

IMPLEMENTING THE RIGHT TO KEEP AND BEAR ARMS  
FOR SELF-DEFENSE: AN ANALYTICAL FRAMEWORK  
AND A RESEARCH AGENDA

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*How should state and federal constitutional rights to keep and bear arms be turned into workable constitutional doctrine? I argue that unitary tests such as “strict scrutiny,” “intermediate scrutiny,” “undue burden,” and the like don’t make sense here, just as they don’t fully describe the rules applied to most other constitutional rights.*

*Rather, courts should separately consider four different categories of justifications for restricting rights: (1) Scope justifications, which derive from constitutional text, original meaning, tradition, or background principles; (2) burden justifications, which rest on the claim that a particular law doesn’t impose a substantial burden on the right, and thus doesn’t unconstitutionally infringe it; (3) danger reduction justifications, which rest on the claim that some particular exercise of the right is so unusually dangerous that it might justify restricting the right; and (4) government as proprietor justifications, which rest on the government’s special role as property owner, employer, or subsidizer.*

*I suggest where the constitutional thresholds for determining the adequacy of these justifications might be set, and I use this framework to analyze a wide range of restrictions: “what” restrictions (such as bans on machine guns, so-called “assault weapons,” or unpersonalized handguns), “who” restrictions (such as bans on possession by felons, misdemeanants, noncitizens, or 18-to-20-year-olds), “where” restrictions (such as bans on carrying in public, in places that serve alcohol, or in parks, or bans on possessing in public housing projects), “how” restrictions (such as storage regulations), “when” restrictions (such as waiting periods), “who knows” regulations (such as licensing or registration requirements), and taxes and other expenses.*

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INTRODUCTION

The Second Amendment, the Supreme Court has held, secures an individual right to keep and bear arms for self-defense.<sup>1</sup> Whether or not the federal right will be applied to the states, at least forty state constitutions secure a similar right.<sup>2</sup> But how should courts translate this right into workable constitutional doctrine?

1. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). It might also secure an individual right to keep and bear arms for other purposes as well, but that is a topic outside the scope of this Article.

2. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006). The number will likely rise to at least forty-one in 2010, when Kansas voters consider recasting the Kansas rights to bear arms as a clearly individual-rights provision. See Kan. S. Con. Res. 1611, 2009 Sess. (Kan. 2009), available at [http://www.kslegislature.org/bills/2010/2009\\_1611.pdf](http://www.kslegislature.org/bills/2010/2009_1611.pdf) (placed on the ballot by a 39–1 vote in the state senate and by a 116–9 vote in the state house). And the number might be increased by one more, to include Virginia, if one takes the view of a 2006 Virginia Attorney General’s opinion, Va. Op. Att’y Gen. No. 05-078 (2006) (treating the Virginia Constitution’s right to bear arms as individual). *But cf.* 1993 Va. Op. Att’y

In this Article, I offer a few thoughts towards answering this question (chiefly in Part I), and apply those thoughts to some areas in which the question needs answering (chiefly in Part II). I sometimes offer my views on how particular gun-rights controversies should be resolved, but more often I just suggest a structure for analyzing those controversies and chart an agenda for future research.

In particular, I argue that the question should not be whether federal or state right-to-bear-arms claims ought to be subject to strict scrutiny, intermediate scrutiny, an undue burden standard, or any other unitary test.<sup>3</sup> Rather, as with other constitutional rights, courts should recognize that there are four different categories of justifications for a restriction on the right to bear arms.

1. *Scope*. A restriction might not be covered by 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.

2. *Burden*. A restriction might only slightly interfere with rightholders' ability to enjoy the benefits of the right, and thus might be a burden that doesn't rise to the level of unconstitutionally "infring[ing]" the right.

3. *Danger Reduction*. A restriction might reduce various dangers (in the case of arms possession, chiefly the dangers of crime and injury) so much that the court concludes that even a substantial burden is justified. This is where talk of intermediate scrutiny or strict scrutiny would normally fit, though, as Part I.C argues, such labels likely obscure more than they reveal.

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Gen. 13 (concluding that "judicial interpretation of the Second Amendment . . . applies equally to" the Virginia right to bear arms provision, and concluding, given the federal Second Amendment caselaw of the time, that this meant that the Virginia right to bear arms was only a collective right). And it might rise by one more if Hawaii's right to bear arms is interpreted as an individual right, a matter that is not settled. See *State v. Mendoza*, 920 P.2d 357, 367 (Haw. 1996).

3. See, e.g., Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 CONST. L.J. 101, 172-73 (1995) (calling for strict scrutiny of state gun restrictions and intermediate scrutiny of federal gun restrictions); Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 113, 120 (suggesting that government regulation of machine guns may be constitutional if it "survive[s] strict scrutiny," and seemingly accepting strict scrutiny as the generally proper test for gun controls); Mark Tushnet, *Permissible Gun Regulations After Heller: Some Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1426 (2009) (predicting that courts "will circle around a standard of review akin to either rational basis with bite or intermediate scrutiny, and that the Supreme Court . . . will use rational basis with relatively weak bite"); Gerard E. Faber, Jr., Casenote, *Silveira v. Lockyer: The Ninth Circuit Ignores the Relevance and Importance of the Second Amendment in Post-September 11th America*, 21 T.M. COOLEY L. REV. 75, 89 (2004) ("Had the court recognized an individual right to bear arms, the [California assault-weapon ban] would be subject to strict scrutiny, a far more demanding standard.").

4. *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 behavior by recipients of its property.

Paying attention to all four of these categories can help identify the proper scope of government authority. For instance, even if some kinds of gun bans are presumptively unconstitutional, under something like strict scrutiny or a rule of per se invalidity, it doesn't follow that less burdensome restrictions must be judged under the same test. Conversely, the conclusion that certain kinds of restrictions should be upheld even when they might not pass muster under a demanding form of review shouldn't lead courts to entirely reject that demanding review for all restrictions.<sup>4</sup>

Breaking down the possible elements of the constitutional test into these categories can also tell us which analogies from one restriction to another are sound. For example, if the limitation on minors' possessing guns is a matter of scope—stemming from the background legal principle that minors' constitutional rights are narrower than adults' rights—this would suggest that the validity of bans on possession by minors offers little support for bans on possession of handguns by 18-to-20-year-olds.<sup>5</sup> On the other hand, if the limitation is a matter of the danger posed by ownership by relatively immature people, then the analogy between under-18-year-olds and 18-to-20-year-olds becomes more plausible.

And laying out these categories can help us notice and evaluate analogies to other constitutional rights. Many of the disputes that arise in the context of gun control debates are similar to those arising in other fields, such as free speech, abortion rights, and property rights. Consider, for instance, debates about whether the presence of ample alternative means for self-defense should justify a restriction on one means,<sup>6</sup> whether gun possession may be taxed,<sup>7</sup> or whether waiting periods are constitutional.<sup>8</sup> Understanding exactly why these types of restrictions are upheld or struck down elsewhere can inform the discussion about how they should be treated where gun rights are involved.

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4. Cf. Tushnet, *supra* note 3, at 1428–29 (implicitly assuming that courts will adopt a unitary test, and concluding that courts will opt for a deferential test rather than strict scrutiny, “because of concern that such a standard [strict scrutiny] imperils too many well-established . . . gun regulations” such as “[t]he ban on possession of guns by convicted felons”).

5. See *infra* Part II.B.5.b.

6. See *infra* Part I.B.

7. See *infra* Part II.F.

8. See *infra* Part II.E.3.

A few notes on the limits of this Article: First, let me repeat that this Article offers a framework for gun rights doctrine, and a research agenda for further inquiry about the constitutionality of some particular gun controls. It does not offer an exhaustive analysis of each regulation, or an answer about which regulations are sound. But I hope the framework, and some brief sketches of how the framework would apply in each area, will prove useful to those who are working on such questions.

Second, the Article focuses solely on the right to keep and bear arms for self-defense. The constitutional provisions I discuss may have other components,<sup>9</sup> for instance a right to keep arms that would deter government tyranny, or in seven states a “right to keep and bear arms . . . for hunting and recreational use.”<sup>10</sup> But those components are left for other articles.

Third, the framework that the Article proposes would lead to the upholding even of some laws that I think are unlikely to do much good, and may even do some harm. But not all unwise laws are unconstitutional; and, conversely, not all that is constitutionally permitted should in fact be implemented.

Fourth, the Article tries to discuss the right to bear arms under both the federal Constitution (whether or not the right is eventually incorporated against the states) and state constitutions. But state constitutions often have different wording and different histories: For instance, a general discussion of whether waiting periods are constitutional says little about the Florida right-to-bear-arms provision, which expressly authorizes a three-day waiting period.<sup>11</sup> Nonetheless, broadly discussing a multistate law of the right to bear arms—or of search and seizure, civil jury trial rights, and other constitutional rights—can be helpful, so long as we recognize that there may be differences among states significant enough to override any general theoretical framework we develop.

## I. A FRAMEWORK FOR THINKING ABOUT CONSTITUTIONAL RIGHTS DOCTRINE

Say a restriction is challenged under a constitutional rights provision, such as the freedom of speech, the right to jury trial, the right to marry, or the right to keep and bear arms. There are at least four general categories of reasons why the restriction might be upheld.

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9. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

10. 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.

11. FLA. CONST. art. I, § 8.

## A. Scope

Sometimes, a constitutional right isn't violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution. The restriction may still implicate some of the central concerns that prompted the recognition of the right, but the constitutional text, the original meaning, or our understanding of background constitutional norms may lead us to conclude that the right is narrower than its purposes may suggest.

### 1. Text

This is clearest when the right is expressly textually limited: If someone seeks a jury trial in a federal case in which an injunction is requested, he will lose because an injunction demand doesn't constitute a "suit[] at common law."<sup>12</sup> Much could still be said for a jury trial in such cases as a policy matter, but the constitutional text forecloses such arguments in Seventh Amendment cases.

Likewise, the First Amendment's protection of "freedom of speech" may well—for functional and original meaning reasons—extend to symbolic expression.<sup>13</sup> But at some point conduct may be so different from "speech" that it will not be protected, for instance when the conduct isn't in a conventionally expressive medium and isn't intended to or likely to convey a particular message.<sup>14</sup>

Similarly, a restriction on carrying concealed weapons can't violate the Colorado state constitutional right to keep and bear arms, which expressly states, "nothing herein contained shall be construed to justify the practice of carrying concealed weapons."<sup>15</sup> And a hypothetical Connecticut ban on gun possession by noncitizens can't violate the Connecticut Constitution, which secures a right to bear arms to "[e]very citizen."<sup>16</sup>

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12. U.S. CONST. amend. VII.

13. See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009).

14. See, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65–67 (2006).

15. COLO. CONST. art. II, § 13; *Douglass v. Kelton*, 610 P.2d 1067, 1069 (Colo. 1980); see also *Watson v. Stone*, 4 So. 2d 700, 701–03 (Fla. 1941) (concluding that then-existing provision that "the Legislature may prescribe the manner in which [arms] may be borne" allowed the legislature to require a license to carry a weapon in public); cf. *State v. Grob*, 690 P.2d 951, 953–54 (Idaho 1984) (applying a state constitutional clause authorizing the legislature to provide "minimum sentences for crimes committed while in possession of a firearm," and punish illegal "use of a firearm").

16. CONN. CONST. art. I, § 15.

## 2. Original Meaning

Those who believe that original meaning is relevant to constitutional interpretation (including those who see it as relevant but not dispositive) may also find a right's scope to be limited by the original meaning.<sup>17</sup> Thus, for instance, the Jury Trial Clause has been interpreted to exclude “petty crimes”—despite the text’s reference to “all criminal prosecutions”—because such an exception has apparently been accepted from the late 1700s to the present.<sup>18</sup> Similarly, the criminal procedure amendments have been interpreted to not apply to military justice, or to the detention of enemy combatants.<sup>19</sup> And *District of Columbia v. Heller* interpreted “arms” in light of what the Court saw as the Framing-era meaning of the term.<sup>20</sup>

## 3. Tradition

Some, especially Justice Scalia, view tradition as an important source of a right's scope. This could be because traditions that start near the Framing are evidence of original meaning.<sup>21</sup> Or it could be because “the principles adhered to, over time, by the American people”<sup>22</sup> are independently constitutionally relevant (though not necessarily dispositive, for instance if they clash with clear textual command or clearly demonstrated original meaning). In Justice Scalia's words,

The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining

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17. See, e.g., *Klein v. Leis*, 795 N.E.2d 633 (Ohio 2003) (relying on an originalist argument about the Ohio Constitution's right-to-bear-arms provision, which had been reenacted in 1874); *State v. Willis*, 100 P.3d 1218 (Utah 2004) (same as to the Utah provision, enacted in 1984); *King v. Wyo. Div. of Criminal Investigation*, 89 P.3d 341, 351–52 (Wyo. 2004) (same as to the Wyoming provision, enacted in 1889).

18. See *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 969–70 (1926).

19. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

20. 128 S. Ct. 2783, 2816–17 (2008).

21. See, e.g., *Printz v. United States*, 521 U.S. 898, 905–16 (1997); *Marsh v. Chambers*, 463 U.S. 783, 791–92 (1983).

22. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).



table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.<sup>23</sup>

Likewise, the Court has held that tradition is relevant by itself—even when it isn't evidence of original meaning—in determining which rights, whether substantive or procedural, are protected by the Due Process Clause.<sup>24</sup> And of course Burkeans, and those with Burkean tendencies (which judges tend to possess as a professional norm), tend to see tradition as a presumptive guide.

There has been less written about tradition as a guide to constitutional meaning than about original meaning as a constitutional guide. I suspect more scholars and judges think original meaning is presumptively normatively binding than think the same about tradition (as opposed to just following tradition because they tend to follow precedent). And I myself am not sure what to think about tradition as an independently binding constitutional norm. But it is a possible source for defining the scope of a constitutional right, especially given that the traditionalist Justice Scalia is the author of *Heller* and that *Heller's* approval of "longstanding" (but not Framing-era) restraints on felons and of concealed carry laws is consistent with Justice Scalia's broader endorsement of tradition.

#### 4. Background Legal Principles

Constitutional rights are drafted against a background of legal principles, often ones that aren't tied to the particular right. The freedom of speech,

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23. *Id.* at 95–96 (footnote omitted); see also Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173 (defending a similar approach in which tradition has independent constitutional significance); Michael W. McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682–85 (likewise).

24. *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997); *Medina v. California*, 505 U.S. 437, 445–47 (1992).

for instance, generally doesn't include a right to speak on others' property, even though such speech is indeed restricted through government action (trespass law).<sup>25</sup> The freedom to hire a lawyer doesn't include a right to pay him with money that isn't rightly your own.<sup>26</sup> Likewise, the right to bear arms doesn't apply to possession of arms on private property against the property owner's wishes.<sup>27</sup> Nor does it preclude the seizure of arms, alongside other property, in satisfaction of a money judgment against the owner, though some states do indeed statutorily exempt some weapons from such execution.<sup>28</sup>

One could argue that such actions are constitutional because trespassing or failing to satisfy judgments is so harmful that those laws trump the freedom of speech or the right to keep and bear arms. But I don't think that's right. Laws aimed at stopping greater harms, such as the risk of violence or interference with national war efforts, often don't trump those constitutional rights.<sup>29</sup> Rather, the actions described above are constitutional because constitutional rights have always been understood as involving a right to use one's own property to accomplish one's goal, not the property of others or the property that lawfully becomes that of others as a result of a lawsuit.<sup>30</sup> This is the background legal principle against which the rights have been enacted and interpreted.

The same is true as to who counts as a rightholder: Prisoners lose many constitutional rights, surely including the right to bear arms,<sup>31</sup> alongside much of their Fourth Amendment rights and Free Speech Clause rights.<sup>32</sup> That's not said in the text of the Constitution, but it's widely accepted as a background legal principle that was likely embodied in the original meaning and in longstanding tradition.

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25. See *Hudgens v. NLRB*, 424 U.S. 507 (1976). A few state courts take a different view under their state constitutions, but they are a small minority, see *State v. Viglielmo*, 95 P.3d 952, 963–64 (Haw. 2004) (discussing cases), and even those decisions apply only to a small set of private property (chiefly large shopping malls), see *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001).

26. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989).

27. See, e.g., *Winters v. Concentra Health Servs., Inc.*, No. CV075012082S, 2008 WL 803134, at \*4 (Conn. Super. Ct. Mar. 5, 2008).

28. See, e.g., *An Act to Protect the Owners of Firearms*, Jan. 26, 1869 (noting in the preamble that the act is partly justified by concerns about constitutional rights), quoted in *MATTHEW P. DEADY & LAFAYETTE LANE, THE ORGANIC AND OTHER GENERAL LAWS OF OREGON* 613 (Portland, E. Semple 1874) (codified as to the substance at OR. REV. STAT. § 18.362 (2007)).

29. See, e.g., *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

30. See, e.g., *Caplin & Drysdale*, 491 U.S. at 626.

31. See, e.g., *State v. Barnes*, 708 P.2d 414 (Wash. Ct. App. 1985).

32. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

Minors have some constitutional rights, like many aspects of the freedom of speech, but they don't have the right to sexual autonomy or to access sexually themed publications, and they have weaker versions of other rights, such as the right to marry or the right to abortion.<sup>33</sup> Noncitizens found outside the U.S. are seen as lacking Fourth Amendment rights;<sup>34</sup> the same logic would necessarily strip them of Second Amendment rights. Enemy combatants lack most constitutional rights,<sup>35</sup> though they have some due process rights once they are captured.<sup>36</sup>

All these scope restrictions reflect background legal principles reasonably assumed to be part of the original meaning of the right to bear arms, or of its meaning as traditionally understood. And this is so even if the principles were usually discussed or assumed in the context of rights generally, rather than being discussed with regard to the right to bear arms specifically.

#### 5. Why It's Helpful to Distinguish Scope-Based Restrictions From Burden-Based Restrictions or Reducing-Danger-Based Restrictions

Because scope-based restrictions often flow from particular drafting decisions, there is less need for courts to logically reconcile them with other restrictions, and less justification for arguing by analogy from those restrictions to others. If, for instance, courts rely on a danger reduction argument to conclude that a concealed carry ban is constitutional, that might well set a precedent for other restrictions justified by a desire to reduce danger (for instance, waiting periods for acquiring guns). But if courts conclude that a concealed carry ban is constitutional because the state constitution expressly excludes concealed carry from the right to bear arms, or because that has been seen as a traditional limitation on the right, that conclusion should offer little room for arguments by analogy. So long as neither the text nor tradition allows waiting periods, the textual or traditional endorsement of concealed carry bans offers little support for waiting periods.

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33. See *infra* Part II.B.5.b.

34. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

35. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (arguing that it can't be the case that "during military occupation irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments," since "[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment").

36. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

## B. Burden

### 1. Generally

A restriction may also be justified on the grounds that it imposes a less than substantial burden on the exercise of a right, and therefore doesn't unconstitutionally "infringe[]" the right even though it regulates the right's exercise.<sup>37</sup> The mildness of the burden, the argument would go, means that it's unnecessary for the government to prove that the law would indeed likely materially reduce some harm. Rather, the mildly burdensome law would be treated as categorically constitutional, at least so long as it is not outright irrational.

We see this approach in many constitutional doctrines. The government may require that people get a marriage license, and pay a modest amount for it, because these minor restrictions do not infringe the right to marry; the heightened scrutiny that's applied to substantial burdens on the right to marry isn't applied here.<sup>38</sup> More controversially, the government may require that a woman seeking an abortion be given certain information and that she wait twenty-four hours before the procedure because the Court has concluded that these are not "substantial obstacle[s]" to her exercising her right to get an abortion.<sup>39</sup> Similarly, religious freedom provisions that secure a substantive right to religious exemptions apply only to "substantial burden[s]" on religious practice.<sup>40</sup>

We likewise see a substantial burden threshold in the lower scrutiny applied to content-neutral restrictions on speech that regulate only the "time, place, or manner" of speech and leave open "ample alternative channels" for

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37. U.S. CONST. amend. II.

38. See *infra* note 428; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 683–84 (2000) (concluding that only a law that "serious[ly] burden[s]" or "significant[ly]" "affect[s]" or "substantial[ly] restrain[s]" a group's ability to express its views should be seen as violating the right of expressive association).

39. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885–87 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). I don't agree with the claim in Tushnet, *supra* note 3, at 1436, that "[t]o the extent that one can extract something from the abortion cases, it is that the undue-burden standard might require rational basis with bite, intermediate scrutiny, or more likely something in between." Rather, I read *Casey* as saying that if the law imposes a substantial burden—an inquiry that focuses on the magnitude of the burden, not the importance or legitimacy of the government interest—it is *per se* unconstitutional, and that if it doesn't impose a substantial burden (and isn't intended to impose a substantial burden), it is judged only under the rational basis test and is thus almost always constitutional.

40. See, e.g., *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 746 N.W.2d 105, 106 (Mich. 2008). For an excellent treatment of substantial burden thresholds, see Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994).

expression.<sup>41</sup> The availability of ample alternative channels makes the restrictions into lesser burdens than a broader ban would be. The restrictions' content neutrality provides a natural political check on their growth, since people with many different views will be affected by them; this political check will likely limit the risk that a particular kind of speech will be subjected to many small burdens that will add up to a larger burden.<sup>42</sup> And the restrictions' content neutrality makes the burden qualitatively less troubling to the Justices, because the restrictions aren't contrary to the equality norm that the Justices have sensibly read into the Free Speech Clause.<sup>43</sup>

As Part I.C.2.d below notes, the time, place, and manner inquiry requires *some* showing that even laws that impose only small burdens will reduce danger. In this respect, the time, place, and manner test is different from the substantial burden tests mentioned in the preceding paragraph. But it is still similar to those other tests in that it requires an inquiry into the magnitude of the burden in deciding what kind of danger reduction showing, if any, must be made.

Many of the cases upholding restrictions on low-value or no-value speech—such as false statements of fact, obscenity, fighting words, and child pornography—also reason that the restrictions impose only a slight burden on the values that the Free Speech Clause protects.<sup>44</sup> When the Court says that “there is no constitutional value” in false statements of fact, obscenity, or fighting words, it's suggesting that restrictions on such speech do not materially interfere with the marketplace of ideas, democratic self-government, or even constitutionally valuable self-expression, and thus do not substantially burden free speech rights.<sup>45</sup>

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41. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

42. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1305–10 (2005).

43. *Id.* at 1304–05.

44. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (explaining the false statements of fact exception by reasoning that “there is no constitutional value in false statements of fact,” because they do not “materially advance[] society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (doing likewise for the obscenity exception); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (doing likewise for the fighting words exception); *New York v. Ferber*, 458 U.S. 747 (1982) (doing likewise for the child pornography exception).

45. *Gertz*, 418 U.S. at 340. Some of these First Amendment decisions may also be partly “scope” cases, for instance when they rely on assertions about the historical exclusion of obscenity from constitutional protection, see, e.g., *Roth v. United States*, 354 U.S. 476, 482–85 (1957), or danger reduction cases, see, e.g., *Ferber*, 458 U.S. at 749, 757. But much speech that can cause comparable harms remains protected, on the premise that it is valuable, that restricting it would therefore substantially burden public debate, and that the speech therefore must be protected despite the harm it might cause. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending*

## 2. In Right-to-Bear-Arms Cases

A similar inquiry into the magnitude of the burden on a constitutional right is visible in *Heller's* discussion of why the handgun ban is unconstitutional. Consider, for instance, the Court's distinction between unconstitutional handgun bans and potentially constitutional gun safety laws: "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>46</sup> Likewise, in distinguishing the handgun ban from colonial laws that imposed minor fines for unauthorized discharge of weapons, the Court pointed out that "[t]hose [colonial] laws provide no support for the severe restriction in the present case."<sup>47</sup>

Earlier in the opinion, the Court similarly justified striking down the handgun ban on the grounds that the ban is a "severe restriction." In the process, the Court favorably quoted an old case distinguishing permissible "regulat[ion]" from impermissible "destruction of the right" and from impermissible laws that make guns "wholly useless for the purpose of defence."<sup>48</sup> The Court did not discuss what analysis would be proper for less "severe" restrictions, likely because it had no occasion to. But its analysis suggested that the severity of the burden was important.

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, as petitioners do, 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 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

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*Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996). It is largely the perceived lesser value of false statements, fighting words, and the like that makes the restrictions into lesser burdens on free-speech interests, and thus makes the restrictions constitutional.

46. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2819–20 (2008).

47. *Id.* at 2820.

48. *Id.* at 2818.

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>49</sup>

The Court is pointing out that handguns are popular for a reason: For many people, they are the optimal self-defense tool, and bans on handguns make self-defense materially more difficult. The handgun ban, then, is a material burden on the right to bear arms in self-defense.

Parts of the Court's analysis do focus on whether the law bans "an entire class of 'arms,'" or whether handguns are actually popular, which might seem like inquiry into something other than the magnitude of the burden on self-defense.<sup>50</sup> Likewise, in free speech law, the Court has sometimes asked whether a law bans an "entire medium of expression."<sup>51</sup>

But on its own, asking whether the law bans "an entire class of 'arms'" or an "entire medium" of expression can't yield a determinate answer. How can we decide whether, say, a hypothetical ban on revolvers bans "an entire class of 'arms'" or only a subclass of the broader class of handguns? How can we decide whether a ban on possessing firearms with obliterated serial numbers bans "an entire class of 'arms'" or only a subclass?<sup>52</sup> How can we decide whether a ban on window signs (unconstitutional) or residential picketing (constitutional) bans an "entire medium" of expression or only a subclass of the broader medium of signs or demonstrations?<sup>53</sup>

For example, say a law banned black or silver handguns (or purely mechanical handguns) and required all new handguns to be fluorescent orange (or electronic and personalized to be fired only by the owner). The

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49. *Id.* at 2818 (citations omitted).

50. The same is true of the reasoning in the decision affirmed in *Heller*, *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007). *Parker* reasoned:

The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them. See [State v. Kerner, 107 S.E. 222, 225 (N.C. 1921)] ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . 'arms' which the people are entitled to bear."). Indeed, the pistol is the most preferred firearm in the nation to "keep" and use for protection of one's home and family.

51. See *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 803 (1995) (Stevens, J., dissenting).

52. See *United States v. Marzzarella*, 595 F. Supp. 2d 596, 599 (W.D. Pa. 2009) (concluding, in my view correctly, that such a ban "imposes a burden on gun ownership that is practically negligible when compared to the District of Columbia's complete ban on operable firearms within the home").

53. *Gilleo*, 512 U.S. at 55; *Frisby v. Schultz*, 487 U.S. 474 (1988).

constitutionality of this law should not be much affected by the historical or esthetic circumstance of whether black and silver handguns, or mechanical handguns, are the most popular form of weapon, or are seen as a separate “class of ‘arms.’” Rather, the “entire medium” and “entire class” formulations should be seen as shorthand proxies for an inquiry into the functional magnitude of the restriction: whether the measures “significantly impair the ability of individuals to communicate their views to others,”<sup>54</sup> or whether they significantly impair the ability of people to protect themselves.

Many state right-to-bear-arms cases likewise look to the magnitude of the burden on self-defense. Some do so only loosely, by asking whether a restriction is a “reasonable regulation” or a prohibition.<sup>55</sup> This is probably the dominant test in the state cases, and it does seek to sort at least the most severe burdens (prohibitions) from less severe ones, though many cases tend to set the unconstitutionality threshold very high—allowing anything short of a prohibition—with a vague additional requirement of “reasonableness,” whatever that might mean.<sup>56</sup> But other cases are more explicit, upholding gun controls unless they “materially burden” the right to bear arms in self-defense,<sup>57</sup> or unless they “frustrate the purpose” of the right to bear arms, which is to say substantially burden people’s ability to defend themselves.<sup>58</sup>

As the previous subsection suggests, we can also borrow from the First Amendment time, place, and manner restriction test, and articulate the substantial burden inquiry as an inquiry into the presence of “ample alternative channels” for exercising the right.<sup>59</sup> While a restriction on certain gun types might be justifiable as a manner restriction that leaves open ample alternative

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54. *Gilleo*, 512 U.S. at 55; *id.* at 55 n.13 (quoting Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987)).

55. See, e.g., *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976).

56. For an absurd example of how high the unconstitutionality threshold has at times been set, see *State v. Wilburn*, 66 Tenn. 57 (1872). *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871), struck down a statute banning open carrying of handguns, on the grounds that the state right to bear arms provision protected such carrying. But in *Wilburn*, the court upheld a similar statute because it had exactly one exception—for army pistols carried “openly in [one’s] hands.” *Wilburn*, 66 Tenn. at 62. A requirement that, to carry a gun, one must constantly have it in one’s hands, is obviously a very serious burden on the right, one that makes exercise of the right largely impractical. Yet the court nonetheless upheld the requirement as a permissible “regulat[ion].” *Id.*

57. See, e.g., *Lacy v. State*, 903 N.E.2d 486, 490 (Ind. Ct. App. 2009) (upholding a ban on switchblades because it does not “materially burden” the right to bear arms for self-defense).

58. *Dano v. Collins*, 802 P.2d 1021, 1022 (Ct. App. Ariz. 1990), *review granted*, Jan. 15, 1991, *review dismissed as improvidently granted*, 809 P.2d 960 (Ariz. 1991).

59. See, e.g., *Gilleo*, 512 U.S. at 56–57 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).



channels,<sup>60</sup> a ban on carrying guns in public can't be justified as a place restriction: It leaves people without ample alternative means of defending themselves in public places.<sup>61</sup>

### 3. Risks and Benefits of a Burden Threshold

One difficulty with a substantial burden threshold, of course, is that people will disagree about the normative question of how large a burden must be to qualify as substantial (or whatever other term one uses for such thresholds, such as “grave” or “serious”). Still, the problems with determining whether a burden is substantial should be less than the problems with defining “reasonableness” or “balancing.” Among other things, the substantiality inquiry requires comparisons along a single dimension—a judgment of how much a law’s interference with self-defense compares to benchmark interferences considered by past cases—rather than a balancing of incommensurable quantities such as burden and danger reduction.<sup>62</sup> (Such balancing is also often called for under reasonableness tests, if the tests ask whether the burden the law imposes is reasonable in light of its benefits.) But there’s no doubt that there’ll be controversy about the substantiality inquiry, just as there’s controversy about how large a burden on abortion rights must be to qualify 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>

Another difficulty is that people will disagree about the empirical question of just how much of a burden a particular restriction will impose. The answer should often be fairly clear,<sup>65</sup> and this estimate should often be easier than

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60. Cf., e.g., *United States v. Marzzarella*, 595 F. Supp. 2d 596, 606 (W.D. Pa. 2009) (suggesting that a ban on the possession of guns with obliterated serial numbers should be judged under a standard comparable to that “applicable to content-neutral time, place and manner restrictions,” and upholding it partly because it “[le]ft open ample opportunity for law-abiding citizens to own and possess guns within the parameters recognized by *Heller*”).

61. See *infra* Part II.C.1; see also Eugene Volokh, *Time, Place, and Manner Restrictions*, in *Free Speech Law and Elsewhere* (unpublished work in progress, on file with author).

62. See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 167–94.

63. Compare, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886–87 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.) (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) (arguing that it is a substantial burden).

64. Compare, e.g., *Members of the 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) (arguing that this did not leave open ample alternative channels).

65. See, for instance, the discussion of weapon category bans in Part II.A.

estimates of whether a gun control law will reduce the danger of gun crime and gun injury. Estimating the burden on self-defense will require considering how a particular hypothetical defense scenario is likely to play out under different regulatory schemes—for instance, how self-defense with a shotgun might be harder than self-defense with a handgun—as well as having a rough sense for how often the scenario will occur. Estimating the burden will not, however, require predicting how many criminals will comply with the law (always hard to measure or even guess) or trying to separate causation from mere correlation in empirical studies. Nonetheless, I should again acknowledge that the judgment about just how much a law will interfere with self-defense will sometimes be difficult and controversial.

Finally, a third difficulty is the danger that many small, less-than-substantial burdens will aggregate into a substantial burden. In the words of an 1822 court decision striking down a ban on carrying concealed handguns, “if the act be consistent with the constitution, it can not be incompatible with that instrument for the legislature, by successive enactments, to entirely cut off the exercise of the right of the citizens to bear arms.”<sup>66</sup> This might be one reason that the Court has generally concluded that content-based speech restrictions are constitutionally suspect even when they impose only slight burdens on communication.<sup>67</sup> But courts can avoid this, I think, by considering each burden together with others, and asking (for instance) whether the remaining legal classes of guns—or legal means of carrying guns—indeed provide ample channels for self-defense that are pretty much as good as those that would have been offered by the prohibited guns.<sup>68</sup>

More importantly, though, despite these difficulties, I don’t think courts are at all likely to reject the burden threshold and take the view that any gun restriction is an unconstitutional infringement of the right. As noted above, restrictions on other rights are often held constitutional if the burden is seen as not substantial. The exceptions tend to be equality rights, such as racial or sexual equality, or equality of ideas where content-based speech restrictions are involved; but I expect that judges will treat the right to bear

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66. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822); see also Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1105–14 (2003) (discussing “small change tolerance slippery slopes”).

67. See Volokh, *supra* note 42, at 1305–10.

68. 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 [‘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’”).

arms more like the liberty rights, which tend to be subject to a substantial burden threshold, than like the equality rights, which are not.

Judges also seem especially likely to adopt a substantial burden threshold as to the right to bear arms because judges are rightly worried about gun crime and gun injury, and are likely to want to leave legislatures with some latitude in trying to fight crime in ways that interfere little with lawful self-defense. A substantial burden threshold would give legislatures the power to experiment without requiring a court to estimate the effectiveness of the law in preventing future crime and injury—estimation that Part I.C argues is likely to be especially hard.

