

## ARTICLES

# What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment\*

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*Particularly in places with few recognizable gun control laws, “gun neutral” civil and criminal rules are an important but often-unnoticed basis for the legal regulation of guns. The burdens that these rules impose on the keeping and bearing of arms are at times significant, but they are also incidental, which raises hard questions about the boundaries between constitutional law, regulation, and legally enforceable private ordering. Does the Second Amendment apply to civil suits for trespass, negligence, and nuisance? Does the Amendment cover gun-neutral laws of general applicability like assault and disturbing the peace? In the course of addressing these practical questions and the broader conceptual challenges that they represent, this Article fashions analytic tools that may be useful to a wide range of constitutional problems.*

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### INTRODUCTION

The boundaries of the Second Amendment do not coincide with the boundaries of gun control. The Amendment does not reach, let alone prohibit,<sup>1</sup> all direct burdens imposed by gun control.<sup>2</sup> Conversely, it might apply to—and could invalidate—some incidental burdens imposed by civil suits or other gun-neutral laws of general applicability.<sup>3</sup>

*District of Columbia v Heller*<sup>4</sup> makes the first of these propositions clear, holding that certain “longstanding prohibitions” like bans on possession by felons and the mentally ill fall outside the scope of the Second Amendment.<sup>5</sup> In the wake of *Heller*, lower courts have adopted and extended the Court’s analysis to other well-established types of regulation. With regard to these categories of regulation, scrutiny is not an issue; the Second Amendment “just does not show up.”<sup>6</sup>

The second proposition—that the Second Amendment might cover gun-neutral laws of general applicability—is not (yet) a matter of blackletter law but is easy enough to illustrate. *Heller*

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<sup>1</sup> The distinction between reaching and prohibiting echoes the distinction between coverage and protection. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765, 1769 (2004) (explaining the distinction between coverage and protection in the First Amendment context).

<sup>2</sup> See Part II.A.

<sup>3</sup> See Part II.B.

<sup>4</sup> 554 US 570 (2008).

<sup>5</sup> Id at 626.

<sup>6</sup> Schauer, 117 Harv L Rev at 1769 (cited in note 1) (discussing the First Amendment).

struck down a safe-storage rule that, with some exceptions, penalized gun owners who failed to keep their guns locked or disassembled when not in use.<sup>7</sup> That law directly burdened gun possession and thus constituted “gun control” in the traditional sense. But what if the DC courts had held that ordinary negligence law created a duty of care identical to that imposed by the safe-storage regulation and thus that gun owners were civilly liable for injuries caused by failures to keep their guns locked or disassembled?<sup>8</sup> Or what if the prosecutor’s office brought criminal negligence charges against a gun owner on the same basis?<sup>9</sup>

The Second Amendment’s relevance to these indirect burdens on guns remains unclear as a matter of doctrine and theory.<sup>10</sup> Whether gun-neutral regulations implicate the Second Amendment raises at least three fundamental inquiries: What kinds of behavioral constraints are constitutionally significant?<sup>11</sup> How does answering—or even entertaining—that question help define the boundaries of constitutional rights? And is it possible to answer any constitutional question of this type without an *a priori* theory of the constitutional right at issue?

In addressing these questions, this Article contributes to scholarship on the Second Amendment, and on constitutional law more generally, in three ways. First, it demonstrates that “gun control”—conventionally understood as direct legislative regulation of the use, possession, sale, and manufacture of firearms—is just one part of a larger regulatory environment. Second, it offers

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<sup>7</sup> *Heller*, 554 US at 575 (discussing the DC Code’s exceptions to the safe-storage requirement, including exceptions for places of business and for lawful recreational purposes).

<sup>8</sup> See, for example, *Estate of Strever v Cline*, 924 P2d 666, 669 (Mont 1996) (“We conclude that Susanj did owe a duty to not only Robert but also to the public in general to store his firearm and ammunition in a safe and prudent manner.”).

<sup>9</sup> See, for example, *People v Heber*, 745 NYS2d 835, 842–43 (NY Sup 2002) (denying a motion to dismiss on charges of negligent homicide and reckless endangerment after a child accidentally shot and killed himself because he found a loaded gun that the owner had not stored properly). See also Nicholas J. Johnson, et al, *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 19 (Wolters Kluwer 2012) (“As with any potentially lethal instrument, the general rules of criminal and civil negligence apply to your use and storage of a firearm.”).

Although criminal and civil liability have some important differences—obvious state action, constitutionally guaranteed procedure, and the like—for our purposes they are relevantly similar when they do not target guns *as such* and therefore do not constitute traditional gun control.

<sup>10</sup> See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L Rev 1443, 1456–61 (2009).

<sup>11</sup> We focus here on the threshold question of coverage and not on the level of protection—that is, we are interested in whether the Second Amendment applies *at all*.

a framework with which to evaluate the constitutional salience of incidental burdens. Finally, it highlights the need for a more comprehensive and integrated theory of the Second Amendment and outlines three such theories.

Part I identifies how the law regulates firearms in ways that are not conventionally thought of as gun control. Black-letter tort law, criminal law, and property law define individual freedoms to legally keep, carry, and use firearms. Whether the issue is liability for threatening displays of guns,<sup>12</sup> negligence for the alleged misuse of weapons,<sup>13</sup> or the exclusion of guns from private property,<sup>14</sup> these legal rules can have a significant impact on the possession and use of guns. The legal burdens they impose can be thought of as incidental because they do not explicitly regulate guns *as such*.<sup>15</sup>

As a general matter, such incidental burdens on constitutional rights are a widespread phenomenon. With varying levels of success, judges and scholars have examined incidental burdens on speech,<sup>16</sup> religious practice,<sup>17</sup> property,<sup>18</sup> and other constitutionally protected activities.<sup>19</sup> By contrast, few courts and

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<sup>12</sup> See Part I.A.2.

<sup>13</sup> See Part I.B.

<sup>14</sup> See Part I.C.

<sup>15</sup> We do not suppose that the line between direct and incidental burdens in this context will always be clear, any more than the line between such burdens is clear when it comes to speech. But drawing the line between laws that explicitly regulate guns and those that do not seems to be a reasonable first pass at the problem. For a related discussion in the First Amendment context, see Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 Iowa L Rev 111, 112 (1989):

A law is “unrelated to the suppression of free expression” if it (a) does not explicitly restrict speech, and (b) is not justified by reference to interests that are directly related to the restriction of speech, and (c) does not restrict expressive conduct because of the reactions of others to the content of the message conveyed.

<sup>16</sup> See, for example, *Cohen v Cowles Media Co*, 501 US 663, 665 (1991) (holding that the First Amendment does not exempt journalists from generally applicable rules regarding promissory estoppel); *Clark v Community for Creative Non-violence*, 468 US 288, 289 (1984) (holding that the First Amendment does not exempt political protests from generally applicable National Park Service rules regarding camping).

<sup>17</sup> See, for example, *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 878–82 (1990) (holding that neutral laws of general applicability are not subject to heightened scrutiny under the Free Exercise Clause).

<sup>18</sup> The regulatory takings inquiry has similar features, inasmuch as it seeks to identify laws that do not directly “take” property but should nonetheless be treated as having done so. See *Penn Central Transportation Co v New York City*, 438 US 104, 123–24 (1978) (describing a three-factor test).

<sup>19</sup> For simplicity’s sake, at this initial stage we use “constitutionally protected activity” as something of a shorthand, recognizing that constitutional rights prevent certain kinds of *rules* rather than prevent protected activities per se. See generally Matthew

commentators have yet paid sustained attention to the regulation of guns by anything other than conventional gun control.<sup>20</sup>

This omission is in need of a remedy, and soon. The superheated politics of guns mean that nearly any regulatory measure can spark a conflagration over “gun control” without any agreement on what that term actually means.<sup>21</sup> Further, incidental burdens on gun-related activities are likely to become more visible and contested, especially in places where traditional gun control is rolled back by legislative or judicial actions or where states impose strict scrutiny standards of review through state constitutional amendments.<sup>22</sup> Moreover, the kinds of neutral laws that impose these incidental burdens also establish baselines against which Second Amendment concepts like “law-abiding citizens” and “lawful purposes”<sup>23</sup> are defined. Recent statutory changes<sup>24</sup> shift these baselines, generating unforeseen constitutional consequences.<sup>25</sup> Any complete discussion of the

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D. Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 Mich L Rev 1 (1998).

<sup>20</sup> This omission is by no means universal, however. See generally, for example, Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in Timothy D. Lytton, ed, *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 62 (Michigan 2006); Tom Diaz, *The American Gun Industry: Designing & Marketing Increasingly Lethal Weapons*, in Lytton, ed, *Suing the Gun Industry* 84 (cited in note 20). See also Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 Hastings L J 1205, 1231–43 (2009); Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 U Fla L Rev \*15–35 (forthcoming 2016), archived at <http://perma.cc/A7K7-36DE>.

<sup>21</sup> See, for example, Amanda Crawford, *Arizona Cities May Sell Guns under Anti-destruction Bill* (Bloomberg, Feb 20, 2013), archived at <http://perma.cc/5M96-BM7U> (quoting Charles Heller of the Arizona Citizens Defense League as saying that “[a]nything that diminishes the use and the utility of firearms—anything—is gun control”); Michael S. Rosenwald, *Store Backs Away from Smart Guns Following Outcry from 2nd Amendment Activists* (Wash Post, Mar 6, 2014), archived at <http://perma.cc/EUP4-7NDC> (discussing opposition to the marketing of a gun with smart technology).

<sup>22</sup> See, for example, La Const Art I, § 11; Mo Const Art I, § 23.

<sup>23</sup> *Heller*, 554 US at 625 (“[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”). See also *id* at 644 (Stevens dissenting) (“[W]hen it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to ‘law-abiding, responsible citizens.’”).

<sup>24</sup> See, for example, Niraj Chokshi, *What Georgia’s Expansive New Pro-Gun Law Does* (Wash Post, Apr 23, 2014), archived at <http://perma.cc/L96H-MSV5>. See also Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 Fordham L Rev 1689, 1716–23 (2014) (exploring the related question of how courts should address common-law questions in the “gaps” between related statutes).

<sup>25</sup> See, for example, Jeffrey Bellin, *The Right to Remain Armed*, 63 Wash U L Rev \*1 (forthcoming 2016), archived at <http://perma.cc/74KM-EPNA> (arguing that “enhanced Second Amendment rights trigger Fourth Amendment protections that could radically transform American policing”). By focusing on these contemporary developments, we do

regulatory landscape, whether laudatory or critical, must account for these types of incidental burdens.

Identifying these burdens is only part of the task; whether and when incidental burdens raise *constitutional* concerns is an exceedingly vexing question whose answer is often assumed rather than articulated.<sup>26</sup> It is difficult to discern a transsubstantive rule or set of principles from the Supreme Court's occasional forays into the field. In some cases, the Court unhesitatingly subjects standard tort and contract claims to constitutional scrutiny.<sup>27</sup> In others, the Court insulates laws of general applicability from constitutional review.<sup>28</sup> In either set of cases, the threshold question is whether the Constitution applies at all, and that question rarely has an obvious answer. For example, it is tempting to dismiss tort claims as private ordering between individuals that are not subject to the Constitution. But as free speech doctrine demonstrates, the constitutional issue cannot be avoided so easily.<sup>29</sup>

Part II of this Article suggests a framework with which to approach these questions, using incidental burdens to illuminate the boundary conditions of the Second Amendment. While some direct burdens on the right to keep and bear arms implicate the Constitution, others, for reasons of history or longevity, do not.<sup>30</sup> Equally, there may be some indirect burdens that do not directly regulate guns but that implicate the Constitution because of their history, significance to the individual, structural consequences, or

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not mean to slight the importance of other tectonic shifts in the law, such as the rise of strict liability in products-liability cases over the past few decades.

<sup>26</sup> See Schauer, 117 Harv L Rev at 1767 (cited in note 1) (“[T]he question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed.”).

<sup>27</sup> See, for example, *New York Times Co v Sullivan*, 376 US 254, 268 (1964) (subjecting libel law to scrutiny under the First and Fourteenth Amendments); *Shelley v Kraemer*, 334 US 1, 18–23 (1948) (subjecting property and contract law to scrutiny under the Fourteenth Amendment); *Palmore v Sidoti*, 466 US 429, 431–32 (1984) (subjecting family law to scrutiny under the Fourteenth Amendment).

<sup>28</sup> See, for example, *Smith*, 494 US at 878–79.

<sup>29</sup> See Part II.B.3.

<sup>30</sup> See *Heller*, 554 US at 626–27:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

See also Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us about the Second*, 122 Yale L J 852, 867 (2013).

purpose. We suggest that these four factors—discussed in detail below<sup>31</sup>—represent modalities that judges can employ to determine whether an incidental burden raises a constitutional question.<sup>32</sup>

Judicial use of these modalities will define the contours of the Second Amendment, separating constitutional space from nonconstitutional space. And the jurisprudential significance of that separation will increase if the Supreme Court continues to edge away from the tiers of scrutiny and toward a more rule-based approach.<sup>33</sup> In a regime that puts a premium on clearly defined boundaries and bright lines, the question of constitutional coverage is critical—if not dispositive—and so it is essential to identify the tools with which courts may draw those lines.

But as Part III shows, these modalities for evaluating incidental burdens—their history, individual significance, structural relevance, and purpose—also demand a more comprehensive account of the Second Amendment. As a doctrinal matter, *Heller* may have resolved the decades-long fight over whether the Amendment is limited to militia service or extends to individual uses such as self-defense. But defining the Second Amendment as protecting an individual right does not end the debate about the right's purpose any more than the individual nature of free speech resolves the question whether that freedom primarily protects autonomy,<sup>34</sup> promotes democracy,<sup>35</sup> or facilitates a marketplace of ideas.<sup>36</sup>

There are at least three plausible ways to understand the individual self-defense right announced in *Heller*.<sup>37</sup> The first

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<sup>31</sup> See Part II.B.

<sup>32</sup> In this respect, we both differ from and acknowledge our debt to Professor Philip Bobbitt's six modalities of constitutional argument. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7–8, 93–94 (Oxford 1982).

<sup>33</sup> The Second Amendment provides a particularly useful object of study in this regard because the individual right it protects was only recently recognized by the Supreme Court. See *Heller*, 554 US at 592. The nascent doctrine is thus largely unburdened by precedent, and it is more directly reflective of current trends that seem to favor rules over standards. See Joseph Blocher, *Roberts' Rules: The Assertiveness of Rules-Based Jurisprudence*, 46 *Tulsa L Rev* 431, 432–33 (2011) (describing Chief Justice John Roberts's preference for rules over standards).

<sup>34</sup> See, for example, C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 *S Cal L Rev* 979, 981 (1997).

<sup>35</sup> See, for example, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 94 (Harper & Brothers 1948).

<sup>36</sup> See, for example, *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

<sup>37</sup> These three theories strike us as covering the most plausible self-defense theories of the Second Amendment, but there are certainly other possibilities. See generally

approach is that the Second Amendment right protects individual gun owners' autonomy, irrespective of its impact on public or personal safety or the ability to resist the government. A second approach posits that the Second Amendment guarantees a right to self-defense against the government. A third approach is that, just as truth is most likely to emerge from an open marketplace of ideas, optimal security is likely to occur when people can freely keep and bear arms as a deterrent to antagonists—a marketplace of violence, so to speak.<sup>38</sup> On this view, just as “the counter to negative or damaging speech is to allow more speech,”<sup>39</sup> the “only thing that stops a bad guy with a gun, is a good guy with a gun.”<sup>40</sup>

These three theories lead to different conclusions regarding which burdens on guns should be recognized as constitutionally salient. All three have descriptive and normative merits and demerits. Our goal here is to describe these theories and their importance rather than to choose one over the others. We suspect that the Second Amendment, like the First Amendment, will be shaped largely in a common-law fashion by the competition between these approaches or others like them and that no single approach will fully displace the others.

Looking beyond the doctrine and theory for a moment, our (perhaps immodest) hope is to help reframe the gun debate. People sometimes treat that debate as one between gun control on the one hand and the Second Amendment on the other,<sup>41</sup> and the parties often fight about “gun control” without any agreement as to what that term really means. This confusion obscures the degree to which gun regulation operates within a complex legal and social ecology. Cutting back on gun control will increase the relevance of incidental burdens on guns; repealing

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Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 *Notre Dame L Rev* 131 (2008).

<sup>38</sup> See Part III.C.

<sup>39</sup> Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 *Denver U L Rev* 65, 87 (2001), citing *New York Times*, 376 US at 304. See also *Whitney v California*, 274 US 357, 377 (1927) (Brandeis concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

<sup>40</sup> Peter Overby, *NRA: ‘Only Thing That Stops a Bad Guy with a Gun Is a Good Guy with a Gun’* (NPR, Dec 21, 2012), archived at <http://perma.cc/QU56-TPE6> (quoting National Rifle Association (NRA) Executive Vice President Wayne LaPierre).

<sup>41</sup> See, for example, Tim Devaney, *GOP Gains Slam Door on Gun Control Push* (The Hill, Nov 8, 2014), archived at <http://perma.cc/ZN8D-L94J> (quoting NRA spokeswoman Jennifer Baker as saying that “[w]e now have a Senate leader [Mitch McConnell] who is pro-Second Amendment, so it will be more difficult for them to pass gun control measures”). See also generally Joseph Blocher, *Gun Rights Talk*, 94 *BU L Rev* 813 (2014).



statutes will lead to more private ordering through law; the social acceptance or rejection of practices like open carry will determine whether those practices are tortious. The gun debate, like the Second Amendment itself, is about more than just gun control.

