadly than other firearms in the hands of mass shooters. To be sure, "assault weapons" like the AR-15 have been used in some high-casualty mass public shootings, but the data does not tell us whether the casualty rate in those shootings is due to

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(D. Haw. 2020) ("butterfly knives"). One other case also upheld a ban on a narrow category of knives on scope grounds. *Commonwealth v. Pineiro*, No. WOCR2016474, 2019 WL 4017038, at \*2 (Mass. Super. Ct. July 31, 2019) (concluding that switchblades are "dangerous and unusual" and therefore unprotected).

<sup>90</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 n.9 (2022) (citation omitted).

<sup>91</sup> *Id.* (citation omitted).

<sup>92</sup> *But see* *Rigby v. Jennings*, No. 21-1523, 2022 WL 4448220 (D. Del. Sept. 23, 2022) (striking down such a ban on scope grounds, but without discussing whether the ban substantially burdened the right to keep and bear arms in self-defense).

<sup>93</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

weapon type or to other factors such as shooter intent or skill, the duration and location of the shooting, or victim characteristics, location, or posture.<sup>94</sup>

Definitions of assault weapons reflect this functional similarity to other semiautomatic weapons: They often focus on features that have little relation to dangerousness, such as folding stocks, pistol grips, bayonet mounts, flash suppressors, or (for assault handguns but not assault rifles) magazines that attach outside the pistol grip or barrel shrouds that can be used as handholds.<sup>95</sup> And such weapons are also not unusual, and indeed are in common use: A recent study reports that “30.2% of gun owners, about 24.6 million people, have owned an AR-15 or similarly styled rifle, and up to 44 million such rifles have been owned.”<sup>96</sup> They thus do not seem to be categorically outside the scope of the Second Amendment’s protection. (“Assault weapons” should not be confused with fully automatic weapons, which are heavily regulated, and indeed nearly banned, by long-existing restrictions,<sup>97</sup> and are generally not included within the definitions of “assault weapons.”<sup>98</sup>)

The analysis of assault weapons bans should instead focus on the burden inquiry. On one hand, the availability of comparably lethal and effective substitutes for assault weapons—the very reason why assault

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<sup>94</sup> See E. Gregory Wallace, “Assault Weapon” Lethality, 88 TENN. L. REV. 1, 3, 68 (2020) (focusing on the AR-15, “the main target of ‘assault weapon’ bans”); see also, e.g., *id.* at 13–14, 25, 28, 34, 39, 44–45, 53 (explaining why the AR-15 is not materially more deadly than many other rifles that are not labeled “assault weapons”); GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 121–24 (1997). Even Carl Bogus, one of the leading supporters of broad gun control (including a near-total ban on handgun possession in large cities) and a former member of the Brady Campaign board, agrees that the focus on these features is “largely cosmetic.” Carl T. Bogus, *Gun Control and America’s Cities: Public Policy and Politics*, 1 ALB. GOV’T L. REV. 440, 463, 468 n.189, 469 (2008). Likewise, Charles Krauthammer, a proponent of total handgun bans, labeled the assault weapons ban “phony gun control,” and said that “[t]he claim of the advocates that banning these 19 types of ‘assault weapons’ will reduce the crime rate is laughable. . . . Dozens of other weapons, the functional equivalent of these ‘assault weapons,’ were left off the list and are perfect substitutes for anyone bent on mayhem.” Charles Krauthammer, *Disarm the Citizenry. But Not Yet.*, WASH. POST (Apr. 5, 1996), <https://www.washingtonpost.com/archive/opinions/1996/04/05/disarm-the-citizenry-but-not-yet/8efbb5da-fd5e-48c9-8a83-0fb41c728338> [<https://perma.cc/6MUN-797D>].

<sup>95</sup> Wallace, *supra* note 94, at 13–14, explains why those features have little relation to a weapon’s dangerousness.

<sup>96</sup> William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 20 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494) (May 13, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4109494](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494) [<https://perma.cc/VVE4-68FF>].

<sup>97</sup> See Volokh, *supra* note \*, at 1484 n.166.