Finally, the mantra that not all regulations are prohibitions has been commonplace in American right-to-bear-arms law for over 150 years,<sup>69</sup> with only a few departures.<sup>70</sup> The judges who are most likely to take at least a moderately broad view of the right—judging by *Heller*, usually the more conservative judges—are also the judges who are most likely to take such traditions seriously.

So courts are likely to look at the degree to which a gun control law burdens self-defense, and are likely to uphold laws that impose only a modest burden. The best way to protect self-defense rights, I think, is to acknowledge that courts are likely to find slight burdens to be constitutional, to focus on defining the threshold at which the burden becomes substantial enough to be presumptively unconstitutional, and to concretely evaluate the burdens imposed by various gun restrictions.

### C. Danger Reduction

The government often tries to justify substantial burdens on constitutional rights by arguing that such burdens significantly reduce some grave danger. Courts sometimes accept this by saying that a constitutional right may be restricted when the restriction is necessary to serve a compelling government interest, or is substantially related to an important government interest. But such phrases often obscure more than they reveal. The real inquiry is into whether and when a right may be substantially burdened in order to materially reduce the danger flowing from the exercise of the right, and into what sort of proof must be given to show that the substantial restriction will indeed reduce the danger.

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69. See, e.g., *Owen v. State*, 31 Ala. 387 (1858).

70. For one such departure, see *Bliss*, 12 Ky. (2 Litt.) at 91–92.

### 1. Per Se Invalidation, at Least for Especially Serious Burdens

To begin with, certain kinds of restrictions are unconstitutional even when they seem likely to substantially reduce some grave dangers. I discuss this in detail elsewhere,<sup>71</sup> but clear examples are offered by the right to trial by criminal jury, the right to counsel, and some similar rights: Even if mandating bench trials, for instance, were necessary to effectively serve a compelling government interest in most effectively punishing and preventing certain crimes, the jury trial right still couldn't be abrogated.

There are, of course, some scope limits on the jury trial right stemming from the original meaning of the provision, for instance as to criminal trials in petty cases (even though the government interest in making such trials cheaper and quicker is probably not compelling),<sup>72</sup> or as to the enforcement of military law against military combatants.<sup>73</sup> But once a particular situation is found to be within the historical scope of the jury trial right, a jury trial must be afforded, even if mandating bench trials were the most effective way to reduce the danger posed by certain kinds of criminals.

The same is true for some kinds of especially burdensome speech restrictions<sup>74</sup> or interferences with the autonomy of religious institutions.<sup>75</sup> Though the Court sometimes uses the language of strict scrutiny in such cases, many of its decisions can only be explained as applying a principle that certain kinds of burdens on speech rights or religious institutions are per se unconstitutional.<sup>76</sup>

*District of Columbia v. Heller* implicitly adopted such a rule of per se invalidation of especially severe burdens, I think, when it struck down the handgun ban. In the heart of the Court's analysis of the ban's validity, Justice Scalia wrote:

Under any of the standards of scrutiny that we have applied to enumerated constitutional rights [except the rational basis test], banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

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71. See Eugene Volokh, *Beyond Strict Scrutiny: Per Se Invalidation of Certain Kinds of Burdens on Certain Constitutional Rights* (unpublished work in progress, on file with author).

72. See sources cited *supra* note 18.

73. See sources cited *supra* note 19.

74. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

75. See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1496 (1999).

76. See Volokh, *supra* note 71.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. . . .

....

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . The Second Amendment . . . [l]ike the First, . . . is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home. . . .

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. . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>77</sup>

Absent here is any inquiry into whether the law is necessary to serve a compelling government interest in preventing death and crime, though handgun ban proponents did indeed argue that such bans are necessary to serve those interests and that no less restrictive alternative would do the job.<sup>78</sup> The Court concludes that “the enshrinement of constitutional rights necessarily takes” “severe restriction[s]” “off the table,” and that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” The statement that “Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster” suggests that even tests such as intermediate or

77. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–22 (2008) (citations omitted).

78. See, e.g., Brief of the American Academy of Pediatrics et al. as Amici Curiae in Support of Petitioners at 5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157189.

strict scrutiny are in practice rules of per se invalidation of laws that sufficiently “severely” burden the right.

The matter might be different if it came to some truly extraordinary danger.<sup>79</sup> The rules the Bill of Rights sets forth should cover the great majority of risks, but it’s not clear that such rules—developed with an eye towards ordinary dangers—can deal with dangers that are hundreds of times greater.<sup>80</sup> This is why the usual Fourth Amendment rules related to suspicionless home searches might be stretched in cases involving the threat of nuclear terrorism.<sup>81</sup> It’s why we continue to have a debate about the propriety of torture in the ticking nuclear time bomb scenario.<sup>82</sup> It’s why, in a somewhat different context, the Constitution provides for the suspension of habeas corpus in cases of rebellion or invasion.<sup>83</sup> And it’s why courts are and probably should be willing to reduce normal free speech protections when it comes to the publication of information that can help readers build nuclear bombs or create smallpox epidemics.<sup>84</sup>

But while this rationale may justify, for instance, bans on the possession of arms of mass destruction or surface-to-air-missiles, those bans are already outside the scope of the right as defined by *Heller*,<sup>85</sup> and are in any event not substantial burdens on self-defense.<sup>86</sup> The right to keep and bear weapons that are roughly as dangerous as civilian firearms will definitionally exclude the extraordinarily dangerous weapons. And while it will indeed protect ordinarily dangerous guns, this ordinary danger is precisely what the right to bear arms expressly contemplates.

## 2. The Two Versions of Strict Scrutiny

A different approach to danger reduction arguments is sometimes implemented using the strict scrutiny test: Rights may indeed be substantially

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79. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271, 1304 (2007) (noting that “[o]ne stringent version [of the Court’s strict scrutiny test] allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms”).

80. See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1209–12 (2005).

81. See, e.g., Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1279 (2004).

82. See, e.g., ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 141, 158–63 (2002); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 48–49 (1991). See generally TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

83. U.S. CONST. art. I, § 9, cl. 2.

84. See *supra* note 80.

85. See *infra* Part II.A.1.

86. See *infra* Part II.A.2 (discussing machine gun bans).

burdened, the claim goes, so long as the burden is genuinely necessary to serve a compelling government interest. Where other less restrictive means can serve the compelling interest pretty much equally, the more restrictive means will be unnecessary and therefore unconstitutional. But where only the more restrictive means can provide the reduction of danger that the government seeks, those means will indeed be constitutional.<sup>87</sup>

a. The Shape of the Underlying Factual Debate

The difficulty is that we often won't know if the proposed law is really necessary to reduce various dangers. And this is especially true as to the right to keep and bear arms: People notoriously disagree about whether gun control laws will indeed reduce total injury and crime, especially since such evaluations require one to predict both (1) the possible decrease in injury and crime stemming from the controls and (2) the possible increase in injury and crime stemming from the interference with lawful self-defense.

Gun control proponents argue that only banning guns, or removing guns from certain places, or limiting guns in other ways will prevent certain kinds of crimes. And they suggest that lawful self-defense isn't really that effective, or that it won't be much interfered with by the proposals (even fairly burdensome ones, such as bans on public carrying of handguns).

Gun control opponents argue that the gun restrictions largely won't disarm those who misuse guns, since the misusers are criminals who won't comply with gun laws any more than they comply with laws banning robbery, rape, or murder.<sup>88</sup> And they argue that any possible slight decline in injuries caused by people who do comply with gun laws, or in accidental injuries or in suicides (to the extent suicides are legitimately weighed against lawful self-defense) will be more than offset by the increase in crime and injury stemming from lost opportunities for effective self-defense.

Scientific proof of any of these theories is very hard to get. There are no controlled experiments that can practically and ethically be run. "Natural experiments" stemming from differences in policies and in gun ownership rates among different cities, states, or countries are subject to many confounding factors, such as culture and background crime rates. Many studies purport to show some statistically significant effects, even controlling for

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87. See Volokh, *supra* note 74, at 2422, 2431.

88. Cf. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 169 (2002) (expressing skepticism that a permit requirement for door-to-door political solicitors would reduce the danger that criminals will pose as solicitors).

various factors. But many other studies argue the contrary, and point to failures to control for other important factors.

Thus, for instance, some claim that international comparisons show that private gun ownership is strongly correlated with homicide rates.<sup>89</sup> Even if true, this isn't proof that laws reducing gun ownership will reduce the danger, since the correlation doesn't prove a causal relationship, given the possibility of uncontrolled-for confounding cultural factors. Moreover, even if high private gun ownership did cause high homicide rates, it's not clear that banning or otherwise restricting guns would be effective in reducing the danger:<sup>90</sup> Perhaps any reduction will primarily affect law-abiding citizens and won't disarm the criminals who are causing the crime.

And beyond this, the most comprehensive recent study of the subject, reviewing twenty-one Western countries, including the U.S., found no statistically significant correlation between gun ownership levels and total homicides or suicides.<sup>91</sup> Perhaps such a correlation, or even causation, does exist but is hidden by random noise; the study doesn't disprove the empirical case for gun control. But the study's results do highlight the weaknesses of previous studies that found significant correlations in smaller samples, and claimed to therefore support the empirical case for gun control.

More strikingly, even much simpler questions, such as how often guns are used in self-defense, remain unanswered, with studies from credible sources yielding results that differ by a factor of thirty. Leading gun control criminologist Gary Kleck conducted a survey in the 1990s that yielded an estimate of roughly 2.5 million per year.<sup>92</sup> The National Criminal Victimization Survey conducted a survey in the 1990s, based on which it estimated the total at 80,000 per year.<sup>93</sup> Another leading gun control criminologist, Phil Cook, conducted a survey that yielded raw numbers quite close to Kleck's 2.5 million. But Cook's bottom

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89. Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. L. U. PUB. L. REV. 243, 248 (1993); Martin Killias, *International Correlations Between Gun Ownership and Rates of Homicide and Suicide*, 148 CAN. MED. ASS'N J. 1721, 1723 (1993).

90. See David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 294–319, 344–49, 353–59 (1993).

91. Martin Killias et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 CAN. J. CRIMINOLOGY 429 (2001). The study did show a correlation between gun ownership levels and some categories of gun homicide and gun suicide, but that doesn't show that lower gun ownership is correlated with reduced danger: If the total homicide and suicide rate remains the same, but gun homicides or suicides are replaced by an equal number of nongun homicides or suicides—for instance, because a decrease in gun homicides is offset by an increase in nongun homicides that would have otherwise been prevented by self-defense using guns, or because suicides shift from guns to other highly lethal means—the total harm remains the same.

92. Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184–86 (1995).

93. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, GUNS AND CRIME 1, 2 (1994).



line was that the numbers might be skewed by unreliable reporting, and that the actual number is unknown and possibly unknowable.<sup>94</sup>

Those are just two examples, but they are characteristic of the field. A National Research Council 2004 report, *Firearms and Violence: A Critical Review*, reports that there is basically no sound scientific data supporting either gun control or gun decontrol proposals (such as broadened availability of concealed carry permits).<sup>95</sup> The same is true of the Centers for Disease Control 2005 report, *Firearms Laws and the Reduction of Violence: A Systematic Review*.<sup>96</sup> Both reports do argue that with the proper research design, statistically reliable results could indeed be obtained.<sup>97</sup> But given that we don't have adequate results after at least thirty-five years of serious work on the matter, it's not clear that even a fresh research agenda will yield definitive conclusions any time soon.

#### b. The Consequences for Strict Scrutiny

Because of this uncertainty, the application of strict scrutiny to gun controls ends up turning on how courts evaluate empirical claims of likely danger reduction. Courts might take a few different approaches in their evaluations.

1. One approach would be to require some substantial scientific proof to show that a law will indeed substantially reduce crime and injury (and that other alternatives, such as liberalizing concealed carry, won't do the job). The Court has at times suggested that this was a necessary part of strict scrutiny,<sup>98</sup> and lower courts have as well. For instance, courts have struck down bans on the distribution to minors of works that contain violent (but

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94. See PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE 68–76 (1996); cf. Tom W. Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOLOGY 1462, 1462–69 (1997) (describing the debate, and suggesting that the right answer is somewhere in the mid-to-high hundreds of thousands).

95. See NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 7–8 (2004); see also Tushnet, *supra* note 3, at 1427 (“[I]t is quite difficult to show with any moderately persuasive social-science evidence that discrete and moderate gun regulations . . . do much if anything to advance public policies favoring reduction in violence, reduction in gun violence, reduction in accidents associated with guns, or pretty much anything else the public thinks the regulations might accomplish.”).

96. Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 59 (2005) (“Review of eight firearms laws and law types found insufficient evidence to determine whether the laws reviewed reduce (or increase) violence.”).

97. See NAT'L RESEARCH COUNCIL, *supra* note 95, at 7–9; Hahn et al., *supra* note 96, at 59, 61.

98. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391–93 (2000) (applying something short of strict scrutiny, but not far short).

not sexual) imagery. Though the government has argued that the bans are necessary to serve the compelling interest in reducing crime, courts have generally demanded strong social science proof of this, and have rejected existing studies as methodologically inadequate.<sup>99</sup>

If courts accept such an approach in right-to-bear-arms cases (at least ones involving a substantial burden), then this test will likely be tantamount to per se invalidation: As the National Research Council and Centers for Disease Control reports point out, such scientific proof of effectiveness is absent.<sup>100</sup>

2. Another approach to ostensibly strict scrutiny would be to simply require a logically plausible theory of danger reduction that many reasonable people believe. This test would likely uphold virtually any gun control law, including a total ban on all guns: One can make a logically plausible argument that anything short of complete gun prohibition will fail to prevent thousands of crimes and killings.

Even a total handgun ban, for instance, would leave people able to kill their housemates with rifles and shotguns, or illegally take those guns out of the house for criminal purposes (perhaps with the barrels illegally sawn down for greater concealability). Only a complete gun ban would prevent that harm. And, the argument would go, guns are so rarely used for self-defense that the loss of valuable self-defense will be more than compensated for by the gain in crime and injury prevention. Proven? Absolutely not. Correct? Not in my view. But logically plausible? Yes, given a certain view of likely behavior by criminals and by law-abiding citizens.

Some laws might be hard to support if a logically plausible theory were required: For instance, as I argue in Part II.A.2, so-called “assault weapons” are not materially more dangerous than other kinds of weapons, so anyone who is denied an “assault weapon” will almost certainly substitute another gun that is equally lethal. It’s therefore hard to see how assault weapons bans will do much to reduce danger of crime or injury.<sup>101</sup> But many people, including many legislators, obviously don’t share my view; and I expect many judges will find these other views to be at least credible. So this sort of strict scrutiny will in practice be little different from a rational basis test.

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99. See, e.g., *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 962–64 (9th Cir. 2009); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001) (Posner, J.).

100. See *supra* notes 95–97 and accompanying text.

101. Even Charles Krauthammer, a noted supporter of gun bans and of the assault weapons ban in particular, acknowledged as much. See Charles Krauthammer, *Disarm the Citizenry*. *But Not Yet.*, WASH. POST, Apr. 5, 1996, at A19.

3. Finally, courts could rely on their own common sense judgments of when a particular law will likely reduce danger, and demand empirical evidence only when a litigant is promoting a view that doesn't comport with the court's common sense judgment.<sup>102</sup> The Court and lower courts have at times used this approach in strict scrutiny cases,<sup>103</sup> for instance upholding some restrictions that restrict adult access to sexually themed speech in the name of protecting minors' psychological well-being without any scientific evidence that access to such speech will indeed harm the minors.<sup>104</sup>

Such an approach would yield results in gun control cases that are impossible to predict. And it's hard to see why this approach would have much to recommend it, given that there's little reason why judges' intuitions about the danger of guns would be particularly reliable.

I should acknowledge that this sort of approach has been applied in some areas of free speech law, and I can't say the sky has fallen from this sort of decisionmaking. Perhaps such intuitive decisionmaking is in some measure inevitable, where deference to the legislature is undesirable because a constitutional right is involved and where insistence on empirical proof is unappealing because such proof is often unavailable.

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102. Consider, for instance, *State v. Brown*, 859 N.E.2d 1017 (Ohio Ct. App. 2006), which involved a law requiring that concealed carry licensees traveling in cars have their guns either holstered and in plain sight on the person, or stored in a locked glove compartment or case. The Ohio state right-to-bear-arms rule asks courts to decide whether a regulation is "reasonable," something that requires more than the extremely deferential federal rational basis test. See *Arnold v. City of Cleveland*, 616 N.E.2d 163, 171 (Ohio 1993). The majority upheld the law as "reasonable," on the grounds that "[t]hese restrictions reduce the possibility of the loaded firearm being acquired by a third person" and "alert[ approach police] officer[s] that a loaded firearm in the vehicle." *Brown*, 859 N.E.2d at 1020. The dissent concluded that the law was not "reasonable," because "the majority's views are contrary to common sense and physical realities" because "[a] third person can just as readily reach out and grab a firearm from a driver's unlocked holster as he can take that firearm from a closed [but unlocked] glove compartment" and "the real risk to law enforcement officers . . . is the criminal element, who do not bother with such matters as permits, visible holsters, or closed glove compartments." *Id.* at 1022 (Grendell, J., concurring and dissenting in part). With no requirement of scientific evidence, the case became a battle of the judges' intuitions.

103. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 207–08 (1992) (plurality opinion). See also *Nixon*, 528 U.S. at 391, which reasoned that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"; *Nixon* applied a standard that was somewhat less demanding than strict scrutiny, but my sense is that the quote from *Nixon* also expresses how the Court has behaved in cases such as *Burson* and *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

104. See, e.g., *Sable Communications*, 492 U.S. 115; *Crawford v. Lundgren*, 96 F.3d 380 (9th Cir. 1996); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991); *Info. Providers' Coal. for Def. of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Am. Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990).

But it's nonetheless hard to see this level of judicial discretion as particularly appealing, at least outside areas that are viewed as largely peripheral to the constitutional right that's involved. And the strength of modern free speech protection, at least where content-based restrictions on core protected speech are involved, has chiefly stemmed from the Court's adopting a per se invalidation regime even while it talks about strict scrutiny.<sup>105</sup>

c. Intermediate Scrutiny

Intermediate scrutiny, the other common test used to evaluate reducing-danger arguments, is likely to suffer from the same problems as strict scrutiny.

In principle, intermediate scrutiny differs from strict scrutiny in two ways. First, intermediate scrutiny allows restrictions that serve merely important and not compelling government interests.<sup>106</sup> That's unlikely to be relevant to gun controls, since virtually every gun control law is aimed at serving interests that would usually be seen as compelling—preventing violent crime, injury, and death.<sup>107</sup>

Second, intermediate scrutiny allows restrictions that are merely substantially related to the government interest rather than narrowly tailored to it. In one prominent intermediate scrutiny context—the scrutiny applicable to restrictions on commercial advertising—this has played out as a requirement that the law be merely a “reasonable fit” with the government interest rather than that it be the least restrictive means of serving the interest.<sup>108</sup>

But applying this lower tailoring requirement would likely yield the same problems discussed in the previous subsections. If the substantial relationship or the reasonable fit has to be proven through social science, such proof would likely be as unavailable or unpersuasive as it would be if the court applied strict scrutiny. If the substantial relationship or reasonable fit claim has to be merely intuitively persuasive to reasonable legislators, that requirement would nearly always be satisfied. And if the claim has to be intuitively persuasive to the reviewing judge, there's little reason to think that the judge's intuitions are going to be particularly sound.<sup>109</sup>

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105. See Volokh, *supra* note 74, at 2425–38, 2452–54.

106. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989).

107. Cf., e.g., *Sable Communications*, 492 U.S. at 126 (treating the prevention of physical and even psychological injury to minors as a compelling interest).

108. See, e.g., *Fox*, 492 U.S. at 480.

109. Consider, for instance, *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. Jan. 5, 2009), which involved the federal felon-in-possession ban as applied to someone who had been convicted only of felony failure to pay child support. The court

d. Different Levels of Danger-Reduction Showings for Different Levels of Burden

So far, I've talked about "low burden" justifications separately from "preventing danger" justifications. But a court could demand different levels of preventing danger arguments to justify different degrees of burden.

For instance, where content-neutral speech restrictions are involved, restrictions that impose severe burdens (because they don't leave open ample alternative channels) must be judged under strict scrutiny, but restrictions that impose only modest burdens (because they do leave open ample alternative channels) are judged under a mild form of intermediate scrutiny.<sup>110</sup> Ballot access regulations are likewise subject to strict scrutiny if they "impose a severe burden on associational rights," but to a much weaker level of scrutiny if they "impose[ ] only modest burdens."<sup>111</sup>

On the other hand, in some areas meaningful scrutiny is reserved only for restrictions that impose a sufficiently grave burden, and remaining restrictions are subject to minimal rationality review. That, for instance, is what is done with the right to abortion after *Planned Parenthood v. Casey*.<sup>112</sup> If the law

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concluded that the Equal Protection Clause required intermediate scrutiny, even of a restriction on possession by felons. But the court quickly upheld the law under intermediate scrutiny because "[p]ersons who have committed felonies are more likely to commit crimes than those who have not," *id.* at \*15–16, and because the defendant's claim that "[t]here is no empirical data suggesting that persons convicted of non-violent felonies . . . are more likely to seek guns or use them than other, non-convicted person" lacked a sufficient "factual basis" that would "persuade[ the court] that these factual assertions are correct." *Id.* at \*16 n.6.

Thus, the court largely relied on its intuitions that the recidivism rates for criminals generally (a statistic that the court did cite, *see id.* at \*16 n.4 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>)) also apply to *violent* recidivism—the sort that might be in some measure prevent a gun possession ban—by *non-violent* felons, including ones guilty only of failure to pay child support. Perhaps that's so, on the grounds that people who break one law are materially more likely to break others, even very different ones. Perhaps it's not. But all the court had to rely on was its intuition.

The court also separately concluded that "the challenged statute still substantially relates to the important governmental objective of public safety," *id.* at \*16 n.6 (quoting Response to Government's Reply at 2, *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. Jan. 5, 2009) (No. 1:08-CR-75)), even if nonviolent felons don't have a higher gun crime rate than violent felons. But that was not legally sound, since if a law is so substantially overinclusive—if it covers millions of nonviolent felons, whose actions don't implicate the government interest, together with violent felons, whose actions do implicate the interest—then it would fail intermediate scrutiny. *See, e.g.,* Supreme Court of N.H. v. Piper 470 U.S. 274, 285 n.19 (1985); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569–70 (1980); Craig v. Boren, 429 U.S. 190, 199–02 (1976).

110. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

111. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191–92 (2008).

112. 505 U.S. 833 (1992).

is seen as imposing a “substantial obstacle” to a woman’s getting an abortion (or having the purpose to impose such a substantial obstacle), then it’s categorically invalidated, but if it is seen as imposing merely a minor burden, then it’s upheld unless it is seen as simply irrational.<sup>113</sup> Likewise, under religious accommodation regimes, whether the *Sherbert/Yoder*-era<sup>114</sup> Free Exercise Clause regime or the regimes in those states in which the state constitutions are interpreted to track *Sherbert* and *Yoder*, a substantial burden led to a weak form of strict scrutiny, while minor burdens led to minimal rationality review.<sup>115</sup>

There are thus many possible options for the right to bear arms. The Court could adopt a *Casey*-like undue burden test, under which substantial burdens are struck down but less-than-substantial burdens are upheld. The Court could adopt a test under which substantial burdens are struck down but less-than-substantial burdens are still evaluated under a mild form of intermediate scrutiny. The Court could adopt a test under which very serious burdens are categorically struck down, substantial but less serious burdens are evaluated under some demanding form of strict scrutiny, and less-than-substantial burdens are evaluated under a mild intermediate scrutiny. Or it could adopt some other mix.

My sense is that there’ll be plenty of trouble getting courts to adopt meaningful scrutiny even of substantial burdens.<sup>116</sup> The chances of getting courts to adopt meaningful scrutiny of mild burdens are thus very low; judges are understandably reluctant to strike down democratically enacted laws, especially ones that are both aimed at crime control and seen as imposing little burden on law-abiding citizens. Nor do I see much to be gained from requiring such modest scrutiny when the burden on self-defense is indeed slight. It’s probably best for courts (and for those who are recommending doctrine to courts) to save their energy and their willingness to fight a battle

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113. See *id.* at 877 (opinion of O’Connor, Kennedy, and Souter, JJ.) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”); *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (concluding that abortion procedure regulations that don’t “impose an undue burden” on the right to an abortion need only have a “rational basis”). The plurality did state that a law could also be unconstitutional if it is *intended* to impose a substantial burden, presumably even if it fails to do so. See *Casey*, 505 U.S. at 877. But in any event, if the abortion restriction does not impose a substantial burden, and is not intended to impose such a burden, it is judged under rational basis scrutiny.

114. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

115. See, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

116. See, e.g., 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. (forthcoming 2009) (manuscript at pt. II, on file with author) (discussing how the right to bear arms has been read quite narrowly even after *Heller*).

with the legislative and executive branches for those situations where the law does indeed substantially burden self-defense.

#### D. Government Proprietary Role

A restriction might also be justified because the government is acting not as sovereign—outlawing, taxing, or imposing liability on private citizens' behavior—but as subsidizer, landlord, employer, and the like. This distinction has been most clearly developed in free speech cases: If I wear a jacket with a vulgarity printed on it, the government may not throw me in prison, but it likely may fire me from my government job, especially if I wear the jacket to work.<sup>117</sup> It might even be able to bar such jackets from certain “nonpublic forum” property.<sup>118</sup>

Likewise, the government may not criminalize abortions, but it may bar them from government-owned hospitals, or even from hospitals built on land leased from the government.<sup>119</sup> The government as employer has more power to search its employees' offices than it does to search private citizens' offices, and more power to search people entering government buildings than it does to search people entering private buildings.<sup>120</sup> The government as employer has more power to restrict its employees' choices to send their children to private schools than it does as to private citizens' choices.<sup>121</sup> The same is likely true for other rights, such as the right to marry, or the right to religious freedom under state constitutions that follow the *Sherbert/Yoder* model.<sup>122</sup>

Some might argue that such restrictions are permissible because they are not that burdensome, given that people can still exercise the right (for instance, get an abortion) off government property.<sup>123</sup> Or some might argue that the government has an especially strong reason for imposing the restriction (for instance, the desire to keep government workplaces running smoothly).

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117. See *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion).

118. See *Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 678–79 (1992) (holding that content-based restrictions are permitted on government “nonpublic forum” property, so long as they are reasonable and viewpoint-neutral).

119. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

120. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709 (1987).

121. E.g., *Fyfe v. Curlee*, 902 F.2d 401, 405 (5th Cir. 1990) (applying the government employee free speech analysis from *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968)); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479, 1480–81 (11th Cir. 1984) (likewise).

122. See, e.g., *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996); Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595, 635 (1999).

123. See, e.g., *Webster*, 492 U.S. at 509.

But many of the decisions are most plausibly explained by a judgment that even burdensome restrictions may be more restricted by the government as proprietor than by the government as sovereign, even when the government interest is the same. For instance, insulting labor picketing (for instance, with signs calling strikebreakers “scabs” or “traitors”) outside a government office, or similarly unpleasant public-issue picketing, might affect employees’ morale more than would one coworker’s rudeness. The picketing, though, is generally protected, even when it substantially hurts morale; the coworker speech (on the job or even off the job) is often unprotected.<sup>124</sup>

And having such separate standards for different government roles may well make sense, both to give the government more power when it comes to accomplishing its democratically determined goals on its property and with its wage payments, and to keep this power from bleeding over to controls of private citizens’ behavior on private property. Draft office employees shouldn’t be able to interfere with office morale by telling their colleagues that the draft is slavery, or interfere with office efficiency more broadly by telling would-be registrants the same. But similarly morale-reducing speech by picketers outside the door, or by influential media commentators or political leaders, should be protected despite its effect on draft office efficiency.<sup>125</sup> A unitary standard might overprotect speech by employees but, just as likely, it might end up underprotecting speech by private citizens.

For some classes of government property the government might not have special powers acting as proprietor. Free speech doctrine, for instance, treats the government acting as proprietor of “traditional public fora”—chiefly public sidewalks and public parks—the same as the government acting as sovereign.<sup>126</sup> Fourth Amendment doctrine generally applies to public sidewalks to the same extent that it applies to unenclosed places on private property. The First and Fourth Amendments might also apply to the inside of public housing, much the same way as they apply to privately owned homes.<sup>127</sup> And constitutional rights that inherently involve government

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124. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); see also *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (“The restrictions [on speech imposed by the government as employer] are allowed not just because the speech interferes with the government’s operation. Speech by private people can do the same, but this does not allow the government to suppress it.”).

125. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 234–35, 237 (1995) (discussing the constitutional foundation for giving the government some extra power when it is acting as manager of its own property).

126. See, e.g., *ISKCON v. Lee*, 505 U.S. 672, 678 (1992).

127. See, e.g., *Pratt v. Chicago 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



adjudicative processes, such as the right to a jury trial, are naturally not diminished by the government's owning the courtroom. Nonetheless, there is both precedent and reason for allowing the government acting as proprietor extra power to restrict the exercise of many constitutional rights on its property.

This suggests that separate government-as-proprietor standards may likewise be proper for the right to keep and bear arms, whether in government buildings, by government employees, in government-owned parks, in government-owned housing, and so on.<sup>128</sup> Some constraints on government power as proprietor may also be proper, since people's need for self-defense can remain even on government property. And it may well be that for some of this property (such as public housing or national parks) the constitutional analysis should be no different than on private property. But there is little reason to assume that the rule should always be precisely the same whether the gun possession is on private property or on government-owned property.

## II. APPLYING THE FRAMEWORK TO VARIOUS GUN-CONTROL LAWS

This framework, I hope, can help us analyze a wide range of gun control laws—and the analyses can help us reflect on whether the framework is helpful.

### A. “What” Bans: Bans on Weapon Categories

#### 1. Scope

Let me begin with bans on categories of weapons, weapons parts, or ammunition: machine guns, .50 caliber weapons, handguns, semiautomatic “assault weapons,” cheap and supposedly low-quality “Saturday Night Specials,” magazines with room for more than 10 rounds, nonfirearms such as knives and billy clubs, or nonlethal defensive devices such as stun guns (e.g., Tasers) or irritant sprays (e.g., pepper spray). Such bans naturally raise a scope question: What sorts of “arms” are protected by the right to keep and bear arms?

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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.

128. See *infra* Part II.C.7.

a. The “Usually Employed in Civilized Warfare” Test

Some early cases took the view that “arms” covered only arms that were “usually employed in civilized warfare,”<sup>129</sup> “in distinction from those which are employed in quarrels and brawls and fights between maddened individuals.”<sup>130</sup> Under this definition, some 1800s cases read the right as excluding, among other things, daggers, “sword-cane[s],” and “belt or pocket pistol[s] or revolver[s].”<sup>131</sup>

This, however, is not the meaning that makes the most sense for a right to keep and bear arms that is at least partly aimed at protecting self-defense. Nor is it the textual meaning: As *Heller* pointed out, arms in the late 1700s generally meant “weapons of offence, or armour of defence,”<sup>132</sup> or “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”<sup>133</sup>

Nor have I seen any evidence that a more limited definition became solidly accepted in the subsequent decades, as new state constitutions were adopted; some courts did take the “civilized warfare” view, but many did not.<sup>134</sup> And functionally, if the right protects arms used for self-defense, it’s not clear why such defensive arms should be limited to those that are also used in civilized warfare. *Heller* expressly rejected the notion that “only those weapons useful in warfare are protected,”<sup>135</sup> and while *Heller* isn’t dispositive of the

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129. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840); *Fife v. State*, 31 Ark. 455, 458 (1876) (quoting *Aymette*, 21 Tenn. (2 Hum.) at 158).

130. *Fife*, 31 Ark. at 459 (citing 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124 (3d ed. 1865)).

131. *Id.* (citing *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871)); see also *Aymette*, 21 Tenn. (2 Hum.) at 161; Tenn. Op. Att’y Gen. No. 08-19 (2008) (following Tennessee precedent to conclude that “switchblades, sword canes, and pocket pistols” are not covered by the right to bear arms). But see *Andrews*, 50 Tenn. (3 Heisk.) at 187 (suggesting that the “pistol known as the repeater is a soldier’s weapon” and is therefore constitutionally protected even under the “civilized warfare” test); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928) (relying on *Andrews* to strike down a ban on carrying “any pistol”); *English v. State*, 35 Tex. 473, 476 (1872) (applying the “arms of a militiaman or soldier” test, but concluding that “holster pistols” qualify).

132. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008) (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773)).

133. *Id.* at 2791 (quoting 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771)). This casts doubt on the conclusion in *Walker v. State*, 222 S.W.3d 707, 711 (Tex. App. 2007), that body armor isn’t covered by the right to bear arms. Nonetheless, *Walker*’s upholding of the ban on felons’ possessing body armor might still be constitutional on the theory that felons are excluded from the scope of the right to bear arms, see *infra* Part II.B.4; *United States v. Bonner*, No. CR 08-00389 SBA, 2008 WL 4369316, at \*4 (N.D. Cal. Sept. 23, 2008).

134. See, e.g., *Owen v. State*, 31 Ala. 387 (1858); *Nunn v. State*, 1 Ga. 243 (1846); *State v. Jumel*, 13 La. Ann. 399 (1858).