## I. INCIDENTAL BURDENS ON GUNS

Falsely shouting “Fire!” in a crowded theater and causing a panic is the prototypical example of constitutionally unprotected speech.<sup>42</sup> In the wake of the mass murder in Aurora, Colorado,<sup>43</sup> and other movie theater shootings,<sup>44</sup> falsely shouting “Gun!” and causing a panic seems likely to be unprotected as well. What happens, then, if a person actually *brings* a gun to a movie theater and causes a panic? Does the Second Amendment insulate him from tort or criminal liability? Recently, opponents of gun regulation have openly carried AR-15s outside meetings of gun control groups<sup>45</sup> (including those at which victims of gun violence were speaking<sup>46</sup>), at rallies opposing President Barack Obama<sup>47</sup> (including those at which the president was present<sup>48</sup>), and in stores and restaurants.<sup>49</sup> In response, some private businesses—

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<sup>42</sup> *Schenck v United States*, 249 US 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”). See also Harry Kalven Jr, *A Worthy Tradition: Freedom of Speech in America* 133 (Harper & Row 1988) (“*Schenck*—and perhaps even Holmes himself—are best remembered for the example of the man ‘falsely shouting fire’ in a crowded theater.”).

<sup>43</sup> Michael Pearson, *Gunman Turns ‘Batman’ Screening into Real-Life ‘Horror Film’* (CNN, July 20, 2012), archived at <http://perma.cc/WBX5-JDT5> (describing the mass murder of individuals at a movie theater in Aurora, Colorado, during a showing of *The Dark Knight Rises*).

<sup>44</sup> See, for example, Doug Stanglin, *No Bail for Suspect in Texting Shooting at Movie Theater* (USA Today, Jan 14, 2014), archived at <http://perma.cc/Y2VW-5TYT> (describing a movie theater shooting in Florida after a dispute over texting).

<sup>45</sup> See Cathaleen Qiao Chen, *A Right-to-Bear-Arms Twist: Rallying with a Gun in Hand* (NY Times, Apr 24, 2014), archived at <http://perma.cc/P9SD-WW5K>; Liz Klimas, *Open Carry Advocates Stand outside Moms against Gun Violence Meeting: Tell Us If You Think They Went Too Far* (The Blaze, Nov 11, 2013), archived at <http://perma.cc/U7Y7-NZKY>.

<sup>46</sup> See Jessica Chasmar, *1 Arrested after Gun Rights, Gun Control Activists Clash at N.H. Rally Hosted by Bloomberg Group* (Wash Times, June 19, 2013), archived at <http://perma.cc/255K-MYRJ>.

<sup>47</sup> Carol Cratty, *Man Carries Assault Rifle to Obama Protest—and It’s Legal* (CNN, Aug 18, 2009), archived at <http://perma.cc/9KJD-9BQN>.

<sup>48</sup> Declan McCullagh, *Gun-Toting Man Draws Scrutiny outside Obama Town Hall* (CBS News, Aug 11, 2009), archived at <http://perma.cc/EV9E-R3GX>.

<sup>49</sup> See Carol Kuruvilla, *Armed Gun Activists Gather at Newtown Starbucks, Sparking Outrage in the Grieving Community* (NY Daily News, Aug 10, 2013), archived at <http://perma.cc/HQL7-TT7E> (describing a clash between gun-rights and gun control activists).

Target and Starbucks among them—have begun posting “no guns” signs.<sup>50</sup> If a gun owner disregards such a sign and is charged with trespass, can he raise a Second Amendment defense?<sup>51</sup>

These scenarios raise questions about the regulation of guns but not about gun control as such. Some involve private rights and others derive from public regulations, but they all involve generally applicable rules—tort law, property law, and the like—that occasionally apply to gun-related activities. The burdens that these regulations impose on the possession and use of guns are therefore incidental to the regulatory text and overall design. These burdens often are ignored in popular and scholarly debates about gun control and the Second Amendment, but they raise extraordinarily important and complex questions. The goal of the following discussion is to illustrate the scope of those questions and the potential applicability of these neutral rules to gun-related activities. Part II presents a framework with which to identify whether these rules, as applied to gun-related activity, raise Second Amendment questions.

#### A. Intentional Torts and Criminal Law

Perhaps the most obvious legal rules that implicate gun ownership and use are intentional torts, such as assault and intentional infliction of emotional distress (IIED), and the analogous criminal prohibitions that forbid activities like “menacing.” Gun possession is not a necessary element of these legal rules—they apply whether a person wields a gun, a hammer, or no weapon at all.<sup>52</sup> And because these rules do not focus on guns as such, the burdens that they impose on the freedom to keep and bear arms are incidental.

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at a Starbucks roughly two miles from the scene of the Newtown elementary school shooting where gun activists had gathered to support Starbucks for allowing its customers to carry firearms in its stores).

<sup>50</sup> Ben Brody, *Target to Customers: No Guns Please* (CNN, July 2, 2014), archived at <http://perma.cc/WN92-CPG4> (noting that some businesses, including Target, Chili’s, and Sonic, have requested that customers enter unarmed).

<sup>51</sup> See Ellen Jean Hirst and Bob McCoppin, *Concealed Carry: Illinois Businesses Face a Loaded Issue over Concealed Carry Law* (Chi Trib, July 29, 2013), archived at <http://perma.cc/32ZX-6MG6> (analyzing the heated debate over whether business owners can or should prohibit concealed-carry-permit holders from carrying guns on their property).

<sup>52</sup> There are, of course, many gun-specific crimes and sentencing enhancements. See, for example, 28 USC § 924(c) (setting mandatory minimum sentences for persons who use or carry firearms in furtherance of certain crimes). We hold these aside because they are more likely to impose *direct* burdens on the keeping and bearing of arms.

### 1. Assault and related crimes.

A person commits an assault when he acts either intending to cause harmful or offensive contact with another person or intending to put another person in imminent apprehension of such contact, and the other person is thereby put in such imminent apprehension.<sup>53</sup> Unsurprisingly, the use of a gun can contribute to civil liability in assault cases. A person who points a gun at another person and thereby creates a reasonable fear of imminent harm has committed an assault.<sup>54</sup> The mere mention of a gun is probably not enough to satisfy this standard,<sup>55</sup> but a gun-wielding person can be held liable for assault even if the gun is not loaded,<sup>56</sup> if it is not pointed at anyone,<sup>57</sup> or if no one sees it.<sup>58</sup>

The same basic rules apply to criminal assault<sup>59</sup> and related crimes. Actions that give rise to tort liability for assault may also give rise to criminal liability on a variety of other grounds. It is generally illegal, for example, to “menace” a person,<sup>60</sup> and the use of a gun can be a factor in determining liability.<sup>61</sup> This is not

<sup>53</sup> See Restatement (Second) of Torts § 21 (1965). See also *Kline v Kline*, 64 NE 9, 9 (Ind 1902).

<sup>54</sup> See, for example, *Jordan v Wilson*, 5 S3d 442, 449 (Miss App 2008) (“In her complaint, Jordan alleged that Wilson pointed a firearm at her and that she feared for her life. This was sufficient to state a claim for the intentional tort of assault.”); *Lowry v Standard Oil Co of California*, 146 P2d 57, 60 (Cal App 1944) (“The pointing of a gun at another in a threatening manner is sufficient to cause fear of personal injury unless it is known by the person at whom the weapon is pointed that the gun is in fact unloaded.”); *Chapman v State*, 78 Ala 463, 464 (1884) (holding that brandishing an unloaded gun will not support a conviction for criminal assault but may sustain a civil tort suit).

<sup>55</sup> See *Durivage v Tufts*, 51 A2d 847, 849 (NH 1947) (holding that the plaintiff could not maintain a tort action for assault based solely on the defendant’s verbal threat that he would shoot the plaintiff if he had a gun).

<sup>56</sup> See *Beach v Hancock*, 27 NH 223, 229 (1853) (“So if a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off; *semble* that this is an assault, even though the pistol were, in fact, not loaded.”).

<sup>57</sup> See *Castiglione v Galpin*, 325 S2d 725, 726 (La App 1976) (“[W]e are convinced from the circumstances surrounding the incident that defendant’s action (whether the gun remained on defendant’s lap or was pointed at plaintiffs) resulted in plaintiffs being placed in reasonable apprehension of receiving a battery and was sufficient to constitute an assault.”).

<sup>58</sup> See *State v Misner*, 763 P2d 23, 25 (Mont 1988) (“We conclude that it was not necessary that Mr. Taber personally observe the gun being waved at him in order to experience reasonable apprehension of serious bodily injury.”).

<sup>59</sup> See *State v Hagberg*, 920 P2d 86, 90 (Mont 1996) (upholding a conviction for felony assault when the victim believed, but did not see, that the defendant was holding a gun out of his sight).

<sup>60</sup> William Blackstone, 3 *Commentaries on the Laws of England* 94 (Cavendish 2001) (Wayne Morrison, ed) (originally published 1768).

<sup>61</sup> See *State v Wardlow*, 1999 WL 595357, \*2 (Ohio App):

to say that the simple act of carrying a gun is criminal menacing (at least not in states where open carry is legal<sup>62</sup>), only that it can be in certain circumstances—if the gun is pointed at someone else, for example<sup>63</sup> (though this does not seem to be strictly required<sup>64</sup>). Some jurisdictions treat these incidents separately as “unlawful display[s] of a firearm,”<sup>65</sup> but we hold such laws aside because the burdens they impose are direct rather than incidental.<sup>66</sup>

## 2. Intentional infliction of emotional distress and disturbing the peace.

A person commits the tort of IIED when he intentionally causes “severe emotional harm” to another person by engaging

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The jury was presented with two divergent stories, i.e., that while ordering the men off her property she either pointed the gun at the men, or that she simply held the gun at her side. If the jury believed the former, she was guilty of at least Menacing; if it believed the latter, she was not guilty of anything.

See also *People v Silva*, 680 NYS2d 43, 44 (NY Crim 1998) (“[D]efendant[s] state[ment] that he was going to ‘smoke’ the undercover police officer . . . conjoined with defendant’s simultaneous action of reaching into his waistband, an area traditionally associated with a secreted handgun . . . makes out the crime of second-degree Menacing.”); *City of Akron v Boyd*, 1983 WL 3904, \*1 (Ohio App) (affirming the conviction of a defendant convicted of menacing when he placed a holstered gun on his lap pointing toward another person).

<sup>62</sup> See, for example, *Ex parte Pate*, 145 S3d 733, 738 (Ala 2013) (“[W]e conclude that Pate’s *getting the gun*, without more, was not sufficient to establish the physical-action element of menacing.”); *Graham v Commonwealth*, 667 SW2d 697, 699 (Ky App 1983) (holding that a gun “being waved at someone rather than just being brandished in the air” constituted menacing).

<sup>63</sup> *Wood v State*, 2003 WL 22863086, \*2 (Del) (holding that pointing a gun at someone is menacing).

<sup>64</sup> See *People v Hines*, 780 P2d 556, 559 (Colo 1989) (“We also conclude that an offender may commit felony menacing by the ‘use’ of a firearm without actually pointing the firearm at another person.”).

<sup>65</sup> *State v Baggett*, 13 P3d 659, 662 (Wash App 2000) (upholding a conviction for the unlawful display of a firearm). See also *People v Hall*, 100 Cal Rptr 2d 279, 285 (Cal App 2000) (discussing the crime of “draw[ing] or exhibit[ing] any firearm, whether loaded or unloaded,” and concluding that “[w]hen the evidence shows the weapon was exhibited in a rude, angry or threatening manner, the offense is complete”).

<sup>66</sup> For similar reasons, we do not discuss the important and interesting distinction between “brandishing” and simple open carrying. See, for example, *Morris v Commonwealth*, 607 SE2d 110, 114 (Va 2005) (defining “to brandish” as “to exhibit or expose in an ostentatious, shameless, or aggressive manner”); *People v Sanders*, 905 P2d 420, 457 (Cal 1996) (“The crime of brandishing consists of drawing or exhibiting, in the presence of another person, any firearm, whether loaded or unloaded, in a rude, angry or threatening manner. The weapon need not have been pointed directly at a victim.”) (citation omitted); *State v Overshon*, 528 SW2d 142, 143 (Mo App 1975) (“[I]t [is] unlawful for a person to exhibit, in the presence of one or more persons, a deadly weapon in a rude, angry or threatening manner.”) (quotation marks omitted).

in “extreme and outrageous conduct.”<sup>67</sup> In some circumstances, the use of a gun may be the basis for an IIED claim<sup>68</sup>—for example, if the presence of a gun contributes to the emotional distress that is inflicted.<sup>69</sup> But as the definition suggests, the burden on the plaintiff is extremely high: simply being scared by the presence of a gun<sup>70</sup> is generally not enough.<sup>71</sup>

The closest criminal analogues to the tort of IIED are rules against harassment,<sup>72</sup> disorderly conduct,<sup>73</sup> and disturbance of the peace<sup>74</sup> (or its historical antecedent, affray<sup>75</sup>). For these purposes,

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<sup>67</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 (2012).

<sup>68</sup> See *Cullison v Medley*, 570 NE2d 27, 31 (Ind 1991) (noting the possibility of IIED when the defendants threatened harm while one was armed with a revolver).

<sup>69</sup> Compare *Davis v Copelan*, 452 SE2d 194, 203 (Ga App 1994) (finding sufficient evidence to support an IIED claim when “there [was] evidence that Pat Cheek conspired with Officer Russell to separately and unexpectedly call plaintiffs to her office for the intimidating, abusive and well-planned termination interviews,” and further noting that “the evidence show[ed] that Pat Cheek allowed an armed law enforcement officer to attend the meetings; that she permitted the officer to dominate the meetings and that she acquiesced in the officer’s intimidating, overbearing and abusive conduct”), with *Holloway v Wachovia Bank & Trust Co, NA*, 452 SE2d 233, 236, 243–44 (NC 1994) (upholding summary judgment against one plaintiff on an IIED claim despite an allegation that the defendant had aimed a gun at the plaintiff, because the plaintiff’s own testimony indicated that she did not suffer severe and disabling emotional distress, while reversing summary judgment for the other plaintiffs).

<sup>70</sup> See, for example, *Sharp v Paul*, 2013 WL 1278185, \*3 (Cal App) (finding that evidence did not support a restraining order, which is subject to same standard as IIED, because the plaintiff admitted both that he did not feel threatened when the defendant pointed the gun at him and that the defendant did not intend to threaten him); *Montross v United Parcel Service of America, Inc.*, 2002 WL 318336, \*1 (ND Tex) (affirming summary judgment dismissing an IIED claim when the defendant’s employee, “who had a camera at the time, suggested that Ritman point the rifle at Montross’s head so she could take a picture . . . which caused Montross to fear for his safety”).

<sup>71</sup> See, for example, *Clark v Elam Sand and Gravel, Inc.*, 777 NYS2d 624, 625 (NY Sup 2004) (rejecting an IIED claim when the alleged wrongful conduct consisted of “showing [the plaintiff] a gun on various occasions and by innuendo he would use to shoot whoever installed the devices, he would become belligerent, slam doors, talk sarcastically to the Plaintiff and sarcastically asked to use the phones when there was no need to do so”) (brackets in original).

<sup>72</sup> See, for example, MPC § 250.4 (ALI 1962).

<sup>73</sup> See, for example, MPC § 250.2 (ALI 1962); *City of Chicago v Roma*, 374 NE2d 1097, 1098 (Ill App 1978) (reversing a conviction for disorderly conduct when the defendant’s gun was “was wrapped in a plastic bag, [in] an attache case . . . approximately 25 feet away” from him).

<sup>74</sup> See, for example, *State v Albert*, 184 SE2d 605, 607 (SC 1971) (affirming the defendant’s conviction for rioting, defined as a “tumultuous disturbance of the peace,” for taking control of the library at Vorhees College while armed).

<sup>75</sup> See, for example, Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L Rev 487, 501 (2004) (discussing the use of affray to regulate gun-related activities).

we hold aside related prohibitions on brandishing,<sup>76</sup> unlawful display,<sup>77</sup> and riding armed to the terror of the people,<sup>78</sup> each of which imposes direct burdens on arms-related activities.

As with assault, the use of a gun is neither necessary nor sufficient to create liability under these rules, but it can still be an important contributing factor.<sup>79</sup> The manner in which a person carries or displays a gun,<sup>80</sup> the reasonableness of the plaintiff's response,<sup>81</sup> and an assessment of the overall context will all factor into whether liability attaches.

Consider the practice of openly carrying guns to gun control rallies,<sup>82</sup> including those at which victims of gun violence are speaking.<sup>83</sup> It is plausible to think that this inflicts emotional distress on the speakers and that doing so is the intent of some (although of course not all) of the carriers.<sup>84</sup> It might even be considered "extreme and outrageous"<sup>85</sup> to, for example, bring AR-15s

<sup>76</sup> See, for example, Cal Penal Code § 417 (criminalizing brandishing a weapon).

<sup>77</sup> See, for example, *State v Byrd*, 868 P2d 158, 162 (Wash App 1994) ("The gravamen of the offense of unlawful display of a weapon is displaying and handling of the weapon in a manner 'that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.'").

<sup>78</sup> See, for example, ALI, *Model Penal Code: Council Draft No 29* 47 (Feb 23, 1961) (citing individual state codes listing an aggravating factor to misdemeanor riot as "carrying a dangerous weapon"); Portland City Code § 14A.06.010(A) ("It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place . . . having failed to remove all the ammunition."); Statute of Northampton, 2 Edw 3, ch 3 (1328) ("[N]o Man great nor small . . . [shall] ride armed by night nor by day, in Fairs, Markets . . . nor in no part elsewhere.").