<sup>98</sup> See, e.g., CAL. PENAL CODE § 30510 (“[A]ssault weapon’ means the following designated semiautomatic firearms . . .”).

weapons bans are unlikely to reduce killings—makes it hard to see how assault weapons bans would materially interfere with self-defense. The reasons the Court gave for why handgun bans are impermissible—that handguns are “easier to store in a location that is readily accessible in an emergency,” “cannot easily be redirected or wrestled away by an attacker,” “easier to use for those without the upper-body strength to lift and aim a long gun,” and “can be pointed at a burglar with one hand while the other hand dials the police”<sup>99</sup>—do not apply to assault weapons bans: Assault weapons are no more useful for self-defense than are many other handguns and rifles that aren’t prohibited by assault weapons bans. In this respect, such bans likewise “do not necessarily prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right[s].”<sup>100</sup>

Indeed, such bans likely impose considerably smaller burdens on the right to be armed for defensive purposes than do shall-issue requirements. Faced with a ban on “assault weapons,” I can instead immediately buy a wide range of guns that are comparably effective for self-defense, as easily available, and no more expensive (though I would indeed be denied the ability to buy the gun of my choosing, which I might find particularly convenient or enjoyable). Faced with a shall-issue licensing scheme, I will often have to pay money for training and licensing, I will often have to take many hours of training classes, and in any event I will face some delay.

Some argue that any ban on a class of commonly owned arms is *per se* unconstitutional: “A ban on a class of arms is not an ‘incidental’ regulation. It is equivalent to a ban on a category of speech.”<sup>101</sup> But this supposed equivalence is, I think, illusory: Bans on categories of speech are forbidden because speakers (and listeners) get sharply different value from different kinds of speech; being able to talk about dogs is no substitute for being able to talk about gods. Likewise, a right to marry must be a right to marry the person you want, not a right to marry *someone*—people aren’t fungible.

Yet it’s not clear that the right to buy contraceptives (still recognized by the Court’s precedents) must necessarily include the right to buy the very kind of contraceptive you most like—for aesthetic reasons or even for comfort reasons—if other, virtually identically functioning contraceptives are available. (I appreciate that a condom is quite different from the birth control pill, which is in turn different from an IUD; I’m speaking here about the difference between, say,

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<sup>99</sup> District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

<sup>100</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022).

<sup>101</sup> Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1285 (D.C. Cir. 2011).

brands of condoms that are essentially fungible in their operation and effectiveness.)

Likewise, say a state constitution secures a right to emigrate, as does the Vermont Constitution and as did the Pennsylvania Constitution of 1776.<sup>102</sup> Would a law that bans travel to Canada by train and instead requires that it be by bus violate that right? I doubt that it would, because the point of a right to emigrate is to let you leave, and various mechanisms for leaving seem to be largely fungible ways of exercising the right (even if one loves trains and hates buses).

The question then is to what extent constitutional law should view slightly different kinds of guns—for instance, two very similar rifles, one an “assault rifle” and one not—as fungible tools for accomplishing a goal, the way many of us view condoms or tools of emigration, or as importantly different from each other, the way we generally view speech or spouses. If the guns are fungible, then restricting one kind while leaving people free to have other, functionally nearly equivalent guns would not be seen as a burden that rises to the level of “infring[ing]” the “right of the people to keep and bear [a]rms.”<sup>103</sup> But if one kind of weapon is not fungible with others (as the Court in *Heller* found handguns not to be fungible with rifles or shotguns), then a restriction on that kind of weapon may indeed be seen as an unconstitutionally heavy burden on the right.

Yet even if the burden imposed by assault weapons bans is modest, perhaps it still isn’t adequately justified under the *Bruen* framework. Assault weapons bans, unlike shall-issue license requirements, are not “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’”<sup>104</sup> And it’s not clear that the “regulatory burden” of assault weapons bans, modest as it may be, “is comparably justified” to that imposed by “historical regulations.”<sup>105</sup>

### B. “Who” Bans: Bans on Possession by Certain Classes of People

The constitutionality of such bans following *Bruen* is likewise a matter of *scope*, chiefly related to the Court’s conclusion that the right is limited to “law-abiding, responsible citizens,”<sup>106</sup> and the Court’s repeated dicta that restrictions on “felons and the mentally ill” are

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<sup>102</sup> See also Daniel Francis, *Exit Legitimacy*, 50 VAND. J. TRANSNAT’L L. 297, 307 n.46 (2017) (collecting sources supporting such a right as a matter of political theory).

<sup>103</sup> U.S. CONST. amend. II.

<sup>104</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (citation omitted).