135. 128 S. Ct. at 2815.

meaning of state constitutional provisions, I expect it to be influential,<sup>136</sup> and the reasons just given suggest that it was correct.

b. The “Descended From Historically Personal-Defense Weapons” Test

The Oregon courts have taken the view that “arms” covers only those weapons that, “as modified by [their] modern design and function, [are] of the sort commonly used by individuals for personal defense” at or before the time the Oregon Constitution was adopted in 1859.<sup>137</sup>

This doesn’t fix the technology at the 1859 level: A switchblade, for instance, was held to be a protected weapon even though it contains a spring that knives in 1859 didn’t possess.<sup>138</sup> But the Oregon Court of Appeals has essentially concluded that, to be protected, a modern weapon must be a “technological advancement” on an 1859-era personal-defense weapon, rather than a “modification[ ]” of a more modern military weapon.<sup>139</sup> In particular, the court held that semiautomatic weapons—including but not limited to the “assault weapons” at issue in that case—don’t qualify as constitutionally protected arms.<sup>140</sup> Revolvers and other guns, on the other hand, would qualify for constitutional protection.

The trouble with this kind of reasoning is that all civilian firearms are in some ways both modifications of military firearms and technological advancements on past civilian firearms. A semiautomatic handgun or rifle, for instance, can correctly be described as a technological advancement on the ordinary revolver or rifle owned by 1859 Oregonians.<sup>141</sup> At the same time, modern civilian semiautomatic handguns can also be described as a modification of military weapons. Semiautomatics are built on the concept that the recoil caused by the firing of one round can automatically load the next round, a concept that’s also at the heart of automatic weapons.<sup>142</sup>

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136. See Denning & Reynolds, *supra* note 116, at pt. III.D.

137. State v. Delgado, 692 P.2d 610, 612 (Or. 1984).

138. *Id.*

139. Or. State Shooting Ass’n v. Multnomah County, 858 P.2d 1315, 1319–22 (Or. Ct. App. 1993).

140. *Id.* at 1319.

141. Firearms designers in the 1800s had to solve a fundamental problem: How does one easily allow multiple shots, whether at enemy soldiers or civilian attackers, without the need to manually reload or even manually chamber a new round? The revolver, invented in the early 1800s, was one popular solution to that problem, but the rotating cylinder was inherently limited in capacity, so designers kept looking for new technological advancements, and found one in the semiautomatic.

142. The military has long been an early adopter of much new firearms technology, and the first broadly used fully automatic military weapon was likely the Maxim gun, developed for military use in the 1880s; semiautomatic civilian weapons quickly followed, by 1893. MERRILL LINDSAY, ONE HUNDRED GREAT GUNS 196–97 (1967); POLLARD’S HISTORY OF FIREARMS 294

Most guns labeled “assault weapons” today are semiautomatic versions of more modern automatic weapons, rather than of the late 1800s varieties.<sup>143</sup> But there too one could equally describe them as technological advancements on earlier civilian handguns and rifles, especially the late 1800s semiautomatics, as well as modifications of military weapons. Civilian and military small arms technology have always developed hand in hand.

Nor is the Oregon Court of Appeals’ alternative formulation, which asks “whether the drafters would have intended the constitutional protection to apply if they had envisioned the technological advancements and the reasons for which those advancements were made,”<sup>144</sup> particularly helpful. I tend to agree with the Oregon Court of Appeals’ dissenting opinion that, under this very test, semiautomatics would be protected. “It is hard to conceive that the pioneer family facing an attacking foe would have chosen the one shot ball and powder musket over a firearm that gave them the ability to fire repeatedly,”<sup>145</sup> and it’s hard to conceive that Oregonians’ representatives would have treated the more effective firearm as not falling within the constitutional term “arms.”

In any case, the Oregon Court of Appeals’ test seems to me to be a largely indeterminate inquiry. We have some equipment, such as legal dictionaries and contemporaneous sources, for figuring out the 1791 or 1859 meanings of particular legal terms. But it’s hard to see how we can reliably guess what legislators in 1859 would have done had they envisioned certain changes in weapons technology.

c. The “of the Kind in Common Use” “by Law-Abiding Citizens for Lawful Purposes” Test

*Heller* defines arms to exclude “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>146</sup> Some

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(Claude Blair ed., 1983); see generally David B. Kopel, Clayton E. Cramer & Scott G. Hattstrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1199–1200 (1995) (faulting the Oregon test on similar grounds). (The Gatling gun, patented in 1862, was crank-operated and thus was probably not technically an “automatic weapon” as the term is now understood. LINDSAY, *supra*, at 196; POLLARD’S HISTORY OF FIREARMS, *supra*, at 293.)

143. See GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 110 (1997).

144. *Or. State Shooting Ass’n*, 858 P.2d at 1320.

145. *Id.* at 1327 (Edmonds, J., concurring in part and dissenting in part).

146. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815–16 (2008).

state cases have used similar definitions.<sup>147</sup> But it's not quite clear how this test is to be applied, for six reasons.

1. *Typical possessor vs. is possession typical?* It's not clear whether "typically possessed by law-abiding citizens for lawful purposes" requires 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.<sup>148</sup> The two are different, since a rare weapon that is overwhelmingly used for lawful purposes (e.g., an expensive or antique hunting rifle) would fit the first definition—its typical possessor would likely be a lawful hunter—and not the second, since possession of it would be highly atypical. My sense is that the first definition, focusing on the characteristics of the typical possessor, is the more natural reading of the phrase. Yet the phrase is offered as an interpretation of *United States v. Miller's* "arms . . . of the kind in common use" language, which supports the second definition, focusing on how typical possession is.

2. *Uncertainty about the typical possessor.* It will often not be clear who might be the typical possessor of the weapon; one can hardly do a survey of owners of a particular kind of gun, asking them whether they possess it for lawful purposes. Nor is perceived utility for self-defense and hunting a good proxy for whether a gun is "typically possessed by law-abiding citizens for lawful purposes," given that collecting and recreational shooting are "lawful purposes." Gun collecting may seem like a strange hobby to many, but likely about a million law-abiding Americans engage in it.<sup>149</sup> So while few people would choose (for instance) a semiautomatic version of an AK-47 rifle for home defense or for hunting, this doesn't tell us whether its "typical[ ] possess[or]" is a criminal or a law-abiding collector.

3. *Definition of weapon category.* How common a weapon is depends on how specifically it is defined. Handguns are in common use, but particular brands of handguns are less common, and some are uncommon, simply because they come from small companies or are of unusual caliber or design. Likewise, some so-called "assault weapons" are indeed not that commonly owned;<sup>150</sup> semiautomatic versions of the AK-47 rifle, for instance, likely make

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147. See, e.g., *Lacy v. State*, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009); *City of Akron v. Williams*, 172 N.E.2d 28, 30 (Ohio Mun. Ct. 1960); *State v. Kessler*, 614 P.2d 94, 99 (Or. 1980) (likewise); *Burks v. State*, 36 S.W.2d 892, 894 (Tenn. 1931); *State v. Duke*, 42 Tex. 455, 458 (1875).

148. See *State v. Graves*, 700 P.2d 244, 248 (Or. 1985) (likewise noting that the phrase "commonly used [for a certain purpose]" can mean either "generally or usually used" for that purpose in the sense of most users' having that purpose, or "frequently used" in the sense of the use being frequent).

149. See COOK & LUDWIG, *supra* note 94, at 39 tbl.4.6.

150. See Jim Stewart & Andrew Alexander, *Assault Weapons Muscle in on the Front Lines of Crime*, reprinted in FIREPOWER: ASSAULT WEAPONS IN AMERICA (1989) (reporting on BATF's

up a small fraction of the total gun stock owned by law-abiding citizens. But the same could equally be said of virtually any specific kind of gun, except the most popular.

4. *Uncertainty about gun stocks.* There are also no censuses of weapons. Surveys give us an approximate sense of how many households own guns generally, or handguns in particular,<sup>151</sup> but they don't give us many more details than that. Nor does gun tracing data help, because there's no reason to think that traced guns are even close to a representative sample of all guns. Guns found at crime scenes are disproportionately likely to be traced, so guns that are more popular with law-abiding citizens will be underrepresented, as would more expensive guns that are less likely to get left behind.<sup>152</sup> And we're even more in the dark about the prevalence of nearly all weapons other than guns, such as fighting knives and billy clubs.

5. *Defensive devices that are often not owned as weapons.* Some defensive weapons aren't primarily owned as weapons; a home defender may pick up a sharp kitchen knife when no other weapon is close to hand.<sup>153</sup> Knives and baseball bats are very common, but knives and baseball bats owned specifically for defensive purposes are doubtless much less so. Which then should count for the "in common use"/"typically possessed . . . for lawful purposes" inquiry?

6. *The difficulty with a "dangerous and unusual weapons" test.* *Heller* does seem to offer one clue to what its test might mean—that the weapons ought not be "dangerous and unusual":

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148–149 (1769); [other treatises and cases].<sup>154</sup>

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guess about assault weapon prevalence); see Tenn. Op. Att'y Gen. No. 89-54 (1989) (opining that an assault weapons ban would be constitutional because assault weapons are not "the usual arms of the citizen of the country").

151. See, e.g., KLECK, *supra* note 143, at 112–18, 141–42 (1997) (citing data suggesting that only 5 percent or less of all privately owned guns fall in the category of "assault weapons").

152. *Id.* at 112.

153. The National Crime Victimization Survey (NCVS) reports that non-gun weapons are used defensively more often than are guns. See data run on 1992–2005 NCVS datasets by Joe Doherty of the UCLA School of Law (on file with author). The NCVS might capture only a small fraction of defensive actions, see KLECK, *supra* note 143, at 152–53, so the comparison is only suggestive, not dispositive. But the data shows that non-gun defensive actions are not uncommon in absolute terms, and suggests that they are not uncommon even when compared to defense with guns.

154. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (citations omitted).

But the sources *Heller* cites—some of which say “dangerous *and* unusual weapons” and some of which say “dangerous *or* unusual weapons”<sup>155</sup>—don’t really discuss what sorts of weapons could historically be *possessed*. As *Heller* admitted, the historical tradition is focused on carrying, and carrying only in the circumstances where the carrying is so open that it is “terrifying.”<sup>156</sup> The cited Blackstone passage, which the other treatises and cases closely echo,<sup>157</sup> makes this clear:

The offence of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. C. 3 upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.<sup>158</sup>

Even carrying normally dangerous arms was punishable if it was done in a way that indicated a likely hostile intent, perhaps simply by the unusualness of the behavior, as in the Athenian example. Conversely, even possessing unusually dangerous weapons at home wouldn’t be covered if the weapons were hidden at home and thus were not terrifying to observers.

#### d. An Unusual Dangerousness Test

My main point in this Article is to identify questions and possible answers, not to propose any definitive solutions. Nonetheless, I’d like to offer a possible interpretation of “arms” that might be relatively consistent with the concerns expressed in *Heller*, with the bottom-line conclusion that *Heller* endorsed (no protection for sawed-off shotguns and machine guns), and with many aspects of *Heller*’s language.

As I noted above, whether a weapon is in common use depends a lot on how generally one defines the weapon: for instance, as a handgun generally, or as a Glock 17 in particular. At the same time, if one says that a form of arms is protected if weapons of *this general level of practical dangerousness*<sup>159</sup> are in common use, the answer is more definite. This is especially so if one further

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155. See, e.g., WILLIAM BLACKSTONE, 4 COMMENTARIES \*148–49 (using “or”) (emphasis added).

156. *Id.*

157. *State v. Lanier*, 71 N.C. 288, 288–89 (1874), didn’t itself involve weapons, but it mentioned “the offence of going armed with dangerous or unusual weapons” in passing and cited *State v. Huntley*, 25 N.C. (3 Ired.) 418 (1843), which followed the Blackstone passage.

158. BLACKSTONE, *supra* note 155, at \*148–49.

159. I say “practical dangerousness” to focus on dangerousness as the weapon is likely to be used in a typical criminal or defensive shooting, as opposed to the hypothetical dangerousness in the hands of a perfect marksman.

refines this (though at the expense of moving a little further beyond *Heller's* language) to whether this weapon is no more practically dangerous than what is in common use among law-abiding citizens.<sup>160</sup>

Machine guns are more dangerous in their likely effects than are those guns that are in common use among law-abiding citizens. They not only fire very quickly, but they are harder to shoot in a discriminating way, at least in their fully automatic mode.<sup>161</sup>

Likewise, short-barreled shotguns are practically more dangerous than the kinds of guns that are in common use among law-abiding citizens, because they combine a lethality close to that of a shotgun—at least at the short distances characteristic of the typical criminal attack—with a concealability close to that of a handgun.

On the other hand, if we're talking about a particular sort of handgun that is not materially more dangerous than a typical handgun would be, then it would qualify as a type of arm covered by the constitutional provisions. This is so even if this particular variety happened to be rare (for instance, because it came from a small or new manufacturer). And this decision wouldn't require speculation—and speculation is all that it could be—about whether the typical owner of the handgun is a criminal or a law-abiding citizen.

This test (is the weapon not more materially dangerous than what is in common use among law-abiding citizens?) would thus be consistent with *Heller's* examples, and would use the elements *Heller* pointed to—common use, unusualness, dangerousness, and use by law-abiding citizens for lawful purposes—though in a somewhat different mixture from the one *Heller* set forth. Not a perfect way of reading a case, but, for the reasons given above, there might not be a perfect way of reading *Heller* on this point.

This leaves one more question: What happens when a particular type of arm—for instance a knife or billy club, or nonlethal weapon such as a stun gun or pepper spray—is *less* dangerous than the guns that are in common use?

I'm inclined to agree with the Oregon courts—and some other recent authorities—in concluding that these should be considered arms alongside

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160. Cf. *Rinzler v. Carson*, 262 So. 2d 661, 665–66 (Fla. 1972) (upholding a machine gun ban on the grounds that the legislature “can determine that certain arms or weapons may not be kept or borne by the citizen,” when they are “too dangerous to be kept in a settled community by individuals, and . . . which, in times of peace, find[ their] use by . . . criminal[s]”).

161. Because each shot generates recoil that moves the gun barrel, and because the fully automatic firing makes it impossible to aim again after each shot, a machine gun's shots tend to cover a much larger area than a non-automatic weapon's shots would. A shotgun also has a considerable spread, but shotgun pellets go a considerably shorter distance than do machine gun bullets.



guns.<sup>162</sup> First, the literal definition of arms isn't limited to firearms, and laws from the Framing era used arms to refer both to firearms and to non-firearm weapons.<sup>163</sup> Second, if one purpose of the right is to preserve people's ability to use weapons in self-defense, it's hard to see why only the more lethal self-defense weapons should qualify as arms and be protected by the right. And third, many devices other than firearms, even if not necessarily designed as weapons, are indeed commonly used by law-abiding citizens for self-defense, just because those devices (clubs, knives, and the like) are often the only things at hand when the need for self-defense arises.<sup>164</sup>

## 2. Burden

As I said, bans on particular kinds of arms naturally raise a scope question; but the analysis shouldn't be limited to this question only. Among other things,

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162. See, e.g., *State v. Delgado*, 692 P.2d 610 (Or. 1984) (striking down a ban on possessing and carrying switchblades); *State v. Blocker*, 630 P.2d 824 (Or. 1981) (striking down a ban on carrying billy clubs in public); *State v. Kessler*, 614 P.2d 94 (Or. 1980) (striking down a ban on possessing of billy clubs); *Barnett v. State*, 695 P.2d 991 (Or. Ct. App. 1985) (striking down a ban on possessing blackjacks); see also *Hill v. State*, 53 Ga. 472, 474–75 (1874) (taking the view that “swords” and “bayonets” are protected because they “are recognized in civilized warfare”); *Ex parte Thomas*, 97 P. 260, 262, 265 (Okla. 1908) (following *Hill* and finding likewise); *City of Akron v. Rasdan*, 663 N.E.2d 947 (Ohio Ct. App. 1995) (treating a ban on public carrying of knives as implicating the right to bear arms, though concluding that the ban was a “reasonable regulation” and thus did not violate the constitutional provision); 1986 Fla. Op. Att’y Gen. 2 (concluding that stun guns qualify as “arms” under the state right-to-bear-arms provision); cf. *City of Seattle v. Montana*, 919 P.2d 1218, 1222 (Wash. 1996) (noting the question of whether knives are protected but not reaching it); *Concealed Handgun Permits*, Alaska Op. Att’y Gen. (Inf.) 209 (1994) (suggesting that the Alaska courts may conclude that knives are protected, though not making a definitive prediction). *But see* *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921) (“[None of a] ‘bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knucks or razor or other deadly weapon of like kind’ . . . except ‘pistol’ can be construed as coming within the meaning of the word ‘arms’ used in the constitutional guaranty of the right to bear arms.”).

Those decisions that reject constitutional protection for non-firearms tend to do so on the grounds that those weapons are customarily used for criminal purposes—an approach that I argue against above—and not on the grounds that “arms” necessarily covers only firearms. See, e.g., *Lacy v. State*, 903 N.E.2d 486, 492 (Ind. Ct. App. 2009) (holding that switchblades are unprotected because they “are primarily used by criminals and are not substantially similar to a regular knife or jackknife”); *State v. Swanton*, 629 P.2d 98, 98 (Ariz. Ct. App. 1981) (holding that nunchakus are not arms, because “arms” is limited to “such arms as are recognized in civilized warfare and not those used by a ruffian, brawler or assassin”); *People v. Brown*, 235 N.W. 245, 246–47 (Mich. 1931) (upholding a ban on, among other things, blackjacks, because they are “too dangerous to be kept in a settled community by individuals” and their “customary employment by individuals is to violate the law,” but concluding that the legislature may not ban arms which “by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property,” and stressing in the law’s defense that the law “does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure” (emphasis added)).

163. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008).

164. See *supra* text accompanying note 153.

banning some categories of arms might not substantially burden people's right to self-defense, because the remaining categories will be pretty much as effective without being materially harder to use or materially more expensive.<sup>165</sup>

This is clearest when we look at bans on so-called "assault weapons." Such bans have been hotly controversial, but the dispute about them is largely symbolic. The laws generally define assault weapons to be a set of semiautomatic weapons (fully automatic weapons have long been heavily regulated, and lawfully owned fully automatics are very rare and very expensive<sup>166</sup>) that are little different from semiautomatic pistols and rifles that are commonly owned by tens of millions of law-abiding citizens. "Assault weapons" are no more "high power" than many other pistols and rifles that are not covered by the bans.<sup>167</sup> Definitions of assault weapons reflect this functional similarity: 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 hand-holds.<sup>168</sup>

It's therefore hard to see how assault weapons bans would do much to decrease crime, since even a criminal who complies with the ban could easily find an unbanned gun that is as criminally useful as the unbanned gun, and is

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165. This doesn't resolve the matter under state constitutions that protect a "right to keep and bear arms . . . for hunting and recreational use," see *supra* note 10, or under any right to keep and bear arms to deter government tyranny, to the extent such a right is recognized under some constitutional provision. But those aspects of the right to bear arms are outside the scope of this Article.

166. See, e.g., KLECK, *supra* note 143, at 108–10; Rusty Marks, *Machine Guns Rumble Mountains, Shinnston Range Attracts Shooters of Automatic Arms*, CHARLESTON GAZETTE (W. Va.), June 19, 2004, at 1A ("Fully automatic weapons cost anywhere from a few thousand dollars to tens of thousands of dollars each, and there are stiff federal licensing fees that must be paid by machine gun owners.").

167. See, e.g., KLECK, *supra* note 143, at 121–24 (explaining why that notion is mistaken).

168. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102(b), 108 Stat. 1796, 1997 (1994) (expired 2004, *id.* § 110105(2)). 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, "The 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." Krauthammer, *supra* note 101. A statute that restricts guns that take large capacity fixed-size magazines, and restricts interchangeable large capacity magazines—as the 1994 Act did only in small part—might have noncosmetic effects, though I doubt it. See Bogus, *supra*, at 469; *infra* pp. 1487–88. But any focus on pistol grips and the like is sure to have no material effect on crime.

as dangerous to victims as is the banned gun.<sup>169</sup> The class of assault weapons is indeed not “typical,” at least in the sense of common use.<sup>170</sup> But there is no reason to think that most assault weapons owners have them for criminal purposes. And assault weapons are not more dangerous than the usual gun, which in my view makes them fit within the category of “arms.”

Nonetheless, the availability of close substitutes for assault weapons—the very reason why assault weapons bans are unlikely to work—also makes it hard to see how assault weapons bans would materially interfere with self-defense,<sup>171</sup> at least given definitions such as those in the 1994 federal statute.<sup>172</sup> And the reasons the Court gave for why handgun bans are impermissible—that handguns are “easier to hold and control (particularly for persons with physical infirmities), easier to carry, easier to maneuver in enclosed spaces, [or easier to handle while] still hav[ing] a hand free to dial 911”—do not apply to assault weapons bans: Assault weapons are no more

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169. See generally David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 388–401 (1994).

170. See *supra* note 150.

171. See, e.g., *Robertson v. City & County of Denver*, 874 P.2d 325, 333 (Colo. 1994) (upholding the assault weapons ban because it was not an “onerous restriction,” given that “there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense” and “the barriers . . . created [by the law] do not significantly interfere with this right”); *Benjamin v. Bailey*, 662 A.2d 1226, 1232–35 (Conn. 1995) (upholding the assault weapons ban because the right to bear arms secures only a right to possess weapons adequate for self-defense, not any weapons that one might choose, and the assault weapons ban “does not frustrate the core purpose” of the right to bear arms); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (upholding the assault weapons ban but noting need “to allow for the practical availability of certain firearms for purposes of hunting, recreational use and protection”); Nelson Lund, *The Past and Future of an Individual’s Right to Bear Arms*, 31 GA. L. REV. 1, 71 (1996) (agreeing that assault weapons bans would not materially interfere with self-defense, but concluding that they should be struck down because they are irrational); Kopel et al., *supra* note 142, at 1211–12 (likewise).

172. Because the term “assault weapon” has no inherent technical definition, it’s in principle possible for virtually any firearm to be so labeled by a legislature. Thus, for instance, the proposed Assault Weapons Ban and Law Enforcement Protection Act of 2007, H.R. 1022, 110th Cong., § 3(a) (2007) (proposing 18 U.S.C. § 921(a)(30)(L)), defined “assault weapon” to include (among other things) “a firearm based on the design of such a firearm, that is not particularly suitable for sporting purposes, as determined by the Attorney General. In making the determination, there shall be a rebuttable presumption that a firearm procured for use by the United States military or any Federal law enforcement agency is not particularly suitable for sporting purposes, and a firearm shall not be determined to be particularly suitable for sporting purposes solely because the firearm is suitable for use in a sporting event.” Nearly all handguns might have been labeled “assault weapons” under this proposed law, on the theory that they are not “particularly suitable for sporting purposes” in the sense of hunting, that the possibility of using them for target shooting doesn’t count because “a firearm shall not be determined to be particularly suitable for sporting purposes solely because the firearm is suitable for use in a sporting event” and that their primary purpose is defensive rather than sporting. Such a ban would be broad enough to substantially burden people’s ability to defend themselves, and the analysis in the text—which rests on the much narrower scope of most past and present assault weapon bans—would not apply.

useful for self-defense than are many other handguns, rifles, and shotguns that aren't prohibited by assault weapons bans.<sup>173</sup> Assault weapons bans might well be pointless, and might offend gun owners who want the freedom to choose precisely what sorts of guns they own. But this need not make assault weapons bans unconstitutional, if the courts focus on whether the law substantially burdens self-defense.

Nor can one draw much from the Court's conclusion in the Free Speech Clause context that "one can[not] forbid particular words without also running a substantial risk of suppressing ideas in the process."<sup>174</sup> Though this is likely true as to particular words, the Court has concluded that certain means of expression—such as residential picketing, or the use of sound trucks—can indeed be forbidden without running a substantial risk of suppressing ideas.<sup>175</sup> Not all restrictions on the use of some devices to exercise a constitutional right are unconstitutional burdens on that right. And it's likewise possible to forbid certain kinds of guns without running a substantial risk of materially interfering with the ability to use arms in self-defense.<sup>176</sup>

As Part I.C.2.d pointed out, in a few constitutional fields—for instance, the review of content-neutral speech restrictions—even mild burdens on a right are judged under a relatively deferential form of intermediate scrutiny; it is possible that assault weapons bans would fail even that mild scrutiny. But, for the reasons discussed in Part I.C.2.d, it seems unlikely that courts will adopt anything more than rational basis scrutiny for minor burdens on self-defense. And while it is conceivable that bans that focus on matters such as pistol grips or bayonet mounts might fail rational basis scrutiny,<sup>177</sup> I doubt that this

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173. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008) (explaining why handguns may make more convenient self-defense tools than long guns).

174. *Cohen v. California*, 403 U.S. 15, 26 (1971).

175. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988); *Kovacs v. Cooper*, 336 U.S. 77 (1949), *reaffirmed by Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

176. The dissenting opinion in *Arnold*, 616 N.E.2d at 176 (Hoffman, J., dissenting), takes the view that any "outright prohibition of possession"—including "possession of certain types of arms"—"as opposed to mere regulation of possession" must be judged under "strict scrutiny." But it doesn't explain why a requirement that people use one category of arms instead of another virtually equivalent category of arms should be viewed as a presumptively unconstitutional "prohibition" or "infringement[ment]," *id.* at 176, 177, even though the requirement does not materially interfere with keeping arms for self-defense. And it requires a judgment about what constitutes a "type[ ] of arms" that is often indeterminate, see *supra* text accompanying note 51.

177. See *Kasler v. Lungren*, 72 Cal. Rptr. 2d 260 (1998) (concluding that challengers should be able to introduce evidence to show that a ban is irrational), *rev'd sub nom.* *Kasler v. Lockyer*, 2 P.3d 581 (Cal. 2000); *Kasler*, 2 P.3d at 605–06 (Kennard, J., concurring in part and dissenting in part) (likewise); *Kopel*, *supra* note 169, at 381 (arguing that assault weapons bans fail the rational basis test).

would happen, given the deference given to legislative factual judgments under minimum rationality review.<sup>178</sup>

This is also why a machine gun ban shouldn't be seen as violating the right to keep and bear arms for self-defense, even setting aside the Court's conclusion that machine guns aren't arms. Machine guns are no more useful for self-defense than are nonautomatic guns in all but a tiny fraction of civilian uses.<sup>179</sup>

### 3. Danger Reduction

Finally, some weapons bans might materially reduce various dangers to law-abiding citizens; consider, for instance, the ban on private possession of surface-to-air missiles. But this sort of ban would be independently justifiable through a scope argument: The weapons are certainly much more dangerous and uncommon than the machine guns and short-barreled shotguns that *Heller* concluded were outside the scope of "arms." More broadly, it's hard to imagine any such weapon that is unusually dangerous but that would fit within the scope of "arms" as *Heller* defined it.

That, of course, leaves the normally dangerous weapons, such as handguns, rifles, and shotguns. These weapons are indeed dangerous, and some people believe that entirely banning them will materially diminish the danger of crime and death.

But as *Heller* correctly concluded, right to bear arms provisions embody the judgment that the danger posed by private ownership of the normally dangerous weapons is justified by the benefits of gun ownership for, among other things, private self-defense. This is much like the constitutional judgment that the danger posed by First-Amendment-protected speech praising violence, or by criminals who are harder to catch as a result of the Fourth Amendment or harder to prosecute as a result of the Fifth and Sixth Amendments, is justified by the benefits that those constitutional provisions

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178. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469–70 (1981) (setting forth a rule of extreme deference to legislatures' factual conclusions); *Kasler*, 2 P.3d 581 (upholding an assault weapons ban under the rational basis test); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo.1994) (likewise).

179. Even when several people are attacking you, a semiautomatic pistol or even a revolver will let you fire several times within a few seconds, and likely remain more accurate than a fully automatic weapon. The firing of the first round from a fully automatic will cause recoil that throws off the accuracy of all subsequent rounds during the same trigger-pull. See *supra* Part II.A.1.d. Moreover, the fully automatic firing mode can empty the magazine in under a second, which would leave you unable to aim and shoot more. (Machine guns are useful in warfare, where you might need to lay down a field of fire, but that almost never arises in civilian self-defense.) So machine guns create extra hazard to passersby without providing any real self-defense benefits.

yield. So it seems to me that if a weapon is within the scope of “arms,” because it is not unusually dangerous, avoiding-danger arguments can’t be used to justify bans on such weapons.

#### 4. A Quick Review of Weapons Bans

This allows us to quickly go through some commonly proposed weapons bans, though much of what follows has already been foreshadowed above.

a. *Handguns* are of course protected arms under *Heller*; and, as *Heller* correctly concludes, a handgun ban so interferes with many people’s ability to defend themselves that it constitutes a grave burden.<sup>180</sup> Some old cases that use the “civilized warfare” test for the scope of arms have concluded that handguns may indeed be banned,<sup>181</sup> but as I’ve argued above, this is not a sound test for rights provisions that cover self-defense purposes; and in any event, modern militaries do routinely use handguns.

b. *Machine guns, short-barreled shotguns*, and still more dangerous military weapons (such as surface-to-air missiles or grenade launchers) are outside the scope of “arms,” and may thus be banned.<sup>182</sup> Moreover, such bans do not substantially burden the right to keep and bear arms for self-defense.<sup>183</sup>

c. *Short-barreled or otherwise sawed-off rifles* would likely be arms simply because they aren’t materially different from handguns, which certainly qualify as arms. A handgun is just a very short-barreled rifle (some rifles even have pistol grips), and it’s hard to see why a short-barreled rifle would be materially more dangerous than the even more concealable handgun. But for the same reason it’s hard to see why a ban on short-barreled rifles would materially burden the right to keep and bear arms in self-defense, when handguns remain available.<sup>184</sup>

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180. *Accord* *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (dictum) (concluding that a total ban on handguns would be unconstitutional). *But see* *State v. Bolin*, 662 S.E.2d 38, 39 (S.C. 2008) (concluding that a ban on handguns didn’t substantially burden the right to bear arms, though only in the course of evaluating a handgun ban that was limited to 18-to-20-year-olds).

181. *E.g.*, *Ex parte Thomas*, 97 P. 260, 262–64 (Okla. 1908). *Bolin*, 662 S.E.2d at 39, held that a ban on under-21-year-olds’ possessing handguns didn’t violate the right to bear arms because it “[did] not prevent a person under the age of 21 from possessing other types of guns”; but as I note *infra* note 280, I think *Heller* was correct in concluding that handgun bans impose a substantial burden on the right to bear arms, even when people remain free to possess rifles or shotguns.

182. *See, e.g.*, *Carson v. State*, 247 S.E.2d 68, 73 (Ga. 1978) (upholding ban on short-barreled shotguns); *State v. LaChapelle*, 451 N.W.2d 689, 691 (Neb. 1990) (same); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (same).

183. *See* 51 N.C. Op. Att’y Gen. 60, 65 (1981) (concluding machine guns aren’t covered by the right to bear arms because they are “not a weapon designed for the general use of the populace”).

184. *See, e.g.*, CAL. PENAL CODE §§ 12278, 12280 (West Supp. 2009) (banning .50 caliber rifles); *State v. Astore*, 258 So. 2d 33, 34 (Fla. Dist. Ct. App. 1972) (upholding ban on short-barreled rifles).

d. *Assault weapons bans* would generally be constitutional, if the right is seen as unconstitutionally infringed only when a law substantially burdens self-defense. Semiautomatic assault weapons are functionally virtually identical to other semiautomatics, and are as much arms as are other semiautomatics.<sup>185</sup> But bans on such weapons don't substantially burden the right to keep and bear arms for self-defense, precisely because equally useful guns remain available. Such a ban would be unconstitutional only if the courts conclude that even less-than-substantial burdens on self-defense must be justified by some showing of likely reduction of danger, or unless courts conclude that assault weapons bans are entirely irrational.<sup>186</sup>

e. Bans on *silencers* and *.50 caliber ammunition* would also likely be constitutional because they don't materially burden self-defense.<sup>187</sup>

f. *Large-capacity magazine bans* are a closer question.<sup>188</sup> A gun with a larger than usual capacity magazine is in theory somewhat more lethal than a gun with a 10-round magazine (a common size for most semiautomatic handguns), but in practice nearly all shootings, including criminal ones, use many fewer rounds than that.<sup>189</sup> And mass shootings, in which more rounds are fired, usually progress over the span of several minutes or more.<sup>190</sup> Given that removing a magazine and inserting a new one takes only a few seconds, a mass murderer—especially one armed with a backup gun—would hardly be stymied by the magazine size limit. It's thus hard to see large magazines as materially more dangerous than magazines of normal size.

Still, these same reasons probably mean that the magazine size cap would not materially interfere with self-defense, if the cap is set at 10 or so rather than materially lower. First, recall that until recently even police officers would routinely carry revolvers, which tended to hold only six rounds. Those revolvers were generally seen as adequate for officers' defensive needs, though of course there were times when more rounds are needed. Second, the ability to switch magazines in seconds, which nearly all semiautomatic weapons possess, should suffice for the extremely rare instances when more rounds were needed (though to take advantage of this, the defender would have to make a habit of carrying both the gun and a spare magazine).

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185. See *supra* Part II.A.2.

186. See *supra* p. 1486.

187. See *People v. Brown*, 235 N.W. 245 (Mich. 1931) (upholding ban on silencers).

188. Cf. *id.* (upholding ban on magazines that have room for more than sixteen rounds); *City of Cincinnati v. Langan*, 640 N.E.2d 200 (Ohio Ct. App. 1994) (upholding ban on rifle magazines that have room for more than 10 rounds).