<sup>79</sup> See, for example, *Cortez v State*, 256 SW2d 855, 855 (Tex Crim App 1953) ("There is no offense known as 'rudely displaying a pistol,' but such may constitute a violation of the disturbing-the-peace statute, when done in a manner calculated to disturb the peace.") (citation omitted).

<sup>80</sup> See, for example, *State v Turley*, 521 P2d 690, 691 (Mont 1974) (upholding a conviction for disturbance of the peace when "[t]he State's evidence show[ed] that appellant was slapping his pistol against his leg in an agitated manner; he unholstered the weapon and pointed it at Fairhurst; he threatened to shoot him; and he spat at Fairhurst's departing automobile").

<sup>81</sup> See *Byrd*, 868 P2d at 162 (finding that, for the crime of unlawful display, there "is no necessary nexus between reasonable apprehension and the defendant's actual intent" but that "[u]nder some circumstances, apprehension could be reasonable at the mere sight of a firearm, while the defendant's intent could be completely innocent").

<sup>82</sup> See, for example, Diana Reese, *Moms Demonstrate for Gun Control, Armed Men Stage Counter-Protest in Indiana* (Wash Post, Mar 29, 2013), archived at <http://perma.cc/3RZ3-36V5>.

<sup>83</sup> See note 46.

<sup>84</sup> See Mark Follman, *Spitting, Stalking, Rape Threats: How Gun Extremists Target Women* (Mother Jones, May 15, 2014), archived at <http://perma.cc/NW5D-U8AP>.

<sup>85</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 (2012).

to an event dedicated to the victims of a mass shooting perpetrated with an AR-15.<sup>86</sup>

Gun carriers might respond that this is all backward, that simply showing a gun to a person who dislikes them is not tortious,<sup>87</sup> and that in fact the gun carriers' intent is to normalize guns rather than to inflict emotional distress.<sup>88</sup> Perhaps open carry will cause some distress in the short term, but once people see that guns contribute to safety instead of threaten it, the basis for legal liability will weaken. In this way, shifting private law baselines— informed by social practice—may be outcome determinative.

Statutory changes can also nudge the baselines in one direction or another. In the context of IIED claims for gun carrying, for example, one would have to take into account open-carry laws, which could be said to represent a public determination that guns are *not* threatening. In this case, liability for IIED (and even for assault) should be even harder to prove. For example, as of 1967, simply carrying a concealed weapon could constitute a breach of the peace in Florida.<sup>89</sup> Today, the state has a “shall issue” regime for concealed-carry permits.<sup>90</sup> That change in the background law has major implications for legal liability.<sup>91</sup>

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<sup>86</sup> See note 46.

<sup>87</sup> *Cullison*, 570 NE2d at 31 (concluding that the defendant's knowledge of the plaintiff's apprehension toward guns was not sufficient on its own to support the conclusion that the defendant intended to inflict emotional injury on the plaintiff when he wore a gun in front of the plaintiff).

<sup>88</sup> See, for example, Klimas, *Open Carry Advocates Stand outside Moms against Gun Violence Meeting* (cited in note 45) (quoting an e-mail from Open Carry Texas that stated: “What we are doing is working and society is coming to view the sight of ‘military style rifles’ in public as just another normal thing. Isn't that a good thing?”).

<sup>89</sup> See *Marden v State*, 203 S2d 638, 640 (Fla App 1967).

<sup>90</sup> Fla Stat Ann § 790.06(2).

<sup>91</sup> With regard to legal liability, it is important to note that these incidental burdens—and others discussed below—might be limited in certain circumstances by the law of self-defense, which is the “central component” of the Second Amendment. *McDonald v City of Chicago, Illinois*, 561 US 742, 767 (2010) (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right.”) (citation omitted). How much self-defense law is now constitutional law is an incredibly complex inquiry. What is clear is that, at least as currently construed, the Second Amendment is simultaneously broader and narrower than the common-law rule: broader in the sense that it does not require an imminent threat or an objectively justifiable apprehension of harm to keep a gun; narrower in the sense that it protects only particular implements used for self-defense. See MPC § 3.04(1) (ALI 1962) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”).

## B. Negligence

Blackletter negligence law imposes liability on those who cause harm by failing to fulfill a duty of care that is owed to another person.<sup>92</sup> Standard negligence doctrine builds in a kind of cost-benefit analysis—if the alleged tortfeasor failed to take cost-justified measures to prevent the harm, then he may be liable.<sup>93</sup> Unsurprisingly, the misuse of guns can give rise to liability for civil and criminal negligence, as well as liability under related rules regarding civil and criminal recklessness.<sup>94</sup>

Perhaps the most heartbreaking cases are those in which a child is hurt or killed by an unsecured weapon, a tragedy that occurs hundreds of times every year.<sup>95</sup> It is also negligent to give, sell, or surrender a gun to an adult who is likely to, and does, misuse it.<sup>96</sup> Such liability is nothing new. Section 308 of the Second Restatement of Torts explained that

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<sup>92</sup> Restatement (Second) of Torts § 284 (1965).

<sup>93</sup> See *United States v Carroll Towing Co*, 159 F2d 169, 173 (2d Cir 1947) (“[I]f the probability [of an accident] be called P; the injury, L; and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .”). See also Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 Vand L Rev 813, 817–18 (2001).

<sup>94</sup> See, for example, *Al-Saud v State*, 658 NE2d 907, 910 (Ind 1995) (noting that “[t]he brandishing of a firearm in a congested area or during a dispute can create a variety of risks of bodily injury to others, regardless of whether the weapon is loaded,” and that a triable issue of fact existed as to whether the defendant “committed a delinquent act, i.e., an act which, if committed by an adult, would constitute criminal recklessness”); *Matter of ALJ*, 836 P2d 307, 310 (Wyo 1992) (“We interpret § 6–2–504(b) to mean that, whenever an actor knowingly points a firearm at another, whether the firearm is loaded or not, he is guilty of reckless endangering, provided the firearm was not pointed for defensive purposes.”).

In a forthcoming article, Professor Andrew McClurg argues that “through both common and statutory law, the United States has enshrined a *de facto* Second Amendment right to be negligent regarding many aspects of making, distributing, and possessing firearms.” McClurg, 68 U Fla L Rev at \*1 (cited in note 20) (citation omitted). He goes on to criticize this result as “ignor[ing] or mischaracteriz[ing] the fundamental scope of liability principles,” and he says that it “is derived from deference to Second Amendment rights.” Id at \*2, 6. We are in no position to fully evaluate McClurg’s descriptive account of the doctrine. To the degree that it is accurate, however, we agree that the Second Amendment cannot properly be read to provide blanket immunity for gun-related activities.

<sup>95</sup> Mark Berman, *How Often Do Children in the U.S. Unintentionally Shoot and Kill People? We Don’t Know* (Wash Post, Sept 4, 2014), archived at <http://perma.cc/4BHZ-SBSY> (reporting 591 victims of accidental gun violence in 2011, 102 of which were children under the age of 18). See also Michael Luo and Mike McIntire, *Children and Guns: The Hidden Toll* (NY Times, Sept 28, 2013), archived at <http://perma.cc/4M5K-R7FW>.

<sup>96</sup> See, for example, *Angell v F. Avanzini Lumber Co*, 363 S2d 571, 572 (Fla App 1978) (holding that sellers of a gun who could have inferred from the buyer’s “erratic behavior”



[i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.<sup>97</sup>

And specifically, the Restatement noted that “it is negligent to place loaded firearms . . . within reach of young children or feeble-minded adults.”<sup>98</sup> These rules do not mean that a gun’s owner is responsible for all negative consequences of the gun’s misuse<sup>99</sup> but rather that the owner is responsible only for misuse that is foreseeable,<sup>100</sup> such as when he sells the gun to a person who is underage,<sup>101</sup> mentally ill,<sup>102</sup> or intoxicated.<sup>103</sup>

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that “injury to someone was highly probable” could be held liable for the resulting death).

<sup>97</sup> Restatement (Second) of Torts § 308 (1965).

<sup>98</sup> Restatement (Second) of Torts at § 308, comment b (1965). See also, for example, *Herland v Izatt*, 345 P3d 661, 665 (Utah 2015):

[G]un owners have a duty to exercise reasonable care in supplying their guns to others—such as children and incompetent or impaired individuals—whom they know, or should know, are likely to use the gun in a manner that creates a foreseeable risk of injury to themselves or third parties.

See also *Wroth v McKinney*, 373 P2d 216, 219 (Kan 1962) (“It is negligent to place loaded firearms or poisons within reach of young children or feeble-minded adults.”); *Kuhns v Brugger*, 135 A2d 395, 402–03 (Pa 1957) (finding that prima facie negligence was established by, inter alia, the defendant’s storage of a loaded pistol in an unlocked dresser drawer).

<sup>99</sup> See *Rains v Bend of the River*, 124 SW3d 580, 595 (Tenn App 2003) (“[T]here is no evidence that his conduct or demeanor when he purchased the ammunition should have given the clerk at Bend of the River reason to foresee or anticipate that he intended to use the ammunition to commit suicide or to misuse it in any other way.”).

<sup>100</sup> See, for example, *Jupin v Kask*, 849 NE2d 829, 837 (Mass 2006) (“[T]he risk in the instant case—that a mentally unstable and violent person, to whom unfettered and unsupervised access to Kask’s home was granted, would take a gun from that home and shoot someone—was both foreseeable and foreseen.”).

<sup>101</sup> See, for example, *Lake Washington School District No 414 v Schuck’s Auto Supply, Inc*, 613 P2d 561, 562–63 (Wash App 1980) (explaining that a seller may be held liable for selling a “dangerous instrumentality” to a child whom the seller knows or ought to know is, “by reason of youth and inexperience, unfit to be trusted with it” and who then injures himself or a third party).

<sup>102</sup> See, for example, *Rubin v Johnson*, 550 NE2d 324, 333 (Ind App 1990) (“[T]he recognized unpredictability and dangerous propensities of the mentally ill make the likelihood of injury to third persons resulting from the sale of a handgun to an individual of unsound mind appear to be logical, and, hence, reasonably [foreseeable].”).

<sup>103</sup> See, for example, *Angell*, 363 S2d at 572 (reversing the trial court’s dismissal of the plaintiff’s complaint and finding that a dealer in firearms could have foreseen the probability of someone being injured after selling a firearm and ammunition to an “erratic” purchaser). See also *Kitchen v K-Mart Corp*, 697 S2d 1200, 1208 (Fla 1997) (“We hold

In some areas, statutes have codified the common-law duty of care. For example, many states have child-access prevention (CAP) rules that impose civil or criminal liability on gun owners who fail to exercise due care in keeping their guns out of the hands of children who may misuse them.<sup>104</sup> One perspective is that these rules—like the DC safe-storage provision—are direct regulations of firearms that implicate the Second Amendment. But one might also say that CAP rules simply codify an otherwise-unremarkable negligence rule, just as some states have codified the common-law standards for obscenity or libel to conform to Supreme Court rulings.<sup>105</sup>

Conversely, some statutes preempt negligence liability for gun-related activities. The most prominent example is the Protection of Lawful Commerce in Arms Act<sup>106</sup> (PLCAA), which partially shields gun manufacturers from negligence liability for the criminal misuse of their products.<sup>107</sup> The PLCAA is not a flat bar to liability; it specifically permits lawsuits for negligent entrustment and negligence per se.<sup>108</sup> Nevertheless, such arms-protecting statutory laws can subtly shift the baseline for what counts as gun control subject to the Second Amendment. Prior to the PLCAA, many citizens likely understood state tort law concerning firearms as mere background law, no different than laws that force a printer to clean up its toxic ink.<sup>109</sup> Statutes like the

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that an action for negligent entrustment as defined under section 390 of the Restatement is consistent with Florida public policy in protecting its citizens from the obvious danger of the placement of a firearm in the hands of an intoxicated person.”); *Bernethy v Walt Faylor’s, Inc.*, 653 P2d 280, 284 (Wash 1982) (reversing summary judgment that was granted to a gun shop on a wrongful death action brought after a visibly intoxicated man obtained a gun and ammunition from the defendant gun shop and immediately shot his wife).

<sup>104</sup> *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* \*233–34 (Legal Community Against Violence, 2008), archived at <http://perma.cc/F9S8-MTSP>.

<sup>105</sup> Compare NC Gen Stat § 14-190.1(b), and Mich Comp Laws § 600.2911(6), with *Miller v California*, 413 US 15, 24 (1973), and *New York Times Co v Sullivan*, 376 US 254, 279–80 (1964).

<sup>106</sup> Pub L No 109-92, 119 Stat 2095 (2005), codified in various sections of Titles 15 and 18.

<sup>107</sup> The law provides that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 USC § 7902(a). “Qualified civil liability action” is defined as “a civil action . . . brought by any person against a . . . seller of a [firearm] . . . for damages . . . resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party.” 15 USC § 7903(5)(A).

<sup>108</sup> See, for example, *Estate of Kim v Cox*, 295 P3d 380, 386 (Alaska 2013); *Gilland v Sportsmen’s Outpost, Inc.*, 2011 WL 2479693, \*12 (Conn Super).

<sup>109</sup> See *United States v Fleet Factors Corp.*, 821 F Supp 707, 712–13 (SD Ga 1993) (finding the defendants, as “owners,” liable for the costs associated with the removal of hazardous

PLCAA—accompanied as they are by Second Amendment justifications<sup>110</sup>—tend to accentuate the public nature of state tort law, as opposed to the understanding of tort law as private ordering or restorative justice.

### C. Property

Whether the right to keep and bear arms extends beyond one's own property has been a central Second Amendment question in recent years.<sup>111</sup> Some gun owners—especially open-carry activists—also assert a right to carry guns onto *other* people's property, and in particular onto the property of private business owners. Some business owners have responded by asserting a right to exclude guns from their property.<sup>112</sup> Whatever other legal issues are involved,<sup>113</sup> these scenarios implicate basic principles of property law.

#### 1. Trespass.

As a general matter, private property owners can exclude whomever they want for whatever reasons they want.<sup>114</sup> This right to exclude is frequently called “one of the most essential sticks in the bundle of rights” known as property.<sup>115</sup> Rules against trespass are a significant method of protecting this right.<sup>116</sup>

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substances from a textile-printing facility); *Grillo v Speedrite Products, Inc.*, 532 SE2d 1, 1–2 (SC App 2000) (involving a personal injury action against an ink supplier).

<sup>110</sup> As McClurg notes, the first statement of “[f]indings” in the PLCAA is: “The Second Amendment of the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.” McClurg, 68 U Fla L Rev at \*6 (cited in note 20), quoting 15 USC § 7901(a)(1).

<sup>111</sup> Compare *Peruta v County of San Diego*, 742 F3d 1144, 1179 (9th Cir 2014), vacd and rehearing en banc granted, 781 F3d 1106 (9th Cir 2015) (holding that California's “may issue” concealed-carry law requiring an applicant to show good cause for carrying in public violates the Second Amendment), with *Drake v Filko*, 724 F3d 426, 440 (3d Cir 2013) (upholding New Jersey's concealed-carry law requiring that an applicant present a “justifiable need” before issuing a concealed-carry license).

<sup>112</sup> See note 50 and accompanying text.

<sup>113</sup> One of us has argued that in some circumstances private property owners have a Second Amendment right to exclude guns. See generally Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 Stan L Rev 1 (2012).

<sup>114</sup> See William Blackstone, 2 *Commentaries on the Laws of England* 3 (Cavendish 2001) (Wayne Morrison, ed) (originally published 1766) (describing the right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”).

<sup>115</sup> *Kaiser Aetna v United States*, 444 US 164, 176 (1979).

<sup>116</sup> Trespass can also constitute a criminal offense, for example, when a person refuses to leave after being asked. See MPC § 221.2(2) (ALI 1962).

Only an intentional, *unprivileged* entry onto the land of another constitutes trespass.<sup>117</sup> The most straightforward way in which an entry can be privileged is through the consent of the owner.<sup>118</sup> A person who enters private property with the permission of the owner or possessor has a license to do so and is not a trespasser.<sup>119</sup> This seems simple enough, and when permissions are explicit, it usually is. But the apparent clarity of the consent rule quickly gives way to hard questions both as a general matter and with specific regard to guns.

Consider the bases for privileged entry into a restaurant. A person eating in a restaurant has a license to be there—the restaurant owner consents to her entry precisely because she is a customer.<sup>120</sup> But what if that person is actually a harsh critic who gains access by lying about her occupation? In that case, the license has been obtained through fraud—the restaurant owner would not have consented to entry had he known her true identity.

The law sometimes regards such fraudulently obtained consent as a legitimate defense to a trespass action. Judge Richard Posner's opinion in *Desnick v American Broadcasting Companies, Inc*<sup>121</sup> is perhaps the leading opinion explaining this surprising result.<sup>122</sup> In *Desnick*, investigative journalists fraudulently obtained consent to enter ophthalmic clinics by posing as patients and promising not to engage in “ambush” journalism.<sup>123</sup> There was no doubt that the consent was obtained under false pretenses.<sup>124</sup> And yet the court recognized the consent as legitimate, because there was “no invasion . . . of any of the specific interests that the tort of trespass seeks to protect”—privacy, security, and the like.<sup>125</sup>

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<sup>117</sup> See Restatement (Second) of Torts § 158, comment c (1965).

<sup>118</sup> See Restatement (Second) of Torts § 158, comment e (1965).

<sup>119</sup> Holding aside unusual situations like estoppel, licenses can generally be revoked, and a person whose license has been properly revoked must vacate the premises in a reasonable time or else she will become a trespasser. Restatement (Second) of Torts § 171 (1965).