<sup>105</sup> *Id.* at 2118; cf. *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from the denial of certiorari) (suggesting that assault weapons bans may be unconstitutional).

<sup>106</sup> *Bruen*, 142 S. Ct. at 2131; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

“presumptively lawful regulatory measures.”<sup>107</sup> Whether the Second Amendment protects the rights of 18-to-20-year-olds to possess or acquire guns is likewise a matter of scope, being heavily litigated now with reference to the history of gun restrictions in the 1800s.<sup>108</sup>

### 1. *Felons*

Courts have nearly uniformly upheld laws denying gun rights to people who have been convicted of felonies, even nonviolent felonies, generally concluding that felons categorically lack Second Amendment rights.<sup>109</sup> The Third Circuit’s en banc opinion in *Range v. Attorney General* takes a different view, though: That decision held that a person who had pleaded guilty in 1995 to making a false statement to obtain food stamps—a felony under Pennsylvania law—retained his Second Amendment rights,<sup>110</sup> and its logic suggests that the same may apply even to violent felonies,<sup>111</sup> though a concurrence would have limited the ruling just to certain kinds of minor nonviolent crimes.<sup>112</sup> A few courts

<sup>107</sup> *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *Heller*, 554 U.S. at 626 & n.26.

<sup>108</sup> *Compare*, e.g., *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 418–40 (4th Cir. 2021) (concluding that gun possession and acquisition by 18-to-20-year-olds is within the scope of the Second Amendment), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), and *Jones v. Bonta*, 34 F.4th 704, 717–23 (9th Cir. 2022) (likewise), *vacated and reh’g en banc granted*, 47 F.4th 1124 (9th Cir. 2022), with *Nat’l Rifle Ass’n v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 700 F.3d 185, 200–04 (5th Cir. 2012) (concluding that gun possession by 18-to-20-year-olds is outside the scope of the Second Amendment). See also David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. UNIV. L.J. 495 (2019) (examining colonial and founding-era sources to conclude that extra gun regulations for young adults were considered permissible, but prohibitions on ownership were not).

<sup>109</sup> E.g., *Hamilton v. Pallozzi*, 848 F.3d 614, 629 (4th Cir. 2017); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114–18 (9th Cir. 2010); *United States v. Cropper*, 812 F. App’x 927, 930 (11th Cir. 2020).

<sup>110</sup> *Range v. Att’y Gen.*, 69 F.4th 96, 98, 103, 106 (3d Cir. 2023) (en banc).

<sup>111</sup> *Id.* at 103–06 (generally casting doubt on arguments that the Second Amendment’s scope excludes felons).

<sup>112</sup> *Id.* at 110 (Ambro, J., concurring) (concluding that the federal felon-in-possession ban “fits within our Nation’s history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society,” and joining the majority “with the understanding that it speaks only to [Range’s] situation, and not to those of murderers, thieves, sex offenders, domestic abusers, and the like”); see also *Binderup v. Att’y Gen.*, 836 F.3d 336, 351 (3d Cir. 2016) (en banc) (“[T]o determine whether the Challengers are shorn of their Second Amendment rights, *Heller* requires us to consider the maximum possible punishment but not to defer blindly to it.”); *Miller v. Sessions*, 356 F. Supp. 3d 472, 477–83 (E.D. Pa. 2019) (concluding that courts deciding felons’ Second Amendment claims should consider “(1) whether the state legislature classifies the offense as a felony or a misdemeanor; (2) whether the offense was violent; (3) the actual punishment imposed; and (4) any cross-jurisdictional consensus regarding the offense’s seriousness”); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (leaving open the possibility of an exception for minor crimes in a future case); *United States v. Williams*, 616 F.3d 685,



have suggested that people convicted only of sufficiently minor felonies retain their Second Amendment rights.

Bans on felons possessing guns do seriously burden people's abilities to satisfy their "ordinary self-defense needs."<sup>113</sup> The felons themselves may of course have to lawfully defend themselves. And bans that ostensibly limit just felons may also affect their housemates (spouses, lovers, and others), since the housemates' possessing a gun may be seen as allowing the felon to "constructive[ly] possess[]" the gun in the shared home,<sup>114</sup> and thus as criminally aiding the felons' illegal possession.<sup>115</sup> It seems quite likely that the Court will have to resolve these questions soon, given the circuit split created by the Third Circuit's *Range* decision.