189. See KLECK, *supra* note 143, at 119–20.

190. See *id.* at 144.

g. Bans on *small, relatively cheap guns* (including so-called “Saturday-Night Specials”) might be unconstitutionally substantial burdens if the alternatives that they leave would be materially more expensive.<sup>191</sup> What extra expense qualifies as “material” is of course hard to tell, but as Part II.F discusses, this is not a constitutionally insurmountable problem. Similar issues arise with regard to regulations of abortion, speech, the right to marry, and the like. Moderate fees, and regulations that indirectly impose moderate cost increases, are generally seen as permissible burdens, but at some point the fee becomes sufficient to make the law into an unconstitutional burden.

h. Bans on *knives* or *billy-clubs* would, under the framework I propose, count as restrictions on arms. The question would be whether the ban substantially burdens people’s ability to defend themselves—quite possible, given that firearms tend to be much more expensive than knives and clubs, and given that clubs may be preferred by some defenders precisely because they are less lethal than firearms<sup>192</sup>—and whether there’s some credible danger reduction argument in favor of restricting knives and clubs when guns are protected.<sup>193</sup>

i. Bans on *shotguns* should be unconstitutional, even if handguns are available. Many people keep a shotgun rather than a handgun for home defense, and many self-defense experts recommend shotguns.<sup>194</sup> With shotguns, there is less chance of missing, and their great lethality makes them even more effective at scaring away home invaders.

As *Heller* points out, handguns are for many people easier to store, easier to handle, harder to take away, and easier to hold with one hand while calling 911 with the other.<sup>195</sup> But this just reflects that handguns may be materially more effective self-defense weapons for some people in some contexts while shotguns may be materially more effective self-defense weapons for others (something that can’t be said as to assault weapons, which are almost

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191. See *infra* Part II.F for a discussion of when taxes and indirect cost increases substantially burden the right to bear arms.

192. See the discussion in Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms, Defend Life, and Practice Religion*, 62 STAN. L. REV. (forthcoming 2010) (manuscript pt. III), available at <http://www.law.ucla.edu/volokh/nonlethal.pdf>, about why bans on nonlethal weapons may substantially burden people’s right to bear arms in self-defense, even when firearms are allowed. The same analysis would in considerable measure apply to bans on weapons such as clubs, which are more lethal than stun guns and pepper sprays but much less so than firearms or knives.

193. See the discussion in *id.* (manuscript pt. II.A), about the arguments for banning nonlethal weapons but allowing firearms (arguments that are not irrational, though in my view quite unpersuasive); some of the same arguments would apply to bans on knives and clubs.

194. See generally Massad Ayoob, *Legends and Myths of the Home Defense Shotgun*, GUNS, May 2000, at 16; Firearms Tactical Institute, *Tactical Briefs #10* (Oct. 1998), <http://www.firearmstactical.com/briefs10.htm>.

195. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008).



entirely interchangeable with their non-assault cousins). Allowing only shotguns would substantially burden some people's rights to defend themselves, while allowing only handguns would substantially and similarly burden other people's rights.

j. Bans on *electric stun guns and irritant sprays* are dealt with in a separate article.<sup>196</sup>

##### 5. A Special Case: "Personalized Gun" Mandates

Some have urged laws requiring that all new guns be personalized—designed so they can be fired only by an authorized user. Such personalization could, for instance, use fingerprint technology or wireless sensing of whether the user is wearing some electronic identification ring. In theory, if personalized guns became common, child gun accidents would become rare, and perhaps gun theft would become somewhat rarer, too. (I say "somewhat" because many thieves or resellers of stolen guns will likely know how to disconnect the electronics in a way that leaves the gun operational.) What's more, this could happen without compromising people's ability to defend themselves, something that distinguishes such proposals from handgun bans, carry bans, and locked storage requirements.<sup>197</sup>

Whether these requirements are constitutional should, I think, turn on whether they make guns materially more expensive, slower to fire, or unreliable. Say, for instance, that a personalized gun costs \$1000, often fails to fire until after many seconds of fumbling, or requires monthly battery changes and is unusable if the battery isn't changed. Or say the gun receives its "OK to fire" signal through wireless radio from a ring worn by the owner, and there are cheap devices that would jam such transmissions and would thus let criminals effectively disarm any defender. Requiring that such guns be used—as opposed to the more robust mechanical guns that are now common—would substantially burden self-defense. So if personalization requirements are upheld, they would have to be upheld under a danger reduction theory, if such a theory is accepted as a justification for substantial burdens on self-defense.

On the other hand, say the extra cost is relatively modest, the technology is highly reliable, and the batteries are extremely long-lived (or perhaps have an audible alarm reminding a user that they need replacing), or the gun is

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196. See Volokh, *supra* note 192.

197. See generally Cynthia Leonardatos, Paul H. Blackman & David B. Kopel, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157 (2001).

designed so that, if the electronics fails, the gun is left operational as a mechanical weapon. (This sort of low cost / high reliability outcome seems quite possible as the technology matures.) Then the requirement probably wouldn't be a substantial burden, and should be upheld.

One possible way of estimating whether personalized gun requirements substantially burden self-defense is by looking at what police departments are doing.<sup>198</sup> Police officers can especially benefit from carrying personalized guns, because about 10 percent of all police officer fatalities involving shootings happen with the officer's own weapon.<sup>199</sup> Sometimes the shooter might have his own weapon and might use the officer's weapon just to make tracing harder; but sometimes the shooter starts out unarmed and seizes the gun from the officer in a struggle. If the officer has a personalized gun, the officer's life could be saved.

At the same time, police officers are also vulnerable to many of the reliability risks associated with switching from proven mechanical technology to new and unproven electronic technology. They don't want guns that fail to fire at the critical moment, or that can be disabled electronically.

So if police departments are ready to use personalized guns, and the personalizing technology doesn't increase the gun cost too much, then requiring such guns for civilians probably won't substantially burden civilian self-defense just as it won't substantially burden law enforcement. But if personalized guns aren't reliable enough for police departments, then requiring them would likewise impose a substantial burden on civilian self-defense (though some civilians might still choose to accept this substantial burden in order to get other benefits, for instance if they have small children at home and estimate that the danger of the child's accidentally misusing the gun is higher than the danger of the gun's being unusable at the crucial moment).

One state, New Jersey, has actually enacted a law mandating that, within roughly two and a half years after "personalized handguns" become "available for retail sales," sales of other handguns will be prohibited in New Jersey.<sup>200</sup> But while the law is triggered only when the Attorney General finds that personalized handguns are about as reliable as mechanical handguns,<sup>201</sup> the law

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198. For a related approach as to the definition of "arms" more broadly, and not just as to the burden inquiry, see Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 391-93 (2009).

199. UNIFORM CRIME REPORTING PROGRAM, FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 14 (1998), available at <http://www.fbi.gov/ucr/killed/98killed.pdf> (1989-98 data).

200. N.J. STAT. ANN. §§ 2C:58-2.4, 2C:58-2.5 (West 2005).

201. *Id.* § 2C:39-1(dd) ("No make or model of a handgun shall be deemed to be a 'personalized handgun' unless the Attorney General has determined, through testing or other reasonable means, that the handgun meets any reliability standards that the manufacturer may require for its commercially

nonetheless doesn't apply to guns sold to the police until a separate commission endorses police use.<sup>202</sup> This may breed some skepticism about whether the Attorney General's initial finding of reliability is itself entirely reliable.

The law also doesn't consider the guns' affordability. In principle, the ban on selling unpersonalized handguns could be triggered even when personalized handguns cost many thousands of dollars. So there's some reason to suspect that the New Jersey ban on unpersonalized handguns, when it takes effect, might indeed substantially burden the right to keep and bear arms in self-defense. But it's impossible to tell until the personalized handguns exist, and their reliability and cost can be assessed.

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

### 1. The Bans

Federal law bans gun possession by people guilty of certain illegal conduct—felonies, unlawful drug use, illegal presence in the U.S., or misdemeanor domestic violence.<sup>203</sup> Some laws cover other kinds of misdemeanors,<sup>204</sup> and include misdemeanants released on probation.<sup>205</sup>

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available handguns that are not personalized or, if the manufacturer has no such reliability standards, the handgun meets the reliability standards generally used in the industry for commercially available handguns.”).

202. *Id.* § 2C:58-2.5(b), (d).

203. 18 U.S.C. § 922(g) (2006).

204. See, e.g., 720 ILL. COMP. STAT. ANN 5/24-3.1(a)(2) (West 2003 & Supp. 2008) (barring possession of any gun by 18-to-20-year-olds if they have “been convicted of a misdemeanor other than a traffic offense”); MASS. ANN. LAWS ch. 140, §§ 129B(1)(e), 131(d)(i)(e), ch. 94C, §§ 32L, 34 (LexisNexis 2007) (barring possession of any firearms by anyone who had ever been convicted of any drug crime (except possession of one ounce or less of marijuana), though allowing rifle and shotgun possession for people guilty only of nonviolent drug possession after five years pass from the end of their term of imprisonment, probation, or parole supervision); N.J. STAT. ANN. § 2C:58-3(c)(1), :1-4 (West 2005) (barring possession of any firearms by anyone who has ever been convicted of a crime that carries a maximum sentence of over six months in jail); DAYTON, OHIO, CODE OF ORDINANCES §§ 138.11, 138.14(C), (D) (2009) (banning possession of any firearms by anyone with “more than one conviction of any offense involving drunkenness within one year prior to his/her application for firearm owner’s identification card” or anyone “with more than one conviction of disorderly conduct, or the state equivalent of such offense, within two years prior to his/her application for firearm owner’s identification card”). See *Mosher v. City of Dayton*, 358 N.E.2d 540, 544 (Ohio 1976) (Celebrezze, J., dissenting) (noting that the city ordinance upheld by the majority banned possession by people with more than one conviction in the preceding year as to drunkenness or drug abuse); OHIO REV. CODE ANN. § 2923.13(A)(3) (West 2006) (banning possession even by misdemeanants convicted of “illegal possession” of “any drug of abuse,” though leaving courts discretion to lift this restriction under OHIO REV. CODE ANN. § 2923.14 (West 2006) if “[t]he applicant has led a law-abiding life since his discharge or release [from imprisonment, probation, and parole], and appears likely to continue to do so”).

Federal law also bans gun possession by people who are the targets of protective orders, which are generally assumed to rest on a finding (by a preponderance of the evidence<sup>206</sup>) that the subject has acted violently, or poses a credible threat of violence.<sup>207</sup> And federal law bans the transfer of guns to anyone who is under indictment for a felony, which generally just requires a grand jury finding (usually in a nonadversarial proceeding) of probable cause to believe the person is guilty.<sup>208</sup> Some states ban gun possession, and not just gun acquisition, by people who are under indictment;<sup>209</sup> federal law does the same as to people indicted for murder, kidnapping, or various sex crimes, including possession of child pornography.<sup>210</sup>

Federal law essentially forbids nonimmigrant aliens from possessing guns.<sup>211</sup> Some states ban gun possession by all noncitizens.<sup>212</sup>

Federal law and the laws of many states also largely ban gun possession by under-18-year-olds (though possession of long guns is often allowed with

205. See, e.g., *State v. Hopkins*, No. 2005AP1482-CR, 2005 WL 2739081, at \*3 (Wis. Ct. App. Oct. 25, 2005) (upholding no-firearms probation conditions for someone who pled guilty to misdemeanor theft and misdemeanor trespass to dwelling, because the defendant “might graduate from non-violent, albeit intrusive, anti-social acts to things more serious” and because the defendant’s “taste of not being able to have a gun may spur him to mend his ways and become a wholly law-abiding member of our community”). As a general matter, the constitutional rights of probationers may generally be restricted about as much as the constitutional rights of inmates. See, e.g., *Johnson v. State*, 659 N.E.2d 194, 200 (Ind. Ct. App. 1995).

206. See, e.g., IND. CODE ANN. § 34-26-5-9(f) (LexisNexis 2008); *Sinclair v. Daly*, 672 S.E.2d 672, 673–74 (Ga. Ct. App. 2009); *Uttaro v. Uttaro*, 54 Mass. App. 871, 873 (2002).

207. See 18 U.S.C. § 922(d)(8) (2006); *United States v. Emerson*, 270 F.3d 203, 261–62 (5th Cir. 2001).

208. 18 U.S.C. § 922(d)(1), (n).

209. See, e.g., HAW. REV. STAT. ANN. § 134-7(b) (LexisNexis 2006); OHIO REV. CODE ANN. § 2923.13 (West 2006); WASH. REV. CODE ANN. § 9.41.040(2)(A)(IV) (West Supp. 2009); *State v. Winkelman*, 442 N.E.2d 811, 814 (Ohio Ct. App. 1981) (upholding such a ban, though noting that it imposes only a “temporary limitation,” with provision for relief “[s]hould the temporary limitation work an undue hardship upon the indicted party”), *overruled on other grounds*, *State v. Frederick*, Nos. CA88-07-111, CA88-07-118, 1989 WL 80493, at \*3 (Ohio Ct. App. July 17, 1989).

210. 18 U.S.C. § 3142(c)(1)(B)(viii) (2006).

211. See 18 U.S.C. § 922(g)(5)(B). In this discussion, I’ll omit minor exceptions, such as for noncitizens with certain hunting licenses or ones who are engaged in targetshooting.

212. See, e.g., MASS. ANN. LAWS ch. 140, § 130 (LexisNexis 2007). Guam also bans gun possession by any noncitizens, GUAM CODE ANN. tit. 10, § 60108(b)(2) (1993), and a federal statute extends the entire Bill of Rights (except the Tenth Amendment) to Guam, 48 U.S.C.A. § 1421b(u) (West 2003). The Guam noncitizen possession ban may thus be challenged without resolving whether the Second Amendment binds the states via the Fourteenth Amendment. *But see United States v. Lewis*, Crim. No. 2008-45, 2008 WL 5412013, at \*4 (D.V.I. Dec. 24, 2008) (reasoning, in my view unpersuasively, that a similar federal statute extending the Bill of Rights to the Virgin Islands only extended the same Second Amendment right as applies against state governments, and thus didn’t secure an individual right to bear arms because the Second Amendment has not been incorporated against states).

the permission of a parent or guardian).<sup>213</sup> New York City bars gun possession by 18-to-20-year-olds as well;<sup>214</sup> Illinois bars gun possession by 18-to-20-year-olds, except with the permission of a parent, and sometimes not even then.<sup>215</sup> And many other states bar handgun possession by 18-to-20-year-olds.<sup>216</sup> Federal law doesn't ban such possession, but it does bar gun dealers from selling handguns to 18-to-20-year-olds, which makes handguns available to 18-to-20-year-olds only by the good graces of a nondealer third party who is willing to sell to them.

Finally, government employers may sometimes ban both on-duty<sup>217</sup> and off-duty<sup>218</sup> gun possession by employees. I will not discuss this further in this Article, but I flag it here as a question for further research: How much extra power should the government as an employer have to control gun possession

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213. See, e.g., *Dozier v. State*, 709 N.E.2d 27, 31 (Ind. Ct. App. 1999) (upholding ban on possession of a handgun by under-18-year-olds).

214. N.Y. PENAL LAW § 400.00 (McKinney 2008) (providing minimum age of 21 for license to possess a handgun); N.Y. CITY ADMIN. CODE § 10-303 (1996) (providing that licenses to possess a rifle or a shotgun must be issued if the applicant is 21 or above and satisfies certain other criteria); NYPD, Permits | Rifle/Shotgun Permit Information, [http://www.nyc.gov/html/nypd/html/permits/rifle\\_licensing\\_information.shtml](http://www.nyc.gov/html/nypd/html/permits/rifle_licensing_information.shtml) (last visited May 20, 2009) (asserting that no license to possess a rifle or a shotgun will be issued to under-21-year-olds).

215. 430 ILL. COMP. STAT. ANN. §§ 65/2(a)(1), 65/4(a)(2)(i) (West Supp. 2008), bars gun ownership or possession by under-21-year-olds unless they have the written consent of a parent or guardian, and the parent or guardian is not himself disqualified from owning guns. This entirely bars 18-to-20-year-olds from possessing a gun if their parents are dead, or if the living parent or parents are felons, nonimmigrant aliens, mental patients, or otherwise disqualified from owning a gun in Illinois. It also conditions other 18-to-20-year-olds' rights on the permission of their parents, something that is not normally done with regard to the exercise of constitutional rights by adults.

216. See, e.g., CONN. GEN. STAT. ANN. §§ 29-34, -36f (West 2003 & Supp. 2008); see also N.M. STAT. § 30-7-2.2 (2004) (banning possession of handguns by anyone under nineteen).

217. See *Ariz. Op. Att'y Gen. No. I01-011* (2001) (opining that such a restriction should be constitutional).

218. See, e.g., *Simons v. Gillespie*, 2008 WL 3925157 (C.D. Ill. Aug. 1, 2008) (noting possibility of constitutional problem with a police department's barring an employee "from possessing or carrying firearms without prior authorization from the Chief of Police"); Nassau County (N.Y.) District Attorney, Assistant District Attorney Applicant Information & Instruction Form 5, <http://www.nassaucountyny.gov/agencies/DA/Docs/PDF/AppInfoForms.pdf> (last visited Feb. 26, 2009) ("I understand that assistant district attorneys are not permitted to apply for a handgun permit nor own or possess a handgun while employed by the Nassau County District Attorney. Any exception to this policy must be in writing and approved by the District Attorney."). For a case that should be easy, because it involved a less than substantial burden on self-defense, see *Lally v. Dep't of Police*, 306 So. 2d 66 (La. Ct. App. 1974), in which the court upheld a police department rule that when police officers carry guns off-duty, the guns they carry must be .38s or .357s.

by its employees, and if one seeks analogies from other fields, such as free speech law, how can such analogies be sensibly drawn?<sup>219</sup>

## 2. Burden

An individual right to keep and bear arms for self-defense is substantially burdened whenever an individual is entirely barred from owning a gun, or even entirely barred from owning a handgun.<sup>220</sup> It is a mistake to treat such total bans as “relatively minor” restrictions,<sup>221</sup> or assume that there’s no infringement of the right to bear arms simply because non-firearm “arms” are available.<sup>222</sup> Perhaps such total bans are ultimately found to be justifiable burdens, but they are certainly substantial burdens.

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219. The First Amendment analogy would be to *Pickering v. Board of Ed.*, 391 U.S. 563 (1968), which held that a government employer was constrained by the Constitution in firing an employee for his speech, but that the employer may nonetheless fire the employee if the speech is sufficiently potentially disruptive to its mission, and to *Waters v. Churchill*, 511 U.S. 661, 677 (1994) (plurality opinion), which held that a government employer may make such a judgment based on the facts as it reasonably believes them to be. It seems to me that *Connick v. Myers*, 461 U.S. 138 (1983), which held that there ought to be no First Amendment scrutiny of discipline based on speech on matters of purely private concern, is not analogous here. First, it is hard to see how a “private concern”/“public concern” line would apply to the right to keep and bear arms in self-defense. Second, the *Connick* Court’s underlying rationale, which is that allowing a First Amendment claim whenever an employment decision was made based partly on private-concern speech would turn a vast range of employment decisions into federal lawsuits, *id.* at 147, doesn’t apply to the right to keep and bear arms (at least off the job), since very few government employment decisions would normally turn on the exercise of that right. For a similar analogy to *Pickering* as to a different constitutional right, see the cases involving government employees’ rights to send their children to private schools, cited *supra* note 121.

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

221. See *State v. Owenby*, 826 P.2d 51, 53 (Or. Ct. App. 1992) (upholding ban on gun possession by the mentally ill on the grounds that it was a “relatively minor” restriction).

222. See *People v. Swint*, which defended a ban on gun possession by felons this way:

We also note that while [the Michigan Constitution] ensures a Michigan citizen’s right to keep and bear “arms,” that term is not defined. Black’s Law Dictionary (6th ed.), p. 109, defines “arms” as “[a]nything that a man wears for his defense, or takes in his hands as a weapon.” While [the statute] only precludes a former felon’s use, possession, receipt, sale or transportation of a “firearm,” it is silent regarding other “weapons.” Arguably, [the statute] does not completely foreclose defendant’s constitutional right to bear “arms,” i.e., nonfirearm weapons, in defense of himself. . . . “[A]s long as our citizens have available to them *some types of weapons* that are adequate reasonably to vindicate the right to bear arms in self-defense, the state may proscribe the possession of other weapons without infringing on” the constitutional right to bear arms. Accordingly, we find that the constitutional right to bear arms contained in [the Michigan Constitution] does not guarantee defendant the right to possess a firearm after defendant is convicted of a felony.

572 N.W.2d 666, 670–71 (Mich. Ct. App. 1997) (citation omitted). But non-gun weapons are not “adequate reasonably to vindicate the right to bear arms in self-defense” at anywhere near the effectiveness of firearms. *Id.* at 671. A ban on felons’ possession of guns, if it is to be upheld, should be upheld despite its burden on self-defense, not because it doesn’t much burden self-defense.

Some of the statuses that trigger the laws—minority, alienage, being under indictment, being a felon in those states that allow for restoration of civil rights some years after the conviction—are temporary, and may expire in years or even months. But denying people the ability to defend themselves with firearms for that long remains a substantial burden on self-defense. To be upheld, then, the bans must be justified either by a scope argument (that the constitutional right explicitly or implicitly excludes the prohibited class of people) or by a danger reduction argument (that people in the prohibited class are so unusually dangerous that even a total ban on their gun possession is constitutional).

### 3. Scope and Danger Reduction

Naturally, the scope and danger reduction arguments are often related, because any textual or original-meaning limitations on who possesses the right will often stem from the perception that certain people aren't trustworthy enough to possess firearms. The Idaho right to bear arms, for instance, enacted in its current form in 1978, expressly states that the provision shall not "prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon."<sup>223</sup>

Even provisions that do not have such explicit language might have been enacted with a background assumption that some people are not entitled to the full range of constitutional rights. Consider, for instance, the rights of minors. Though no right-to-bear-arms provision expressly excludes minors, it seems likely that such provisions were enacted with an understanding that minors might not have the same constitutional rights as adults. This background understanding likely reflects a judgment that minors aren't mature enough to fully appreciate the consequences of their actions, a judgment that could apply to minors' potential dangerousness to others, as well as to themselves.

At the same time, the scope and danger reduction justifications are importantly different. For one, they look to two different kinds of authorities. Scope justifications rest on a conclusion that some past authorities responsible for the scope of the constitutional provision—usually those who enacted the provision, but possibly those who maintained a particular tradition throughout American history—view certain people as untrustworthy (presumably because they are dangerous). Danger reduction justifications rest on a conclusion that the legislature and the reviewing court view certain people as untrustworthy, notwithstanding a constitutional text, original meaning,

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223. IDAHO CONST. art. I, § 11.

and historical tradition that would secure the constitutional rights of those people as much as the rights of the rest of us.

Relatedly, scope justifications are less subject to being extended by analogy. If felon bans are upheld on the grounds that felons have historically been seen as outside the scope of various constitutional rights, then felon bans would offer a poor analogy for bans on possession by misdemeanants (even violent misdemeanants), or people who are under indictment and thus haven't yet been convicted. Scope arguments that exclude those categories of people would have to be made independently, and the prohibition on possession by felons would offer only a weak analogy.

But if felon bans are upheld on the grounds that felons pose an unusual danger to society, then many other categories of people might be seen as posing a comparable danger. This is especially so because many felonies are nonviolent crimes and their perpetrators probably pose a comparatively small danger of gun violence. If this small danger is enough to support a reducing danger argument in favor of a gun ban, then a wide range of other people could likewise be disarmed on a reducing danger theory.

I'm not sure which theory is right, though my instincts push me towards scope justifications, precisely because scope justifications are less likely to be broadened by analogy. But in any event, the decision about which theory to use is important.

#### 4. Bans Justified by Individualized Finding of Likely Past Criminal Behavior or Future Danger

We therefore need more research on the historical scope limitations on the right to bear arms.

a. *Felons*. As to bans on gun possession by felons, the question is likely to be academic: *Heller* expressly held that such bans are constitutional. Nor did it distinguish between people convicted of violent felonies and those convicted of, say, fraud. Dozens of state court decisions likewise take the view that felons (even those convicted of nonviolent felonies) lack a constitutional right to keep and bear arms.<sup>224</sup>

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224. See, e.g., *Mason v. State*, 103 So. 2d 341, 343 (Ala. 1958) (Coleman, J., dissenting); *Morgan v. State*, 943 P.2d 1208 (Alaska Ct. App. 1997); *People v. Blue*, 544 P.2d 385 (Colo. 1975); *State v. Brown*, 571 A.2d 816 (Maine 1990); *People v. Swint*, 572 N.W.2d 666 (Mich. Ct. App. 1997); *State v. Ricehill*, 415 N.W.2d 481 (N.D. 1987); see also *United States v. Schultz*, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. Jan. 5, 2009) (rejecting a Second Amendment argument as to someone convicted of felony refusal to pay child support). For the few dissenting views, see *United States v. Abner*, 2009 WL 103172 (M.D. Ala. Jan. 14, 2009) (concluding that the federal ban on gun possession by felons "has a strikingly large scope—a scope that might be arguably called into question by a fair reading of *Heller's* rationale"); *Posey*



Felons may need arms for lawful self-defense just as much as the rest of us do. Moreover, bans on felon possession of firearms also affect their law-abiding spouses, girlfriends and boyfriends, and other housemates: Those people might be unable to safely possess guns in their homes because of the possibility that their felon housemate will be seen as “constructive[ly] possess[ing]” the gun,<sup>225</sup> and that they themselves will therefore be seen as criminally aiding this illegal possession.<sup>226</sup> Nonetheless, the understandable worry about felon recidivism probably makes it unlikely that the settled law on the subject will change, though a few judges have expressed some dissenting views.<sup>227</sup>

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*v. Commonwealth*, 185 S.W.3d 170, 183–84 (Ky. 2006) (Scott, J., concurring in part and dissenting in part); *State v. Amos*, 343 So. 2d 166, 170 (La. 1977) (Calogero, J., dissenting); *Britt v. State*, 649 S.E.2d 402, 410 (N.C. Ct. App. 2007) (Elmore, J., dissenting); *City of Akron v. Williams*, 172 N.E.2d 28, 31 (Ohio Mun. Ct. 1960); *Long v. State*, 339 S.W.2d 215, 219 (Tex. Crim. App. 1960) (Davidson, J., dissenting). Some cases suggest that there is a constitutional right for a felon to pick up or borrow a gun for immediate self-defense, though not to possess it for defending himself against unspecified future threats. *E.g.*, *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988). Finally, *People v. Ford*, 568 P.2d 26, 28 (Colo. 1977), suggests that felons generally have a right to possess guns, so long as they can show that the “purpose in possessing weapons was the defense of . . . home, person, and property,” but later cases suggest that this applies only when there was a specific threat to which the felon was responding. *See, e.g.*, *People v. Barger*, 732 P.2d 1225, 1226 (Colo. App. 1986).

225. Cf. ALASKA STAT. § 11.61.200(a)(10) (2008) (expressly barring felons from “resid[ing] in a dwelling knowing that there is a firearm capable of being concealed on one’s person or a prohibited weapon in the dwelling,” though providing an exception for felons who get an apparently discretionary “written authorization to live in a dwelling in which there is a concealable weapon described in this paragraph from a court of competent jurisdiction or from the head of the law enforcement agency of the community in which the dwelling is located”). There are limits on the constructive possession doctrine, for instance if the housemate keeps the gun locked in a combination-locked safe. But such practices can substantially burden the housemate’s gun possession, both by making guns hard to access in an emergency and by increasing the cost, especially for long guns that require large safes.

226. This is especially likely in jurisdictions which allow criminal liability for aiding criminal conduct whenever the defendant knowingly aids another’s conduct, without a further requirement that the defendant purposefully aid the conduct. *Compare, e.g.*, IND. CODE ANN. § 35-41-2-4 (West 2004) (“A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense.”); W. VA. CODE § 17C-19-1 (2004) (likewise); WYO. STAT. ANN. § 6-1-201(a) (2007) (likewise); *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940) (treating knowing help as aiding and abetting); *People v. Spearman*, 491 N.W.2d 606, 610 (Mich. Ct. App. 1992) (likewise), *overruled as to other matters by People v. Veling*, 504 N.W.2d 456 (Mich. 1993), *with ALA. CODE § 13a-2-23* (2004) (defining only intentional aiding as aiding and abetting); COLO. REV. STAT. ANN. § 18-1-603 (West 2008) (likewise); 18 PA. CONS. STAT. ANN. § 306 (West 2004) (likewise); TEX. PENAL CODE ANN. § 7.02 (Vernon 2004) (likewise); *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (likewise); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (likewise). *See generally* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988). They might also be civilly liable for possessing a firearm where a felon might be able to access it. *Compare Estate of Heck v. Stoffer*, 786 N.E.2d 265, 270–71 (Ind. 2003) (holding that parents of a fugitive may be liable for leaving their gun where it was available for the fugitive to steal, logic that would apply equally to nonfugitive convicted felons), *with Lelito v. Monroe*, 729 N.W.2d 564, 567 (Mich. Ct. App. 2006) (holding, in a civil lawsuit, that felon-in-possession statutes “impose no duty on the felon’s friends, family, neighbors, etc. . . . to suppress their own lawful access to firearms when a felon is present”).

227. *See supra* note 224.

b. “[Non-]Peaceable Citizens.” The more practically important question concerns extensions of the ban from felons to violent misdemeanants<sup>228</sup> and to nonviolent misdemeanants.<sup>229</sup> Some historical references say that the right to keep and bear arms encompassed only “peaceable citizens” or “virtuous citizens,”<sup>230</sup> and some recent scholarship and recent government arguments suggest that this justifies restrictions that go beyond felons and at least to violent misdemeanants.<sup>231</sup> The question is whether this was indeed a historically understood limitation.

c. *People Found Dangerous by Preponderance of the Evidence or Under a Probable Cause Standard.* A related question would be the extent to which this historical exclusion of the nonpeaceable or nonvirtuous has covered those who haven’t been criminally convicted—or, if one focuses on the preventing danger theory, to what extent it should cover them. May the right to bear arms be restricted simply based on a finding by a preponderance of the evidence that the target poses a danger of violence?<sup>232</sup> What if the finding is at a hearing conducted without notice to the target?<sup>233</sup> May the right be restricted on a finding of probable cause by a grand jury handing down an indictment, a context where the defendant has no opportunity even to introduce exculpatory

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228. See, e.g., 18 U.S.C. § 922(g)(9) (2006) (banning possession by people convicted of domestic violence misdemeanors); *United States v. Li*, No. 08-CR-212, 2008 U.S. Dist. LEXIS 100867, \*6 (E.D. Wis. Sept. 22, 2008) (upholding § 922(g)(9)); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (upholding ban on possession by violent misdemeanants).

229. See *supra* note 204.

230. See 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 681 (1971) (quoting Samuel Adams’ proposal for a right-to-bear-arms constitutional amendment, made during the Massachusetts Ratifying Convention, which would have limited protection to “peaceable citizens”); *id.* at 665 (discussing a proposal for a right-to-bear-arms constitutional amendment, made during the Pennsylvania Ratifying Convention, which would have limited the right to exclude disarming “for crimes committed, or real danger of public injury from individuals”); see, e.g., *State v. Hirsch*, 114 P.3d 1104, 1131 (Or. 2005) (using these sources as a justification for upholding bans on gun possession by felons); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Spring 1986, at 143, 146 (likewise); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995) (likewise).

231. See Don B. Kates & Clayton E. Cramer, *The Second Amendment: Scope and Criminological Considerations* 17–18, [http://works.bepress.com/clayton\\_cramer/3](http://works.bepress.com/clayton_cramer/3) (last visited Apr. 5, 2009) (so arguing); *Li*, 2008 U.S. Dist. LEXIS 100867, at \*6 (quoting the government’s argument).

232. See, e.g., *Kampf v. Kampf*, 603 N.W.2d 295, 298 n.3 (Mich. Ct. App. 1999); see also Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 189 (1999) (“[A] strong case can be made for upholding that part of [18 U.S.C.] § 922(g)(8) that imposes a firearms disability on persons who are under a domestic violence restraining order because a court has found that they represent a credible threat to the physical safety of their domestic partner or child.”).

233. *Kampf*, 603 N.W.2d at 297.

evidence? Two courts have held such a restriction violates the right to bear arms, but two others have held otherwise.<sup>234</sup>

d. *People Found “Unsuitable” by Police Departments*. Massachusetts law provides that people may get or keep permits to carry handguns—which are also required for simple possession of handguns at home—only so long as the police department finds them to be “suitable person[s].”<sup>235</sup> The police department may make this judgment based on its own conclusions about the person’s likely past misconduct or future dangerousness, with only a highly deferential review by judges.<sup>236</sup> Police departments have in fact sometimes revoked such licenses based on charges that had been “dismissed or otherwise

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234. Compare *United States v. Arzberger*, Nos. 08 Cr. 894 (AKH), 08 Mag. 1876 (JCF), 2008 WL 5453739, at \*10–11 (S.D.N.Y. Dec. 31, 2008) (holding that a mandatory no-firearms condition for pretrial release of people accused of possessing child pornography was unconstitutional, in the absence of “an independent judicial determination” of “whether such a condition [was] reasonably necessary in his case to secure the safety of the community”), and *United States v. Kennedy*, No. CR08-354-RAJ-JPD, 2008 WL 5517643 (W.D. Wash. Nov. 25, 2008) (same), with *State v. Winkelman*, 442 N.E.2d 811 (Ohio Ct. App. 1981) (upholding such a ban, though noting that it imposes only a “temporary limitation,” with provision for relief “[s]hould the temporary limitation work an undue hardship upon the indicted party”), *overruled on other grounds by State v. Frederick*, Nos. CA88-07-111, CA88-07-118, 1989 WL 80493 (Ohio Ct. App. July 17, 1989), and *State v. In*, 18 P.3d 500, 503 (Utah Ct. App. 2000) (also stating that such a ban is constitutional, but without a detailed explanation).