<sup>120</sup> See *Desnick v American Broadcasting Companies, Inc*, 44 F3d 1345, 1351 (7th Cir 1995) (giving the example of a restaurant critic, as well as others).

<sup>121</sup> 44 F3d 1345 (7th Cir 1995).

<sup>122</sup> See Joseph William Singer, et al, *Property Law: Rules, Policies, and Practices* 3–4, 9–12 (Wolters Kluwer 6th ed 2014) (using *Desnick* to illustrate trespass and the right to exclude).

<sup>123</sup> *Desnick*, 44 F3d at 1348.

<sup>124</sup> *Id* at 1354–55.

<sup>125</sup> *Id* at 1352.

Now replace the critic concealing her identity with a patron concealing her handgun. Presumably, if the maître d' knew she was carrying a gun, he would have asked her to leave the gun in her car or else refused to seat her, which is precisely why she concealed it. Has the gun owner committed a trespass? Or is her fraudulently obtained consent a defense, as it is for the restaurant critic? The basic analysis from cases like *Desnick* suggests that the gun carrier *is* a trespasser, because—unlike the secret critic—her fraud interferes with the interests that the right to exclude is meant to protect, especially that of security.

But, one might object, a concealed carrier cannot be a trespasser absent some notice, actual or constructive, that the owner prohibits private firearms on the premises. The default rule, in other words, should be that business owners presumably consent to have guns on their property. Even if that were the rule, the presumption could probably be overcome by a sign forbidding guns on the property. Posting a “no guns allowed” sign<sup>126</sup> would arguably limit the scope of the privilege by conditioning the grant of a license on the licensees’ agreement not to carry a gun. And though such signs might not automatically transform all concealed-gun-carrying shoppers into trespassers,<sup>127</sup> it certainly would strengthen the conclusion that their licenses were obtained by fraud.

As the sign-posting hypothetical suggests, neutral laws of general applicability in property law, just like in negligence or intentional tort, set baselines that impact the keeping and bearing of arms. For example, requiring gun owners to seek permission to carry their guns on another person’s land, rather than requiring private property owners to identify and exclude guns, would set a default rule that might well be outcome determinative. If state law said that guns were forbidden unless a bar or restaurant explicitly permitted them,<sup>128</sup> then businesses wishing to allow guns would have to post a sign saying, “Guns allowed

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<sup>126</sup> See note 50 and accompanying text. Even better might be a “no guns allowed (except mine)” sign. See Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 NYU L Rev 887, 907–08 (2011); Blocher, 64 Stan L Rev at 26–37 (cited in note 113).

<sup>127</sup> *Desnick* itself noted that the court was not resolving the question of “what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops.” *Desnick*, 44 F3d at 1353.

<sup>128</sup> “State law” for these purposes could be the equivalent of a reasonable-access statute applicable to public businesses, or it could be simply the courts’ interpretations of common-law trespass.

here.” An alternative rule saying that guns are permitted unless a business explicitly forbids them would lead to some signs saying, “No guns allowed.” Though both of these rules give business owners the final say over whether to permit guns, the former regime would almost certainly result in less gun carrying overall due to the inevitable stickiness of default rules.<sup>129</sup>

Just like open-range and closed-range rules in cattle-ranching areas,<sup>130</sup> opt in and opt out regimes for gun carrying on private property represent different ways to allocate the costs of preventing certain kinds of harms. In an opt out regime (one in which guns are forbidden only if the property owner makes it so), business owners would have to make costly enforcement decisions by posting signs, interrogating potential customers, or—especially in states that permit concealed carry—implementing pat downs and metal detectors. In an opt in regime, by contrast, gun carriers would face greater costs in that they would need to seek out and identify gun-friendly businesses rather than relying on a default permission. Notably, Georgia’s recent gun law incorporates both approaches: bars can opt out, while houses of worship and schools can opt in.<sup>131</sup>

Some gun-rights advocates go further, saying that neither of these default rules is strong enough and that, in fact, the constitutional and statutory regimes *require* private property owners—at least those who open their property to the public—to permit guns on their land.<sup>132</sup> Law does, after all, sometimes abrogate the

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<sup>129</sup> See generally Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87 (1989).

<sup>130</sup> Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 Stan L Rev 623, 662–63 (1986).

<sup>131</sup> Ga Code Ann § 16-11-127(b)(6) (allowing bars to opt out); Ga Code Ann § 16-11-127(c) (allowing places of worship to opt in); Ga Code Ann § 16-11-127.1(c) (allowing schools to opt in).

<sup>132</sup> See, for example, Jessica Marquez, *Employers Fire Back at Law Making It a Felony to Ban Guns on Company Premises* (Workforce, Jan 27, 2006), archived at <http://perma.cc/KNL3-LWSJ> (quoting former NRA President Marion Hammer as saying, “We have employers violating the constitutional rights of their employees”); Louise Red Corn, *NRA to Boycott Companies* (Tulsa World, Aug 2, 2005), archived at <http://perma.cc/6AA4-GQMN> (quoting NRA Executive Vice President LaPierre as saying, “We’re going to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights”); Darrel Rowland, *Bill Would Allow Ohioans to Carry Concealed Firearms with No Permit, Training* (The Columbus Dispatch, Apr 8, 2015), archived at <http://perma.cc/JL6U-BUJD> (describing an Ohio bill that would prevent landlords from barring tenants or their guests from having legal firearms).

right to exclude—for example, on the basis of race.<sup>133</sup> Some common-law doctrines, like the “reasonable access” rule, require inns and other common carriers to permit access to the public,<sup>134</sup> although these doctrines do not yet require reasonable access to an armed public. The issue is whether the baseline—opt in or opt out, trespass or reasonable access—should be thought of as a constitutional matter, and if it is a constitutional matter, what tool of judicial delineation makes it so.<sup>135</sup>

## 2. Nuisance.

As a conceptual matter, nuisance law is a close cousin of trespass.<sup>136</sup> Private nuisance is typically defined as a substantial, unreasonable interference with another’s quiet enjoyment of his property.<sup>137</sup> Public nuisance law covers actions that impose costs on a broader community rather than on a specific person.<sup>138</sup>

As with trespass, it is easy to imagine how gun ownership and use might give rise to nuisance claims. Guns impose externalities, and controlling externalities is a central function of nuisance law.<sup>139</sup> A person shooting guns in his backyard, for example, might disturb his neighbors with the noise, sight, and perceived risk either of the shooting itself or of the possibility that lead bullets will contaminate their property or groundwater.<sup>140</sup> In many areas, shooting guns even on one’s own private

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<sup>133</sup> See, for example, *Shelley v Kraemer*, 334 US 1, 19–21 (1948) (forbidding, on constitutional grounds, the judicial enforcement of racially restrictive covenants); Title II of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 243, codified at 42 USC § 2000a et seq.

<sup>134</sup> See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw U L Rev 1283, 1305–31 (1996).

<sup>135</sup> As with self-defense, intentional torts like battery and trespass include exceptions for cases of necessity. See *Ploof v Putnam*, 71 A 188, 189 (Vt 1908) (holding that a ship captain could moor his ship on a private dock to escape a damaging storm). If a gun carrier were fleeing a true threat or rushing to defend a person who was being assaulted, for example, the necessity exception could protect him from civil or criminal trespass liability. See, for example, *United States v Gomez*, 92 F3d 770, 778 (9th Cir 1996) (finding that the justification defense was available to a felon who was convicted for the possession of a gun when that felon faced an unlawful and present threat of death).

<sup>136</sup> Singer, et al, *Property Law* at 365–66 (cited in note 122).

<sup>137</sup> Restatement (Second) of Torts § 821D (1965).

<sup>138</sup> Restatement (Second) of Torts § 821B (1965).

<sup>139</sup> See Restatement (Second) of Torts § 821B (1965).

<sup>140</sup> *Concerned Citizens of Cedar Heights-Woodchuck Hill Road v DeWitt Fish and Game Club, Inc*, 755 NYS2d 192, 193 (NY App 2003):

The first cause of action alleges that defendant’s shooting range constitutes a private nuisance and the second and third causes of action allege that it constitutes a public nuisance by virtue of the impulse noise associated with the discharge of firearms. The fourth cause of action alleges that defendant’s shooting

property will subject the owner to gun-neutral regulations like noise-control ordinances. Violation of those laws can support a finding of nuisance liability,<sup>141</sup> just as compliance with them can serve as a strong defense.<sup>142</sup>

Nuisance liability is determined through a multifactor test that considers, among other things, the severity of the harm, the social utility of the activity, whether the plaintiff came to the nuisance, and what activities are considered reasonable for the particular area at issue.<sup>143</sup> Generalizations about such multifactor tests are difficult. One obvious implication, though, is that social practices and understandings—in this context, those that are shaped by cultural battles over the appropriate use of guns—will have a direct impact on the laws that incidentally burden guns, for the simple reason that whether an activity is reasonable or socially useful depends in part on the baseline norms concerning that activity.<sup>144</sup>

### 3. Covenants.

The law of servitudes can also burden firearm possession and use. Real estate covenants are written, legally enforceable agreements that require property owners to do or not do certain things.<sup>145</sup> They are often found in deeds, especially in common-interest communities like condominiums and housing subdivisions. Scholars have noted the extent to which such communities

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range constitutes a public and private nuisance as the result of the discharge of lead shot into the air and land.

<sup>141</sup> See, for example, *Kitsap County v Kitsap Rifle and Revolver Club*, 337 P3d 328, 344 (Wash App 2014) (holding that increased noise levels and unsafe conditions at a shooting range constituted a public nuisance).

<sup>142</sup> See, for example, *Concerned Citizens of Cedar Heights*, 755 NYS2d at 193 (dismissing a public nuisance claim in part because the defendant, who operated a shooting range, “submitted proof that, at the time of the commencement of the action, it was in compliance with the noise control ordinance of the Town of DeWitt”).

<sup>143</sup> See Singer, et al, *Property Law* at 346–49 (cited in note 122).

<sup>144</sup> Consider the fact that in recent years some states have come to treat secondhand smoke as a negative externality that might be sufficient to support a nuisance claim. See, for example, Utah Code Ann § 78B-6-1101(3).

<sup>145</sup> Public housing regulations are conceptually similar, but the state actions in those scenarios are clear, and so we hold them aside here. See, for example, *Doe v Wilmington Housing Authority*, 880 F Supp 2d 513, 537 (D Del 2012) (finding that lease provisions that prohibited the carrying of firearms in common areas of public housing did not violate the residents’ Second Amendment rights); *Lincoln Park Housing Commission v Andrew*, 2004 WL 576260, \*1–2 (Mich App) (finding that the Second Amendment was unsuccessfully invoked to challenge a lease provision prohibiting the possession of guns in government-subsidized housing).



have become akin to “private governments,”<sup>146</sup> exercising the kind of regulatory authority that is typically associated with state actors.<sup>147</sup> Many of these communities use this authority to restrict guns or ban them altogether.<sup>148</sup>

In one sense, such covenants are a classic example of private ordering. People are free to choose the arrangements that best suit them and reject the agreements that do not, just as they would with a standard contract. On this reading, there should be no problem with covenants restricting or banning guns. People who want to live in gun-free neighborhoods can choose to do so, just as they can choose to live in communities with uniform setbacks, a defined color palette, restrictions on aboveground sprinklers, or any of the other home-related restrictions that are the bread and butter of covenant law. People who wish to have guns at home can simply find other places to live.

The reach of covenant law is broad, but it does have some limits. The law disfavors—and in some cases forbids—covenants that violate public policy or that burden certain fundamental rights.<sup>149</sup> The most famous example is *Shelley v Kraemer*,<sup>150</sup> in which the Court found that the Equal Protection Clause forbids the judicial enforcement of racially restrictive covenants.<sup>151</sup> Even holding aside the applicability of the Constitution (an issue addressed in more detail below<sup>152</sup>), one might argue that gun-restrictive covenants should be unenforceable on public policy grounds.<sup>153</sup> As of 2013,

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<sup>146</sup> See generally, for example, Stephen E. Barton and Carol J. Silverman, eds, *Common Interest Communities: Private Governments and the Public Interest* (Institute of Governmental Studies 1994).

<sup>147</sup> See Miller, 86 NYU L Rev at 954 (cited in note 126) (“A home buyer who covenants not to possess firearms is a respectful neighbor; a village of private covenants not to possess firearms is a zoning regulation.”).

<sup>148</sup> See, for example, Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U Fla J L & Pub Pol 479, 526 (2009) (noting that most homeowners’ associations (HOAs) “reportedly hold restrictions against firearms in homes”).

<sup>149</sup> Restatement (Third) of Property: Servitudes § 3.1 (2000).

<sup>150</sup> 334 US 1 (1948).

<sup>151</sup> *Id.* at 19–20. See also *Mazdabrook Commons Homeowners’ Association v Khan*, 46 A3d 507, 522 (NJ 2012) (finding that an HOA rule banning all signs other than “for sale” signs violated the state constitution).

<sup>152</sup> See Part II.

<sup>153</sup> Compare *Guaranty Realty Co v Recreation Gun Club*, 107 P 625, 627–28 (Cal App 1910) (involving a failed effort to invoke the right to bear arms against a restrictive covenant), with John-Patrick Fritz, Comment, *Check Your Rights and Your Guns at the Door: Questioning the Validity of Restrictive Covenants against the Right to Bear Arms*, 35 Sw U L Rev 551, 576 (2007) (arguing that “courts should invalidate restrictive covenants that completely ban firearms in the home as violating constitutional rights and good public policy”).

the issue apparently had not been litigated,<sup>154</sup> and the few commentators to address it have generally concluded that such covenants would be upheld.<sup>155</sup>

#### D. Why It Matters

The foregoing list is only a partial account of the ways in which law imposes incidental burdens on the right to keep and bear arms. Such burdens also arise in areas as diverse as employment law<sup>156</sup> and zoning.<sup>157</sup> The breadth and diversity of this regulatory environment demonstrate that gun regulation is surprisingly pervasive. This does not mean that gun-related activities are burdened by incidental regulations to the same degree or in the same manner as speech,<sup>158</sup> nor that constitutional challenges to such regulations would or should succeed. What this account does show is that common law, statutory law, incidental burdens, and gun-related activities are deeply interwoven in dynamic and unacknowledged ways and that this relationship has important practical, political, and theoretical implications.

First, a great deal of gun regulation happens outside the glare of the gun control debate, and a full discussion of the regulatory landscape must account for that fact. For supporters of

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<sup>154</sup> See, for example, Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U Pa J Const L 1003, 1003 (2013).

<sup>155</sup> See, for example, Boudreaux, 20 U Fla J L & Pub Pol at 526 (cited in note 148); Wahl, 15 U Pa J Const L at 1036 (cited in note 154) (“Time will tell how far the looming penumbra of *Heller* will reach, but for now the narrow slice of our legal system occupied by HOAs remains fertile soil on which to experiment with limits on our right to keep and bear arms.”).

<sup>156</sup> Plaintiffs occasionally invoke the right to bear arms in the course of challenging a termination of employment. See *Perry v State Civil Service Commission*, 38 A3d 942, 954–55 (Pa Commw 2011) (involving an unsuccessful attempt to challenge a termination by raising the right to bear arms as a defense); *Winters v Concentra Health Services, Inc.*, 2008 WL 803134, \*4–5 (Conn Super) (same); *Bastible v Weyerhaeuser Co.*, 437 F3d 999, 1004–08 (10th Cir 2006) (same); *Hansen v America Online, Inc.*, 96 P3d 950, 953 (Utah 2004) (same). But see *Mitchell v University of Kentucky*, 366 SW3d 895, 903 (Ky 2012) (finding that an employee’s termination based on firearm possession at work was contrary to the right to bear arms).

<sup>157</sup> The most prominent gun-zoning case involved a direct rather than an incidental burden, but the issue could easily arise under a “neutral” zoning regulation. See *Ezell v City of Chicago*, 651 F3d 684, 689–90 (7th Cir 2011) (invalidating a law that required gun owners to spend one hour at a gun range but also prohibited the construction of such ranges within city limits).

<sup>158</sup> See Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 Hastings L J 921, 933 (1993) (“The entire corpus juris, from the general common law of contracts, property, and torts to the most particular tax regulation, affects what gets said, by whom, to whom, and to what effect.”).

gun control frustrated by what they see as a lack of political will, the forms of liability discussed above are tried-and-true legal tools that can be used to regulate the possession and use of guns while perhaps avoiding the negative political connotations of “gun control.” For supporters of gun rights, the enumeration of these rules might be a cause for alarm and a reason to support progun legislation that would abrogate the traditional rules and expand legal immunity for gun owners.

Second, many of these rules—property and tort laws, for example—provide the basis for legally enforceable private ordering with regard to guns. In law and economics terms, the rules put one person in the position of either paying to stop a gun-related activity, paying to permit a gun-related activity, or paying for the consequence of some gun-related activity. Such “private gun control,” enforced through civil suits rather than through criminal sanctions, raises novel and important issues for the Second Amendment and for the gun debate more generally. By minimizing the government’s role, it lays bare the ways in which interests in gun possession interact with other important private interests like personal safety or compensation for injury.

Third, and relatedly, these incidental burdens are likely to be especially important in jurisdictions where courts and legislatures have eliminated traditional gun control. The rollback of state gun control laws magnifies the significance of private ordering, as individuals fill the regulatory void by negotiating with one another regarding guns and their use. These negotiations, in turn, occur against a background of sometimes-conflicting legal entitlements—exclusion versus reasonable access, quiet enjoyment versus free use of property, and so on. Gun control of this type is an inevitable part of the legal landscape and raises difficult questions of common and statutory law.