## 2. *Subjects of Restraining Orders and "Red Flag" Orders*

Courts sometimes suspend gun rights even in the absence of criminal convictions. One area is so-called "red flag" laws, which generally require a finding that the defendant is dangerous to himself or to others, though the finding need not be made under the "beyond a reasonable doubt" standard required for a criminal conviction; those laws have been carefully explored by others.<sup>116</sup> Another area is domestic restraining orders issued based on a finding, again not beyond a reasonable doubt, that the defendant has acted violently or threatened violence; I discuss those elsewhere.<sup>117</sup>

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693–94 (7th Cir. 2010) (same); *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (arguing a ban on felony possession is unconstitutional as applied to an individual convicted of mail fraud); *Folajtar v. Att’y Gen.*, 980 F.3d 897, 914–15 (3d Cir. 2020) (Bibas, J., dissenting) ("Historically, Second Amendment rights were limited for dangerous—but not nondangerous—felons."); Volokh, *supra* note \*, at 1498–99 & n.224 (citing some earlier cases); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. REV. 249, 251 (2020) ("[P]rohibitions on violent felons may be presumptively lawful under *Heller*, but prohibitions on nonviolent felons contradict the original understanding of the Second Amendment.").

<sup>113</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2150 (2022).

<sup>114</sup> *Cf. Volokh, supra* note \*, at 1499; *State v. Beeman*, 417 P.3d 541, 543–44 (Or. Ct. App. 2018) (suggesting that the constructive possession doctrine may in some measure be limited by the Second Amendment).

<sup>115</sup> Some jurisdictions allow criminal liability for knowingly aiding another's conduct, without requiring purposeful aiding. Volokh, *supra* note \*, at 1499 n.226. And many jurisdictions allow civil liability for keeping a firearm where someone with a violent past might be able to access it. *Id.*

<sup>116</sup> *See, e.g., David B. Kopel, Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39 (2021) (discussing the various due process, enforcement, and other issues that red flag statutes have instigated).

<sup>117</sup> *See Volokh, supra* note \*, at 1505–06. Some courts have allowed such restrictions (including when an order does not expressly ban gun possession but rather triggers 18 U.S.C. § 922(g)(8), which bans gun possession by those subject to such an order) precisely because



But other such orders are entered even without a finding of violence, perhaps just based on repeated unwanted phone calls or e-mails, alleged libel, and the like.<sup>118</sup> A civil finding of such nonviolent conduct shouldn't, I think, suffice to strip a defendant of a constitutional right, whether permanently or for months or years.<sup>119</sup>

### 3. *The Mentally Ill*

As noted above, the Court has said that the “mentally ill,” alongside “felons,” are presumptively excluded from the scope of the Second Amendment.<sup>120</sup> But while the word “felon” refers to past behavior, “the mentally ill” refers to the present, which suggests that people who are no longer mentally ill may regain their Second Amendment rights. This might pose problems for 18 U.S.C. § 922(g)(4), which on its face covers anyone who has been adjudicated mentally incompetent in certain ways, with only limited mechanisms available for people to regain their rights.<sup>121</sup>

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they are based on a finding of violence, which (the theory goes) takes the defendant outside the scope of the Second Amendment. *See, e.g.*, *United States v. Kays*, No. CR-22-40-D, 2022 WL 3718519, at \*4 (W.D. Okla. Aug. 29, 2022) (taking this view post-*Bruen*); *United States v. Boyd*, 999 F.3d 171, 187–88 (3d Cir. 2021); *Wargocz v. Brewer*, No. 02-17-00178-CV, 2018 WL 4924755, at \*9 (Tex. App. Oct. 11, 2018); *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1023–24 (E.D. Wis. 2008); *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001). *But see* *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at \*8–12 (W.D. Tex. Nov. 10, 2022) (rejecting this view post-*Bruen*), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023).

<sup>118</sup> *See* Volokh, *supra* note \*, at 1503–07; Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 HARV. J. L. & PUB. POL'Y 147, 153–61 (2022).