*State v. Spiers*, 79 P.3d 30 (Wash. Ct. App. 2003), struck down a ban on *ownership* of guns while under indictment, but partly because other laws that allowed a ban on *possession* of guns under those circumstances were “sufficient to protect public safety”:

It should be kept in mind that, separate from the challenged ownership provision, the State may prohibit a defendant from possessing guns. RCW 9.41.040(1)(b)(iv) (contains prohibition on possession that is unchallenged here); CrR 3.2(d)(3) (on showing that defendant poses substantial danger). Thus, in analyzing Spiers’s rights, this court examines whether it is reasonably necessary to prohibit Spiers’s gun ownership rights in addition to his gun possession rights.

*Id.* at 34–35. But while the first cited provision covers anyone “free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010,” WASH. REV. CODE ANN. § 9.41.040(1)(b)(iv) (West 2003) (current version at WASH. REV. CODE ANN. § 9.41.040(2)(a)(iv) (West Supp. 2009)), the second is limited to situations where there is “a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice,” WASH. SUP. CT. CRIM. R. 3.2(d)(3) (West Supp. 2009). It is therefore not clear to what extent the *Spiers* court approved of bans on possession by all indictees, by those indicted for serious offenses (a fairly large category defined in WASH. REV. CODE ANN. § 9.41.010(12) (West 2003), which covers both violent offenses and some nonviolent offenses), or by those who “pose[ ] substantial danger.”

235. MASS. ANN. LAWS. ch. 140, § 131 (LexisNexis 2007).

236. *Chief of Police of Shelburne v. Moyer*, 453 N.E.2d 461, 464 (Mass. App. Ct. 1983) (providing that a police chief’s decision may be set aside only if it is “arbitrary, capricious, or an abuse of discretion”).

resolved without a finding of guilt”<sup>237</sup> and on unadjudicated criminal complaints that “never ended in convictions [and] that . . . were essentially all brought by one person.”<sup>238</sup> The denials or revocations are also sometimes based in part on whether the “person habitually associates with persons who violate the law or otherwise engage in inappropriate behavior, including verbal behavior”<sup>239</sup> or on whether the person “refused to cooperate in the police investigation concerning . . . several shooting incidents.”<sup>240</sup>

Other states have similar rules, whether as to permits to possess firearms or permits to carry them; some provide for de novo review by courts,<sup>241</sup> while in others courts review police decisions deferentially, and set them aside only if they are found to be arbitrary or capricious.<sup>242</sup> Do such decisions have to involve a more concrete finding of dangerousness than just a conclusion that the person is not “a suitable person”? Does there have to be some judgment using an explicit quantum of proof, such as by a preponderance of the evidence? Moreover, should such decisions be reviewed de novo by the judiciary, as is required in some constitutional contexts?<sup>243</sup> This too bears further investigation.

237. *Tucci v. Police Dep’t of Wareham*, No. 07-P-1409, 2008 WL 2595923, at \*1–2 (Mass. App. Ct. July 2, 2008) (upholding revocation of permit); *see also Stavis v. Carney*, No. Civ.A. 99-349-A, 2000 WL 1170090, at \*8 (Mass. Super. Ct. July 31, 2000) (noting the revocation of permit but not reaching a final conclusion on the merits).

238. *Roddy v. Leominster Dist. Court*, No. 03457, 2005 WL 2539851, at \*2 (Mass. Super. Ct. Sept. 2, 2005) (upholding revocation of permit).

239. *Stavis*, 2000 WL 1170090, at \*7.

240. Brief of the Defendant-Appellee, *Godfrey v. Fritts*, No. 91-P-1460, at 9 (Mass. App. Ct. Apr. 7, 1992) (listing this as the “sole[]” reason for the revocation of the license); *Godfrey v. Chief of Police of Wellesley*, 616 N.E.2d 485, 488 (Mass. App. Ct. 1993) (upholding the revocation). The police had been investigating a series of shootings in town, and had gotten tips that the shootings might have been committed by Godfrey’s brother using Godfrey’s gun. Brief of the Defendant-Appellee, *supra*, at 4–5. But the government’s brief in the case specifically declined to point to any finding by the police department that Godfrey had likely committed any crime, or had been complicit in his any crime on his brother’s part. Rather, it asserts that “All that the Chief knew is that Godfrey declined at all relevant times to answer any questions whatsoever as a part of the Department’s ongoing investigation into the incidents,” *id.* at 13; *see also id.* at 9, 16, and that this sufficed as a justification for the license revocation.

241. *See, e.g., Heindlmeyer v. Ottawa County Concealed Weapons Licensing Bd.*, 707 N.W.2d 353, 361 (Mich. Ct. App. 2005); *Kozerski v. Steere*, 433 A.2d 1244, 1245 (N.H. 1981); *Weston v. State*, 286 A.2d 43, 47 (N.J. 1972); *Moats v. Pennsylvania State Police*, 782 A.2d 1102, 1104–05 (Pa. Commw. Ct. 2001).

242. *See, e.g., Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 298–99 (Md. Ct. Spec. App. 1980); *Denora v. Safir*, 711 N.Y.S.2d 900, 900 (App. Div. 2000).

243. *Compare, e.g., Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6 (1964) (lead opinion by Brennan, J.) (“Even in judicial review of administrative agency determinations, questions of ‘constitutional fact’ have been held to require *de novo* review.”); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (taking a similar view); *Simonson v. Iowa State University*, 603 N.W.2d 557, 561 (Iowa 1999) (likewise), *with NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (providing for deferential review of expert agency’s decisions restricting speech of employers or unions); *Hamdi v. Rumsfeld*,

e. *People found to be physically incapable of safely using firearms.* A few statutes limit gun possession by those who are seen as too “physical[ly] infirm[ ]” to “safe[ly] handl[e]” firearms.<sup>244</sup> I have seen virtually no cases or commentary on this, though one case, *In re Breitweiser*, suggests that sometimes this standard might be misapplied to handicapped people who are capable of safely using weapons but require special adaptive tools for doing so.<sup>245</sup>

5. Bans Without Individualized Findings of Likely Past Violence or Future Danger

a. Side Effects of Attempts to Disarm the Dangerous: Bans on Gun Possession by People Subject to Restraining Orders Without Findings of Misconduct or Dangerousness

New Jersey law prohibits gun possession by “any person whose firearm is seized pursuant to the ‘Prevention of Domestic Violence Act of 1991’ and whose firearm has not been returned.”<sup>246</sup> This was likely aimed at people whose firearm hadn’t been returned because of a finding of domestic violence, made by a preponderance of the evidence in a civil proceeding.

But in *M.S. v. Millburn Police Department*,<sup>247</sup> a New Jersey appellate court held this applied more broadly, to anyone whose firearm has not been returned.<sup>248</sup> M.S. and his wife had both filed domestic violence complaints against each other, and each had agreed to have restraining orders issued against the other. The prosecutor sought the forfeiture of M.S.’s guns, and “M.S. signed a consent judgment, permitting him to sell the five weapons to a registered firearms dealer,”<sup>249</sup> without admitting guilt. Some time after he sold his firearms, the restraining orders were vacated, and apparently no finding as to any violence

542 U.S. 507, 534 (2004) (providing for some deference to a military tribunal’s determination that someone was an enemy combatant).

244. See N.J. STAT. ANN. § 2C:58-3(c)(3) (West 2005); GUAM CODE ANN. tit 10, § 60108(b)(7) (1993). For similar provisions in statutes limiting the issue of concealed carry licenses, see also ARK. CODE ANN. § 5-73-309(4) (2005); FLA. STAT. ANN. § 790.06(2)(c) (West 2007); KAN. STAT. ANN. § 75-7c04(a)(3) (Supp. 2008); LA. STAT. ANN. § 40:1379.3(C)(5) (2008); MISS. CODE ANN. § 45-9-101(2)(c) (2004); NEB. REV. STAT. § 69-2432(3) (2003); WYO. STAT. ANN. § 6-8-104(b)(iii) (2007).

245. 2007 WL 845916, at \*1 (N.J. Super. Ct. App. Div. Mar. 22, 2007) (upholding trial court’s reversal of a police department’s decision to deny someone a permit to possess a shotgun for hunting, because he was “partially paralyzed,” had “limited use of his left arm and hand,” and had “partially limited” “left side peripheral vision”).

246. N.J. STAT. ANN. § 2C:58-3(c)(8) (citation omitted).

247. 930 A.2d 481, 484 (N.J. Super. Ct. App. Div. 2007), *rev’d*, 962 A.2d 515 (N.J. 2008).

248. *Id.*

249. *Id.* at 482.

on M.S.'s part was ever made.<sup>250</sup> Nonetheless, because M.S.'s firearms hadn't been returned—with no finding or admission of M.S.'s likely guilt—M.S. was permanently barred from having guns under New Jersey law.

The following year, the New Jersey Supreme Court reversed the ruling, concluding that the statute should be read as applying only when the firearms aren't returned because of a finding or admission of guilt.<sup>251</sup> This basically places the New Jersey law on a similar footing with laws that bar gun possession based on a restraining order entered upon a finding of past violence or future danger.<sup>252</sup> But for over a year, New Jersey law appeared to bar certain people from possessing guns even without any such finding.

The same might sometimes happen under the federal statute that bans possession of guns by people subject to restraining orders. The federal statute applies when the order

(B) restrains such person from harassing, stalking, or threatening an intimate partner . . . or child . . . , or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.<sup>253</sup>

The use of “or” between (C)(i) and (C)(ii) suggests that the law could bar gun possession even when there is no finding of a credible threat or of past violence, and all that is present is a prohibition on “use, attempted use, or threatened use of physical force.”

And a judge might not think much about issuing an order barring the use of injury-causing force even without a finding of threat or past misconduct: After all, such force is already generally illegal (setting aside self-defense, which would likely be implicitly exempted), so why not prohibit it?<sup>254</sup> In such

250. *Id.* at 482–83; see Video of Oral Argument (No. A-80-07) (Sept. 23, 2008), available at [http://njlegallib.rutgers.edu/supct/args/A\\_80\\_07.php](http://njlegallib.rutgers.edu/supct/args/A_80_07.php) (not noting any finding of violence on M.S.'s part).

251. *M.S. v. Millburn Police Dep't*, 962 A.2d 515, 524–25 (N.J. 2008).

252. Though not exactly the same footing, because the New Jersey law's prohibition is permanent—much like a prohibition based on a criminal conviction—and not just for the duration of the restraining order.

253. 18 U.S.C. § 922(g)(8) (2006).

254. See *Pearson v. Pearson*, 488 S.E.2d 414, 428 (W. Va. 1997) (Workman, C.J., dissenting) (noting that “[b]oilerplate mutual restraining orders” that bind both partners are “all too often” issued “without a proper evidentiary foundation,” perhaps because “[o]n first glance, they seem harmless”).

a case, barring firearms possession solely because the order exists, unbacked by any findings of dangerousness or misbehavior, must violate the right to bear arms.

Some courts that have considered the federal statute quoted above have concluded that no-use-of-force orders will indeed be based on a factual finding of threat:

Congress legislated against the background of the almost universal rule of American law that for a temporary injunction to issue: “There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus, a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown. However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.”

We conclude that Congress in enacting section 922(g)(8)(C)(ii) proceeded on the assumption that the laws of the several states were such that court orders, issued after notice and hearing, should not embrace the prohibitions of paragraph (C)(ii) unless such either were not contested or evidence credited by the court reflected a real threat or danger of injury to the protected party by the party enjoined.<sup>255</sup>

Some states (perhaps many or even almost all) might only authorize such orders when some finding of threat or past violence has been made.<sup>256</sup> And some might demand a persuasive showing of violent conduct precisely because they want to avoid improperly restricting a person’s right to bear arms.<sup>257</sup>

On the other hand, at least some courts seem willing to enter orders simply based on “verbal[] abus[e]” that consists of “insulting and foul language [used] to humiliate and degrade.”<sup>258</sup> Likewise, even statutes that ostensibly

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255. *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (emphasis, footnote, and citation omitted).

256. *See id.* at 262–63 (concluding that Texas law so requires); *see also In re Marriage of Yates*, 148 P.3d 304, 317 (Colo. App. 2006); *M.B. v. H.B.*, No. CS02-04668, 2003 WL 22265053, at \*4–5 (Del. Fam. Ct. May 2, 2003); *Murphy v. Okeke*, 951 A.2d 783, 790 (D.C. 2008); *Uttaro v. Uttaro*, 768 N.E.2d 600, 604 (Mass. App. Ct. 2002); *Pearson*, 484 S.E.2d at 424.

257. *See M.B.*, 2003 WL 22265053, at \*4; *see also Moore v. Moore*, 657 S.E.2d 743, 747–48 & nn.3–4 (S.C. 2008).

258. *Green v. Green*, No. 269, 1997 WL 67315 (Del. Oct. 14, 1997) (upholding such an order, and summarily rejecting the target’s state right-to-bear-arms claim, even though the Delaware Constitution expressly secures a right to bear arms in self-defense). *See also Lujan ex rel. Lujan v. Casados-Lujan*, 87 P.3d 1067, 1068–69, 1071 (N.M. Ct. App. 2003), which issued such an order based on a stepmother’s “continuous verbal abuse and belittlement” of her 14-year-old stepson (though also mentioning a possible implicit threat “inasmuch as [the wicked stepmother] was always bragging about hitting people, and [the stepson] was fearful that she would hit him”). The court concluded that “the language . . . could be interpreted as symbolizing an aggressiveness and threat of physical and emotional domination that comes well within the provisions of [N.M. REV.

require a finding of domestic violence could be satisfied simply by “a communication . . . in offensively coarse language” made “with purpose to harass,”<sup>259</sup> or based on “making annoying telephone calls, directly or indirectly destroying personal property and ‘contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party . . . .’”<sup>260</sup> And under the Vermont statute, a person’s supposed future dangerousness could be determined not just based on the person’s past unlawful conduct, but also based on the person’s past lawful use of nondeadly force to defend property.<sup>261</sup>

Moreover, the physical conduct required for the statutes (which of course only require a showing by a preponderance of the evidence) may often be quite ambiguous. In one case, for instance, the target of the order “grabbed [the petitioner’s] arm” and then “stormed out.”<sup>262</sup> In another, the target of the order was found to have “[p]hysically blocked [a] pathway to prevent [the petitioner] from entering the house” and “subjected [the petitioner] to extreme psychological abuse.”<sup>263</sup>

In a third, a domestic protective order was issued against a woman who quickly backed out from a driveway when the petitioner and his son were in the way on a small riding mower, and “stopped within a few feet” of the petitioner and the son—possibly a threat but possibly just an incident of unsafe driving.<sup>264</sup> Moreover, the order applied to the driver’s husband as well

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STAT. § 40-13-2)(C)(2), (4), and (10),” a statute that defined “domestic abuse” to include incidents that result in “severe emotional distress,” “a threat causing imminent fear of bodily injury,” and “harassment.” The *Lujan* court noted that “the special commissioner told Respondent that she would not be subject to firearms restrictions,” 87 P.3d at 1071, but this seems to have been a misstatement on the commissioner’s part: 18 U.S.C. § 922(g)(8) would indeed apply in such a situation, see *Lujan v. Casados*, No. D0117DV200200105 (N.M. Super. Ct. Feb. 25, 2002) (order of protection) (expressly prohibiting the use or threat of force that would result in bodily injury, which would trigger § 922(g)(8), and expressly noting to the target that “federal law prohibits you from possessing or transporting firearms or ammunition while this order is in effect”).

259. N.J. STAT. ANN. §§ 2C:25-19(a)(13), 2C:25-29, 2C:33-4 (West 2005).

260. See, e.g., *Anderson v. Weakland*, No. A104837, 2004 WL 1574529, at \*2-3 (Cal. Ct. App. July 14, 2004) (upholding a domestic protective order that expressly barred firearms possession, expressly asserting that such orders can be issued based on “abuse” short of “physical abuse or bodily injury,” and giving the material quoted in the text as examples of what could constitute “abuse”).

261. *Raynes v. Rogers*, 955 A.2d 1135, 1139-40 (Vt. 2008).

262. *Saladino v. Harms*, No. 05-1785, 2006 WL 1897166, at \*1 (Iowa Ct. App. July 12, 2006).

263. *Kie v. McMahel*, 984 P.2d 1264, 1267 (Haw. Ct. App. 1999). These were the only incidents of “domestic abuse” that the court found.

264. *Acosta v. Wilder*, No. D041293, 2004 WL 206288 (Cal. Ct. App. Feb. 4, 2004). The targets of the order, the Acostas, had apparently been the subject of a campaign of harassment on petitioner Wilder’s part, including “intimidating the Acostas’ son, repeatedly telephoning the Acosta residence, making threats, and stating racial and disparaging statements about the Acostas.” *Id.* at \*2. (A restraining order was also issued against Wilder.) This may have led the court to assume that the driver’s behavior was deliberate retaliation; but such an inference is hard to reliably draw.



as to the driver herself, though there was no finding of any violence on the husband's part. In another case, though reversed on appeal, a judge issued a restraining order against a woman based simply on her briefly remaining at a party in her boyfriend's apartment after he had ordered her to go; she had just learned of the boyfriend's infidelity while at the party, started to cry and yell at the unfaithful boyfriend, and then did not obey his order to "Get the F[expletive] out of [the] house."<sup>265</sup>

Other courts allow the issuance of restraining orders when the target has long been out of the state or even out of the country—or perhaps even has always lived outside the state and the country—and was thus outside what would normally be the court's jurisdiction under the Due Process Clause.<sup>266</sup> Such nonresidents might find it too burdensome to return to defend themselves against the factual allegations, one common explanation for why personal jurisdiction is generally required in the first place.<sup>267</sup> A finding of past violence or future threat may thus be based on a one-sided presentation in a context where the legal system would otherwise not treat the defendant's rights as being forfeited by a decision not to appear.

It thus seems to me that there might well be cases in which the right to bear arms is denied to the targets of restraining orders even in the absence of a credible finding of threat or violence. Whether this is true needs further research. And if the research reveals that such prohibitions are indeed sometimes imposed, it seems to me that they would likely be unconstitutional. It's hard to see how the scope of the right to bear arms can be understood as excluding people simply because they're subject to a court order that has been entered with no finding of past violence or future dangerousness.<sup>268</sup>

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265. See *Murphy v. Okeke*, 951 A.2d 783, 786 (D.C. 2008) (describing the circumstances); *id.* at 790–91 (reversing the order).

266. See *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001). *But see* *T.L. v. W.L.*, 820 A.2d 506 (Del. Fam. Ct. 2003).

267. 18 U.S.C. § 922(g)(8)(A) (2006) applies only to orders "issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate," but doesn't specifically require that the court had personal jurisdiction over the person.

268. See *Lund*, *supra* note 232, at 163 (taking the same view).

b. Proxies for Likely Inadequate Judgment: Bans on Gun Possession by Under-18-Year-Olds, the Mentally Ill, Mentally Retarded, the Drug-Or-Alcohol-Addicted, and 18-to-20-Year-Olds

*Scope and Burden.* Many (but not all) states generally ban gun possession by under-18-year-olds,<sup>269</sup> though such states tend to have exceptions for hunting and target shooting with a parent's permission. These laws are serious burdens on the ability of under-18-year-olds to defend themselves. Older minors are just as likely to be violently attacked as are younger adults (and much more so than older adults), and 12-to-17-year-old girls are substantially more likely to be raped than young adult women.<sup>270</sup> Moreover, both male and female minors are often without adult protection, whether at home or in public places.

Nonetheless, it is also highly plausible that even older minors are more likely to misuse their guns, chiefly because their capacities for impulse control and thoughtful judgment haven't fully matured. This avoiding danger argument is of course the justification for age cutoffs for various decisions, whether decisions that may jeopardize the minors' own safety, or ones (such as about driving or drinking) that may jeopardize third parties.<sup>271</sup> And because the

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269. See, e.g., CAL. PENAL CODE §§ 12072, 12078 (Deering Supp. 2009) (banning selling or giving a firearm to a minor, except as to loans of no more than thirty days with the parent's permission, or longer loans for limited reasons that don't include self-defense). For examples of the minority view generally allowing possession of handguns by under-18-year-olds, see MONT. CODE ANN. § 45-8-344 (2007) (age 14) and VT. STAT. ANN. tit. 13 § 4008 (1998) (age 16). See also N.Y. PENAL LAW §§ 265.00(3), 265.05, 400.00 (McKinney 2008) (setting the age at 16 for long guns); N.C. GEN. STAT. §§ 14-269.7, -316 (2007) (setting the age at 12 for long guns).

270. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, tbl.4 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus06.pdf>. The equal or higher victimization of older minors compared to adults applies even if one focuses only on victimization by strangers. See *id.* at tbls.4, 29.

271. The driving age is generally 16 rather than 18, even though many more 16- and 17-year-olds die in car accidents than in gun accidents, gun suicides, or gun homicides, but this lower driving age is likely a concession to the practical reasons why parents want children to have cars (especially to travel to work and school), and not a considered judgment that 16-year-olds are generally mature enough to be entrusted with a wide range of adult responsibility where the use of deadly weapons is involved. See Insurance Inst. for Highway Safety, *US Licensing Systems for Young Drivers*, May 2009, [http://www.iihs.org/laws/pdf/us\\_licensing\\_systems.pdf](http://www.iihs.org/laws/pdf/us_licensing_systems.pdf) (summarizing driving ages in various states, with thirty-three pegged at exactly age 16 and forty-six being between age 15½ and age 16½); Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control & Prevention, WISQARS Leading Causes of Death Reports, 1999-2006, <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html> (last visited May 6, 2009) (2001-05 data for 16-to-17-year-olds) (reporting about 35 fatal gun accidents, 260 gun suicides, and 500 gun homicides per year); NAT'L SAFETY COUNCIL, INJURY FACTS 104 (2009) (reporting that there were 700 16-year-old drivers and 1100 17-year-old drivers involved in fatal accidents in 2007, though the total number of deaths caused would be a little less than 1800 since the 1800 double-counts accidents in which two 16- or 17-year-old drivers were involved but only one fatality resulted); E-mail from Lyn Cianflocco, National Highway Traffic Safety Administration, to Cheryl Kelly Fischer, UCLA Law Library (Mar. 24, 2009,

drafters of the Second Amendment likely saw this danger, it also seems to me that such bans on gun possession by minors can be justified by a scope argument: Minors generally have, and historically have had, lesser constitutional rights than do adults,<sup>272</sup> and the same should apply to the right to possess deadly weapons.<sup>273</sup>

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12:09 PST) (on file with author) (reporting, using 2007 data, a total of 844 “fatalities in motor vehicle traffic crashes involving at least one 16 year old driver” and 1408 where at least one 17-year-old was involved).

272. Minors, for instance, generally don’t have the constitutional right to sexual autonomy, to marry, or to beget children, and are limited in their abortion rights. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing adults’ right to sexual autonomy and implicitly adults’ right to beget children, but specifically noting that the case did not involve minors); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding that minors have narrower abortion rights than do adults); *Kirkpatrick v. Eighth Judicial Dist. Court ex rel. County of Clark*, 64 P.3d 1056, 1060 (Nev. 2003) (holding that minors do not have the right to marry); *In re R.L.C.*, 643 S.E.2d 920 (N.C. 2007) (likewise as to sexual autonomy and implicitly the right to beget children). For a rare decision to the contrary, see *B.B. v. State*, 659 So. 2d 256 (Fla. 1995), holding that 16-year-olds have a constitutional right to have sex with each other, though not with adults.

The law’s support for parental control over their minor children, something that would be a grave interference with liberty as to adults, tracks that. See, e.g., CAL. WELF. & INST. CODE § 601 (West 2008) (threatening a child “who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian” with being adjudged a “ward of the court”); MINN. STAT. ANN. § 609.06 subd. 1(6) (West 2003) (exempting reasonable force used by parents from criminal assault law); *id.* § 609.255 (West 2003) (defining false imprisonment to exclude conventional parental restraint of children); *Brekke v. Wills*, 23 Cal. Rptr. 3d 609, 613 (Ct. App. 2005) (upholding an injunction barring a sixteen-year-old girl’s ex-boyfriend, whom her mother considered a bad influence, from contacting her, partly on grounds that injunction helped protect “[mother’s] exercise of her fundamental right as parent to direct and control her daughter’s activities”); *L.M. v. State*, 610 So. 2d 1314 (Fla. Dist. Ct. App. 1992) (affirming the lower court’s order, as condition of juvenile’s probation, that he obey his mother); MODEL PENAL CODE § 3.08 (Proposed Official Draft 1962) (providing that parents’ use of force is justified when done for “the purpose of safeguarding or promoting the welfare of the minor”).

The same is in some measure true for explicitly secured rights, such as free speech rights, at least where it comes to sexually themed expression. See *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968). And the law has long allowed children to be adjudged delinquent and basically imprisoned through the juvenile justice system, without the standard constitutional guarantees applicable to criminal proceedings. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545–51 (1971). This has been rationalized on the grounds that the proceedings are civil rather than criminal, see, e.g., *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839), but it was precisely the presumed incapacity of the child that justified such civil proceedings.

On the other hand, when it comes to criminal prosecutions as opposed to juvenile court proceedings, minors have apparently generally had the same constitutional rights as adults. See EDWARD W. SPENCER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 628, at 549 (1911). And some sorts of constitutional rights, such as the right to have some judicial hearing before any imprisonment, including through the juvenile justice system, have apparently also been long extended to minors. See, e.g., SILAS JONES, AN INTRODUCTION TO LEGAL SCIENCE 63 (New York, J.S. Voorhies 1842).

273. See, e.g., *Glenn v. State*, 72 S.E. 927 (Ga. Ct. App. 1911) (upholding ban on carry license for under-18-year-olds). I suggest in Volokh, *supra* note 192, that the result might be different for generally nondeadly weapons, such as pepper spray or stun guns.

For related reasons, I suspect that those whose judgment is seen as compromised by mental illness,<sup>274</sup> mental retardation, or drug or alcohol addiction<sup>275</sup> have historically been seen as less than full rightholders, alongside those whose judgment is compromised by youth.<sup>276</sup> But again, some solid historical research would be more helpful than either scholars' or judges' speculation.

But what about 18-to-20-year-olds? The New York City ban on all gun ownership by 18-to-20-year-olds surely qualifies as a substantial burden.<sup>277</sup> So must the Illinois law, which bans gun ownership by 18-to-20-year-olds whose parents are dead, felons, or nonresident aliens, and conditions other 18-to-20-year-olds' rights on their parents' permission.<sup>278</sup> And under *Heller*, the same should be true for the more common restrictions on handgun ownership and acquisition by 18-to-20-year-olds:<sup>279</sup> The availability of long guns as a self-defense option wouldn't undo the "sever[ity of the] restriction," for the same reasons that it didn't do so in *Heller*.<sup>280</sup>

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274. See, e.g., *United States v. McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009) (upholding 18 U.S.C. § 922(g)(4) (2006), which bans gun possession by persons committed to a mental institution, by citing *Heller's* approval of bans on possession by "the mentally ill"); *Foss v. Town of Mansfield*, No. 03-P-1457, 2004 WL 2150984 (Mass. App. Ct. Sept. 17, 2004) (upholding revocation of handgun license based on the licensee's depression, which led to a suicide threat and brief hospitalization).

275. See *State v. Oaks*, 594 S.E.2d 788, 793 (N.C. Ct. App. 2004) (striking down court order permanently barring firearms possession by a person who had admitted to habitually using marijuana, on the grounds that "we cannot affirm an order that apparently presumes that he will always be an unlawful user of controlled substances, and therefore may never possess firearms").

276. For instance, the sufficiently mentally ill may have conservators appointed for them, and thus be stripped of the right to dispose of their property. Their criminal trials may be delayed while they are incompetent, despite the Speedy Trial Clause. See, e.g., *United States v. Mills*, 434 F.2d 266, 271 (8th Cir. 1970); *Langworthy v. State*, 416 A.2d 1287, 1293-94 (Md. Ct. Spec. App. 1980). Sex with those who are so mentally ill or mentally retarded that they can't fully appreciate the consequences of their actions may likely be criminalized, see, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (repeatedly stressing the rights of "consenting adults"); *Anderson v. Morrow*, 371 F.3d 1027, 1032-33 (9th Cir. 2004) ("The *Lawrence* Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct. The holding does not affect a state's legitimate interest and indeed, duty, to interpose when consent is in doubt."), even though similar bans on competent adults would interfere with the right to have children and the right to sexual autonomy.

277. See *supra* note 215.

278. See *id.*

279. See *supra* notes 215-216 and accompanying text.

280. The South Carolina Supreme Court did hold that a ban on handgun possession by under-21-year-olds didn't violate the state constitutional right to bear arms, "because persons under the age of 21 have access to other types of guns." *State v. Bolin*, 662 S.E.2d 38, 39 (S.C. 2008). (The court went on to still strike down the ban, because it violated S.C. CONST. art. XVII, § 14, which provided that "[e]very citizen who is eighteen years of age or older . . . shall be deemed *sui juris* and endowed with full legal rights and responsibilities." *Id.* at 39-40.) But I think *Heller* has the better view here, for reasons given in Part II.A.4; courts should recognize that handgun bans impose a substantial burden on state constitutional rights to keep and bear arms in self-defense as well as on the federal right.

Yet regardless of the burden, there is also the scope question: Should constitutional rights be seen as fully vesting at age 18, or at age 21, in keeping with the historical tradition of 21 being the age of majority? The rule that majority begins at 21 endured until the early 1970s,<sup>281</sup> so most right-to-bear-arms provisions were thus enacted while 18-to-20-year-olds were technically treated as minors.<sup>282</sup> And the same issue arises as to other rights as well: Consider, in the First Amendment context, a recent proposal to set 21 as the age of consent for being filmed or photographed naked or in sexual contexts,<sup>283</sup> and the possibility that this is already the law in Mississippi and as to under-19-year-olds in Nebraska.<sup>284</sup> Consider the Nebraska requirement of parental consent for marriage of under-19-year-olds.<sup>285</sup> Or consider the Alaska law barring possession of marijuana by under-19-year-olds even though the Alaska Supreme Court has interpreted the Alaska Constitution's right to privacy as securing adults' right to possess small quantities of marijuana at home.<sup>286</sup>

I'm skeptical about this argument, because the pre-1970s cases that I've seen involving lesser constitutional rights for minors—lesser free speech rights, lesser religious freedom rights, and lesser criminal procedure rights—involved age cutoffs of 18 or less.<sup>287</sup> Whatever setting the age of majority at 21 might

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281. See Larry D. Barnett, *The Roots of Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 613, 681–86 (2007). A few states had the age of majority set at 18 for women, but 21 for men. *Id.* In the early 1970s, almost all the states lowered the age of majority to 18. *Id.*

282. The exceptions are Alaska, Delaware, Maine, Nebraska, Nevada, New Hampshire, North Dakota, West Virginia, and Wisconsin, which enacted right-to-bear-arms provisions (or in the cases of Alaska and Maine, an expressly individual right-to-bear-arms provision) for the first time after the age of majority was decreased, and Florida, Idaho, Louisiana, New Mexico, and Utah, which substantially revised the texts of their individual right-to-bear-arms provisions after the age of majority was decreased. See Volokh, *supra* note 2. Note that in one of these states, Nebraska, the age of majority is 19 rather than 18. NEB. REV. STAT. § 43-2101 (2004).

283. Garance Franke-Ruta, *Age of Innocence Revisited*, WALL ST. J., May 4, 2007, at W11.

284. Mississippi law provides that “[t]he term ‘minor,’ when used in any statute, shall include any person, male or female, under twenty-one years of age,” and then bans encouraging minors to participate in pornography production. MISS. CODE ANN. §§ 1-3-27, 97-3-54.1(1)(c) (2005). Nebraska bans encouraging minors to participate in pornography production, NEB. REV. STAT. §§ 28-707, 28-831 (Supp. 2006), and defines “minor” to be under 19 unless otherwise specified, NEB. REV. STAT. § 43-2101 (2004); *State v. Johnson*, 695 N.W.2d 165, 174–75 (Neb. 2005); *cf.* NEB. REV. STAT. § 28-807 (1995) (defining “minor” to “mean any unmarried person under the age of eighteen years,” but limiting the definition to § 28-807 through § 28-829, the sections having to do with the distribution or display of pornography to minors).

285. See NEB. REV. STAT. §§ 42-105, 43-2101 (2004).

286. *Allam v. State*, 830 P.2d 435 (Alaska Ct. App. 1992) (upholding such a law).

287. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (age 18 for proceedings in juvenile court without a jury under one statute, see PA. STAT. ANN. § 243(2) (West 1965) (repealed 1972) and age 16 under another, see N.C. GEN. STAT. § 110-21 (1943) (repealed 1973)); *Ginsberg v. New York*, 390 U.S. 629 (1968) (age 17 for receipt of sexually themed materials); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (age 18 for girls, 12 for boys, for the right to sell literature—including literature that one felt a religious obligation to distribute—on public streets); Abe Fortas, *Equal*

have meant for purposes such as contracting, parental authority, and the like, it seems not to have affected those other constitutional protections. At the same time, for much of our nation's history, the right to contract was seen as an important constitutional guarantee, and that right was not fully secured to 18-to-20-year-olds. The matter of the historical constitutional rights of 18-to-20-year-olds warrants more research.

*Danger reduction.* The 18-to-20-year-old issue illustrates the importance of figuring out precisely why the less controversial restrictions on the under-18-year-olds and the mentally infirm are constitutional. If the reason for upholding the ban on possession by under-18-year-olds is the historical scope of constitutional rights, then that reason probably will not carry over to other age groups. It certainly wouldn't carry over to, say, 22-year-olds. (In St. Louis, one can't carry a gun on a public street until one is 23.<sup>288</sup>) And it wouldn't even carry over to 18-to-20-year-olds, unless they were historically not seen as full rightsholders for the purposes of most constitutional rights, or of the right to keep and bear arms in particular.