Fourth, the nature of the gun-neutral regulations discussed here helps demonstrate the baseline-shifting effect of the progun laws that some states have recently adopted. Even age-old common-law principles like negligence and the right to exclude must be read in conjunction with contemporary statutes. And some of those statutes have a major impact, either by granting outright statutory immunity to traditional rules<sup>159</sup> or by changing the warp and woof of common-law principles. Georgia’s recent “carry anywhere” law, for example, appears to limit private

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<sup>159</sup> See generally, for example, PLCAA, 119 Stat 2095.

business owners' rights to exclude guns.<sup>160</sup> States that preempt local gun-safety measures (for example, municipal prohibitions on guns in public parks) might thereby undermine torts that are predicated on a duty that tracks the abrogated local regulation (for example, a duty to keep firearms away from places where children congregate).

Fifth, while the breadth of incidental burdens on the ability to keep and bear arms may be substantial, many of the generally applicable laws discussed here contain their own safety valves that might be used to shield gun-related activities without resort to the Second Amendment. The reasonable-access requirement limits the right to exclude, for example, and self-defense law could do the same for assault. The basic canons of constitutional avoidance<sup>161</sup> and respect for the common law<sup>162</sup> suggest that courts should avail themselves of these tools when possible.

Sixth, many of the incidental burdens discussed here incorporate community standards and social practices, thereby providing a method by which popular understandings become legal rules. Nuisance law, for instance, takes account of what kinds of activities are appropriate and reasonable in a given context and hence permits different kinds of gun usage in different areas. For example, backyard target practice might constitute a nuisance in the suburbs but not in the country. The legal standard for IIED, too, incorporates an objective inquiry into the reasonableness of the plaintiff's asserted harm. As a result, it inevitably depends on popular views—which vary from place to place—about appropriate gun usage. This kind of local tailoring is not only constitutionally permissible but is in some cases normatively desirable.<sup>163</sup>

Finally, our hope is to help reframe the gun debate away from its narrow focus on gun control and toward a broader evaluation of the regulation of gun-related activities. Although much of our analysis will probably appeal to gun-rights supporters,

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<sup>160</sup> Safe Carry Protection Act, 1 Ga Laws 601 (2014).

<sup>161</sup> See *Clark v Martinez*, 543 US 371, 380–81 (2005) (“[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.”).

<sup>162</sup> See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U Chi L Rev 782, 792–95 (1986) (criticizing the development of the “actual malice” rule and arguing for a return to the common law of libel and strict liability).

<sup>163</sup> See Joseph Blocher, *Firearm Localism*, 123 Yale L J 82, 133 (2013) (arguing that Second Amendment doctrine “can and should be tailored to better reflect the urban/rural divide”).

this theme in particular should also interest gun control advocates. Neutral background norms concerning firearms are the rule, not the exception. By highlighting the ubiquity of well-established gun-neutral doctrines from various areas of law, this Article helps break through what appears to be a pathological legislative dysfunction arising when any regulation, no matter how popular or long-standing, is labeled “gun control.”

## II. THE BOUNDARIES OF THE SECOND AMENDMENT

The story of the Second Amendment is, increasingly, a story of its boundaries.<sup>164</sup> *Heller* and the two-part test that predominates in the courts of appeals rely heavily on threshold determinations about which arms, people, and activities are constitutionally covered.<sup>165</sup> What Professor Frederick Schauer has said of the First Amendment is therefore equally true of the Second Amendment: “[Q]uestions about the involvement of the [ ] Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the [ ] Amendment affords the [activities] to which it applies.”<sup>166</sup> Indeed, such threshold inquiries appear increasingly important throughout constitutional rights law, as many of the justices express a preference for categorical tests rather than for the familiar tiers of scrutiny.<sup>167</sup>

One way to identify a constitutional right’s boundaries is by reference to the kinds of burdens on individual choice that warrant constitutional scrutiny. This is a harder question than it

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<sup>164</sup> See Schauer, 117 Harv L Rev at 1765 (cited in note 1) (“The history of the First Amendment is the history of its boundaries.”).

<sup>165</sup> See, for example, *United States v Marzzarella*, 614 F3d 85, 89 (3d Cir 2010):

As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

See also, for example, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 NYU L Rev 375, 380 (2009) (noting that the *Heller* majority endorsed a categorical test under which “some types of ‘Arms’ and arms-usage are protected absolutely from bans and some types of ‘Arms’ and people are excluded entirely from constitutional coverage”).

<sup>166</sup> Schauer, 117 Harv L Rev at 1767 (cited in note 1).

<sup>167</sup> See, for example, *United States v Stevens*, 559 US 460, 471–72 (2010) (holding that “crush videos” and other depictions of animal cruelty are not one of the “categories of speech . . . fully outside the protection of the First Amendment”); *Brown v Entertainment Merchants Association*, 131 S Ct 2729, 2733–35 (2011).

might seem, because not all burdens on constitutionally enumerated activities—speech and free exercise of religion, for example—raise constitutional concerns. Some burdens, whether direct or incidental, simply fall outside the Constitution’s scope; they lack constitutional salience.<sup>168</sup>

In part because it is so heavily categorical,<sup>169</sup> in part because it is so new, and in part because it so frequently bumps up against neutral laws of general applicability,<sup>170</sup> the right to keep and bear arms presents a unique opportunity to explore these broad constitutional issues. Is the Second Amendment due for its own version of *Employment Division v Smith*,<sup>171</sup> insulating gun-neutral regulations from constitutional review?<sup>172</sup>

This is a question about both the Second Amendment and the boundaries of the Constitution itself. On one level, our goal is to help judges, lawyers, and scholars determine which burdens on firearms should be subject to Second Amendment scrutiny.<sup>173</sup> At a more general level, our project is to identify the analytic tools that are useful for demarcating the boundary between constitutional rights and other forms of law. That border is particularly important because, given the supremacy of constitutional law over other sources of law, any intrusion by non-constitutional law on the Constitution’s side of the border will subject that law to constitutional scrutiny, if not invalidation.<sup>174</sup> Indeed, disputes as to the location of this border generate a large share of litigation over constitutional rights.

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<sup>168</sup> See generally Schauer, 117 Harv L Rev 1765 (cited in note 1).

<sup>169</sup> See Blocher, 84 NYU L Rev at 405–11 (cited in note 165) (describing the “originalist categoricism” of the *Heller* majority).

<sup>170</sup> See Part I.

<sup>171</sup> 494 US 872 (1990).

<sup>172</sup> In *Smith*, the Court held that criminal laws prohibiting the use of peyote did not violate the First Amendment right to free exercise of religion. *Id.* at 878–79. As Justice Antonin Scalia wrote: “[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879 (quotation marks omitted).

<sup>173</sup> Providing the tools is about as specific as we can get—to apply them thoroughly to any of the incidental burdens discussed above would require at least another article’s worth of analysis. See, for example, Wahl, 15 U Pa J Const L at 1024–35 (cited in note 154) (exploring the constitutionality of HOA servitudes that ban handgun possession in homes).

<sup>174</sup> See US Const Art VI, cl 2.

### A. Direct Burdens

Some gun control laws—like some regulations of other rights<sup>175</sup>—impose direct burdens on the keeping and bearing of arms by targeting those activities as such. These laws are what people typically have in mind when they refer to gun control: regulations that specifically govern the use, possession, sale, and manufacture of firearms. The laws challenged in *Heller* and *McDonald v City of Chicago, Illinois*<sup>176</sup> were unusual in their stringency but otherwise representative of such direct regulations. Understanding the constitutional status of direct burdens is a useful first step toward understanding the constitutional salience of incidental burdens.

As a *prima facie* matter, direct regulations would all seem to be subject to the Second Amendment, no matter how minimal the impact they impose. After all, by definition they burden what the Constitution, by its very terms, protects: the keeping and bearing of arms. Perhaps not all these burdens should count as “infringing” this right, but one might think that at the very least they should be subject to scrutiny. In other words, it seems reasonable to think that direct burdens would be subject to Second Amendment *coverage*.<sup>177</sup>

As a doctrinal matter, however, courts have held to the contrary. Some direct regulations are not only constitutional but actually fall entirely outside the scope of the Second Amendment. With regard to such uncovered forms of gun control, the Amendment does not show up at all. Thus, a short-barreled shotgun can be banned not because the relevant degree of scrutiny is satisfied but rather because “the Second Amendment does not protect those weapons.”<sup>178</sup>

This kind of categoricalism is particularly pronounced in Second Amendment doctrine but is not unique to it. Some direct regulations of what an ordinary speaker of English would describe as speech, for example, are generally not subject to any

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<sup>175</sup> See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv L Rev 1175, 1176–77 (1996) (noting that “the government sometimes singles out protected activity for disadvantageous treatment” and referring to these actions as “direct burdens”).

<sup>176</sup> 561 US 742 (2010).

<sup>177</sup> See Schauer, 117 Harv L Rev at 1769 (cited in note 1) (discussing how, in the context of the First Amendment, some activities may not be prohibited but nevertheless must pass additional scrutiny).

<sup>178</sup> *Heller*, 554 US at 625.

First Amendment scrutiny. For example, securities fraud,<sup>179</sup> child pornography,<sup>180</sup> and obscenity<sup>181</sup> are usually<sup>182</sup> not treated as “speech” for constitutional purposes. And those exclusions, in turn, have been explained on many different grounds, including the low value of the speech involved,<sup>183</sup> the weight of the government’s interest,<sup>184</sup> and the history of the prohibition.<sup>185</sup>

The Second Amendment similarly carves out some direct regulations from constitutional coverage, and it does so (or at least claims to do so) primarily based on whether the regulations are long-standing. Those with a long historical lineage—preferably all the way to the Founding,<sup>186</sup> though most judges will be satisfied with less<sup>187</sup>—are exempted from Second

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<sup>179</sup> See, for example, *United States Securities and Exchange Commission v Pirate Investor LLC*, 580 F3d 233, 255 (4th Cir 2009) (“Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment.”).

<sup>180</sup> See, for example, *New York v Ferber*, 458 US 747, 764 (1982).

<sup>181</sup> See, for example, *Miller v California*, 413 US 15, 24 (1973).

<sup>182</sup> The modifier is necessary because even these categories might be able to claim First Amendment protection if, for example, they were subject to viewpoint-discriminatory regulation. See *R.A.V. v City of St. Paul, Minnesota*, 505 US 377, 418 (1992):

It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag.

<sup>183</sup> See, for example, *Chaplinsky v New Hampshire*, 315 US 568, 571–72 (1942):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

(citation omitted).

<sup>184</sup> See, for example, *Ferber*, 458 US at 761 (noting that child pornography is not subject to the *Miller* obscenity test because of the state’s strong interest in protecting exploited children and in prosecuting those who promote such exploitation).

<sup>185</sup> See, for example, *R.A.V.*, 505 US at 382–83 (noting that, “[f]rom 1791 to the present,” the United States has “permitted restrictions upon the content of speech” and that “the First Amendment does not include a freedom to disregard these traditional limitations” on, for example, obscenity, defamation, or fighting words).

<sup>186</sup> See, for example, *Ezell v City of Chicago*, 651 F3d 684, 702–03 (7th Cir 2011) (“[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there.”).

<sup>187</sup> See, for example, *National Rifle Association of America, Inc v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F3d 185, 204 (5th Cir 2012) (upholding restrictions on selling firearms to eighteen-year-olds).



Amendment scrutiny no matter how significant the burdens they place on regulated parties.

*Heller* itself is exemplary in this regard. After dispensing with the militia clause as “prefatory” and not a limit on the second, “operative” clause, the majority said that it would “start [ ] with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”<sup>188</sup> Later, however, the Court took a notable turn, concluding that some laws, people, purposes, and weapons fall completely outside the scope of the Second Amendment:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>189</sup>

So, despite what many gun-rights advocates urge as a clear textual command to protect all “people” and “arms” and “bearing,” the opinion makes equally clear that some people (“felons and the mentally ill”<sup>190</sup>), some kinds of guns (“weapons not typically possessed by law-abiding citizens for lawful purposes”<sup>191</sup>), and some gun-related activities (“*any sort* of confrontation”<sup>192</sup>) are categorically excluded from the scope of the Amendment.

The majority suggested that these exceptions were embedded in the meaning of the text at the time it was ratified.<sup>193</sup> But scholars and judges, even those sympathetic to *Heller*’s basic conclusion, have noted that there is scanty Founding-era support for *Heller*’s carveouts.<sup>194</sup> The federal ban on possession by felons, for example, did not exist until 1938 and did not extend

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<sup>188</sup> *Heller*, 554 US at 580–81.

<sup>189</sup> *Id.* at 626–27.

<sup>190</sup> *Id.* at 626. See also *id.* at 644 (Stevens dissenting) (“[W]hen it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to ‘law-abiding, responsible citizens.’”).

<sup>191</sup> *Id.* at 625. See also *id.* at 627 (“[T]he sorts of weapons protected [by the Second Amendment] were those ‘in common use at the time.’”).

<sup>192</sup> *Heller*, 554 US at 595.

<sup>193</sup> *Id.* at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”).

<sup>194</sup> See, for example, Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L Rev 1343, 1357–58 (2009) (noting that there is an “absence of historical support” for Scalia’s claim that supposedly long-standing prohibitions are consistent with the preexisting right to bear arms).

to all felons until 1968.<sup>195</sup> Prior to 1961, there were no specific federal prohibitions on carrying a loaded gun onto an airplane—which is unquestionably a “sensitive place.”<sup>196</sup> Unless courts construe Founding-era regulations at a higher level of abstraction,<sup>197</sup> shorten the length of time for regulations to be considered long-standing, or both, few modern regulations will find indisputable support in Founding-era law.

Nevertheless, a history-based categorical approach to direct regulations has become an essential part of the post-*Heller* analysis. In the wake of *Heller*, most courts have adopted a two-part test for evaluating Second Amendment claims,<sup>198</sup> the first part of which asks whether a particular claim falls within the Amendment’s scope.<sup>199</sup> That threshold inquiry into the Amendment’s boundaries is grounded in history. Long-standing regulations are categorically excluded from the Second Amendment’s scope, although courts continue to debate the length of time and the level of abstraction that are required for a regulation to be considered long-standing.<sup>200</sup>

Bans on concealed carry are a good example of this kind of analysis. *Heller* suggests that such regulations—which undoubtedly impose direct burdens on the keeping and bearing of arms—are constitutional due to historical practice: “[T]he majority of the

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<sup>195</sup> See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv J L & Pub Pol 695, 698–99, 735 (2009). See also Lund, 56 UCLA L Rev at 1357 n 33 (cited in note 194) (“Even limited bans on the possession of concealable weapons by violent felons were apparently not adopted until well into the twentieth century.”).

<sup>196</sup> Act of Sept 5, 1961, Pub L No 87-197, 75 Stat 466.

<sup>197</sup> The Court has already engaged in this level-of-abstraction inquiry with regard to the weapons that are covered by the Second Amendment. A modern nine-millimeter handgun is materially different in operation, accuracy, and lethality than an eighteenth-century musket, but confining the Second Amendment to only the latter, according to the Court, would “border[] on the frivolous.” *Heller*, 554 US at 582.

<sup>198</sup> See, for example, *United States v Greeno*, 679 F3d 510, 518 (6th Cir 2012); *Heller v District of Columbia*, 670 F3d 1244, 1252–53 (DC Cir 2011); *Ezell*, 651 F3d at 701–04; *United States v Chester*, 628 F3d 673, 680 (4th Cir 2010); *United States v Reese*, 627 F3d 792, 800–01 (10th Cir 2010); *Marzzarella*, 614 F3d at 89.

<sup>199</sup> If that threshold question is answered in the affirmative, then the second part of the test asks whether the challenged regulation can be justified in light of the burden that it imposes on protected conduct—an inquiry that is largely guided by interest balancing, which is discussed below.

<sup>200</sup> Compare *National Rifle Association*, 700 F3d at 206 (noting that “categorically restricting the presumptive Second Amendment rights of 18-to-20-year-olds does not violate the central concern of the Second Amendment” because such restrictions are analogous to regulations on firearms in the hands of the mentally ill and felons), with *National Rifle Association, Inc v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 714 F3d 334, 339 (5th Cir 2013) (Jones dissenting from denial of hearing en banc) (criticizing “[t]he panel’s resort to generalized history” to uphold the regulation).

19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>201</sup> Lower courts facing challenges to concealed-carry regulations have overwhelmingly agreed, holding that such prohibitions are so well entrenched that they are not subject to scrutiny of any kind. On this reading, concealed carrying simply does not constitute keeping or bearing arms for Second Amendment purposes.

Although *Heller* and the two-part test both emphasize history in exempting direct regulations from constitutional scrutiny, it seems likely that some form of prudentialism or interest balancing plays a role, even if only implicitly.<sup>202</sup> Although the Court has recently tried to suggest otherwise, First Amendment jurisprudence has often employed interest balancing when defining the boundaries of free speech.<sup>203</sup> Categories like child pornography, for example, are often said to fall outside the scope of the First Amendment in part because they are so harmful and worth so little.<sup>204</sup> It is not hard to imagine that the same kind of reasoning lies behind intuitions and judicial decisions that exclude from Second Amendment coverage certain arms that have the potential to inflict indiscriminate carnage and that are “of such slight social value as a step to” self-defense that banning them need not satisfy even low levels of constitutional scrutiny.<sup>205</sup>

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<sup>201</sup> *Heller*, 554 US at 626 (providing an example of the historically limited nature of the Second Amendment right).