<sup>119</sup> *See, e.g.*, *Dean v. Bevis*, 322 So. 3d 167, 172 (Fla. Ct. App. 2021) (concluding that firearms prohibition in anti-stalking order was unconstitutional, because plaintiff's “allegations do not show that [defendant] posed a significant danger to [plaintiff] or anyone else for personal injury based on his possession of a firearm”); *United States v. Bena*, 664 F.3d 1180, 1185 (8th Cir. 2011) (noting the question but concluding that there was no need to resolve it in that case). *But see* *Altafulla v. Ervin*, 189 Cal. Rptr. 3d 316, 323–25 (Ct. App. 2015) (upholding California's categorical ban on gun possession by people subject to domestic restraining orders, even though that ban doesn't require a finding of violence or threatened violence).

<sup>120</sup> *See* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2007); *see also* *Ramirez v. Commonwealth*, 94 N.E.3d 809, 813 (Mass. 2018).

<sup>121</sup> *See, e.g.*, *United States v. Tucker*, 47 F.4th 258, 261 (5th Cir. 2022) (reserving this question); *Beers v. Att'y Gen.*, 927 F.3d 150, 157–59 (3d Cir. 2019) (holding that people who were once adjudicated mentally incompetent do not regain Second Amendment rights), *vacated as moot sub nom.* *Beers v. Barr*, 140 S. Ct. 2758 (2020); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 687–88, 699 (6th Cir. 2016) (holding that these individuals sometimes might regain such rights); *Mai v. United States*, 974 F.3d 1082, 1084 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (arguing that, though Second Amendment rights can be limited based on “present-day [mental] impairments,” they cannot be limited once there is a “finding that [the person] is no longer mentally ill or dangerous”). *Bruen's* rejection of the countervailing-government-interest rationale implicitly overrules those

#### 4. *Illegal Drug Users*

The Fifth Circuit recently held that at least some drug users had a Second Amendment right to possess guns, notwithstanding the federal ban on gun possession by anyone “who is an unlawful user of or addicted to any controlled substance,”<sup>122</sup> concluding that such drug users were not outside the Second Amendment’s historical scope. People who are actually under the influence of drugs, the court concluded, “may be comparable to a mentally ill individual whom the Founders would have disarmed.”<sup>123</sup> But “while sober,” such people are “like the repeat alcohol user in between periods of drunkenness,” who have not historically been stripped of their Second Amendment rights.<sup>124</sup>

##### C. “Where” Bans: Prohibition on Possession in Certain Places

Such bans, following *Bruen*, would be considered under the “sensitive places” exception (which the Court has concluded is part of the scope of the Second Amendment),<sup>125</sup> but for some places the government’s role as proprietor may also justify some extra power, as it does for the First Amendment and other rights.<sup>126</sup>

##### D. “How” Restrictions: Rules on How Guns Are To Be Stored or Carried

Here too the focus post-*Bruen* would need to be on the burden (unless there is a close historical analog that justifies the particular restriction); the question should be whether the requirement materially interferes with people’s ability to defend themselves, including in situations when seconds count.<sup>127</sup>

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decisions that rejected claims of the formerly mentally ill under intermediate scrutiny, such as *Mai*, and requires courts to focus instead on whether something about original meaning or history excludes such people from the scope of the right.

<sup>122</sup> *United States v. Daniels*, No. 22-60596, 2023 WL 5091317, at \*15 (5th Cir. Aug. 9, 2023).

<sup>123</sup> *Id.* at \*10.

<sup>124</sup> *Id.*

<sup>125</sup> For some recent work discussing the scope of this exception, see David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 206–07 (2018), and Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 461 (2019).

<sup>126</sup> See *supra* Introduction.

<sup>127</sup> *United States v. Masciandaro* upheld a requirement that any guns in parks be kept unloaded, on the theory that the requirement passed intermediate scrutiny, but also that it “[e]ft largely intact the right to possess and carry weapons in case of confrontation.” 638 F.3d 458, 474 (4th Cir. 2011) (cleaned up). But the intermediate scrutiny analysis doesn’t survive *Bruen*, and I think the burden is considerably greater than *Masciandaro* suggested.

E. “When” Restrictions: Rules on When People Are Temporarily Barred from Possessing Guns

1. Restrictions on Possession While Intoxicated

Some courts have upheld such restrictions under a countervailing interest theory, applying intermediate scrutiny,<sup>128</sup> a test that has been rejected by *Bruen*.<sup>129</sup> But the same result should be reachable as a matter of scope, recognizing that a restriction need only be a “representative historical analogue, not a historical twin”<sup>130</sup>: Restricting those who are permanently impaired as a result of illness or disability is analogous to restricting those who are temporarily mentally impaired as a result of intoxication—in both situations, “the person is unable to rationally exercise his right to bear arms and presents a danger to others.”<sup>131</sup> Indeed, the restriction on possession while intoxicated is a more modest burden than the restriction on possession by the mentally ill, both because it is temporary and because it is avoidable by the restricted person (simply by not getting intoxicated).