But if the ban on possession by under-18-year-olds is upheld under a danger reduction argument, which is to say based on the plausible but unproven speculation that banning possession by 17-year-olds will diminish crime in a way that somehow outweighs the diminution in 17-year-olds' legitimate ability to defend themselves, then that argument could easily be applied more broadly. Most obviously, the same argument could be made, about as plausibly, about 18-year-olds or even 22-year-olds. There's a reason why auto insurance companies charge higher rates all the way up to age 25. And gun death rates remain within 10 percent of their age 18 levels into the late 20s,<sup>289</sup> though the need for self-defense remains high then as well.

Moreover, the danger reduction argument could equally justify similar bans for any demographic group that can plausibly be seen as potentially more dangerous. Presumably race-based restrictions and likely even sex-based restrictions would violate the Equal Protection Clause,<sup>290</sup> though of course violent

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*Rights—for Whom?*, 42 N.Y.U. L. REV. 401, 406 (1967) (age 18 for delinquency adjudications through the juvenile justice system, which generally omitted many constitutional protections).

288. Missouri law only allows people age 23 and above to get a license to carry concealed firearms, MO. ANN. STAT. § 571.101(2)(1) (West Supp. 2009), and St. Louis bars all open carrying of firearms on public streets, ST. LOUIS, MO., REV. CODE § 15.130.040 (2008).

289. Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control & Prevention, WISQARS Injury Mortality Reports, 1999–2006, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (last visited Apr. 5, 2009) (select injury cause “firearm,” years 1999 to 2006, custom age range 15 to 39, output group “age”).

290. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (finding a denial of equal protection in a law allowing 18-to-20-year old women, but not men, to purchase 3.2 percent beer).

crime is highly correlated with sex, and in considerable measure with race.<sup>291</sup> But similar arguments could also be made about people who live in especially high-crime cities, or who don't have high school degrees, or who have other possible demographic correlates of gun misuse.

It seems to me that these danger reduction arguments ought to be rejected. At least absent overwhelming statistical evidence, I don't think that any class of mentally competent adults should be denied constitutional rights based on their demographic characteristics, as opposed to things they have personally done. But in any event, this question, and the relationship between the rights of 17-year-olds, 20-year-olds, and 22-year-olds, illustrates the importance of distinguishing restrictions justified by the scope of the right from those justified by a danger reduction rationale.

### c. Bans on Gun Possession by Noncitizens

If bans on gun ownership by noncitizens are constitutional, they have to be constitutional on scope grounds. Reducing-danger grounds will not work: Noncitizens with guns are no more dangerous than citizens with guns.<sup>292</sup>

As to some jurisdictions' right-to-bear-arms provisions, the scope question is clear. Some states expressly secure the right only to citizens.<sup>293</sup>

Others expressly secure the right to any person; consider, for instance, the Colorado provision: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question . . ." <sup>294</sup> The phrase "no person" is clear and broad.<sup>295</sup> The Colorado and Michigan Supreme Courts have indeed relied on state right-to-bear-arms provisions to strike down bans on gun possession by noncitizens.<sup>296</sup>

But some constitutional provisions, including the Second Amendment, secure a "right of the people." And the Court held in *United States v. Verdugo-*

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291. See, e.g., BUREAU OF JUSTICE STATISTICS, *supra* note 270, at tbls.38, 40.

292. If anything, noncitizens face a slightly greater deterrent than citizens do, because they risk deportation as well as criminal punishment if they misuse their guns. A very few noncitizens pose special national security threats, but those people—saboteurs and terrorists—are precisely the ones who would have the least trouble evading gun laws.

293. See, e.g., ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5.

294. COLO. CONST. art. II, § 13.

295. The right to keep and bear arms when "legally summoned" to "aid . . . the civil power" is limited to those whom the government chooses by law to summon, and might thus exclude noncitizens (and others). But the right to keep and bear arms in defense of home, person, and property is not so limited.

296. *People v. Nakamura*, 62 P.2d 246 (Colo. 1936); *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922) (interpreting a provision that "[e]very person has a right to bear arms for the defense of himself and the state").

*Urquidez*<sup>297</sup> that “the people” (as opposed to “person”) is a “term of art” that “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>298</sup> Likewise, *Heller* described “the people” as referring “to all members of the political community”—“not an unspecified subset,” but also not persons who are outside the political community.<sup>299</sup>

I’m inclined to say that “the right of the people” should be read in the Second Amendment the same way it has been read in the First and Fourth Amendments: as including the nation’s lawful guests, though not applying to those who are largely unconnected with the country, for instance because they are aliens in foreign countries,<sup>300</sup> or perhaps because they are illegally present in the United States.<sup>301</sup> The right to bear arms is in part aimed at self-defense, something valuable to all people and not just to citizens. Given that the American constitutional tradition generally secures individual rights to citizens as well as noncitizens (though not to people in foreign countries), the Second Amendment right to bear arms in self-defense should be treated the same way.

But whether or not I’m right on this, the scope of the phrase “the people” is the key question here. Resolving the matter by just asserting that the law is a regulation rather than a prohibition, as the Utah Supreme Court did in a

297. 494 U.S. 259 (1990).

298. *Id.* at 265.

299. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008). *Heller* also repeatedly spoke of the right of the people to bear arms as a right of “citizens,” see *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226, at \*1 & n.2 (W.D.N.C. Oct. 6, 2008) (stressing this in holding that illegal aliens aren’t covered by the Second Amendment), but this alone means little. “Citizen” is often used casually to mean any person, especially contrasted with a government official. *Heller* itself said, for instance, that “we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*,” 128 S. Ct. at 2799, even though the First Amendment has long been read as applying to noncitizens. *Bridges v. Wixon*, 326 U.S. 135, 148 (1945). Likewise, the Court has discussed the Sixth Amendment as “protect[ing] a right of citizens,” *Doggett v. United States*, 502 U.S. 976 (1991), even though it expressly applies to any “accused” and has always been understood as covering noncitizen criminal defendants as well as citizens. See also *United States v. Gouveia*, 467 U.S. 180, 195 (1984) (same as *Doggett*); *Berkemer v. McCarty*, 468 U.S. 420, 435 n.22 (1984) (speaking of “a citizen’s Fifth Amendment rights,” though the relevant Fifth Amendment clause speaks generally of the right of “any person”). None of this suggests that “citizen” always means “person”; it plainly doesn’t. But it does suggest that the Court may casually speak of the rights of “citizens,” in a case in which citizenship status is not at issue, without deliberately choosing to limit the right to citizens to the exclusion of aliens.

300. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 274–75 (holding that the Fourth Amendment does not apply to aliens in foreign countries).

301. See *United States v. Boffil-Rivera*, No. 08-20437-CR-Graham/Torres, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008) (holding that the Second Amendment does not protect illegal aliens); *Guerrero-Leco*, 2008 WL 4534226 (likewise).



cursory decision,<sup>302</sup> would be a mistake; so would concluding that disarming noncitizens is somehow necessary to materially reduce danger of crime or injury.

Finally, I should note that it's possible that state laws that discriminate against noncitizens when it comes to gun possession or gun carrying might violate the Equal Protection Clause, which has been interpreted as requiring strict scrutiny of some (but not all) state discrimination against noncitizens.<sup>303</sup> But I leave that question to others.

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

Many laws prohibit most people from possessing guns in certain places, such as on all public streets, in bars, in parks, and in public housing projects.<sup>304</sup> Naturally, these laws are by definition lesser burdens than are total bans on possession. But they are nonetheless serious burdens: Whenever people are in the prohibited places—places where they have a right to be, and often have a practical need to be—they are barred from protecting themselves with a firearm.

And of course people's ability to protect themselves elsewhere is no substitute for their ability to protect themselves where they are. Some rights, such as free speech, may be only slightly burdened by laws that bar speech in some places but allow it in many other places. But self-defense has to take place wherever the person happens to be. Nearly any prohibition on having arms for self-defense in a particular place (I note some exceptions below) is a substantial burden on the right to bear arms for self-defense. Perhaps the burden can be justified on scope or danger reduction grounds,<sup>305</sup> but it is indeed a serious burden.

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302. *State v. Vlacil*, 645 P.2d 677 (Utah 1982).

303. See Pratheepan Gulasekaram, *Aliens With Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007), for an extended treatment. State courts have split on the Equal Protection Clause question. For decisions holding that bans on noncitizen gun possession or carrying violate the Equal Protection Clause, see *People v. Rappard*, 28 Cal. App. 3d 302, 305 (Ct. App. 1972) (concealed carry); *Chan v. City of Troy*, 559 N.W.2d 374, 376–77 (Mich. Ct. App. 1996) (possession); *State v. Chumphol*, 634 P.2d 451 (Nev. 1981) (concealed carry). For decisions upholding such bans, see *Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914) (possession); *State v. Vlacil*, 645 P.2d 677, 679–81 (Utah 1982) (possession); *State v. Hernandez-Mercado*, 879 P.2d 283, 287–90 (Wash. 1994) (possession).

304. Some of these exempt certain categories of people, such as bodyguards, or give the police discretion to give certain people licenses; but the laws remain broad bans on public possession by those people who aren't fortunate enough to be exempted or licensed.

305. See Volokh, *supra* note 61.

## 1. Bans on All Gun Carrying

*Heller* stated that bans on concealed carry of firearms are so traditionally recognized that they must be seen as constitutionally permissible.<sup>306</sup> This tradition does indeed go back to 1813 and the following decades, at least in some Southern and border states, as well as in Indiana,<sup>307</sup> and by the end of the 19th century the constitutionality of such bans had become pretty broadly accepted.<sup>308</sup> A few state court cases have struck down such bans,<sup>309</sup> but most courts have upheld them, and many state constitutions expressly authorize them.

The same cannot, however, be said about general bans on carrying firearms in public, which prohibit open as well as concealed carrying. *Heller* expressly concluded that “the right to . . . bear arms” referred to carrying arms.<sup>310</sup> Ten state

306. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

307. See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 143–52 (1999).

308. See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897):

The law is perfectly well settled that . . . the ‘Bill of Rights’ was] not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (Article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . .

309. See the Indiana, Kentucky, Vermont, and West Virginia cases cited *infra* note 312.

310. 128 S. Ct. at 2793; see also O’Shea, *supra* note 198, at 377–79.

Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008), makes what is essentially a scope argument for “confin[ing]” the right to bear arms “to home possession,” based on “the fact that the Court’s individual rights jurisprudence more broadly treats the home as special.” But the cases that article cites, *Stanley v. Georgia*, 394 U.S. 557 (1969), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), are inapposite. *Stanley* protected home possession even of material—obscenity—that the Court had, earlier and later, said lacks constitutional value. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Roth v. United States*, 354 U.S. 476, 484 (1957). Nothing in *Stanley* suggests that constitutionally valuable speech can only be possessed in the home, and not in public; *Stanley* sets forth a narrow form of extra protection for obscenity, not a reason for restriction of constitutionally valuable speech. *Stanley* thus offers no analogy for restriction of guns in public, when those guns can be used for constitutionally valuable self-defense.

Likewise, *Griswold* and *Lawrence* dealt with conduct (sex and contraception) that has throughout American history been restricted to private places; moreover, restricting such conduct to private places doesn’t materially burden the values that the Court pointed to as justifying recognition of the right—people remain free to plan their reproductive lives, engage in marital intimacy, and use sex to create intimate relationships even if they must do so in private. Barring the possession of guns for self-defense in public, on the other hand, does seriously burden the ability to defend oneself, for the reasons discussed in the following pages: Self-defense at home is no substitute for self-defense on a public sidewalk when the sidewalk is where you are attacked; having sex at home is for nearly all of us an adequate substitute for having sex on the sidewalk. And of course the legal tradition, both the constitutional tradition I note below and the broader tradition of legally

constitutions strongly imply this, by protecting “bear[ing] arms” but expressly excluding “carrying concealed weapons.”<sup>311</sup> Other constitutions don’t mention carrying as such, but they do use the word “bear.” And many courts applying state constitutional provisions have held or suggested that carrying in public is generally constitutionally protected,<sup>312</sup> though some courts have disagreed.<sup>313</sup>

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allowed carrying (though often with a license requirement), has been to allow gun possession in most public places but to forbid sex in most public places. In this respect, original meaning and tradition both point to treating gun rights very differently from sexual rights.

311. COLO. CONST. art. II, § 13; IDAHO CONST. art. I, § 11; KY. CONST. § 1; LA. CONST. art. I, § 11; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; OKLA. CONST. art. II, § 26; *see also* TENN. CONST. art. I, § 26 (authorizing the legislature to “regulate the wearing of arms with a view to prevent crime,” which suggests that “bear[ing] arms” includes “wearing” them, which is to say carrying them in public, though subject to regulations); TEX. CONST. art. I, § 23 (same).

312. For cases or attorney general opinions holding or suggesting that there is a right to carry openly, *see State v. Reid*, 1 Ala. 612, 619 (1840) (dictum), *reaffirmed*, *Hyde v. City of Birmingham*, 392 So. 2d 1226, 1228 (Ala. Crim. App. 1980); *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990), *review granted but later dismissed as improvidently granted*, 809 P.2d 960 (Ariz. 1991); *Numm v. State*, 1 Ga. 243 (1846), *reaffirmed*, *Strickland v. State*, 72 S.E. 260, 264 (Ga. 1911); *In re Brickley*, 70 P. 609 (Idaho 1902); *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (dictum); *State v. Chaisson*, 457 So. 2d 1257 (La. Ct. App. 1984); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920) (dictum), *reaffirmed*, *Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio 2003); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988); La. Op. Att’y Gen. No. 80-992 (1990); Wisconsin Department of Justice Advisory Memorandum (Apr. 20, 2009), <http://www.doj.state.wi.us/news/files/FinalOpenCarryMemo.pdf>. For cases holding the right extends even to carrying a concealed weapon, though perhaps regulated through a nondiscretionary licensing regime, *see Kellogg v. City of Gary*, 562 N.E.2d 685, 705 (Ind. 1990); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), *abrogated as to concealed carry but not as to open carry by KY. CONST. of 1850, art. XIII, § 25*; *State v. Rosenthal*, 55 A. 610, 610–11 (Vt. 1903); *State v. Vegas*, Case No. 07 CM 687 (Cir. Ct. Milwaukee County Sept. 24, 2007), *available at* <http://www.law.ucla.edu/volokh/vegas.pdf> (concluding that under *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003), the right to bear arms may include the right to concealed carry in some narrow circumstances, especially where the person is engaging in dangerous activity such as delivering pizzas in high-crime areas). Oregon courts take the view that the right extends to carrying weapons openly, but allows restrictions on carrying loaded guns, so long as the law allows the carrying of both an unloaded gun and ammunition. *See State v. Delgado*, 692 P.2d 610, 614 (Or. 1984) (striking down total ban on carrying switchblade knives); *Barnett v. State*, 695 P.2d 991 (Or. Ct. App. 1985) (per curiam) (striking down a total ban on carrying blackjacks); *State v. Boyce*, 658 P.2d 577, 578–79 (Or. Ct. App. 1983) (upholding a requirement that handguns be carried unloaded).

*Chaisson* struck down a very limited carrying ban—one that applied only while hunting frogs at night—but its reasoning suggested that there was a constitutional right to carry for self-defense (including self-defense against alligators). 457 So. 2d at 1259; *see also State v. Chandler*, 5 La. Ann. 489, 490 (1850) (taking this view with regard to the Second Amendment). *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972), also struck down a carry ban because it was broad enough to ban gun stores, ban people “from transporting guns to and from such places of business,” and ban people from “possess[ing] a firearm in a vehicle or in a place of business for the purpose of self-defense”; the court concluded that “[s]everal of these activities are constitutionally protected,” which suggests that carrying in a car might have been protected. *Id.* This is consistent with the

Such protection, of course, makes sense when the right is (at least in part) a right to keep and bear arms in self-defense: Often, people need to defend themselves against robbers, rapists, and killers outside and not just in the home.<sup>314</sup> Two-thirds of all rapes and sexual assaults, for instance, happen outside the victim's home, and half happen outside anyone's home.<sup>315</sup> The percentages are even greater for robberies and assaults.<sup>316</sup> So a ban on carrying weapons outside the home—especially in places that one practically needs to frequent, such as the streets on the way to work or to buy groceries—is a serious burden on the right, more so than the ban on handgun possession struck down in *Heller* (which would have at least left open some possibility of self-defense with shotguns or rifles).

Some states ban unlicensed carrying of loaded weapons, even when they are carried openly, but allow the carrying of unloaded weapons. A few courts have upheld such laws on the grounds that they let a would-be defender carry both the weapon and ammunition, and load it when needed.<sup>317</sup> But seconds count when one is attacked, especially in public, where one might not have the warnings that are sometimes available in the home (the breaking window, the barking dog, the alarm). While loading a gun may take only several seconds, especially if the ordinance allows the carrying of loaded

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Colorado right to bear arms' express exclusion of "the practice of carrying concealed weapons," COLO. CONST. art. II, § 13, which suggests that carrying weapons unconcealed would be presumptively protected.

All these cases speak of carrying in most public places; they often leave room for restrictions on carrying in particular places, such as businesses that serve liquor, churches, or polling places. See *infra* note 342.

313. See *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33 (Mo. Ct. App. 1994); *Pierce v. State*, 275 P. 393 (Okla. Crim. App. 1929); *Commonwealth v. Ray*, 272 A.2d 275, 278–79 (Pa. Super. Ct. 1970), *vacated* 292 A.2d 410 (Pa. 1972); *Masters v. State*, 685 S.W.2d 654 (Tex. Crim. App. 1985) (per curiam); see also *In re Bastiani*, 2008 WL 5455690, at \*2 (N.Y. County Ct. Dec. 15, 2008) (applying Second Amendment). But see *Cockrum v. State*, 24 Tex. 394, 401–02 (1859) (taking the view that the right to bear arms includes the right to carry them); *Galloway v. State*, 69 S.W.2d 89, 90 (Tex. Crim. App. 1933) (per curiam) (likewise).

314. See Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 215–16 (1982); Lund, *supra* note 171, at 73–74.

315. BUREAU OF JUSTICE STATISTICS, *supra* note 270, at tbl.61.

316. *Id.*

317. *E.g.*, *Boyce*, 658 P.2d at 578–79.

magazines so long as the magazine is outside the weapon,<sup>318</sup> those will often be seconds that the defender doesn't have.<sup>319</sup>

So these laws are substantial burdens on the right to defend oneself, and carrying arms is within the scope of the right, alongside home possession. The question is whether bans on carrying can be justified on a rationale that they avert so much danger that the restriction on self-defense is an acceptable price to pay. I don't believe they can.

To begin with, bans on carrying loaded weapons that let people carry ammunition as well as a gun seem unlikely to avert much danger. An enraged driver can generally quickly load a weapon, even while driving,<sup>320</sup> and several seconds' delay will likely be less of a barrier to an attacker (who usually gets to choose the moment of attack) than to a defender. A would-be armed robber could load a weapon in seconds before going into a liquor store, so that he won't be committing a gun crime pretty much until he's actually committing the robbery itself. And while a ban on loaded carry might avert some gun accidents, it seems to me that preventing gun accidents—which are over ten times less common than deliberate gun injuries<sup>321</sup>—would not justify such a serious loss of self-defense rights.

Bans on carrying loaded weapons that require people to carry the guns or ammunition in locked cases might do more to prevent road rage killings, or to increase the chances that a would-be gun criminal is caught after he removes the gun from a locked case but before he is about to use it. But they seem unlikely to prevent the great majority of gun crime, which is committed by criminals who ignore gun laws just as they ignore other laws<sup>322</sup> and

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318. The ordinance in *Boyce* applied whenever a person carried a loaded magazine together with an unloaded gun, see PORTLAND, OR., MUNICIPAL CODE § 14A.60.010(B) (2009), but some such statutes only apply when the ammunition is physically present in or attached to the gun, see, e.g., CAL. PENAL CODE §§ 12001(a)(1), (c), (j), 12031(a)(1), (g) (West 2000 & Supp. 2009); *People v. Clark*, 53 Cal. Rptr. 2d 99, 104 (Ct. App. 1996); Case Alert Memorandum From Paul R. Coble, Law Firm of Jones & Mayer, to All California Police Chiefs and Sheriffs, (Dec. 4, 2008), <http://www.hoffmang.com/firearms/carry/CPOA-Client-Alert-12042008.pdf>.

319. A requirement that one carry the gun unloaded would be much more burdensome than the requirement that one carry only a 6- or 8-round magazine, and reload if that magazine is emptied, see *supra* pp. 1487–88. The initial loading would be required whenever the gun is needed for self-defense; the reloading would be required only in the very rare circumstances, see *id.*, when more than six or eight rounds are needed.

320. Not while driving very safely, but presumably those enraged enough to contemplate shooting would be enraged enough to depart from the safest course of driving conduct.

321. Nat'l Ctr. for Injury Prevention & Control, *supra* note 289 (intent or manner of the injury "unintentional," cause or mechanism of the injury "firearm," years 1999 to 2005); *id.* (intent or manner of the injury "homicide," cause or mechanism of the injury "firearm," years 1999 to 2005).

322. *Cf. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 169 (2002) (rejecting the government's argument that a licensing requirement for door-to-door noncommercial solicitors was necessary to stop criminals who might pretend to be such solicitors, by

who are unlikely to be stopped and arrested for a gun law violation by the police before the crime is committed.

And such bans would essentially deny people the ability to defend themselves in public places using firearms—the tools that are likely to be the most effective for self-defense, and that the criminal attackers are already likely to possess. That seems to me to be an unacceptable burden on a constitutionally protected right, even if one in principle accepts some power to substantially burden self-defense in order to reduce danger of crime or injury. As the National Academy of Sciences and Centers for Disease Control reports suggest, a regime in which pretty much all law-abiding citizens can get licenses to carry concealed guns has not been shown to cause any increase in net crime or death.<sup>323</sup>

This having been said, I must acknowledge that my guesses about the degree to which such laws block lawful and effective self-defense, and the degree to which they prevent criminal attacks, are indeed just guesses. I've read a lot of criminological work on guns, and I designed and four times taught a seminar on firearms regulation policy, which mostly focused on the criminological data. But given the lack of empirical data, an educated guess is all I see available in this field.

My inclination in such situations is to defer to the constitutional judgment embodied in the right to bear (not just to keep) arms, and more broadly to a presumption that people should be free to have the tools they need for self-defense until there is solid evidence that possession of those tools will indeed cause serious harm. And, as I noted above, many courts have taken the same view by holding that there is a constitutional right to openly carry weapons; *Heller's* discussion of the phrase “keep and bear” points in the same direction. Still, I expect that this will be a major area of debate in courts in the coming years.

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pointing out that criminals would likely just shift to pretending to “ask for directions or permission to use the telephone” or to “pos[ing] as surveyers [sic] or census takers”); *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 352–53 (1995) (rejecting the government's argument that a ban on anonymous speech was necessary to prevent fraud and libel, by pointing out that the defrauders and libelers would likely not abide by the requirement that they sign their true names, and would instead “use false names and addresses in an attempt to avoid detection”).

323. NAT'L RESEARCH COUNCIL, *supra* note 95, at 150; Hahn et al., *supra* note 96, at 54. Even Philip Cook, probably the leading American pro-gun-control criminologist, takes the view that “Whether the net effect of relaxing concealed-carry laws is to increase or reduce the burden of crime, there is good reason to believe that the net [change] is not large,” and that concealed carry permit holders “are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders.” Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009). This should be at least as true as to a regime that allowed open carry, perhaps with a nondiscretionary licensing scheme (much like the nondiscretionary licensing scheme that Cook is discussing when he refers to concealed carry permit holders).

## 2. Bans on Concealed Carry, Revisited

To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.<sup>324</sup> Most people are aware that many neighbors own guns, and even that many people are licensed to carry concealed guns and many others carry them illegally,<sup>325</sup> but this abstract knowledge doesn't cause much worry. But when a gun is visible, it occupies people's attention in a way that statistical realities do not. This is likely to deter many people from carrying a gun.<sup>326</sup>

There is indeed an "open carry movement" of people who deliberately wear guns openly, as a means of trying to normalize such behavior and of making a statement in favor of gun possession.<sup>327</sup> But this is like people who wear T-shirts that say "I had an abortion."<sup>328</sup> A few people choose to disclose such facts to make a political point. Yet most people are reluctant to make such disclosures, and would be reluctant to engage in the underlying behavior if they had to publicly disclose it.

And the Court has recognized that requirements of disclosure to the government may substantially burden constitutional rights when they trigger

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324. See *State v. Hamdan*, 665 N.W.2d 785, 809 (Wis. 2003) ("Requiring a storeowner who desires security on his own business property to carry a gun openly or in a holster is simply not reasonable. Such practices would alert criminals to the presence of the weapon and frighten friends and customers."). And the risk of frightening others would remain even when someone is carrying outside his property, though *State v. Cole*, 665 N.W.2d 328, 344 (Wis. 2003), holds that this burden on the right is justifiable when the carrying is outside one's business.

325. In Texas, for instance, over 300,000 people have concealed carry licenses. See Texas Department of Public Safety, Demographic Information (Jan. 5, 2009), [http://www.txdps.state.tx.us/administration/crime\\_records/chl/PDF/ActLicAndInstr/ActiveLicandInstr2008.pdf](http://www.txdps.state.tx.us/administration/crime_records/chl/PDF/ActLicAndInstr/ActiveLicandInstr2008.pdf). In Florida, the number is over 500,000. See Florida Department of Agriculture and Consumer Services, Number of Licensees by Type, <http://licgweb.doacs.state.fl.us/stats/licensetypecount.html> (last visited May 11, 2009). This is only about 1.5–3 percent of the adult population, but chances are that someone in Texas or Florida will come across a concealed carry licenseholder every day.

326. One piece of evidence for this is that, in states that allow concealed carry, 1 to 4 percent of the adult population gets a license. See, e.g., *supra* note 325. But in states that allow only open carry, open carry appears to be much rarer. As in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)—where the Court found a First Amendment problem with the government's forcing the NAACP to list its members—"it is not sufficient to answer . . . that whatever repressive effect compulsory [self-identification of gun carriers] follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the [open-carry requirement] that private action takes hold." *Id.* at 463.

327. See, e.g., Donna Lewinwand, *Four States Considering Open-Carry Gun Laws*, USA TODAY, Feb. 12, 2009, at 3A; OpenCarry.org, *A Right Unexercised Is a Right Lost*, <http://opencarry.org> (last visited Mar. 6, 2009).

328. See, e.g., Mary Bowers, *Getting It Off Your Chest*, GUARDIAN (U.K.), Apr. 23, 2008, (Comment & Features), at 16.

social pressure that deters constitutionally protected behavior. For instance, the right to anonymous speech and anonymous group membership stems largely from concerns that mandated identification of speakers will lead to a risk of ostracism and police harassment, and will thus deter speech.<sup>329</sup> Likewise, banning concealed carry in public places, coupled with the social pressures against open carry, will likely deter many people from carrying guns in public places altogether—and will thus substantially burden their ability to defend themselves.

What's more, the historical hostility to concealed carry strikes me as inapt today. The classic argument was captured well by the Richmond, Virginia Grand Jury in 1820:

On Wearing Concealed Arms

We, the Grand Jury for the city of Richmond, at August Court, 1820, do not believe it to be inconsistent with our duty to animadvert upon any practice which, in our opinion, may be attended with consequences dangerous to the peace and good order of society. We have observed, with regret, the very numerous instances of *stabbing*, which have of late years occurred, and which have been owing in most cases to the practice which has so frequently prevailed, of *wearing dirks*: Armed in *secret*, and emboldened by the possession of these deadly weapons, how frequently have disputes been carried to fatal extremities, which might otherwise have been either amicably adjusted, or attended with no serious consequences to the parties engaged.

The Grand Jury would not recommend any legislative interference with what they conceive to be one of the most essential privileges of freemen, the right of carrying arms: But we feel it our duty publicly to express our abhorrence of a practice which it becomes all good citizens to frown upon with contempt, and to endeavor to suppress. We consider the practice of carrying arms secreted, in cases where no personal attack can reasonably be apprehended, to be infinitely more reprehensible than even the act of stabbing, if committed during a sudden affray, in the heat of passion, where the party was not previously armed for the purpose.

We conceive that it manifests a hostile, and, if the expression may be allowed, a *piratical* disposition against the human race—that it is derogatory from that open, manly, and chivalrous character, which it should be the pride of our countrymen to maintain unimpaired—and that its

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329. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999); *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 341–42 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 462–63.

Police stops of someone who is carrying openly might not be ill-motivated the way that police harassment of unpopular speakers might be: A police officer might be reasonably interested in a visibly armed person's intentions, even if being openly armed isn't a crime. But the burden on the exercise of constitutional rights stemming from such police reaction remains present.



fatal effects have been too frequently felt and deplored, not to require the serious animadversions of the community. Unanimously adopted.

JAMES BROWN, Foreman.<sup>330</sup>

Carrying arms, the theory went, was “one of the most essential privileges of freemen,” but “open, manly, and chivalrous” people wore their guns openly, “for all the honest world to feel.”<sup>331</sup> Carrying a gun secretly was the mark of “evil-disposed men who seek an advantage over their antagonists.”<sup>332</sup> And requiring that people carry openly imposed no burden on self-defense, precisely because open carry was so common that it wasn’t stigmatized.

Today, open carrying is uncommon, and many law-abiding people naturally prefer to carry concealed (in the many states where it is legal). Concealed carrying is no longer probative of criminal intent. If anything, concealed carrying is probably more respectful to one’s neighbors, many of whom are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon. Nor is there any particular reason to think that concealed carrying increases lethal quarrels by suckering people into thinking that they can safely argue with a person who they think is unarmed. We should be aware now that strangers might well be armed, whether lawfully or not. And the very people who are most likely to turn an argument into a gunfight—for example, gang members—are probably especially unlikely to comply with an open-carry-or-no-carry mandate.

So it seems unlikely that there’s a credible danger reduction case to be made for mandating that carrying be done openly rather than concealed—except insofar as one argues that all carrying is dangerous, and that mandating open carry is good precisely because it will deter carrying even by the law-abiding. Yet that is an argument that the right to bear arms in self-defense should foreclose. If my analysis in the previous section is correct, and a right to bear arms generally includes the right to carry, then it ought to include the right to carry concealed.

I must acknowledge, though, that longstanding American tradition is contrary to this functional view that I outline. For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry. Constitutional provisions enacted after this consensus emerged

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330. *On Wearing Concealed Arms*, DAILY NAT’L INTELLIGENCER, Sept. 9, 1820, at 2 (paragraph breaks added).

331. WILLIE NELSON, *Pancho & Lefty*, on PANCHO & LEFTY (Sony Records 1990) (“Pancho was a bandit boy / his horse was fast as polished steel / He wore his gun outside his pants / for all the honest world to feel”). This is a modern source, of course, but one that also captures well the 1800s sentiments.

332. *State v. Smith*, 11 La. Ann. 633 (1856).

were likely enacted in reliance on that understanding. If *Heller* is correct to read the Second Amendment in light of post-enactment tradition and not just Founding-era original meaning, this exclusion of concealed carry would be part of the Second Amendment's scope as well.<sup>333</sup> And if the Second Amendment is incorporated via the Fourteenth Amendment, its scope as against the states might well be properly defined with an eye towards how the right to bear arms was understood in 1868,<sup>334</sup> when the concealed-carry exception was apparently firmly established.

There is a response to be made against this scope argument: The historical exclusion, the response would go, was contingent on the social conventions of the time—the social legitimacy of open carry, and the sense that concealed carry was the behavior of criminals—and this exclusion is no longer sustainable now that the conventions are different.<sup>335</sup> If this response is persuasive, then for the reasons I argue above a ban on concealed carry should indeed be seen as a presumptively unconstitutional substantial burden on self-defense. But overcoming the scope objection would be an uphill battle, as *Heller* itself suggests.

### 3. Bans on Carry Into Places Where Alcohol Is Served or Sold

Many states ban carrying weapons into places where alcohol is served or sold.<sup>336</sup> This generally includes restaurants and sometimes even convenience stores, and not just bars.<sup>337</sup>

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333. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815–17 (2008).

334. See, e.g., Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 907–09.

335. Under this view, the right to bear arms should now be read as protecting concealed carry, albeit perhaps with a shall-issue licensing scheme, see *infra* Part II.H, though not necessarily protecting open carry, which unduly worries observers and can be prohibited without interfering with people's ability to defend themselves by concealed carry. Some states in fact allow licensed concealed carry, and make licenses broadly available to law-abiding adults, but ban open carry. See, e.g., ARK. CODE ANN. §§ 5-73-301, -309, -315 (Supp. 2007) (providing for broadly available licenses to carry concealed firearms); ARK. CODE ANN. § 5-73-120 (2005) (otherwise banning the carrying of firearms, including open carrying).

336. See, e.g., *State v. Dees*, 669 P.2d 261, 264 (N.M. Ct. App. 1983) (upholding this as a reasonable regulation); *Clark v. State*, 527 S.W.2d 292, 294 (Tex. Ct. App. 1975) (doing likewise); *Second Amendment Found. v. City of Renton*, 668 P.2d 596 (Wash. Ct. App. 1983) (likewise); *Tenn. Op. Att'y Gen. No. 04-020* (2000) (taking the view that such a regulation is constitutionally permissible).

337. See, e.g., *State v. Lake*, 918 P.2d 380, 382–83 (N.M. Ct. App. 1996) (upholding such a law even when “sales of liquor were not permitted at the time [the gun carrier] was in the store and he did not intend to purchase or possess alcohol within the store,” using a tenuous argument based on the hypothetical risk that some other patron may be drunk and come back to the store while the gun carrier is there).