<sup>202</sup> This, too, is a common practice in constitutional rights law. See generally Kathleen M. Sullivan, *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U Colo L Rev 293 (1992).

<sup>203</sup> See Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal L Rev 935, 938–39 (1968) (describing the Court’s practice of “ad hoc balancing” of competing interests in First Amendment jurisprudence). See also Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv L Rev 2166, 2197–2211 (2015) (challenging the historical claims that the Court has recently made to support its exclusions of low-value speech).

<sup>204</sup> See, for example, *Ferber*, 458 US at 762 (“The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”). In recent cases, the Court has characterized the First Amendment’s exemptions as being grounded in history rather than in cost-benefit analysis. See, for example, *Stevens*, 559 US at 471. This seems, at the very least, to represent a substantial shift in the Court’s jurisprudence. See Randy J. Kozel, *Second Thoughts about the First Amendment* \*3–4 (unpublished manuscript, Jan 2015), archived at <http://perma.cc/BH24-SQ35>.

<sup>205</sup> *Chaplinsky*, 315 US at 572 (noting that lewd and obscene utterances are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”). *Heller* suggests that the constitutionality of these bans is rooted in tradition. *Heller*, 554 US at 627 (concluding that *Miller*’s limitations are supported by the

However the courts come to construct the categories—whether from historical lineage, analogical reasoning from historical precedent, or interest balancing—the point is that some direct burdens on the right to keep and bear arms do not even raise constitutional questions. Prohibitions on concealed carrying or possession by felons, for example, impose burdens that are both direct and, for the people they reach, quite significant. But Second Amendment challenges to those prohibitions founder at the threshold. Despite the directness or severity of the burdens they impose, such laws are exempt from constitutional scrutiny.

### B. Incidental Burdens

As described above, Second Amendment doctrine has developed rules for determining the constitutional salience of direct burdens on the right to keep and bear arms. But as of yet, courts have identified few tools to determine when *incidental* burdens raise Second Amendment concerns. Supplying those tools is an increasingly unavoidable task. Prior to *Heller*, some gun owners and manufacturers challenged incidental burdens on Second Amendment grounds. These challenges largely failed.<sup>206</sup> But after *Heller*, such claims cannot be so easily dismissed. And as a practical matter, they are likely to arise more often in jurisdictions where courts and legislatures have rolled back—for political or constitutional reasons—conventional forms of gun control. When direct regulations are stripped away, the underlying structure of incidental burdens becomes more relevant. When public carrying is decriminalized, for example, courts are more likely to face the question of when publicly carrying a firearm is a public nuisance or a disturbance of the peace.

Such questions are new to the Second Amendment but not to constitutional law. Religious exercise and free expression, for example, often encounter incidental legal burdens, raising the questions of when and how those burdens are subject to First

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“historical tradition of prohibiting the carrying of dangerous and unusual weapons”) (quotation marks omitted).

<sup>206</sup> See, for example, *National Association for the Advancement of Colored People v AcuSport, Inc.*, 271 F Supp 2d 435, 462 (EDNY 2003) (“There is no justification in the federal Constitution for private persons failing to exercise reasonable care in meeting their legal responsibility to help ensure a safe society.”); *City of Gary, Indiana v Smith & Wesson Corp.*, 801 NE2d 1222, 1235 (Ind 2003) (finding that state constitutional protection of the right to keep and bear arms did not bar a suit for nuisance).

Amendment scrutiny. The Supreme Court's efforts to mediate these encounters between constitutional and nonconstitutional law have created well-known and in some cases quite controversial doctrines, from *Smith*<sup>207</sup> to *Marsh v Alabama*.<sup>208</sup>

Fifth Amendment jurisprudence, especially the law of regulatory takings, also provides lessons on how incidental burdens can implicate constitutional rights. In takings doctrine, courts are required to determine when a regulation that is not specifically designed to take private property should nonetheless be treated as having done so. The Supreme Court has recognized that “[g]overnment hardly could go on” if every burden on property rights constituted a taking,<sup>209</sup> but it has also noted that burdens can sometimes go “too far.”<sup>210</sup> To identify the situations in which constitutional rules must apply, the Court has combined bright-line rules and interest balancing, just as lower courts have done with regard to gun rights. Thus, for example, any permanent physical occupation of property constitutes a regulatory taking no matter how minor the cost,<sup>211</sup> and any total deprivation of a property's value counts as a taking no matter how strong the government's interest.<sup>212</sup> In addition to those bright-line rules, courts also consider a regulation's cost, interference with “investment-backed expectations,” and “character.”<sup>213</sup>

We do not attempt here to synthesize the rules regarding religious exercise, freedom of expression, and takings into a transsubstantive approach for evaluating the constitutional salience of incidental burdens.<sup>214</sup> Instead, our aim is to look to those rules for guidance on similar questions surrounding the keeping and bearing of arms.<sup>215</sup> Drawing on lessons from other constitutional rights, we identify four main forms of argument that are relevant to the question whether a given incidental burden should be subject to heightened scrutiny. These modalities are

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<sup>207</sup> *Smith*, 494 US at 874, 882–84 (demonstrating the tension between eligibility for state unemployment compensation and free exercise of religion).

<sup>208</sup> 326 US 501, 503–04 (1946) (addressing the tension between a state antitrespass statute and the free exercise of religion).

<sup>209</sup> *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (1922).

<sup>210</sup> *Id.* at 415.

<sup>211</sup> See *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 426 (1982).

<sup>212</sup> See *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015–16 (1992).

<sup>213</sup> *Penn Central Transportation Co v New York City*, 438 US 104, 124 (1978).

<sup>214</sup> For the leading effort along these lines, see generally Dorf, 109 Harv L Rev 1175 (cited in note 175).

<sup>215</sup> See generally Nelson Tebbe and Robert L. Tsai, *Constitutional Borrowing*, 108 Mich L Rev 459 (2010).

tools with which judges, lawyers, and scholars can determine whether a particular burden raises constitutional concerns.

The first of these argumentative forms is history and tradition. As noted above, certain long-standing direct burdens on guns are exempt from constitutional scrutiny, and the same should be true for long-standing incidental burdens.<sup>216</sup> A reliance on tradition helps explain why, for example, the right to keep and bear arms is not violated by the equally fundamental and long-standing right to exclude an unwanted visitor from one's private property. The latter right is, as one court recently put it, part of the "canvas" on which the Second Amendment was painted.<sup>217</sup>

The second argument focuses on the consequences of the burden. Laws that impose *substantial* incidental burdens should be subject to scrutiny, but laws that impose *minor* incidental burdens should not. This is essentially the approach that Professor Michael Dorf advocates with regard to incidental burdens on the fundamental rights to free speech, free exercise, and equal protection,<sup>218</sup> and it translates well to the context of guns.

The third approach also focuses on consequences but for the system as a whole rather than for the individual. Applying Second Amendment scrutiny to neutral laws like trespass, assault, and negligence raises serious structural questions about state action, federalism, and the proper role of courts. When adjudication threatens to disrupt these settled matters of institutional design, courts should be more hesitant to apply Second Amendment scrutiny.

The fourth consideration is the purpose or design of the regulation. Some burdens, though nominally incidental, operate like direct regulations and should be treated as such. Some regulations might be facially gun neutral but intended to deter gun-related activities—the replacement of DC's safe-storage law with a substantively identical negligence standard is an example.<sup>219</sup> Similarly, some gun-neutral legal rules—for example, those that are more punitive than compensatory—might serve public interests

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<sup>216</sup> See notes 186–89, 200, and accompanying text.

<sup>217</sup> *GeorgiaCarry.Org, Inc v Georgia*, 687 F3d 1244, 1264 (11th Cir 2012).

<sup>218</sup> See Dorf, 109 Harv L Rev at 1223–33 (cited in note 175).

<sup>219</sup> DC Code § 7-2507.02

rather than interests in private ordering or restorative justice.<sup>220</sup> Such regulatory torts are more likely to implicate the Constitution.

As in other areas of law, these factors interact in complicated ways. An incidental burden's provenance might well trump the significance of its impact on individuals, just as a direct burden's longevity can exempt it from constitutional scrutiny even if it amounts to a complete prohibition on gun possession (felon-in-possession statutes, for example). Through repeated application, some factors might calcify into rules. Just as a permanent physical invasion constitutes a *per se* regulatory taking, so too the abrogation of a necessity defense to a trespass action might constitute a *per se* Second Amendment violation. Nevertheless, the basic proposition bears repeating: the fact that an incidental burden warrants Second Amendment scrutiny says very little about whether the incidental burden actually violates the Second Amendment. These tools of analysis simply help a court assess whether the Second Amendment should even *apply* to the incidental burden under consideration.

#### 1. Text, history, and long-standing incidental burdens.

In answering any constitutional question, the standard place to begin is with the text of the document.<sup>221</sup> And, more often than not, the meaning of that text is created, informed, or demonstrated by history.<sup>222</sup> Reliance on text and history is therefore among the most fundamental tools in constitutional analysis<sup>223</sup> and currently plays a particularly prominent role in Second

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<sup>220</sup> See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *Georgetown L J* 513, 518–24 (2003).

<sup>221</sup> See, for example, *City of Boerne v Flores*, 521 US 507, 519 (1997) (stating that when interpreting the Constitution, “we begin with its text”). See also Joseph Story, 1 *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional Histories of the Colonies and States before the Adoption of the Constitution* § 451 at 345 (Little, Brown 5th ed 1891) (Melville M. Bigelow, ed):

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. . . . The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.

<sup>222</sup> See Eugene Volokh, *Textualism and District of Columbia v. Heller*, 37 *Harv J L & Pub Pol* 729, 730 (2014) (“To the extent that you’re going to be a textualist, you ought to be an originalist.”).

<sup>223</sup> Professor Bobbitt treats text and history as distinct modalities. See Bobbitt, *Constitutional Fate: Theory of the Constitution* at 7–8 (cited in note 32). We certainly have no quarrel with that distinction as a conceptual matter, particularly for textual provisions

Amendment doctrine.<sup>224</sup> These same tools can provide some guidance—but rarely a clear answer<sup>225</sup>—as to the specific question whether incidental burdens should be subject to constitutional scrutiny.

The text of the Second Amendment says that the right to keep and bear arms shall not be infringed. Founding-era dictionaries, assuming that they are reliable<sup>226</sup> or even relevant,<sup>227</sup> define “infringe” as “to violate, intrude, or invade the property or privilege of another.”<sup>228</sup> The notion of “infringement” seems to assume some kind of boundary and can be thought of as binary: either a regulation infringes on a right or it does not. There are no partial infringements. Textually, “infringe” appears to mean something different than, for example, “abridge,” which (again, assuming reliability and relevance) means “to contract, diminish, or cut short.”<sup>229</sup>

Applying this textual analysis to incidental burdens on the keeping and bearing of arms seems straightforward: As with direct burdens, incidental burdens—either accepted by the Amendment’s text or well established in history—should be exempt from constitutional scrutiny. In other words, the boundaries

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whose language is relatively clear to the average person on the street. But in the particular context of the Second Amendment, text and history are almost impossible to separate. *Heller* itself is often described as the Court’s most thoroughgoing originalist opinion, and yet the majority structures its entire opinion around the text of the Amendment. See Jamal Greene, *Selling Originalism*, 97 *Georgetown L J* 657, 659 (2009).

<sup>224</sup> See generally Miller, 122 *Yale L J* 852 (cited in note 30).

<sup>225</sup> See Dorf, 109 *Harv L Rev* at 1179 (cited in note 175).

<sup>226</sup> See Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *Yale J L & Humanities* 295, 298 (2011) (stating that early dictionaries “were idiosyncratic products of their authors, who often had ideological and political agendas”); Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 *Duke L J* 167, 192–93 (2010).

<sup>227</sup> See Jeffrey L. Kirchmeier and Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 *Marq L Rev* 77, 80 (2010) (“Unlike other points of reference for interpreting words and phrases—such as context, the stated or implied purpose of a phrase or enactment, drafts, legislative history, or other documents—dictionary definitions provide no context for the word or phrase being defined.”).

<sup>228</sup> D. Bellamy, et al, *A New Complete English Dictionary* at “infringe” (printed for Fuller 2d ed 1760).

<sup>229</sup> *Id.* at “abridge.” See also US Const Amend I (“Congress shall make no law . . . abridging the freedom of speech.”). The utility of this linguistic exercise is debatable. Some state Second Amendment analogues specify that the right to keep and bear arms “shall not be questioned.” Pa Const Art I, § 21. However, that appears to create either a nonjusticiable political question or an immunity from scrutiny that no constitution in a system with judicial review can tolerate.



of the Amendment's text conform to the features of the common-law and statutory norms that existed at the time of the Founding, or to other features that have arisen from long use over time. If liability for negligence with a weapon, taxes on ammunition, or storage requirements for weapons are historically indicated, then they cannot be "infringements," because there is no corresponding right. From an originalist perspective, one might say that these incidental burdens were embedded in the meaning of the text at the time that it was ratified, just as other constitutional rights are "enshrined with the scope they were understood to have when the people adopted them."<sup>230</sup> This does not mean, however, that the precise contours of those burdens must be frozen in the late 1700s—it is perfectly coherent to say that the Second Amendment, as ratified, not only exempted negligence from coverage but also left to future courts (and perhaps even legislatures) the power to change the definition of negligence.<sup>231</sup>

Although the Second Amendment appears unique in the degree of importance that it places on text and history,<sup>232</sup> many constitutional rights are defined at the margins by long-standing practice.<sup>233</sup> For example, courts look to history to determine whether a given incidental burden raises constitutional problems.<sup>234</sup> A key Fifth Amendment takings case, *Lucas v South Carolina Coastal Council*<sup>235</sup> (authored, like *Heller*, by Scalia), holds that even total deprivation of a property's value is not a regulatory taking if the common law would have defined the property usage as a nuisance.<sup>236</sup> In that scenario, there is no property for the government to take. Though there are important differences, the structure of this analysis is worth emphasizing: even if a well-established background rule—an incidental burden, in other words—were to fully deprive a person of what he may consider his property, it would nonetheless be exempt from constitutional

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<sup>230</sup> *Heller*, 554 US at 634–35.

<sup>231</sup> See Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo Wash L Rev* 1813, 1819–54 (2012); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U Chi L Rev* 877, 879 (1996) (describing, inter alia, "the rational traditionalism that is the most important part of common law constitutional interpretation").

<sup>232</sup> The Seventh Amendment is probably the closest competitor in this regard. See Miller, 122 *Yale L J* at 872 (cited in note 30).

<sup>233</sup> See *Washington v Glucksberg*, 521 US 702, 720–21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.") (quotation marks omitted).

<sup>234</sup> See Dorf, 109 *Harv L Rev* at 1186–87 (cited in note 175).

<sup>235</sup> 505 US 1003 (1992).

<sup>236</sup> *Id* at 1029.

scrutiny because the burden would not be a taking of property as the Constitution uses those terms.

The same is likely true in the Second Amendment context, in which the history and boundaries of the Second Amendment appear to be mutually constitutive. Sometimes the implications are straightforward enough. Rules against negligence, trespass, and nuisance are as traditional and long-standing as any legal prohibitions can be.<sup>237</sup> Therefore, like analogous direct burdens, they should be strongly insulated from constitutional scrutiny and also insulated from facial challenges. Of course, in a given case, even these rules might impose such a burden<sup>238</sup> or be applied in such a fashion<sup>239</sup> as to give rise to an as-applied challenge.

Consider a concrete illustration. In a recent case involving a Second Amendment challenge to the ability of churches to exclude armed parishioners, the Eleventh Circuit explained that “property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment.”<sup>240</sup> The court held that “[a] clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner’s wishes.”<sup>241</sup> This is a straightforward application of the principle that traditional incidental burdens—imposed through “property law, tort law, and criminal law”—are not subject to Second Amendment scrutiny.<sup>242</sup>

This is not to say that the question will always be straightforward or the answer easy to explain. Why are property and tort the canvas for the Second Amendment and not the other way around? Both are undoubtedly fundamental, as the Eleventh Circuit recognized,<sup>243</sup> and it is hard to say—at least given the logic of *Heller*—that one or the other is more deeply rooted in

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<sup>237</sup> See Blackstone, 3 *Commentaries* at 163–68 (cited in note 60) (discussing trespass); id at 169–73 (discussing nuisance); William Blackstone, 1 *Commentaries on the Laws of England* 331–32 (Cavendish 2001) (Wayne Morrison, ed) (originally published 1765) (discussing a master’s duty to answer for his servant’s negligence).

<sup>238</sup> See Part II.B.2.

<sup>239</sup> See Part II.B.4.

<sup>240</sup> *GeorgiaCarry.Org*, 687 F3d at 1264.

<sup>241</sup> Id.

<sup>242</sup> Id. The court had no cause to consider whether a prosecution for running into a church with a firearm to defend individuals under attack would be unconstitutional. That kind of self-defense exception is as much built into the as-applied challenge as is a felon picking up a pistol in an emergency.

<sup>243</sup> See id.

the American constitutional system. A great deal turns on the framing issue, and it often goes unexplained.