On the other hand, this reasoning should not be extended to prohibit “constructive possession,” in instances where a gun owner is drunk in their home where a gun is stored (but not immediately at hand). Such a constructive possession theory would effectively bar anyone who occasionally gets drunk at home from owning a gun, or would have to move it elsewhere before any occasional substantial drinking.<sup>132</sup>

2. Waiting Periods

*Bruen* authorizes modest delays before a person may exercise the right to carry guns,<sup>133</sup> and the same logic may apply to similar waiting

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<sup>128</sup> E.g., *State v. Christen*, 958 N.W.2d 746 (Wis. 2021); *State v. Weber*, 168 N.E.3d 468 (Ohio 2020). *But see* *People v. Deroche*, 829 N.W.2d 891 (Mich. Ct. App. 2013) (applying intermediate scrutiny but concluding that “the government cannot justify infringing on defendant’s Second Amendment right to possess a handgun in his home simply because defendant was intoxicated in the general vicinity of the firearm”).

<sup>129</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2129 (2022).

<sup>130</sup> *Id.* at 2133.

<sup>131</sup> *Weber*, 168 N.E.3d at 487–90 (Dewine, J., concurring in the judgment). *But see* *Christen*, 958 N.W.2d at 776 n.5 (Grassl Bradley, J., dissenting) (contending that *Heller*’s language about the mentally ill is “of no relevance in assessing the constitutionality of laws criminalizing the intoxicated bearing of firearms”); *id.* at 764–66 (Hagedorn, J., concurring) (arguing that gun possession by the intoxicated is constitutionally unprotected, but turning to specific historical evidence on the subject—which strikes me as relatively thin—rather than relying on the analogy to mental illness).

<sup>132</sup> *See* *Christen*, 958 N.W.2d at 758–59; *Deroche*, 829 N.W.2d at 897; *see also* *State v. Beeman*, 417 P.3d 541, 543–44 (Or. Ct. App. 2018) (declining to decide whether constructive possession can be constitutionally applied concerning prohibitions on the possession of firearms while intoxicated).

<sup>133</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

periods designed to verify that the person is authorized to possess guns. The Court has allowed some waiting periods for other rights, for instance to get a permit for a parade or large protest, to get a marriage license, or to get an abortion.<sup>134</sup> Yet again, the delays must be modest and “designed to ensure only that” gun carriers or perhaps gun owners “are, in fact, ‘law-abiding, responsible citizens.’”<sup>135</sup>

### F. Taxes, Fees, and Other Expenses

*Bruen* made clear that non-“exorbitant” fees are constitutionally permissible conditions on carry licenses.<sup>136</sup> Moderate fees and taxes for gun purchases would presumably be permissible as well, as would insurance requirements that impose a modest cost.

After *Heller* but before *Bruen*, courts upheld concealed carry fees of \$200<sup>137</sup> and a handgun purchase permit fee of \$340,<sup>138</sup> but struck down a \$1,000 handgun purchase permit fee.<sup>139</sup> Post-*Bruen* cases now must consider which fees (including ones of \$200 or \$340) constitute “exorbitant fees [that] deny ordinary citizens their right to public carry” or their right to possess the guns at home.<sup>140</sup> Fees that are closely connected to the costs of administering a permitting system might be more justifiable than ones that operate simply as taxes or as attempts to deter gun possession or carrying.<sup>141</sup> But even when dealing with fees that are tied to administrative costs, I think courts should recognize that “[t]he poorly financed [self-defense] of little people,” like their “poorly financed causes,”<sup>142</sup> deserves constitutional protection as much as the self-defense of the rich.

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<sup>134</sup> *Silvester v. Harris*, 843 F.3d 816, 832 (9th Cir. 2016) (Thomas, J., concurring); *Volokh*, *supra* note \*, at 1538–42.

<sup>135</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>136</sup> *Id.*

<sup>137</sup> *Maryland Shall Issue, Inc. v. Hogan*, 566 F. Supp. 3d 404, 437 (D. Md. 2021) (\$200).