It also strips people of the ability to have a gun present for self-defense not just at the restaurant, store, or bar, but also on the way to and from their cars (or their homes, for those who walk or take public transportation). A gun might be comparatively unnecessary for people who want to go into a restaurant, because a rape or an assault inside the establishment might be relatively unlikely. But an attack outside the restaurant, on the way to the car, may be much more likely, especially if the restaurant has no parking lot of its own, or if the jurisdiction bars firearms even from alcohol licensees' parking lots;<sup>338</sup> the tools for self-defense are therefore more necessary on the way from the restaurant to the car. And given that there's no sign that restaurants, bars, and convenience stores are likely to set up some sort of gun check or locker system, a ban on gun carrying in such places is likely to disarm the law-abiding on their ways to and from these places as well as inside them.

So the burden here seems fairly substantial: To remain able to defend oneself, one has to avoid not just bars but a wide range of restaurants and stores. It's much less substantial than the burden imposed by laws that prohibit all carrying in public places, because it applies to many fewer places. But in and on their way immediately to and from those places, law-abiding citizens are stripped of the ability to bear arms in self-defense.

So the question is again whether the law might still be justified on the theory that it reduces danger. But here any such judgment is even more speculative than it usually is. I'm pretty sure that there's no good data on (1) the number of gun crimes that happen within places that serve alcohol, (2) the number of such gun crimes that are committed by people who are likely to comply with gun control laws, (3) the number of accidental gun injuries in such places, (4) the number of defensive gun uses that happen inside such establishments, or on the way from the establishment to a parking place, in those jurisdictions that allow the carrying of guns in such establishments, or (5) comparative crime rates in states that do and don't allow such carrying, controlling for various possible confounding factors.

We can guess that guns are more likely to be abused by drunk people, but not how often. We can guess that some of this abuse will be by people who would comply with gun control laws when sober, and thus not carry the gun into the bar—though we can also guess that much will be by people who

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338. Compare, e.g., CITY OF BATON ROUGE & EAST BATON ROUGE PARISH, LA. CODE OF ORDINANCES § 13:95.3(a), (c) (2009) (banning guns from the premises of places "where alcoholic beverages are sold and/or consumed on the premises," and specifically including parking lots) with MICH. COMP. LAWS ANN. § 28.425o(1)(d), (3) (West Supp. 2009) (banning guns from the premises of bars or taverns "where the primary source of income of the business is the sale of alcoholic liquor by the glass and consumed on the premises," but specifically excluding parking lots).

wouldn't comply with gun control laws at all. We can guess that guns will sometimes be needed for lawful self-defense on the way to and from such places, and possibly even in such places, but again not how often. It really is all guesswork when it comes to the danger reduction argument, especially as to this less studied sort of restriction.

4. Bans on Carry Into Places With Effective Security Screening and Internal Security, Such as Airports and Courthouses

In a few places, there is pretty thorough protection, through a combination of effective security screening using metal detectors, a substantial law enforcement presence, and the presence of many law-abiding citizens who would witness any crime. This is why violent crime inside airport security cordons, and inside courthouses that screen for weapons, seems to be rare (though of course not unheard of, especially since some extremely violent and determined criminals could steal weapons from police officers and marshals).<sup>339</sup>

In such places, a ban on civilian weapons seems likely to be a modest burden on lawful self-defense, perhaps low enough to fall below the constitutional threshold.<sup>340</sup> Most supposed "gun-free zones" are zones in which guns are outlawed but in which criminals still find it easy to have them. But the post-security-screening areas of courthouses and airports may indeed be nearly gun-free zones (as far as civilian possession is concerned),<sup>341</sup> and largely crime-free zones.

This having been said, I should note that the problem raised in the previous subsection—that banning guns in a place also prevents people from having guns available on their way to and from the place—is present here, too. Given this, the "insubstantial burden" argument should only apply to those courthouses and airports that provide lockers for gun storage. If such lockers aren't provided, the justification for gun possession restriction would have to flow from the "government as proprietor" argument (discussed below) or from a danger reduction argument.

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339. See, e.g., Shaila Dewan, *Suspect Kills 3, Including Judge, at Atlanta Court*, N.Y. TIMES, Mar. 12, 2005, at A1.

340. See, e.g., *United States v. Davis*, No. 05-50726, 2008 U.S. App. LEXIS 26934 (9th Cir. Nov. 21, 2008) (upholding conviction for carrying a gun onto an airplane); *Minich v. County of Jefferson*, 919 A.2d 356, 360–61 (Pa. Commw. Ct. 2007) (upholding county's decision to ban members of the public from bringing guns into a courthouse).

341. I say "nearly" because no security system is foolproof. See, e.g., Jeannette Rivera-Lyles et al., *Man Sneaks 14 Guns Into Jet's Cabin at OIA*, ORLANDO SENTINEL, Mar. 7, 2007, at A1.

## 5. Bans on Carrying in Other Privately Owned Places

Some jurisdictions ban, and sometimes have long banned, carrying guns into certain kinds of places, such as schools (including private schools), churches, polling places, and the like.<sup>342</sup> *Heller* similarly, though rather cryptically, endorsed “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>343</sup> *Heller* didn’t discuss whether this would be limited to public schools and government buildings, in which case the law might be justified by the government’s power as proprietor (discussed two subsections below). But the general reference to schools (which on its face includes private schools), and the description of places as “sensitive” rather than just government-owned, at least leaves open the possibility that *Heller* is endorsing such prohibitions on carrying into “sensitive” privately owned buildings.

These laws substantially burden self-defense. While violent crime against adults on private school and church property is fairly rare, it is not unheard of, especially once one includes open spaces such as parking lots.<sup>344</sup> The question must be whether the carry bans might nonetheless be justified because of (1) the historical exclusion of certain places from the right to bear arms, or (2) some sufficient evidence that the prohibition on gun carrying in those places will considerably reduce the aggregate danger of crime and injury (taking into account the decline in lawful self-defense opportunities). It seems to me that future research should focus on those questions, rather than dismissing the burden on the right to bear arms as immaterial, or just assuming that the language in *Heller* gives the government carte blanche to ban guns in schools, government buildings, or other places.

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342. See *Isaiah v. State*, 58 So. 2d 53, 56 (Ala. 1912) (McClellan, J., concurring); *Strickland v. State*, 72 S.E. 260, 264 (Ga. 1911); *Hill v. State*, 53 Ga. 473 (1874); *State v. Shelby*, 2 S.W. 468 (Mo. 1886), characterizing *State v. Wilforth*, 74 Mo. 528 (1881); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921); *Walter v. State*, 16 Ohio C.C. (n.s.) 523, 524 (Cir. Ct. 1905); *Andrews v. State*, 50 Tenn. (3 Heis.) 165 (1871); *English v. State*, 35 Tex. 473, 478–79 (1872); *Weapon Searches in Courthouses, Alaska Op. Att’y Gen. (Inf.)* 241 (1991).

343. 128 S. Ct. 2783, 2816–17 (2008); see also William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1254 (1994) (defending a broad view of the right to bear arms, but suggesting that restrictions on carrying guns “in courtrooms or in public schools” are constitutional).

344. See, e.g., Kristin Bender, *Suspect Faces Trial in Wife’s Shooting at Oakland Church*, OAKLAND TRIB., Mar. 14, 2008.

## 6. Bans on Carrying Within One Thousand Feet of a School

The federal Gun-Free School Zones Act bans gun possession, except on private property, within one thousand feet of any school.<sup>345</sup> The Act exempts possession by those with a state gun license,<sup>346</sup> but many states allow unlicensed open carry,<sup>347</sup> Alaska and Vermont allow unlicensed concealed carry,<sup>348</sup> many states don't give someone an option to get a gun possession license, and many more don't allow 18-to-20-year-olds to get concealed carry licenses.<sup>349</sup> In these states, gun carrying on public streets and sidewalks within one thousand feet of a school is effectively barred by federal law.<sup>350</sup>

California and Wisconsin laws likewise prohibit open carrying within one thousand feet of a school, even when the gun is unloaded.<sup>351</sup> (Outside those zones, California law generally allows unloaded open carry,<sup>352</sup> and Wisconsin

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345. 18 U.S.C.A. §§ 921(a)(25), 922(q) (West 2000 & Supp. 2008). An earlier version of the Act was struck down on Commerce Clause grounds by *United States v. Lopez*, 514 U.S. 549 (1995), but the statute was reenacted to prohibit possession of a "firearm that has moved in or that otherwise affects interstate or foreign commerce," and this has since been upheld against a Commerce Clause challenge, see, e.g., *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005). For the rare case considering the constitutionality of the Act under the Second Amendment, see *United States v. Lewis*, Crim. No. 2008-45, 2008 WL 5412013, at \*2 (D.V.I. Dec. 24, 2008) ("It is beyond peradventure that a school zone, where Lewis is alleged to have possessed a firearm, is precisely the type of location of which *Heller* spoke. Indeed, *Heller* unambiguously forecloses a Second Amendment challenge to that offense under any level of scrutiny."); Government's Opposition to Defendant's Motion to Suppress at 2, *United States v. Lewis*, Crim. No. 2008-45, 2008 WL 5412013 (D.V.I. Dec. 24, 2008) (noting that the gun was found in the car defendant was driving, with no mention that the car was actually being driven on school property).

346. 18 U.S.C. §§ 922(q)(2)(B)(i)-(ii) (2006).

347. See NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, COMPENDIUM OF STATE FIREARM LAWS (2003), <http://www.nraila.org/media/misc/Compendium.htm>.

348. See NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, FACT SHEET: RIGHT-TO-CARRY (2008), <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18>.

349. Montana tries to avoid the effect of the federal law by providing, in MONT. CODE ANN. § 45-8-360 (2007), that "[i]n consideration that the right to keep and bear arms is protected and reserved to the people in Article II, section 12, of the Montana constitution, a person who has not been convicted of a violent, felony crime and who is lawfully able to own or to possess a firearm under the Montana constitution is considered to be individually licensed and verified by the state of Montana within the meaning of the provisions regarding individual licensure and verification in the federal Gun-Free School Zones Act." This, though, likely doesn't exempt Montanans from the federal Act, which seems to require some individualized investigation for each license: 18 U.S.C. § 922(q)(2)(B)(ii) (2006) exempts license-holders only if "the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license."

350. One can fault the federal government for this, or fault the state governments for not providing an easy licensing system that allows people to get licenses that would exempt them from federal law. But in any event, gun carrying is indeed banned within one thousand feet of schools in those states, albeit by a combination of federal and state legal regimes.

351. CAL. PENAL CODE § 626.9 (West Supp. 2009); WIS. STAT. ANN. § 948.605 (West 2008).

352. See *supra* note 318.

law generally allows even loaded open carry.<sup>353</sup>) Louisiana law in effect prohibits carrying by 18-to-20-year-olds within one thousand feet of a school or university, except in a car, and provides that “[l]ack of knowledge that the prohibited act occurred . . . within one thousand feet of school property shall not be a defense.”<sup>354</sup> In Aurora (Illinois), carrying of firearms, stun guns, and even pepper spray is banned within one thousand feet of a school or university.<sup>355</sup>

These school zone statutes substantially burden people’s ability to defend themselves. Many people live and work within one thousand feet of schools, and may need to defend themselves in that area even if they never set foot on school property. I know of no longstanding tradition of treating several blocks around a school as a “sensitive place[ ]” in which people are stripped of their right to keep and bear arms in self-defense, including at night when self-defense is most necessary and school is not even in session. And if a reducing danger argument is inadequate to justify gun bans on public streets generally (see Part II.C.1), it’s hard to see how it would be adequate to justify gun bans on public streets within several blocks of a school.

#### 7. Bans on All Gun Possession on Government Property (Setting Aside Streets and Sidewalks)

Some government-run housing projects impose lease conditions barring tenants from possessing any guns in their apartments.<sup>356</sup> Illinois allows firearms

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353. See NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION, *supra* note 347.

354. LA. REV. STAT. ANN. § 14:95.2(A), (C)(5), (E) (2004). The law applies to people of all ages, but excludes carrying under a concealed handgun permit; such permits are unavailable to 18-to-20-year-olds, LA. REV. STAT. ANN. § 40:1379.3(C)(4) (2008). The law exempts “[a]ny constitutionally protected activity which cannot be regulated by the state, such as a firearm contained entirely within a motor vehicle,” LA. REV. STAT. ANN. § 14:95.2(C)(5), but this just means that 18-to-20-year-olds may carry near a school only if the right to bear arms is read as protecting such carrying. There is also an exception for university students possessing firearms in their dormitory rooms, or on their way to or from their cars. *Id.* § 14:95.2(C)(8).

355. AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(4), (12) (2009).

356. See, e.g., *Doe v. Portland Hous. Auth.*, 656 A.2d 1200, 1201 (Me. 1995) (holding such a lease condition to be preempted by state firearms law); *Stipulation Re Settlement, Doe v. S.F. Hous. Auth.*, No. 3:08-cv-03112-THE (N.D. Cal. June 27, 2008) (agreeing to eliminate such a lease condition); *Richmond Tenants Org., Inc., v. Richmond Redevelopment & Hous. Auth.*, 751 F. Supp. 1204 (E.D. Va. 1990) (upholding such a lease condition against a statutory challenge, but not considering the Virginia Constitution’s right to bear arms), *aff’d*, 947 F.2d 942, 1991 WL 230214 (4th Cir. 1991) (unpublished); H.R. 4062, 103d Cong. (1994) (proposing that public housing tenants be allowed to vote on whether to ban gun possession in the projects in which they live); S.B. 730, Gen. Assem., Jan. Sess. (Conn. 1995) (proposing ban on gun possession in public housing); *Tex. Op. Att’y Gen. DM-71* (1991) (concluding such a lease condition is barred by state law); Robert Dowlut, *Bearing Arms in State Bills of Rights, Judicial Interpretation, and Public Housing*, 5 ST. THOMAS L. REV. 203, 212–14 (1993) (describing and criticizing such a policy in Chicago); Lloyd L. Hicks, *Guns in Public Housing: Constitutional Right or Prescription for Violence?*,

in public housing, but bans stun guns.<sup>357</sup> Aurora (Illinois) bans possession in public housing of firearms, stun guns, and even pepper spray.<sup>358</sup> Louisiana and Lincoln (Nebraska) domestic violence shelters ban both guns and stun guns.<sup>359</sup> Guns are also banned on other government property,<sup>360</sup> including places where the risk of crime may be quite substantial, such as government-owned parks (both city parks and national parks).<sup>361</sup> How much extra power should the government's role as proprietor give it in such situations?<sup>362</sup>

I don't know what the right answer is, but I can point to two wrong or at least incomplete answers. The first comes from a court that used a danger reduction rationale to uphold a ban on gun possession in public housing projects:

While the right to possess arms is acknowledged within the Michigan Constitution, this right is subject to limitation. Jurisprudence in this state has consistently maintained the right to keep and bear arms is not absolute. This Court has determined that "the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power." The state has a legitimate interest in limiting access to weapons.

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4 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 153, 163 (1995) (discussing these policies without closely analyzing the constitutional question).

357. See 720 ILL. COMP. STAT. ANN. §§ 5/24-1(a)(10) (West 2003); Volokh, *supra* note 192 (discussing how the right to bear arms, as well as other rights, should apply to restrictions on stun gun possession and irritant spray possession).

358. AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(4), (12).

359. LA. ADMIN. CODE tit. 4, § 1729(B)(3)(c)(iv) (2009); LINCOLN, NEB., MUN. CODE § 9.36.140 (2008).

360. See, e.g., *Estes v. Vashon Maury Island Fire Prot. Dist. No. 13*, No. 55950-8-1, 2005 WL 2417641 (Wash. Ct. App. Oct. 3, 2005) (upholding a ban on possession by visitors to fire stations).

361. In 2006, for instance, there were 11 homicides in national parks, see *Crime in National Parks*, WASH. POST, Feb. 28, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/graphic/2008/02/28/GR2008022800363.html>, though there were only 13.2 million overnight stays. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, tbl.1212 (2009), <http://www.census.gov/compendia/statab/tables/09s1212.pdf>; National Park Serv., Director's Order #82: Public Use Data Collecting and Reporting Program, <http://www.nps.gov/policy/DOrders/DO-82draft.htm> (last visited Apr. 5, 2009) (defining overnight stay as "[o]ne night within a park by a visitor"). If even two of the homicides were of overnight visitors (a subject on which we can only speculate, since the National Park Service doesn't collect data on whether the victims were overnight visitors), this would yield an annualized homicide rate of 5.5 per 100,000 people per year, roughly comparable to a national rate of 5.7 per 100,000 people per year. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES tbl.1 (2006), [http://www.fbi.gov/uct/cius2006/data/table\\_01.html](http://www.fbi.gov/uct/cius2006/data/table_01.html); E-mail From Amy Atchison, UCLA Law Library to Author (Feb. 6, 2009, 14:51 PST) (on file with author) (reporting on Atchison's conversation with the National Park Service).

362. See *Mich. Coal. for Responsible Gun Owners v. City of Ferndale*, 662 N.W.2d 864, 871 (Mich. Ct. App. 2003) (suggesting that the government might be able to "create gun-free zones," in case involving ban on possession in city buildings, but not definitively reaching the constitutional question because it found the ordinance was preempted); *Tenn. Op. Att'y Gen. No. 04-020*, at \*2 (2004) (concluding that "the State has authority to prohibit or regulate the possession and use of firearms on property that it owns").



It is recognized that public housing authorities have a legitimate interest in maintaining a safe environment for their tenants. Infringements on legitimate rights of tenants can be justified by regulations imposed to serve compelling state interests which cannot be achieved through less restrictive means. Restrictions on the right to possess weapons in the environment and circumstances described by plaintiff are both in furtherance of a legitimate interest to protect its residents and a reasonable exercise of police power. This is particularly true given defendant's failure to make any allegation she feels physically threatened or in danger as a resident of plaintiff's complex necessitating her possession of a weapon to defend herself.<sup>363</sup>

This can't be a sound argument, because it doesn't explain why public housing projects are any different from private housing, where the right to keep and bear arms is indeed protected under the Michigan Constitution.<sup>364</sup> After all, the right to bear arms is constitutionally protected even though the government has a legitimate interest in "maintaining a safe environment" for everyone, and there are few "environment[s] and circumstances" in which guns lose their dangerousness.<sup>365</sup>

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363. *Lincoln Park Hous. Comm'n v. Andrew*, No. 244259, 2004 WL 576260, at \*3 (Mich. Ct. App. Mar. 23, 2004) (citations omitted).

364. MICH. CONST. art. 1, § 6, provides, "Every person has a right to keep and bear arms for the defense of himself and the state," which clearly includes an individual self-defense right. *See also* *People v. Zerillo*, 189 N.W. 927, 929 (Mich. 1922) (using this provision to strike down a ban on gun possession by noncitizens).

365. The same criticism applies to the Maine Superior Court's conclusion that a ban on gun possession in public housing is constitutional. *Doe v. Portland Hous. Auth.*, No. CV-92-1408, 1993 Me. Super. LEXIS 359 (Me. Super. Ct. Dec. 29, 1993), *rev'd on statutory grounds*, 656 A.2d 1200 (Me. 1995). There too the court's reasoning would have equally upheld gun prohibitions imposed even on private property (not just government-owned property), though perhaps limited to dangerous apartment buildings: The court reasoned that the ban was a "reasonable . . . regulation" given that (1) the housing complexes "have unique tendencies for violence and even criminal behavior that specially threaten the health, safety and welfare of the residents," stemming from "the congregate closeness of the living arrangements and the resulting relationships among the residents[, which] tend to generate an atmosphere of volatility," and (2) the special complexes for "senior citizens and the disabled" house many people who have "mental or emotional problems" which leads "to assault, vandalism, rowdyism and similar disturbances." *Id.* at \*19, 21–22. But it's hard to see how the Maine Constitution's expressly individual right to bear arms could rightfully be denied to non-criminal, non-mentally-ill people simply because they have the poor fortune to live around dangerous people—precisely the scenario where the right to bear arms is most useful to a law-abiding citizen.

Certain kinds of guns and ammunition may be especially dangerous in apartment buildings, whether publicly or privately owned, because the apartments are separated by only a single wall; this increases the risk that a bullet would injure or kill a neighbor. But this concern has never been seen as justifying total bans on all gun possession in all apartment buildings. And it would in any case not justify bans on shotguns, which fire small pellets that are highly unlikely to go through a wall or retain their lethality even if they do. Likewise, it wouldn't justify bans on handguns that are loaded with special frangible ammunition, which is designed to similarly not go through walls.

The second wrong (or at least incomplete) approach comes from the Oregon Attorney General's opinion that a ban on gun possession in public housing would be unconstitutional:

It is well settled that the government may not condition entitlement to public benefits, whether gratuitous or not, upon the waiver of constitutional rights that the government could not abridge by direct action. The United States Supreme Court has repeatedly upheld that principle under the United States Constitution. . . .

. . . Although the Oregon Supreme Court has not ruled on the issue directly, from [various state court] authorities we believe that, if faced squarely with the question, the court would hold that this "unconstitutional condition" principle applies under the Oregon Constitution. . . .

Eligibility for low-income housing provided by a housing authority plainly is a public benefit or privilege. Subject to certain federal limitations, a housing authority lawfully may condition eligibility for low-income housing on satisfaction of income criteria and other factors designed to ensure that only responsible tenants reside in that housing. However, we conclude that a housing authority may not require an otherwise-eligible individual to surrender rights under article I, section 27 in order to obtain low-income housing.<sup>366</sup>

The problem here is that, though all the cases cited by the Oregon Attorney General indeed rejected government demands that someone waive a constitutional right to get a benefit, many other cases uphold such demands.<sup>367</sup> A plea bargain may be conditioned on a waiver of the right to trial. Welfare benefits, or membership on a high school sports team, may be conditioned on a waiver of some parts of the recipient's rights to be free from searches without probable cause.<sup>368</sup> A government paycheck may be conditioned on a promise not to reveal certain things the employee learns in confidence.<sup>369</sup>

More broadly, the government may sometimes refuse to allow the exercise of constitutional rights on its property, especially setting aside traditionally open places such as parks and sidewalks. It could, for instance, insist that abortions not be performed in government-owned hospitals.<sup>370</sup> It could bar a wide range of speech in government buildings.<sup>371</sup>

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366. 46 Or. Op. Att'y Gen. 122, 127-28 (1988) (citation omitted).

367. See Ark. Op. Att'y Gen. No. 94-093 (1994) (expressing uncertainty about whether a ban on firearms in public housing would be unconstitutional, but not discussing the government's proprietary rights).

368. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (discussing public high school athletes); *Wyman v. James*, 400 U.S. 309 (1971) (discussing welfare recipients).

369. See *Snepp v. United States*, 444 U.S. 507 (1980).

370. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); see also *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (citing *Harris v. McRae*, 448 U.S. 297, 315-16 (1980),

Public housing might be treated specially, because it is a home as well as a government building,<sup>372</sup> or because it is the sort of government benefit that is unusually important to those who use it. This has been the view of cases striking down at least certain kinds of speech restrictions<sup>373</sup> and search and seizure policies in public housing.<sup>374</sup> But still, while the Oregon Attorney General probably reached the right result in concluding that public housing authorities can't require their tenants to surrender the right to bear arms, the unconstitutional conditions analysis in that opinion too categorically rejects the government-as-landlord claim, just as the Michigan opinion quoted above too categorically rejects the constitutional right claim.

It's not clear to me how other public property should be treated: Should the government be allowed to ban guns on government-owned recreational land, whether a city park or a national park, either by insisting that people who want to use the land must waive their right to bear arms, or by otherwise concluding that there is no right to bear arms in such places?<sup>375</sup> As a condition of going onto a public university campus, which might have a considerable amount of open space and parking areas where crime is not uncommon?<sup>376</sup> In public university dorm rooms, where one state attorney general's opinion suggests gun possession is constitutionally protected?<sup>377</sup> As a condition of going onto a public primary or secondary school campus, or into a government office building, especially when this requires walking unarmed through a potentially dangerous parking structure? Courts need to work out a government-as-proprietor doctrine for the right to bear arms much as they have done for the freedom of speech.

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which held that the government could refuse to fund abortions using government money, for the proposition that the government should have broad authority to restrict arms possession on government property, at least "where high numbers of people might congregate").

371. See *Int'l Soc'y for Krishna Consciousness (ISKCON) v. Lee*, 505 U.S. 672 (1992).

372. Cf. 46 Or. Op. Att'y Gen. 122, 131-32 (1988) (concluding that it is probably permissible to ban visitors to public housing from bringing guns).

373. E.g., *Resident Action Council v. Seattle Hous. Auth.*, 174 P.3d 84 (Wash. 2008) (striking down ban on posting material on the outside of one's apartment door).

374. E.g., *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (holding that warrantless searches for guns in public housing units are likely unconstitutional, and silently assuming that the Fourth Amendment rules are the same in publicly owned housing as they are in other homes).

375. See, e.g., *Nordyke*, 563 F.3d at 460 (taking the view that at least those parks "where high numbers of people might congregate" are "sensitive places" where the government may indeed ban private gun carrying).

376. Va. Op. Att'y Gen. No. 05-078 (2006) (ban on carrying concealed weapons by university students and employees is permissible, though not discussing possession in dorm rooms).

377. La. Op. Att'y Gen. No. 94-131 (1994) (suggesting that Second Amendment protects university student's right to possess guns in dorm rooms).

D. “How” Restrictions: Rules on How Guns Are to Be Stored

1. Requirements That Guns Be Stored Locked or Unloaded

The D.C. gun ban required that even long guns be stored locked and unloaded.<sup>378</sup> Other states require that all guns be stored locked if minors under a certain age (often sixteen) can access them.<sup>379</sup>

Such laws substantially burden self-defense. Even if the gun can be unlocked in several seconds (something such laws generally allow<sup>380</sup>), a defender might not have those seconds.<sup>381</sup>

The laws are aimed at danger reduction, especially to children. And it is plausible that the storage requirements will prevent some suicides, accidents, or even crimes by children.<sup>382</sup> But it is also plausible that they will prevent life-saving defensive actions by adults, including defensive actions that save the very children whom the law is trying to protect. The empirical evidence is unsettled.<sup>383</sup>

So it’s hard to see how one can definitively either say that the substantial burden is justified by the danger that the laws reduce, or dismiss the possibility that the laws will indeed materially reduce aggregate crime and injury. As in the other examples, much depends on what kind of showing of danger reduction—empirical proof, mere plausibility, or something in

378. D.C. CODE § 7-2507.02 (2001).

379. See, e.g., CONN. GEN. STAT. § 29-37i (2003); 46 Or. Op. Att’y Gen. No. 122, 131 (1988) (suggesting this would be constitutional, at least as to housing projects—though maybe more broadly—and as to children under 16).

380. See, e.g., CONN. GEN. STAT. § 29-37i. But see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818–19 (2008) (taking the view that the D.C. law did not allow such actions even when self-defense was necessary, and thus presumably allowed guns to be kept at home only to be used at target ranges or for hunting).

381. See *supra* Part II.C.1. Fla. Op. Att’y Gen. 2000-42 (2000), opines that “[a] requirement that gun owners secure their firearms with a gun lock would not appear to interfere with that right [to bear arms],” but doesn’t explain why this is so. When someone is woken in the middle of the night when an intruder is breaking into his house, even the few seconds it takes to unlock the lock may indeed be a substantial “interfere[nce]” with “[t]he right of the people to keep and bear arms in defense of themselves,” FLA. CONST. art. I, § 8(a).

382. See *Heller*, 128 S. Ct. at 2819–20 (acknowledging the Framing-era laws restricting the storage of gunpowder in order to prevent fire, and noting that the Court’s analysis does not “suggest the invalidity of laws regulating the storage of firearms to prevent accidents,” but not discussing exactly what sorts of regulations would remain valid and what sorts would be too burdensome to be constitutional).

383. See NAT’L RESEARCH COUNCIL, *supra* note 95, at 217–20 (noting the conflict in the studies, and concluding that “until independent researches can perform an empirically based assessment of the potential statistical and data related problems, the credibility of the existing research cannot be assessed”).

between<sup>384</sup>—is treated as sufficient justification, if substantial burdens can indeed be justified by a danger reduction argument.

E. “When” Restrictions: Rules on Temporarily Barring People From Possessing Guns

1. Restrictions on Possession While Intoxicated

Many states bar possession of a firearm while intoxicated. Now a drunk man may need self-defense as much as the rest of us, and perhaps even more.<sup>385</sup> But he is also especially likely to endanger innocent people—whether bystanders or people whom he mistakenly identifies as threatening him—and he is especially unlikely to successfully defend himself.<sup>386</sup> And to the extent that the scope of the right to bear arms has historically excluded the mentally infirm, there seems to be little reason to treat those who are briefly mentally infirm as a result of intoxication differently from those who are permanently mentally infirm as a result of illness or retardation.<sup>387</sup>

A difficulty would arise if the law covered not just gun handling or carrying, but gun possession in the home while the homeowner is home and intoxicated. If every gun owner becomes a felon when he drinks too much at home, or must somehow find a friend who will soberly store the gun elsewhere on such occasions,<sup>388</sup> then millions of people will be felons.<sup>389</sup>

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384. See *supra* Part I.C.2.b.

385. Cf. *Robinson v. Pioche*, Bayerque & Co., 5 Cal. 460, 460 (1855).

386. But see *Beckett v. People*, 800 P.2d 74, 83 (Colo. 1990) (Kirshbaum, J., dissenting) (asserting a constitutional right to pick up a gun for immediate self-defense even when intoxicated).

387. For cases holding that the right to bear arms doesn't apply to carrying or possession on the person while intoxicated, see *Gibson v. State*, Nos. A-6082, A-6162, 1997 WL 14147 (Alaska Ct. App. Jan. 17, 1997) (holding that the right does not apply to possession on the person while intoxicated, as applied in the home, but reserving the question whether this would apply to constructive possession); *People v. Garcia*, 595 P.2d 228, 230–31 & n.4 (Colo. 1979) (likewise as to possession on the person while intoxicated, but noting that mere ownership doesn't suffice under the statute for possession, and that possession must be determined by looking at “the proximity of the defendant to the firearm,” “the ordinary place of storage of the firearm,” “the defendant's awareness of the presence of the firearm,” and “locks or other physical impediments which preclude ready access to the firearm”); *City of Salina v. Blaksley*, 72 Kan. 230 (1905) (holding that the right does not apply as to carrying while intoxicated); *State v. Shelby*, 2 S.W. 468 (Mo. 1886) (likewise as to carrying while intoxicated); *State v. Rivera*, 853 P.2d 126, 130 (N.M. 1993) (likewise as to possessing “on the person, or in close proximity thereto, so that the weapon is readily accessible for use” while intoxicated); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (dictum) (likewise as to carrying while intoxicated); *State v. Paolantonio*, No. KS-2006-0262A, 2006 WL 2406735 (R.I. Super. Aug. 15, 2005) (likewise as to carrying while intoxicated).

388. Something many friends might be reluctant to do, for instance if they have children at home and no gun safe, or if they are worried that the requester is trying to hide a gun that had been used in crime.

It's not entirely clear how this problem fits with the constitutional framework outlined above. My inclination is to say that while there may be a strong enough tradition of treating the mentally infirm as too unreliable to possess guns, and the tradition might extend to treating the temporarily mentally infirm as similarly too unreliable, the tradition likely doesn't extend to a usually sober person's possession of a gun in his home while he's drunk. I would also think that requiring gun owners to refrain from normally accepted social drinking practices, to do all their serious drinking outside the home, or to temporarily move their guns outside their homes on party nights creates a substantial burden. But at the same time people can avoid or sharply decrease this burden by entirely or largely refraining from a behavior that, while legal and socially acceptable, is hardly necessary or praiseworthy; perhaps that should affect our judgment about the burden's substantiality.

Fortunately we can largely avoid this issue, at least for now, since nearly all the statutes on the subject cover only "carry[ing]" or "personal possession."<sup>390</sup> The one exception that I've seen, the Missouri statute stating that a person is guilty of a crime if he knowingly "[p]ossesses or discharges a firearm or projectile weapon while intoxicated,"<sup>391</sup> is likely just inartfully drafted: Though accompanying statutes use "possesses" broadly, likely broadly enough to include storing inside one's home,<sup>392</sup> this statute is labeled "Unlawful use of weapons," and generally covers discharging, carrying, or brandishing a weapon (or setting a spring gun). I expect that Missouri courts would therefore narrowly interpret "possesses" in this statute, as covering only having on one's person and not simply having a gun stored somewhere in the home.

## 2. Restrictions on, or Sentence Enhancements for, Possessing Firearms While Possessing Drugs or Committing Another Crime

Many states ban possession of guns while possessing drugs or committing a crime. If read broadly, these could be seen as "when" restrictions, prohibiting all gun possession during the commission of a crime.

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389. Such people are of course unlikely to be caught unless they misuse their guns while drunk. But some of them might be caught: Imagine, for instance, that someone with a grudge against an ex-lover or an ex-boss calls the police to accurately report that the person is drunk and is known to keep a gun in the home. And if the answer to that hypothetical is that the police rightly would not investigate this unless there was evidence the person was actually a danger to others, then this just reinforces the notion that a law banning possession while intoxicated is too broad.

390. See, e.g., CONN. GEN. STAT. § 53-206d (2007); IDAHO CODE ANN. § 18-3302B (2004).

391. MO. ANN. STAT. § 571.030.1(5) (West 2008).

392. E.g., *id.* § 571.020.1 (banning possession of classes of weapons, including machine guns).

The right to keep and bear arms in lawful self-defense doesn't include the right to use those arms in a crime.<sup>393</sup> And this would include using the guns in ways short of firing or even brandishing them (for instance, by carrying them in case one wants to fire or brandish them, which might well embolden the criminal and deter others who know that this criminal is armed).

On the other extreme, keeping a gun for self-defense in a way that's unconnected to the crime should generally be seen as the exercise of one's constitutional right<sup>394</sup>—consider, for instance, a person who possesses a gun for home defense while engaged in consensual sex with someone under the age of consent, or while committing a fraud at work.