One of the dissents in *Heller*, for example, pointed out that safety regulations in major colonial cities like Boston and Philadelphia prohibited people from storing gunpowder in their homes or from carrying loaded firearms into houses, stores, shops, stables, or barns.<sup>244</sup> This dissent held out these regulations as solid evidence that DC's safe-storage requirement should be upheld, or that it at least should be read to incorporate a self-defense exception.<sup>245</sup> But the majority demurred, concluding that the historical regulations were isolated and minor in their severity ("akin to . . . speeding or jaywalking") and, in any event, that they "would [not] be enforced" against someone violating the statute in self-defense.<sup>246</sup> What can explain the difference? Why is property law part of the canvas on which the Second Amendment was drafted, but the gunpowder regulations are not? Similarly, why was self-defense assumed to be part of the canvas for the colonial gunpowder restrictions but not for DC's safe-storage law?<sup>247</sup>

Consider, too, *Heller*'s treatment of the phrase "right of the people." As noted above, the majority suggests that the phrase includes "all Americans,"<sup>248</sup> but "when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to 'law-abiding, responsible citizens.'"<sup>249</sup> *Heller* is not unique in this regard. Justices, judges, scholars, lawyers, and politicians often transform the Amendment's phrase "the

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<sup>244</sup> *Heller*, 554 US at 684–85 (Breyer dissenting). Whether gunpowder-storage regulations are incidental or direct burdens on the right to keep and bear arms is debatable, but the point is the same either way.

<sup>245</sup> *Id.* at 692 (Breyer dissenting).

<sup>246</sup> *Id.* at 633–34.

<sup>247</sup> See *id.* at 692 (Breyer dissenting) ("I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses to accept the District's concession that this law has one.").

<sup>248</sup> *Heller*, 554 US at 581.

<sup>249</sup> *Id.* at 644 (Stevens dissenting). See also *id.* at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.").

people” into “law-abiding citizens,”<sup>250</sup> just as they slip in the word “lawful” before “Arms.”<sup>251</sup>

This raises a fundamental question: What is the law that one must abide by in order to fall within the scope of the Second Amendment? It seems unlikely that the answer is gun control law itself—after all, the point of a Second Amendment challenge is to say that such laws are not constitutionally lawful. Rather, it seems that “law-abiding citizens” are worthy of Second Amendment coverage because they abide by *other* laws—regulations that do not target guns as such. Those who fail to abide by such laws are not law-abiding and are therefore not “the people” who fall within the Amendment’s scope.

This means that these gun-neutral laws impose incidental burdens on the Second Amendment—indeed, they define the very scope of Second Amendment rights. Consider a person convicted of a non-gun-related felony like securities fraud. Federal law forbids him to own a firearm.<sup>252</sup> The latter of these prohibitions is, on its face, a direct regulation of the right to keep and bear arms, *but not as it applies to him*. The logic of *Heller* is not that the latter regulation survives scrutiny because of his earlier conviction, but rather that no scrutiny applies because the felony conviction for securities fraud removes him from the ambit of constitutional coverage. The regulation’s impact on the right to keep and bear arms is significant but incidental. One can do the same exercise for any class of people—for example, felons,<sup>253</sup> the mentally ill,<sup>254</sup> and undocumented immigrants (at least in one circuit)<sup>255</sup>—who are denied the right to keep and bear arms on the basis of a gun-neutral legal status.

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<sup>250</sup> See, for example, Jake Miller, *Ted Cruz Talks Guns, Same-Sex Marriage, Obamacare with Jay Leno* (CBS News, Nov 9, 2013), archived at <http://perma.cc/XQV3-HDJW> (quoting Senator Ted Cruz as arguing that Congress should increase the resources devoted to prosecuting violations rather than “try to take away the constitutional rights of law-abiding citizens”).

<sup>251</sup> See, for example, *Norman v State*, 159 S3d 205, 214 (Fla App 2015) (discussing whether “the Legislature may [] impose some restrictions and conditions on either the method or manner that lawful arms may be carried outside the home”).

<sup>252</sup> See Marshall, 32 Harv J L & Pub Pol at 695 (cited in note 195).

<sup>253</sup> See *Heller*, 554 US at 626.

<sup>254</sup> See *id.*

<sup>255</sup> See *United States v Portillo-Munoz*, 643 F3d 437, 442 (5th Cir 2011) (finding that an undocumented immigrant does not have Second Amendment rights). But see *Britt v State*, 681 SE2d 320, 322–23 (NC 2009) (upholding an as-applied challenge to a felon-in-possession statute brought under a state analogue to the Second Amendment).

In such cases, facially gun-neutral laws have a massive impact on the scope of the right to keep and bear arms<sup>256</sup> and yet are *not* subject to constitutional scrutiny. In fact, they are the very reason that such scrutiny does not apply. This seems to run counter to the approach, described by Dorf and others, suggesting that incidental burdens on constitutional rights should be subject to heightened scrutiny when they impose significant burdens on protected conduct. How can law have such a fundamental practical impact on the Second Amendment's scope and yet be immune from Second Amendment scrutiny? How can neutral laws escape constitutional review when defining a right but not when burdening it?

The answer lies in part with normative and interpretive commitments regarding the value of tradition. Incidental burdens could be insulated from constitutional review precisely *because* they are traditional<sup>257</sup> or perhaps because the Constitution's text or original meaning compels as much.<sup>258</sup> Burkean judges might preserve incidental burdens because the burdens are likely to reflect shared wisdom or because of the costs of change—to avoid disrupting a long-standing web of incidental regulations, courts might simply determine (perhaps *sub silentio*) that those regulations or the activities they reach simply fall outside the text of the Second Amendment.

In addition to these general interpretive considerations, one must also account for the Second Amendment itself. As discussed in Part III, it is here that the necessity of Second Amendment theory becomes apparent, for there is no way to determine what counts as a “canvas” without some prior determination about perspective. That framing will inevitably be driven in large part by a normative vision of the Second Amendment. That the Amendment denies coverage to felons, for example, reflects a law-and-order approach to its purpose.<sup>259</sup> And when courts parse this category of felons, separating some from the

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<sup>256</sup> That scope becomes relevant only when a gun regulation—a ban on possession by felons, for example—is put into place, but it is not the ban itself that defines the scope.

<sup>257</sup> See generally Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029 (1990).

<sup>258</sup> See Sachs, 80 Geo Wash L Rev at 1828–37 (cited in note 231).

<sup>259</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv L Rev 191, 207–11 (2008).

overall felon carveout, they do so with an eye toward other Second Amendment values.<sup>260</sup>

## 2. Individual consequences of the burden: significance.

Another way to evaluate the constitutional salience of an incidental burden is by reference to the size of its imposition on the keeping and bearing of arms. Incidental burdens that are relatively insignificant should not be subject to constitutional scrutiny. Those that are significant burdens should be, though of course they might still survive that scrutiny.

In his insightful article about incidental burdens on fundamental rights, Dorf makes this significance inquiry the touchstone of analysis. The particular rights he studies are free exercise, free speech, and equal protection, and his conclusion with regard to all of them is that “laws having the incidental effect of substantially burdening fundamental rights to engage in primary conduct should be subject to heightened scrutiny.”<sup>261</sup> The same inquiry appears in other areas of constitutional rights law. A basic principle of regulatory takings law, for example, is that if a “regulation goes too far it will be recognized as a taking.”<sup>262</sup> The size of a regulation’s economic impact is one of the most important factors in determining whether it has gone too far.<sup>263</sup>

With regard to guns, then, one might determine whether an incidental burden goes too far by reference to the impact it has on the activity of keeping and bearing arms. As in takings law, this inquiry can in turn be guided by a variety of factors, including the level of generality at which one defines the activity that is burdened, the amount of activity the incidental burden prohibits, and the theory explaining why the activity is constitutionally protected in the first place.

As Judge Jeffrey Sutton put it, “Level of generality is destiny in interpretive disputes.”<sup>264</sup> Whether an incidental burden appears significant or trivial depends on how narrowly or broadly

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<sup>260</sup> See, for example, *United States v Moore*, 666 F3d 313, 320 (4th Cir 2012); *United States v Barton*, 633 F3d 168, 174 (3d Cir 2011).

<sup>261</sup> Dorf, 109 Harv L Rev at 1179 (cited in note 175).

<sup>262</sup> *Pennsylvania Coal*, 260 US at 415.

<sup>263</sup> *Penn Central*, 438 US at 124 (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations [in determining whether there is a taking for the purposes of the Fifth Amendment].”).

<sup>264</sup> *Thomas More Law Center v Obama*, 651 F3d 529, 560 (6th Cir 2011) (Sutton concurring).

one defines the activity that is being burdened. In the takings arena, courts have struggled to decide the metric that one should use to measure whether a “total” taking has occurred—whether, for example, to consider a regulation that affects subterranean mineral rights as a parcel separate from the surface.<sup>265</sup> This is often described as the denominator problem.

With regard to guns, the denominator problem is analogous and equally fraught. When does a regulation (whether direct or indirect) constitute a ban, and when is it simply a regulation of one *aspect* of gun ownership? If, for example, a municipal zoning code or local nuisance law were to effectively forbid people from shooting guns on their private property, courts would have to determine whether this state of affairs were a ban on the bearing of arms at home or merely a regulation of one stick in the bundle of rights.<sup>266</sup>

Ultimately, the most fundamental challenge is not methodological so much as it is normative. Without a clear theory of the Second Amendment’s values, there is simply no way to characterize or measure the significance of a burden. For example, a government regulation that completely deprives a property of economic value is treated as a taking.<sup>267</sup> But this rule makes sense only because economic value is widely accepted as a relevant characteristic of property protected by the Takings Clause—it is, in that context, the *value* that the law seeks to protect. Second Amendment theory has not yet defined analogous values with sufficient specificity. As discussed in more detail below,<sup>268</sup> the self-defense right established in *Heller* is capable of multiple substantive interpretations, each of which has different implications for what burdens are considered constitutionally salient.

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<sup>265</sup> *Pennsylvania Coal*, 260 US at 412–13.

<sup>266</sup> See *Friedman v City of Highland Park, Illinois*, 784 F3d 406, 410 (7th Cir 2015) (considering, inter alia, “whether law-abiding citizens retain adequate means of self-defense”).

<sup>267</sup> *Lucas*, 505 US at 1019.

<sup>268</sup> See Part III.

3. Structural consequences of the burden: the impact of scrutiny on the system.

A second consequentialist factor addresses the impact of a burden on “structural” values<sup>269</sup> rather than on the interests of individual rights holders. Under this approach, judges should avoid constitutional scrutiny when it threatens to upset settled institutional arrangements, such as the division between public and private regulation, the distinctive role of courts, or federalism.

State-action doctrine provides that, with limited exceptions,<sup>270</sup> constitutional provisions only apply against the government.<sup>271</sup> One function of this doctrine is to preserve a private sphere in which individuals can govern themselves as they see fit. Without some kind of limitation on the reach of constitutional rights—and we presume not that the state-action requirement is the ideal limitation but only that it serves this purpose—all forms of private ordering would be subject to constitutional restrictions, perhaps reducing the scope of individual liberty.<sup>272</sup>

Though it technically applies to almost all constitutional claims, the state-action requirement is particularly relevant to incidental burdens imposed by private causes of action rooted in the common law. Typically, if one private party brings a trespass action against another, the defendant cannot raise a free speech or equal protection defense.<sup>273</sup> But sometimes the judicial enforcement of private rights *is* treated as state action. In *Shelley*,

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<sup>269</sup> Philip Bobbitt, *Constitutional Fate*, 58 Tex L Rev 695, 721 (1980) (“Structural arguments are inferences from the existence of constitutional structures and the relationships that the Constitution ordains among the structures of government.”).

<sup>270</sup> The Thirteenth Amendment is perhaps the most prominent example. See, for example, *Jones v Alfred H. Mayer Co*, 392 US 409, 438 (1968); *Civil Rights Cases*, 109 US 3, 20 (1883).

<sup>271</sup> As to whether the Second Amendment has a state-action requirement, some gun-rights activists seem to disagree. See *The NRA Should Hold Its Fire* (Bloomberg, Aug 14, 2005), archived at <http://perma.cc/VH3E-GQ9U>; Marquez, *Employers Fire Back* (cited in note 132).

<sup>272</sup> See Lillian BeVier and John Harrison, *The State Action Principle and Its Critics*, 96 Va L Rev 1767, 1822 (2010).

<sup>273</sup> Courts have carved out exceptions to the state-action requirement when a private party is entangled with, performing the functions of, or otherwise behaving like the government. Assuming these exceptions apply in Second Amendment cases, their reach is quite limited. See, for example, *Brentwood Academy v Tennessee Secondary School Athletic Association*, 531 US 288, 291 (2001) (holding that a nonprofit athletic association’s regulatory activity was state action because of the “pervasive entwinement of state school officials in the structure of the association”); *Nixon v Condon*, 286 US 73, 84–85 (1932).



for instance, the Court found that the Equal Protection Clause bars judicial enforcement of racially restrictive covenants.<sup>274</sup>

In free speech law, some of the most important and recognizable cases involve civil liability. In *New York Times Co v Sullivan*,<sup>275</sup> for example, the Court quickly disposed of the argument (endorsed by Alabama's Supreme Court) that libel judgments are not subject to the First Amendment:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>276</sup>

Since *New York Times*, the Court has repeatedly applied First Amendment scrutiny to civil lawsuits between private parties.<sup>277</sup> Indeed, the *New York Times* Court suggested that civil suits may present a *greater* threat to First Amendment interests than criminal prosecutions do, because civil suits lack procedural safeguards such as grand jury indictments and proof beyond a reasonable doubt.<sup>278</sup>

Exploring the foundations of state-action doctrine is far beyond the scope of this Article. For present purposes, we assume that some incidental burdens on gun-related activities meet the state-action threshold: certainly those imposed by gun-neutral statutes and regulations, and—as with free speech—some civil rules as well. But courts should nonetheless be cautious about applying the Second Amendment in disputes between private parties to preserve sufficient space for private ordering and choice. Businesses and HOAs, for example, might argue that they should not be subjected to constitutional litigation every time they want to exclude guns and that gun owners who wish

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<sup>274</sup> *Shelley*, 334 US at 20. Though never overruled, *Shelley's* impact has been muted, and even those who celebrate the result sometimes question its rightness. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 Cal L Rev 451, 457–69 (2007); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 29–31 (1959).

<sup>275</sup> 376 US 254 (1964).

<sup>276</sup> *Id* at 265 (citation omitted).

<sup>277</sup> See, for example, *Snyder v Phelps*, 131 S Ct 1207, 1215–19 (2011); *Time, Inc v Hill*, 385 US 374, 387–89 (1967).

<sup>278</sup> *New York Times*, 376 US at 277–78.

to carry guns in public can simply choose to visit other establishments.<sup>279</sup> Again, these are arguments not about levels of scrutiny (the safety interests of an HOA versus the interests of traveling visitors) but rather about the burdens imposed by recognizing a constitutional claim in the first instance.

The division between state and private actions is not the only structural issue that is relevant to the prudence of constitutional scrutiny of incidental burdens. Courts might also consider the resource demands on their dockets. As Professor Marin Levy has shown, the Supreme Court does sometimes invoke “flood-gates” concerns when defining the contours of substantive rights.<sup>280</sup> Such concerns seem especially pertinent in the context of incidental burdens. Indeed, nearly all regulations impose *some* incidental burdens on protected conduct, and subjecting them all to constitutional scrutiny would be overwhelming.<sup>281</sup> The threat is not so much that the challenges will succeed but rather that they will generate costs and uncertainty. If every assault case involving a gun were subject to a Second Amendment defense, courts would be clogged with constitutional claims that would, even if weak, require attention. Much of the regulatory state would grind to a halt if every law concerning lead, copper, or labor were scrutinized to see what effect it has on keeping and bearing arms, whether or not it was actually aimed at firearms in the first place.<sup>282</sup> Applying scrutiny generates costs; denying protection is costlier in this regard than denying coverage.

In addition to the burdens it would place on the judiciary, subjecting neutral laws of general applicability to heightened scrutiny could potentially interfere with the other branches of government. As the Court remarked when it refused to apply heightened scrutiny to laws with racially unequal impacts, “[a] rule that a statute designed to serve neutral ends is nevertheless invalid . . . if in practice it benefits or burdens one race more than another . . . would raise serious questions about, and

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<sup>279</sup> Whether a private party may claim a Second Amendment right to designate *who* may be armed on its property is a related issue. See Blocher, 64 Stan L Rev at 41–44 (cited in note 113).

<sup>280</sup> Marin K. Levy, *Judging the Flood of Litigation*, 80 U Chi L Rev 1007, 1008–10 (2013).

<sup>281</sup> See Dorf, 109 Harv L Rev at 1199 (cited in note 175).

<sup>282</sup> See Philip J. Cook, Jens Ludwig, and Adam M. Samaha, *Gun Control after Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L Rev 1041, 1084 (2009) (comparing regulatory-cost concerns arising after *Heller* to the Court’s repeated refusal to grant media operations the “constitutional immunity from labor or antitrust laws that are applicable to other businesses”).

perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes.”<sup>283</sup> These costs would be further compounded by federalism concerns, since many of the most significant incidental burdens on firearms are imposed by traditional subjects of state law such as tort and property.

Advocates of broad gun rights might argue that these structural concerns are subordinate to the most important structural principle: the Supremacy Clause.<sup>284</sup> But with regard to incidental burdens, the relevant and difficult question is not whether the Second Amendment should trump other laws but whether it is implicated at all. Nothing in Article VI answers that critical question.

#### 4. Character of the burden: purpose and design.

A fourth way to consider whether the Second Amendment should apply to an incidental burden on guns is by asking whether the law imposing the burden operates like gun control. When a supposedly incidental burden is in fact directed at protected conduct, it is more properly a subject of constitutional scrutiny, if not necessarily of constitutional invalidation.