<sup>138</sup> *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (\$340).

<sup>139</sup> *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 WL 5508998 (D. N. Mar. I. Sept. 28, 2016) (\$1,000).

<sup>140</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>141</sup> *See Kwong*, 723 F.3d at 165 (“[I]mposing fees on the exercise of constitutional rights is permissible when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity.”); *Volokh*, *supra* note \*, at 1543 (drawing analogies to similar permitting fees imposed on First Amendment-protected activities such as demonstrations and charitable fundraising).

<sup>142</sup> *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943); *see also* *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (noting the importance of preserving “cheap and convenient form[s] of communication[s]” that are particularly needed by “persons of modest means”).

### G. Restrictions on Sellers

*Heller* expressly endorsed “laws imposing conditions and qualifications on the commercial sale of arms,”<sup>143</sup> and both the *McDonald* plurality and *Bruen* reaffirmed that.<sup>144</sup> And this fits well with the scope and burden inquiries.

The Second Amendment is seen as a right of gun owners, not of gun sellers, a difference relevant to the scope inquiry. In this respect, it differs from the First Amendment, which protects publishers and bookstores in part because they themselves are seen as speaking by distributing their chosen material.<sup>145</sup> And many modest “conditions and qualifications” on commercial sale impose only a modest burden on buyers.<sup>146</sup> But when restrictions make it too hard or expensive for people to buy guns, they become unconstitutional as excessive burdens.<sup>147</sup>

### H. Restrictions on Training

For reasons similar to those just discussed, restrictions on shooting ranges should be evaluated by considering whether they substantially burden gun owners’ ability to train themselves.<sup>148</sup>

<sup>143</sup> District of Columbia v. *Heller*, 554 U.S. 570, 626–27 (2008).

<sup>144</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion); *Bruen*, 142 S. Ct. at 2162.

<sup>145</sup> See *Volokh*, *supra* note \*, at 1545 n.437.

<sup>146</sup> See, e.g., *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc) (upholding zoning rules that excluded all gun sellers from the county on the grounds that they didn’t substantially burden gun buyers in any practical sense, given the availability of nearby gun sellers); *Chi. Gun Club v. Village of Willowbrook*, No. 17 C 6057, 2018 WL 2718045, at \*6 (N.D. Ill. June 6, 2018) (upholding zoning rules in part because on the facts of the case there is no basis for “any practical assertion that the implicated right has been even moderately burdened”). Query whether such total exclusions from a municipality should be seen as going too far. Cf. *Schad v. Borough of Mount Ephraim*, 452 U.S. 59, 76 (1981) (rejecting zoning rules that excluded all live entertainment from a small town, though noting that there was “no evidence in this record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas”). Note: I was engaged to file an amicus brief in *Teixeira* opposing the constitutionality of the zoning rules.

<sup>147</sup> See, e.g., *United States v. Flores*, No. H-20-427, 2023 WL 361868, at \*5 & n.24 (S.D. Tex. Jan. 23, 2023) (distinguishing between minor, downstream costs to the firearm industry and laws that meaningfully, and thus unlawfully, burden on gun possession rights); *Pena v. Lindley*, 898 F.3d 969, 1009 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (using analogies to the First Amendment to distinguish between minor restrictions on the commercial sale of firearms and unconstitutionally excessive burdens on Second Amendment rights).

<sup>148</sup> See *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (“The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”); cf. *Chi. Gun Club*, 2018 WL 2718045, at \*8 (upholding a restriction because “the Second Amendment right of the public to train in firearm proficiency . . . has already been abundantly accommodated by nearby facilities,” and because “[p]laintiffs’ potential customers have a surplus of close and accessible gun ranges”).

*I. “Who Knows” Restrictions: Nondiscretionary Licensing, Background Checks, Registration, and Ballistics Tracking Databases*

*Bruen* endorsed nondiscretionary licensing regimes, under which those who would exercise the right to bear arms must disclose their identities to the government. And it did so based not on some history-based scope argument, but on the theory that such regimes are not substantial burdens on the right.<sup>149</sup> Ballistic tracking databases, which are likewise “designed to ensure only that” gun owners remain “law-abiding, responsible citizens”<sup>150</sup> (and to catch non-law-abiding owners), seem likely to be similarly constitutional.