One can hypothesize ways in which even this sort of gun possession could help one commit a crime, for instance to resist arrest in the event that one is caught, or to threaten witnesses or coconspirators should such a threat be necessary. But so long as such possible misuse of a gun is entirely speculative, and not part of either the defendant's behavior during the crime or clearly planned future behavior, those hypotheses shouldn't suffice to turn constitutionally protected behavior into criminal behavior. And the exercise of constitutionally protected rights in ways that are unconnected with criminal conduct generally can't be used to enhance the sentence for such criminal conduct.<sup>395</sup>

This in fact is how many courts have analyzed this, in the "nexus" line of cases: When a gun is not possessed on the person, gun possession can only be treated as criminal or used to enhance a sentence if there is an adequate connection between the possession and the crime.<sup>396</sup> In particular, "mere proximity or mere constructive possession is insufficient to establish that a defendant was armed at the time the crime was committed": "[T]he weapon must be easily accessible and readily available for use," "whether to facilitate the commission of the crime, escape from the scene of the crime, protect

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393. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2812–13 (2008) (endorsing the statement in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), that the Second Amendment protected a right to possess guns for "a lawful purpose"); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009); *United States v. Bowers*, No. 8:05CR294, 2008 WL 5396630, at \*2 (D. Neb. Dec. 23, 2008); *Cockrum v. State*, 24 Tex. 394, 401–03 (1859); *State v. Daniel*, 391 S.E.2d 90, 97 (W. Va. 1990).

394. See, e.g., *Biddinger v. State*, 846 N.E.2d 271, 278 (Ind. Ct. App. 2006) (holding that mere possession of a firearm may not be used as an aggravating factor at sentencing).

395. See *Dawson v. Delaware*, 503 U.S. 159 (1992).

396. *People v. Atencio*, 878 P.2d 147, 150 (Colo. Ct. App. 1994); *State v. Blanchard*, 776 So. 2d 1165, 1174 (La. 2001); *State v. Gurske*, 118 P.3d 333, 335 (Wash. 2005) (one in a long line of Washington state cases on the subject); see also *Brewer v. Commonwealth*, 206 S.W.3d 343, 347–48 (Ky. 2006) (relying partly on the right to bear arms in holding that a firearm may not be forfeited based on the owner's conviction of a crime unless there's a nexus between the firearm and the crime).

contraband or the like, or prevent investigation, discovery, or apprehension by the police.”<sup>397</sup> This test is far from perfectly clear, and needs more scholarly attention. But it seems like a reasonable first cut aimed at making sure that criminals are punished for their criminal behavior, and not for their constitutionally protected behavior.

### 3. Waiting Periods

Some jurisdictions require a “cooling-off” period before a gun may be delivered to the purchaser.<sup>398</sup> Others apply this only to handguns.<sup>399</sup> The rationale for such laws is to prevent impulsive killings or suicides by people who are angry or despondent and who might calm down after a few days.

It’s hard to see how handgun-only cooling-off periods will materially reduce danger of impulsive crime or injury. It’s as easy to commit suicide with a shotgun as with a handgun,<sup>400</sup> and for a crime of passion a shotgun will often be equally effective, too. Though long guns are not as concealable as handguns, and are thus worse for daily carrying or for inconspicuously possessing while waiting for passersby to rob, they can be quite sufficient for a crime of passion, for which they can be concealed briefly under a coat or in a bag. All-gun waiting periods might in principle be effective, if the buyer is an otherwise law-abiding citizen who wouldn’t just turn to the black market instead. But even that has not been proven; as with so many “danger reduction” arguments, the social science evidence on the effectiveness of cooling-off periods is inconclusive.<sup>401</sup>

Other states delay people’s ability to receive a gun, or to get a license that’s required to receive or possess a gun, in order to give the police time to

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397. *Gurske*, 118 P.3d at 335–36.

398. CAL. PENAL CODE §§ 12071(b)(3)(A), 12072(c)(1) (Deering Supp. 2009); HAW. REV. STAT. ANN. § 134-2(e) (LexisNexis Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/24-3(A)(g) (West 2003); R.I. GEN. LAWS. §§ 11-47-35(a)(i), -35.1, -35.2 (Supp. 2008); LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 134 (2008), [http://www.lcav.org/library/reports\\_analyses/regulating\\_guns.asp](http://www.lcav.org/library/reports_analyses/regulating_guns.asp).

399. See FLA. STAT. ANN. § 790.0655(1) (West Supp. 2009); IOWA CODE ANN. § 724.20 (West 2003); MD. CODE ANN., PUB. SAFETY §§ 5-123, 5-124 (LexisNexis 2003); MINN. STAT. ANN. § 624.7132, subdvs. 4, 12 (West 2003); N.J. STAT. ANN. §§ 2C:58-2a(5)(a), -3f (West 2005); S.D. CODIFIED LAWS § 23-7-9 (2006); WIS. STAT. ANN. § 175.35(2)(d), (2g)(c) (West 2006); LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 398, at 134–35. The Maryland and Minnesota laws also cover so-called “assault weapons,” but not most rifles and shotguns. CONN. GEN. STAT. ANN. § 29-37a (West 2003) covers only long guns, not handguns.

400. Consider Ernest Hemingway and Kurt Cobain. Each year, over 30 percent of the gun suicides for which a specific gun type is reported in *Injury Facts* are shotgun suicides, and over 10 percent are rifle suicides. See NAT’L SAFETY COUNCIL, INJURY FACTS 17 (1999) (1994–96 data).

401. See Hahn et al., *supra* note 96, at 52.



perform a more thorough background check. The times on this vary dramatically—two days in Wisconsin (only for handguns), up to thirty days in Massachusetts (for all firearms), and up to six months in New York (only for handguns).<sup>402</sup> The federal background check is generally instant, but can take several days to complete if someone with the same name as the applicant is on the prohibited list.<sup>403</sup> Are these waiting periods substantial burdens on self-defense?<sup>404</sup>

In one way, they are: A person covered by the waiting period is entirely unable to defend himself for days, weeks, or (in New York) months. An attack that requires self-defense can happen during the waiting period just as easily as it can happen during other times.

Moreover, in some situations, the attack may be especially likely during the waiting period: A person's attempt to buy a gun may be prompted by a specific threat, one that could turn into an actual attack in a matter of days or hours. If a woman leaves an abusive husband or boyfriend, who threatens to kill her for leaving, she may need a gun right away<sup>405</sup> and not ten days or six months later.

On the other hand, being disarmed for 0.1 percent of one's remaining life<sup>406</sup> is less of a burden than being disarmed altogether. And waiting periods have been found to be constitutionally permissible as to other rights. The Supreme Court has upheld—over heated dissent—a 24-hour waiting period for abortions, justified by a cooling-off rationale.<sup>407</sup> A short-lived Ninth Circuit decision that recognized a right to assisted suicide said that “reasonable, though

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402. See N.Y. PENAL LAW §§ 265.00.3, 400.00 (McKinney 2008); MASS. ANN. LAWS ch. 140, § 129B(3) (LexisNexis 2007); WIS. STAT. ANN. § 175.35(2) (West 2006). Of course, both the background check and the cooling off period rationale only make sense when the buyer doesn't already own a gun (or if the buyer doesn't already own a handgun, assuming the check is focused on handguns). If the buyer already owns a gun, then any possible benefit in delaying his acquisition of another gun is likely to be vanishingly slight. See generally GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 333 (1991).

403. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2005, at 4 (2006).

404. Compare Ky. Op. Att'y Gen. No. 2-271 (1982) (stating a waiting period is constitutional, without detailed discussion), and Tenn. Op. Att'y Gen. No. 89-34 (1989) (likewise), with State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (rejecting license requirement for carrying a gun because of a risk that one may immediately need to carry a gun in circumstances that leave one no time to get a permit).

405. See, e.g., 137 CONG. REC. 10,288, 10,291 (1991) (discussing an incident in which a woman, Bonnie Elmasri, wanted to buy a gun after a death threat from her husband, was told there was a 2-day waiting period, and was killed the next day, together with her two sons, by her husband); Inge Anna Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 496.

406. That's what fourteen days ends up approximately being, for a person of average age.

407. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

short, waiting periods to prevent rash decisions” would be constitutional,<sup>408</sup> and the Oregon assisted suicide statute indeed provides a 15-day waiting period.<sup>409</sup>

Likewise, a waiting period is often required for sterilization,<sup>410</sup> though there might well be a constitutional right to undergo sterilization as part of one’s right to control one’s procreation.<sup>411</sup> In many states it takes from one to five days to get a marriage license,<sup>412</sup> though I know of no cases considering whether this violates the right to marry.<sup>413</sup>

The Supreme Court has also held that a state may require people to register to vote fifty days before the election,<sup>414</sup> for much the same investigatory reasons that are offered for some background-check-based waiting periods. Cities are generally allowed to require that demonstration and parade permit applications be filed some days in advance.

On the other hand, there are substantial limits on how long a waiting period can be, and on when such waiting periods may be imposed. Lower courts have suggested the upper bound for demonstration and parade permits might be three or four days.<sup>415</sup> Forty-eight-hour waiting periods for abortions have been found to pose “substantial burdens,” even though *Casey* upheld a twenty-four-hour waiting period.<sup>416</sup> Even where prisoners and military members are involved—a context where the government generally has very broad

408. *Compassion in Dying v. Washington*, 79 F.3d 790, 833 (9th Cir. 1996).

409. OR. REV. STAT. § 127.840 (2007).

410. *E.g.*, 42 C.F.R. § 441.253(d) (2007) (requiring a 30-day waiting period for sterilizations for which federal payment is provided).

411. *See, e.g., In re Grady*, 426 A.2d 467 (N.J. 1981) (so holding).

412. *See* ALASKA STAT. §§ 25.05.091, 25.05.161 (2008) (three days, unless the court waives the waiting period); 750 ILL. COMP. STAT. ANN. 5/207 (West Supp. 2009) (one day, unless the court waives the waiting period); WIS. STAT. ANN. § 765.08 (West 2008) (5 days, unless the county clerk waives the waiting period).

413. *See In re Kilpatrick*, 375 S.E.2d 794, 795 n.1 (W. Va. 1988) (noting that a challenge to a three-day waiting period was made but was not addressed in the brief and was therefore waived).

414. *Burns v. Fortson*, 410 U.S. 686, 687 (1973) (upholding the requirement but suggesting that “the 50-day registration period approaches the outer constitutional limits in this area”).

415. *See, e.g., Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (striking down a requirement of 5 days’ notice); *Grossman v. City of Portland*, 33 F.3d 1200, 1204–07 (9th Cir. 1994) (striking down a requirement of 7 days’ notice for demonstrations, when requirement covered even small groups); *NAACP v. City of Richmond*, 743 F.2d 1346, 1356–57 (9th Cir. 1984) (striking down a requirement of 20 days’ notice and suggesting that the upper bound might be as low as two or three days). Lower courts have also suggested that permit requirements would be impermissible for groups of a few people, who don’t materially implicate the city’s interests in traffic control or adequate policing. *Douglas*, 88 F.3d at 1524; *Grossman*, 33 F.3d at 1206–08; *Rosen v. Port of Portland*, 641 F.2d 1243, 1248 n.8 (9th Cir. 1981) (holding that even a 24-hour notice requirement would be unconstitutional for small groups).

416. *See Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 24 (Tenn. 2000).

authority—lower courts have struck down six-month and one-year waiting periods before a soldier or an inmate may marry.<sup>417</sup>

And lower courts have also suggested that even if some substantial advance notice may normally be required for demonstration permits, there has to be a special exception for spontaneous expression occasioned by breaking events.<sup>418</sup> Likewise, there has to be a special exception to abortion waiting periods for medical emergencies.<sup>419</sup> This would suggest that a similar exception might have to be required for handgun permits when the applicant can point to a specific, recently occurring threat—such as the applicant’s leaving an abusive boyfriend who threatened to kill her if she left.<sup>420</sup>

These other constitutional rights are not perfect analogies. A three-day delay in voting, marrying, or demonstrating won’t leave you unprotected against a deadly attack. Conversely, erroneously authorizing someone to vote when he’s a convicted felon is less likely to cause serious harm than erroneously authorizing that same person to buy a gun. Nonetheless, this catalog of decisions at least suggests that (1) waiting periods on the exercise of constitutional

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417. See *United States v. Nation*, 9 C.M.A. 724, 727 (1958) (“For a commander to restrain the free exercise of a serviceman’s right to marry the woman of his choice for six months just so he might better reconsider his decision is an arbitrary and unreasonable interference with the latter’s personal affairs which cannot be supported by the claim that the morale, discipline, and good order of the command require control of overseas marriages.”); *Carter v. Dutton*, No. 93-5703, 1994 WL 18006, at \*1 (6th Cir. Jan. 21, 1994) (noting trial court decision striking down a one-year waiting period for marriages between inmates and non-inmates).

418. See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682 (7th Cir. 2003). See generally *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (“[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights.”).

419. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997); *Planned Parenthood of Del. v. Brady*, 250 F. Supp. 2d 405 (D. Del. 2003).

420. Cf., e.g., FLA. STAT. ANN. § 790.33(2)(d)(6) (West 2007) (exempting from the waiting period, which would normally be up to 3 days, “[a]ny individual who has been threatened or whose family has been threatened with death or bodily injury, provided the individual may lawfully possess a firearm and provided such threat has been duly reported to local law enforcement”); MINN. STAT. ANN. § 624.7132 subd. 4 (West 2003) (providing that “the chief of police or sheriff may waive all or a portion of the five business day waiting period in writing if the chief of police or sheriff finds that the transferee requires access to a pistol or semiautomatic military-style assault weapon because of a threat to the life of the transferee or of any member of the household of the transferee”); OHIO REV. CODE ANN. § 2923.1213 (West 2006 & Supp. 2008) (providing for a temporary emergency license to carry a concealed weapon when the applicant provides a sworn statement “that the [applicant] has reasonable cause to fear a criminal attack upon the [applicant] or a member of the [applicant’s] family, such as would justify a prudent person in going armed,” or other evidence of such a threat); cf. 18 U.S.C. § 922(s)(1)(B) (2006) (exempting transferees from the waiting period for gun purchases if they stated that they “require[] access to a handgun because of a threat to the life of the transferee or any member of the household of the transferee”; this was in effect during the pre-instant-background check era, see *id.* § 922(t)(1)).

rights need not always be seen as unconstitutional, and (2) courts are and should be willing to decide which waiting periods are excessive.

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

Taxes on guns and ammunition, or gun controls that raise the price of guns and ammunition, or bans on inexpensive firearms would be substantial burdens if they materially raised the cost of armed self-defense. (The \$600 tax discussed by Cook, Ludwig & Samaha,<sup>421</sup> justified by an assertion that “keeping a handgun in the home is associated with at least \$600 per year in externalities,” is one example; a proposed Illinois requirement that gun owners be required to buy a \$1 million insurance policy is another.<sup>422</sup>) “The poorly financed [self-defense] of little people,” like their “poorly financed causes,”<sup>423</sup> deserves constitutional protection as much as the self-defense of those who can afford technologically sophisticated new devices or high new taxes. This is true whether the tax or expensive control is imposed on gun owners directly, or on gun sellers or manufacturers, just as a restriction on abortion can be a substantial burden even if it’s imposed on doctors and not on the women who are getting the abortions.<sup>424</sup>

High gun taxes should remain presumptively impermissible even if they are based on some (doubtless controversially calculated) estimate of the public

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421. Cook, Ludwig & Samaha, *supra* note 323, at 1085; see also Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 389–90 (2006) (suggesting that such a tax might vary from \$100 to \$1800 per household).

422. See Ill. H.B. 0687, 96th Gen. Assem., Reg. Sess. (2009).

423. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (striking down ban on door-to-door solicitation, partly on the grounds that “[d]oor to door distribution of circulars is essential to the poorly financed causes of little people”); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (striking down ban on display of signs at one’s home, partly on the grounds that “[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute”).

424. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (applying substantial burden analysis to a requirement that an abortion be performed by a physician rather than by a physician’s assistant); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992) (controlling opinion of O’Connor, Kennedy, and Souter, JJ.) (applying the substantial burden analysis to a recordkeeping restriction imposed on abortion providers); *id.* at 884–85 (applying the substantial burden analysis to a requirement that various information be given to the patient by physicians and not by the physicians’ staff); *Jackson Women’s Health Org. Inc. v. Amy*, 330 F. Supp. 2d 820, 824–26 (S.D. Miss. 2004) (finding a substantial burden on women’s rights to an abortion in a state law that barred any place other than a hospital or a licensed ambulatory care facility from performing abortions). *But see* *Caswell & Smith v. State*, 148 S.W. 1159, 1161, 1163 (Tex. Civ. App. 1912) (upholding—in my view incorrectly—a 50 percent gross receipts tax on the sale of pistols, simply on the grounds that the law “does not infringe or attempt to infringe the right on the part of the citizen to keep and bear arms,” including “the right to carry a pistol openly,” and reasoning even that “absolutel[ ] prohibit[ion]” of the business of selling pistols would be constitutional).

costs imposed by the average handgun: Such an average—like the cost of an insurance policy—takes into account both the very low cost stemming from guns that are always properly used by their owners, and the very high cost stemming from guns that are used in crime. The law-abiding owners thus are not just being required to “internalize the full social costs of their choices,”<sup>425</sup> even if you take into account as a “cost” the possibility that any gun will be stolen by a criminal. They are also being required to internalize the social costs of choices made by criminal users of other guns—much as if, for instance, all speakers were charged a tax that would be used to compensate those libeled by a small subset of speakers, or were required to buy a \$1 million libel insurance policy before speaking.

Nonetheless, some modest taxes might not amount to substantial burdens, as a review of taxes and fees on other constitutional rights illustrates. Taxes based on the content of speech are unconstitutional, regardless of their magnitude.<sup>426</sup> But this is a special case of the principle that discrimination based on certain kinds of characteristics—race, sex, religiosity, or the content or viewpoint of speech—is unconstitutional. Setting aside these special areas of constitutionally forbidden discrimination, and setting aside poll taxes, which were constitutional until the Twenty-Fourth Amendment forbade them, other kinds of taxes, fees, and indirect costs imposed on the exercise of constitutional rights are often permissible.

The government may require modest content-neutral fees for demonstration permits or charitable fundraising permits, at least if the fees are tailored to defraying the costs of administering constitutionally permissible regulatory regimes.<sup>427</sup> The same is true for marriage license fees<sup>428</sup> and filing fees for political candidates (though the Court has held that the right to run for office is in some measure protected by the First Amendment).<sup>429</sup> The same is doubtlessly true of costs involved in getting permits to build on your own property, a right protected by the Takings Clause.<sup>430</sup>

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425. Cook, Ludwig & Samaha, *supra* note 323, at 1085.

426. See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

427. E.g., *Sullivan v. City of Augusta*, 511 F.3d 16, 35–36 (1st Cir. 2007) (demonstrations); *National Awareness Found. v. Abrams*, 50 F.3d 1159, 1167 (2d Cir. 1995) (charitable fundraising); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1137 (6th Cir. 1991) (demonstrations).

428. See, e.g., *Boynton v. Kusper*, 494 N.E.2d 135, 138 (Ill. 1986) (striking down a \$10 tax on marriage licenses, aimed at funding services for victims of domestic violence, but stressing in dictum that this part of the license fee “has no relation to the county clerk’s service of issuing, sealing, filing, or recording the marriage license”); *D’Antoni v. Comm’r, N.H. Dep’t of Health & Human Servs.*, 917 A.2d 177, 183 (N.H. 2006) (upholding a \$38 marriage license fee because the fee was less than the “incidental expenses related to issuing the licenses”).

429. *Lubin v. Panish*, 415 U.S. 709 (1974).

430. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

Likewise, regulations of the right to abortion are not rendered unconstitutional simply because they increase the cost of an abortion. The Court so held when upholding a 24-hour waiting period even though it required some women in states with very few abortion providers to stay in a hotel overnight or miss a day of work,<sup>431</sup> and when upholding viability testing requirements that might have marginally increased the cost of an abortion.<sup>432</sup> So long as the extra costs don't amount to "substantial obstacle[s]" to a woman's getting an abortion, they are constitutional.<sup>433</sup>

At the same time, when a cost is high enough to impose a substantial obstacle to the exercise of a right for a considerable number of people,<sup>434</sup> it is unconstitutional. This is likely also true when a cost goes materially beyond the cost of administering the otherwise permissible regulatory scheme.<sup>435</sup> And if a law substantially burdens rightholders who are relatively poor, an exemption would likely be constitutionally required.<sup>436</sup>

I acknowledge that any such regime necessarily creates linedrawing problems and poses the danger that a genuinely substantial burden will be missed by judges who are deciding how much is too much. But, first, there is ample precedent for such tolerance for modest fees in other constitutional rights contexts, and it thus seems neither likely nor normatively appealing for the courts to conclude that the right to bear arms is more protected than these other rights. Second, the caselaw from those other areas can provide guideposts for the linedrawing process. And third, the caselaw from those other areas (as well as the general logic of the substantial burden threshold) supports a constitutional requirement that poor applicants be exempted from fees—say, fees that dramatically increase the cost of a new gun, or that are required for periodic reregistration of an old gun—that are substantial for them even if relatively minor for others.

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431. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

432. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517–20 (1989) (plurality opinion); *id.* at 529–30 (O'Connor, J., concurring in part and concurring in the judgment).

433. *Casey*, 505 U.S. at 886.

434. See, e.g., *id.* at 874, 886.

435. See, e.g., *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007); *E. Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981); see also *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943) (so suggesting); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (likewise).

436. See *Lubin v. Panish*, 415 U.S. 709, 718–19 (1974) (requiring exemption from filing fee for indigent political candidates); *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985) (same as to demonstration permit fee).

### G. Restrictions on Sellers

The right to keep and bear arms in self-defense protects those who would use the arms in self-defense, not those who would sell such arms. Similarly, the right to an abortion protects those women who want abortions, not abortion providers. The freedom of speech protects speakers and listeners, not sellers of the paper or computer hardware that make certain kinds of speech possible.<sup>437</sup>

Restrictions on the sales transactions that enable the exercise of these constitutional rights should be evaluated based on whether they impose a substantial burden on the exercise of the protected right.<sup>438</sup> A ban on gun sales, or a heavy tax on such sales, would be unconstitutional,<sup>439</sup> just as a ban on engaging in the business of providing abortions would be, because it would make it much harder for would-be gun owners to get guns. But laws allowing gun sales only by particular kinds of sellers or in particular places would not be unconstitutional unless they actually make guns substantially costlier or harder to get.

### H. “Who Knows” Restrictions: Government Tracking Regulations, Including Nondiscretionary Licensing, Background Checks, Registration, and Ballistics Tracking Databases

Governments impose various tracking regulations on arms possession or carrying—nondiscretionary licensing regimes (either for possession or carrying),<sup>440</sup> instant background checks, registration requirements,<sup>441</sup> serial number

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437. The right to speak does protect bookstores, but only because they themselves (unlike the paper sellers or computer sellers) are seen as speaking by distributing material that they want to distribute.

438. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008) (stating that “laws imposing conditions and qualifications on the commercial sale of arms” are constitutional); Or. Att’y Gen. Op. Request OP-5881 (1985) (concluding that ban on non-dealer transfers to people who aren’t “personally known” to seller, and bans on non-dealers engaging in the business of selling guns, would be constitutional).

439. Compare *Caswell & Smith v. State*, 148 S.W. 1159, 1161, 1163 (Tex. Civ. App. 1912) (upholding a 50 percent gross receipts tax on the sale of pistols, simply on the grounds that the law “does not infringe or attempt to infringe the right on the part of the citizen to keep and bear arms,” including “the right to carry a pistol openly,” and reasoning even that “absolute[] prohibit[ion]” of the business of selling pistols would be constitutional), with *Dowlut & Knoop*, *supra* note 314, at 215 (arguing that *Caswell & Smith* was wrong, on the grounds that the tax was “confiscatory”), and Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629, 683 (1989) (likewise).

440. See, e.g., *City of University Heights v. O’Leary*, 429 N.E.2d 148 (Ohio 1981) (4–3) (upholding identification card requirement for nonresidents); *Mosher v. City of Dayton*, 358 N.E.2d 540 (Ohio 1976) (upholding such a requirement for possession); *Photos v. City of Toledo*, 250 N.E.2d 916 (Ohio Ct. Com. Pl. 1969) (same). But see *O’Leary*, 429 N.E.2d at 153 (Celebrezze, C.J., dissenting)

requirements,<sup>442</sup> requirements that guns be test-fired and the marks they leave on bullets recorded,<sup>443</sup> or requirements that all new semiautomatic guns must “microstamp” the ejected brass with the gun’s serial number.<sup>444</sup> If the regulations contain some restrictions, such as waiting periods, fees, or denials of licenses to certain people (either as a class or in government officials’ discretion<sup>445</sup>), those might be substantial burdens. But the tracking regulation itself is not much of a burden on self-defense; a person is just as free to defend himself with a registered gun as he would be if the gun were unregistered.<sup>446</sup>

In one high-profile area of constitutional law, such requirements are indeed forbidden: Most speakers don’t need to get licenses, or register their speech, or submit their typewriters for testing so that their anonymous works can be tracked back to them. Likewise, tracking requirements for abortions would likely be unconstitutional.<sup>447</sup>

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(arguing that the requirement should be struck down because the law should “require that all limitations [on the right to keep and bear arms] not only be reasonable, but also necessary”).

441. See, e.g., *State v. Mendoza*, 920 P.2d 357 (Haw. 1996) (upholding such a requirement); 50 N.C. Op. Att’y Gen. No. 69, 70 (1981) (stating registration of handguns would be constitutional, because it would be “reasonable” and “would not prohibit the right to keep and bear arms”); see also *State v. Hamlin*, 497 So. 2d 1369 (La. 1986) (upholding registration requirement for shotguns with barrel of less than eighteen inches).

442. See, e.g., *State v. Comeau*, 448 N.W.2d 595 (Neb. 1989) (upholding ban on defacing serial number); *United States v. Marzzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009) (likewise).

443. These are sometimes called “ballistic fingerprinting,” but this is likely too optimistic a term: The pattern of marks that a gun creates can apparently be changed quite easily, see Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1117 & n.100 (2005), though one might guess that a substantial number of criminals will nonetheless fail to do this.

444. Such microstamping would in principle make it easier to find which gun was used in a shooting, if the brass were found at the crime scene. See, e.g., CAL. PENAL CODE § 12126(b)(7) (West Supp. 2009); Cook, Ludwig & Samaha, *supra* note 323, at 1090. It is unlikely that this will practically do much to fight crime, since people who anticipate using guns for criminal purposes will just buy either an older semiautomatic or a revolver; revolvers don’t eject the brass after firing, so microstamping requirements for them would be useless. But perhaps microstamping might catch some criminals, for instance people who bought the gun for lawful purposes and thus didn’t worry about microstamping, or chose a new semiautomatic (perhaps because they liked the semiautomatic’s greater capacity, which is usually ten or more rounds as opposed to six to eight rounds for a typical revolver) but then used it for criminal purposes without having the time to buy another gun.

445. See, e.g., *Dowlut & Knoop*, *supra* note 314, at 216–17 (reasoning that state constitutions should be read to protect open carrying of a weapon even without a license, but on the grounds that “licensing officials can be very creative in frustrating applicants” and that the exercise of constitutional rights “cannot be made subject to the will of the sheriff” (quoting *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922))).

446. Cf. Reynolds, *supra* note 230, at 481 (defending licensing laws and background checks on originalist grounds); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 265 (1983) (likewise).

447. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 900–01 (1992) (suggesting that reporting requirements are constitutional to the extent they “respect a patient’s confidentiality and privacy”).



But this is not the normal rule for constitutional rights. Even speakers may sometimes need to register or get licensed. Parade organizers may be required to get permits.<sup>448</sup> Gatherers of initiative signatures may be required to register with the government,<sup>449</sup> and so may fundraisers for charitable causes, though such fundraising is constitutionally protected.<sup>450</sup> People who contribute more than a certain amount of money to a candidate may be required to disclose their identities to the candidate, who must in turn disclose those identities to the government;<sup>451</sup> lower courts have held the same as to people who contribute to committees that support or oppose ballot measures.<sup>452</sup> The contribution disclosure requirements have been judged (and upheld) under a moderately strong form of heightened scrutiny; the other disclosure requirements have been upheld under lower level of scrutiny.

Likewise, the Constitution has been interpreted to secure a right to marry, but the government may require that people get a marriage license. The Takings Clause bars the government from requiring people to leave their land unimproved and thus valueless, but the government may require a building permit before improvements are made.

People have a right to vote, under all state constitutions and, in practice, under the federal Constitution, but they may be required to register to vote. Whom they voted for has been kept secret, at least for a hundred years, but whether they voted and what party they belong to is known to the government, and is often even a matter of public record. Many of these requirements are instituted to prevent crime (chiefly fraud) or injury (such as the injury stemming from unsafe construction).

This of course leaves the question of what the right to bear arms is most like: those rights for which government tracking can't be required, or those rights for which it can be. I'm inclined to think that it is more like the trackable rights, and that it is the untrackable rights that are the constitutional outlier.

The rule barring licensing requirements for many kinds of speakers is in large part historical, stemming from an era when such licenses were discretionary and used to control which viewpoints might be expressed. It persists largely because of a continuing concern that some viewpoints may be so unpopular with the government or the public that people who are known to convey

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448. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941).

449. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191–92 (1999).

450. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

451. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

452. See, e.g., *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007).

those viewpoints will face retaliation.<sup>453</sup> Even so, some kinds of speakers may have to identify themselves to the government, when the speech poses serious concerns about fraud or corruption. The same worry about retaliation, coupled with a longstanding tradition of privacy of medical records, likely provides the cause for the no tracking rule for abortions.

Gun owners as a group have faced some hostility from the government and the public, but gun ownership is very common behavior, and there's safety in numbers: It seems unlikely that the government will retaliate against the tens of millions of gun owners in the country, who represent 35 to 45 percent of all American households. Gun carrying is both rarer and, if required to be done openly, more likely to viscerally worry observers.<sup>454</sup> But mere gun ownership, if disclosed to the government rather than to the public at large,<sup>455</sup> is not likely to yield a harsh government reaction, and registration requirements are thus unlikely to deter ownership by the law-abiding.

It's true that certain kinds of guns are rare and especially unpopular. But as I've argued above, the right to bear arms in self-defense should be understood as protecting a right to own some arms that amply provide for self-defense, not a right to own any particular brand or design of gun. (In this respect, it differs from the right to speak, which includes the right to convey the particular viewpoint one wishes to convey. Many kinds of arms are fungible for self-defense purposes in a way that viewpoints are not fungible for free speech purposes.)

It is not impossible that the government will want to go after gun owners, chiefly to confiscate their guns. This could happen if the government shifts to authoritarianism, and thus doesn't care about constitutional constraints and at the same time wants to seize guns in order to diminish the risk of violent resistance. Or it could happen if a future Supreme Court concludes the individual right to bear arms is not constitutionally protected, and Congress enacts a comprehensive gun ban.<sup>456</sup>

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453. See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166–67 (2002).

454. See *supra* Part II.C.2.

455. I set aside the question whether making gun ownership or concealed carry license records public under state open records acts might be unconstitutional. See generally Kelsey M. Swanson, Comment, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579 (2009).

456. This could also happen if the right to bear arms isn't incorporated against the states, and a state doesn't have a right-to-bear-arms provision; in that case, though, the right to bear arms should not stand in the way of registration and confiscation, precisely because there is no constitutional right to bear arms in the state. And it could happen if the right to bear arms isn't incorporated, and a state repeals its right-to-bear-arms provision after registration is implemented (or if a federal constitutional amendment is enacted to repeal the Second Amendment). But a court ought not prohibit registration on right-to-bear-arms grounds for fear that the people will later repeal the right to bear arms; the people

Some have argued that the Free Speech Clause ought to be interpreted from a “pathological perspective,” with an eye towards creating a doctrine that would serve free speech best even in those times when the public, the government, and the courts are most hostile to unpopular speakers.<sup>457</sup> Should the Second Amendment be interpreted the same way?

Here we may be getting to a topic that’s outside the scope of this Article, because it requires us to think about whether the Second Amendment retains a deterrence-of-government-tyranny component as well as a self-defense component. I’m inclined to be skeptical of the ability of private gun ownership to constrain the government in truly pathological times. I’d like to think that an armed citizenry would provide a material barrier to such pathologies, but I doubt that this would in fact be so, especially given the size and power of modern national government. Nonetheless, figuring this out requires thinking through the deterrence-of-government-tyranny rationale, something I have not done for this Article.

For now, I’ll leave things at this: The tracking requirements likely don’t themselves impose a substantial burden on the right today. Such tracking requirements aren’t generally unconstitutional as to other rights, though they are sometimes unconstitutional as to some rights. And the key question is the extent to which current doctrine should be crafted with an eye towards a future time when the doctrine or government practice may be very different than it is today.

#### CONCLUSION

Right-to-bear-arms controversies will likely arise especially often after *District of Columbia v. Heller*. It is possible that judges will respond to them simply by deciding intuitively what counts as a reasonable regulation, as state courts have often done with regard to state right-to-bear-arms controversies.

My hope, though, is that courts can do better, and decide the questions more reflectively—by looking closely at the scope of the right, at the burden the regulation imposes, at evidence on whether the regulation will actually reduce danger of crime and injury (and at the normative arguments about what sorts of evidence, if any, should suffice), and at any special role the government may be playing as proprietor. It’s hard to predict what answers the courts will give, or to be confident that the answers will be the right ones. But at least it would be a good start for courts to ask the right questions.

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are entitled to change the Constitution, and the current Constitution ought not be read as entrenching itself against future constitutional amendments.

457. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).