Perhaps there is some limit on this, by analogy to other rights: People generally have a right to speak anonymously—because burdens on anonymous speech are seen as burdening the right to speak<sup>151</sup>—even though they can be required to get permits to hold large demonstrations.<sup>152</sup> There thus may be some room to argue that licensing and registration schemes for mere gun ownership (rather than gun carrying), especially ones that call for centralized storage of this information, are unconstitutional.<sup>153</sup>

*J. Restrictions on Gun Use*

*Heller* and *Bruen* do not speak directly to when people can *use* arms in self-defense. They presuppose a preexisting right to self-defense, which may be a constitutional right<sup>154</sup>: Twenty state constitutions expressly secure such a right, and right-to-bear-arms provisions may implicitly secure it.<sup>155</sup> But any such right would presumably reflect

<sup>149</sup> See *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>150</sup> *Id.*

<sup>151</sup> *E.g.*, *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334, 347 (1995).

<sup>152</sup> *E.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

<sup>153</sup> See *Heller v. District of Columbia*, 670 F.3d 1244, 1295 n.19 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (concluding that gun registration is generally unconstitutional, partly by analogy to the principles that “citizens may not be forced to register in order to exercise certain other constitutionally recognized fundamental rights, such as to publish a blog or have an abortion,” and distinguishing voter registration requirements on the grounds that they “serve the significant government interest of preventing voter fraud”); Volokh, *supra* note \*, at 1546–48 (discussing various range of rights as to which identification is forbidden and various others as to which it is permitted, and observing that this “leaves the question of what [right] the right to bear arms is most like”).

<sup>154</sup> See, *e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 664–65 (D.C. Cir. 2017) (“[T]he Second Amendment protects an individual right of responsible, law-abiding citizens to defend themselves.”).

<sup>155</sup> See generally Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 401–07, 414–15 (2007) (listing state constitutional provisions that provide a right to self-defense).

baseline traditional American self-defense law, including its various limitations;<sup>156</sup> for instance, American law has generally not allowed deadly self-defense against mere punches that don't risk serious bodily injury,<sup>157</sup> and there's no reason to think the Second Amendment changes that.

Likewise, there has long been a dispute in American law about whether people can use deadly force in self-defense in a public place when there is a completely safe avenue of retreat.<sup>158</sup> Whatever one thinks of that dispute as a policy matter, it isn't resolved by the Second Amendment and its state constitutional analogues.

## CONCLUSION

*Bruen* holds that the right to bear arms can't be overcome by "compelling governmental interests,"<sup>159</sup> once it is shown that the exercise of the right to bear arms is within the scope of the right, as defined by its text, original meaning, and history. But *Bruen* also leaves room for certain regulations that impose only minor burdens on the right, and perhaps for some regulations imposed by the government acting as property owner or employer. Courts and litigators should consider these possibilities, as well as the more prominent focus on text, original meaning, and history that *Bruen* is more commonly seen as requiring.

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<sup>156</sup> See, e.g., *United States v. Morsette*, 622 F.3d 1200, 1202 (9th Cir. 2010) ("[N]either [*Heller* nor *McDonald*] purports to change, or even to comment on, the law as to the definition of self-defense in a criminal case."); *Calderone v. City of Chicago*, No. 18 C 7866, 2019 WL 4450496, at \*3 (N.D. Ill. Sept. 17, 2019) ("Certainly, the right to be able to engage in self-defense also implies a right to the availability of the assertion of self-defense in legal proceedings. . . . But historical legal commentary and custom indicate that the question of whether a particular actual use of a gun constitutes self-defense is a question left to criminal and tort law, about which the Second Amendment is silent.") (paragraph break omitted), *aff'd*, 979 F.3d 1156 (7th Cir. 2020) (affirming on qualified immunity grounds).

<sup>157</sup> See Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak & Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 49 (2015).

<sup>158</sup> See, e.g., *Commonwealth v. Selfridge*, 2 Am. St. Trials 544 (Mass. 1806), reprinted in L.B. HERRIGAN & SEYMOUR D. THOMPSON, SELECT AMERICAN CASES ON THE LAW OF SELF-DEFENCE 1, 4, 17–18 (1874) (quoting one judge's grand jury charge and another judge's trial jury charge that disagreed on this question).

<sup>159</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126–27 (2022).