This inquiry is not quite as circular as it might sound. Courts and scholars must often address whether common-law claims should be treated as a kind of public regulation for the purposes of state-action doctrine. Sometimes their answer has been yes, as in *New York Times* and *Shelley*. Similarly, the imposition of damages by a jury might appear to be simple restorative justice between parties, but in *BMW of North America, Inc v Gore*,<sup>285</sup> the Court held, inter alia, that the deterrence function of a punitive award transformed private justice into government regulation that was subject to due process requirements.<sup>286</sup>

Drawing from these cases, some characteristics of an incidental burden might make it appear more akin to regulation than to private ordering. If an incidental burden were imposed solely to deter otherwise-innocuous gun-related activities or to

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<sup>283</sup> *Washington v Davis*, 426 US 229, 248 (1976). In this Article, we do not discuss the wisdom of affirmative legislative protections such as the Religious Freedom Restoration Act or the disparate impact provisions of Title VII of the Civil Rights Act of 1964. See generally Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 *Cardozo L Rev* 1815 (2011) (defending political protections for religious accommodations).

<sup>284</sup> US Const Art VI, cl 2.

<sup>285</sup> 517 US 559 (1996).

<sup>286</sup> *Id* at 574.

punish gun owners specifically rather than to compensate victims, then the character of the regulation might warrant constitutional scrutiny. Consider, for example, a facially neutral noise ordinance tailored to affect the only gun range in a municipality. Similarly, permitting punitive damages only for reckless use of a firearm, but not for reckless use of a vehicle, could justify the application of constitutional scrutiny. This is not to say, of course, that the former law would be unconstitutional—only that it might have to satisfy Second Amendment rules.

Showing that a given law has the purpose of restricting guns as such is not necessarily as straightforward as, for example, finding viewpoint discrimination in speech regulations. Some scholars attribute some gun regulations to hatred of guns<sup>287</sup> or even to “bigotry.”<sup>288</sup> But it seems likely that most gun control supporters are concerned not with guns themselves but instead with the negative consequences of their misuse. In that sense, even direct gun control is akin not to content or viewpoint discrimination—which can trigger First Amendment scrutiny even when targeting otherwise-unprotected activities<sup>289</sup>—but rather to regulations targeting secondary effects.<sup>290</sup> Reducing the lethality of confrontations and making negligent actors compensate those whom they injure are content-neutral in this sense. They are focused on harms, not on guns.

In the end, the question whether incidental burdens should be subject to constitutional scrutiny simply cannot be answered using the usual tools of doctrinal analysis. As Schauer notes with regard to free speech, “the location of the boundaries themselves—the threshold determination of what is a First Amendment case and

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<sup>287</sup> See, for example, Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 *Brooklyn L Rev* 715, 795 (2005) (“Some people viscerally hate guns, see no utility in them and think it is insane to talk about balancing factors like the benefits of defensive gun use and the political value of an armed citizenry.”).

<sup>288</sup> David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 *Tenn L Rev* 417, 462 (2014).

<sup>289</sup> See *R.A.V.*, 505 US at 418:

It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag.

For an analysis of content-neutral restrictions, see generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 *U Chi L Rev* 46 (1987).

<sup>290</sup> See *City of Los Angeles v Alameda Books, Inc.*, 535 US 425, 432, 442 (2002) (rejecting a First Amendment challenge to the zoning of adult businesses on the basis that the zoning targeted “secondary effects” rather than protected-speech activity).

what is not—is less a doctrinal matter than a political, economic, social, and cultural one.”<sup>291</sup> We have done our best to exhaust the internal tools, but at some point this kind of external analysis becomes inevitable. And it, in turn, requires some account—thicker than we now have—of what the Second Amendment is for. The following Part addresses that need.

### III. A SECOND GENERATION OF SECOND AMENDMENT THEORY

We have identified a set of legal tools that can be used to determine whether a Second Amendment claim is cognizable. But the tools are just that; they must be employed with some purpose in mind. In the context of the Second Amendment, that means having a theory of what the right is all about. Whether particular tort or property rules are enshrined in the text and history of the Second Amendment depends on what principles and values underlie the Amendment itself. What kinds of burdens are significant varies depending on whether one sees the Second Amendment as concerned with self-defense against crime or against the government.

Again, these are *boundary* questions—issues of coverage rather than of protection. The point is not simply that Second Amendment ideology shapes people’s ideas of permissible gun control. Rather, one’s theory of the Second Amendment also determines what one sees as gun control in the first place. Whether a negligence action for failure to safely store a firearm is a background norm that the Second Amendment does not cover, or a regulation that it does, depends on what you think the Amendment is all about.

The answer to this underlying question cannot be found in *Heller* or *McDonald*. In somewhat-simplified and often-misunderstood terms, those cases hold that the Amendment protects an “individual” right to keep and bear arms, whose “core” and “central component” is “self-defense.”<sup>292</sup> Critics and supporters alike have read these cases as ending the doctrinal debate over what the Second Amendment is really about.<sup>293</sup> But although the Court has taken some arguments off the table—for example,

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<sup>291</sup> Schauer, 117 Harv L Rev at 1765 (cited in note 1).

<sup>292</sup> *Heller*, 554 US at 599, 630 (emphasis omitted). See also *McDonald*, 561 US at 767.

<sup>293</sup> See, for example, Randy E. Barnett, *News Flash: The Constitution Means What It Says* (Wall St J, June 27, 2008), archived at <http://perma.cc/S5DL-FPHA>.

those that are premised solely on militia service<sup>294</sup>—it has also generated demand for a new generation of Second Amendment theory. At least three different accounts seem plausible, all of which are consistent with a self-defense core.

Although we believe that determining the Second Amendment's boundaries requires some account of its purpose or value, we do not suppose that the judges answering these questions will necessarily adopt a comprehensive theory of the Second Amendment. Most judges are likely to continue deciding Second Amendment cases with a healthy dose of pragmatism and intuition. Our goal is to try to discern some pattern to these decisions, relate them to existing and future questions, and explain the whole in a more transparent and integrated way. Whether the resulting categories are called approaches, theories, values, or principles is of no real significance.

Nor do we suppose that a single account of the Second Amendment will command unanimous support, any more than agreement has emerged regarding a theory of free speech or equal protection. But skepticism about theoretical consensus is no reason to leave the theory unarticulated or unexamined. Our goal here is modest: to articulate three plausible Second Amendment values and to briefly identify their weaknesses and strengths.

#### A. Autonomy

As with free speech, the right to keep and bear arms could have some kind of intrinsic value—one that is rooted in an individual right to personal autonomy.<sup>295</sup> This view resonates with the strongly libertarian flavor of much gun-rights rhetoric.

A person who subscribes to this autonomy view of the Second Amendment is primarily concerned with the liberty of self-reliance, not with instrumental ends like preventing tyranny or even promoting personal safety. This person will not be satisfied with the proposition that gun control would make him safer (even assuming that he believes such a thing), just as it would be unsatisfying for him to say that another person's speech can

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<sup>294</sup> *Heller*, 554 US at 593 (“[The right to keep and bear arms] was clearly an individual right, having nothing whatever to do with service in a militia.”).

<sup>295</sup> See Green, 84 *Notre Dame L Rev* at 154 (cited in note 37); Robert Weisberg, Book Review, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 *U Chi L Rev* 333, 337 (2004) (identifying the “association of the gun with a form of individual autonomy”).

be silenced so long as his ideas are expressed or that a person's vote can be taken so long as his political positions are represented. Weaker forms of this autonomy rationale make suspect incidental common-law rules like a duty to retreat<sup>296</sup> or a duty to submit to an unlawful arrest.<sup>297</sup> The strongest form of the autonomy theory is completely unconcerned with any collateral effect created by the possession of a firearm. In this strong version, a blind person has as much of a right to a firearm as a sighted person.<sup>298</sup>

With regard to incidental burdens on gun rights, the hardest questions for the autonomy theory are also the most inevitable: what to do when one individual's choice conflicts with another individual's right—as, for example, when a store owner seeks to exclude a gun carrier. On the one hand, the gun owner's autonomous right to keep and bear arms is threatened, which suggests that the Second Amendment might be put into play to defend it. On the other hand, doing so would threaten the store owner's autonomous right to determine whether guns on his property further or threaten his self-defense interests, irrespective of any data showing that the store owner may be safer by allowing the gun owners to enter the store.<sup>299</sup> This is not a tension that can be resolved from within the Second Amendment—it requires recourse to broader considerations of ethics and political theory.

One of the central complications with an autonomy view of the Second Amendment is that—like autonomy approaches to the First Amendment—it may be overexpansive. If people can assert Second Amendment claims against incidental burdens based simply on the fact that they consider gun ownership to be important to their identities, then extending constitutional coverage seems more like the granting of an unfair subsidy. This was one of the concerns underlying *Smith*. In that case, the petitioner argued that the use of peyote was part of his religious practice and that denying him unemployment benefits based on

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<sup>296</sup> See, for example, *State v Johnson*, 152 NW2d 529, 532 (Minn 1967) (identifying one element of self-defense as “the duty of the slayer to retreat or avoid the danger if reasonably possible”). See also Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 Ind L J 939, 942 n 24 (2011) (noting that law-enforcement officers generally do not have a duty to retreat).

<sup>297</sup> See Miller, 86 Ind L J at 941–42 (cited in note 296).

<sup>298</sup> See William Kremer, *Guide Dogs and Guns: America's Blind Gunmen* (BBC, Aug 13, 2014), archived at <http://perma.cc/Z57H-D5AX>.

<sup>299</sup> See Blocher, 64 Stan L Rev at 42 (cited in note 113).

his drug use therefore violated the Free Exercise Clause.<sup>300</sup> The Court disagreed: “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>301</sup> The majority concluded that “neutral law[s] of general applicability” should be subject to only rational basis review, even when they have the impact of regulating religiously motivated activity.<sup>302</sup>

The analogy to gun rights is not hard to see. If the Second Amendment immunized individuals from generally applicable laws like trespass, nuisance, and assault based on their autonomy interests, then it would essentially permit each person’s “belief” about armed self-defense to be “superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>303</sup> But it cannot be the case that a person’s sincere fear gives him the right to keep whatever arms make him feel secure and to bear them whenever he feels insecure. That is not how self-defense law works,<sup>304</sup> and it would be surprising if it became part of a constitutional right predicated on self-defense.

## B. Democracy

A second way to understand the Second Amendment is as a bulwark of democracy, guaranteeing the means of self-defense against a potentially tyrannical government. Though the popular view (and legal concept) of self-defense tends to focus on its relationship to personal safety against other private citizens, some gun-rights advocates instead focus—even after *Heller*—on the role of guns in preventing government tyranny.<sup>305</sup> This approach

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<sup>300</sup> *Smith*, 494 US at 874–75.

<sup>301</sup> *Id.* at 879, citing *Reynolds v United States*, 98 US (8 Otto) 145, 166–67 (1878). See also Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L Rev 245, 248 (1991) (arguing that “*Smith* rightly jettisoned the conduct exemption because it is manifestly contrary to the plain meaning of the Free Exercise Clause”).

<sup>302</sup> *Smith*, 494 US at 879, 885–89.

<sup>303</sup> *Id.* at 879.

<sup>304</sup> See, for example, *United States v Acosta-Sierra*, 690 F3d 1111, 1119–20 (9th Cir 2012) (noting that a victim’s apprehension of immediate bodily injury must be determined by an “objective standard of reasonableness”).

<sup>305</sup> See, for example, Joshua Horwitz and Casey Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 Albany Govt L Rev 496, 497 (2008):

Distrust—and outright hostility toward—government power has become a cornerstone of gun rights advocacy, and leading gun rights organizations routinely urge their members to prepare to resist their government with force of arms. Recent public opinion research shows that many gun owners have accepted this



is roughly analogous to free speech theories that are based on the role of speech in preserving or constituting democracy.

This view, too, has important implications for what kinds of gun regulations are cognizable. Rather than personal safety or autonomy, the underlying value in the democracy theory of the Second Amendment is the prevention of governmental tyranny—rules that threaten this checking value are most likely to be seen as problematic. With regard to incidental burdens in particular, believers in the antityranny, self-defense-against-government view of the Second Amendment are likely to be particularly sensitive to the state-action requirement—when the government is acting, they might say, the danger of tyranny is ever present.

Even assuming that the state-action requirement is satisfied, however, hard questions remain about whether to subject incidental burdens to constitutional review. For a believer in the antityranny view, structural concerns—especially those that focus on the role of limited federal power—are primary. But it is not immediately obvious which way those concerns should point.

On the one hand, any obvious state action—a statute or regulation, for example—may raise fears of tyranny, notwithstanding the incidental nature of the burden imposed. Some supporters of broad gun rights argue that the Amendment itself was enacted in large part *because* of incidental burdens on gun carrying. It is common, for example, to argue that supposedly neutral regulations of general applicability like the English game laws and rules against affray and disturbing the peace were used to eviscerate the freedom of people to keep and bear arms. If that is so, then the very purpose of the right might have been to protect against such incidental burdens.

In other cases, however, subjecting incidental burdens—especially those arising from private rights of action—to constitutional scrutiny can mean interjecting the government (courts, specifically) into most cases of private ordering. If, for example, trespass actions by homeowners against gun carriers can give rise to Second Amendment claims, then judges will be in the position of exercising government authority against private parties. That

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message . . . and see resistance to government as a compelling reason for owning a gun and opposing efforts to regulate the private ownership of firearms.

(citation omitted).

can raise fears of tyranny just as surely as direct government regulation will.

### C. Personal Safety

Perhaps the best-known theory of free speech is the marketplace of ideas metaphor attributed to Justice Oliver Wendell Holmes: that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>306</sup> Speech must be free to enable this competition, which is more likely than state-imposed orthodoxy to lead to truth, knowledge, and other good results. As Justice Louis Brandeis put it in his own statement of the marketplace rationale, “[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”<sup>307</sup>

An analogous theory—which could be called the “marketplace of violence,” though its persuasiveness does not depend on the strength of the analogy—seems to motivate a great deal of thinking about guns and gun control. On this theory, the state does not possess a monopoly on violence.<sup>308</sup> The individual possesses an inalienable right to threaten violence through the keeping and bearing of arms, which contributes to personal safety in roughly the same way that speech contributes to truth. Some acts of violence—like some ideas—will be undesirable, but they will be deterred or stopped by desirable acts of violence, such as those involving justified self-defense. As with speech, desirable exercises of the right (those that advance self-defense or truth) will win out over undesirable activities (those that

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<sup>306</sup> *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting). See also John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* 45 (MacMillan 1959) (H.B. Cotterill, ed) (originally published 1644) (“Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”).

<sup>307</sup> *Whitney v California*, 274 US 357, 375 (1927) (Brandeis concurring).

<sup>308</sup> See Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 Mont L Rev 79, 99 (1997) (arguing that modern law assumes “that the responsibility for keeping peace has passed from the individual to the state and that the use of force to keep the peace is effectively a state monopoly,” and further arguing that “[t]his modern view differs markedly from eighteenth century views”); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U Pitt L Rev 553, 570 (1996) (“Individuals do not cede a total monopoly of force to the state. They reserve the right when danger is imminent and otherwise unavoidable to secure their own safety against aggression.”); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 Tulane L Rev 387, 459 (1999) (characterizing a common belief among progun minority groups and women that “[t]he state must have no monopoly of violence, either because it threatens hate violence itself or because it tolerates such violence by private parties”).

promote safety threats or falsehoods).<sup>309</sup> In both instances, the marketplace metaphor rests on a confident and optimistic vision of the world. Indeed, there is a striking similarity between Brandeis's conclusion that (with important limitations) when falsehood arises "the remedy to be applied is more speech"<sup>310</sup> and the NRA's argument that "[t]he only thing that stops a bad guy with a gun is a good guy with a gun."<sup>311</sup>

As with the marketplace of ideas, there might be at least three grounds for opposing government efforts to regulate the marketplace of violence: epistemic distrust, inequality, and fear of corruption. Epistemic objections are true marketplace arguments: the government is simply *incapable* of generating optimal safety through gun regulation, and the invisible hand of the market will provide better (that is, safer) results.<sup>312</sup> Equality objections are inflected with autonomy rationales: even if the government could design a regime for optimal safety, it is inequitable for the government to elevate the self-defense interests of, say, armored car drivers over school bus drivers. Finally, corruption arguments are inflected with democracy rationales: the government should not be able to regulate firearms, because it will always do so in a way that protects insiders.

In the context of the Second Amendment, market theories operate similarly with regard to personal safety. For epistemic market advocates, laws that regulate guns in the name of personal safety should be subject to heightened scrutiny precisely because personal safety is best achieved through broad gun ownership.<sup>313</sup> For equality advocates, the government must show why burdens on eighteen-year-olds are justified compared to burdens on twenty-one-year-olds, or how regulating knives differently from pistols does not impermissibly harm those who prefer to protect themselves with blades rather than with bullets. For objections based on corruption, the government's desire

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<sup>309</sup> See, for example, Miller, 86 NYU L Rev at 946 (cited in note 126).

<sup>310</sup> *Whitney*, 274 US at 377 (Brandeis concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

<sup>311</sup> Eric Lichtblau and Motoko Rich, *N.R.A. Envisions 'a Good Guy with a Gun' in Every School* (NY Times, Dec 21, 2012), archived at <http://perma.cc/XXE2-NKWF> (quoting NRA Executive Vice President LaPierre).

<sup>312</sup> See generally, for example, John R. Lott Jr, *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (Chicago 1998).

<sup>313</sup> See Green, 84 Notre Dame L Rev at 146 (cited in note 37) (identifying one theory of the Second Amendment as "constitutionaliz[ing] the empirical judgment that private arms possession promotes public safety").

to empower its own agents—say, the police or the National Guard—over others is a cause for constitutional concern.

Although the marketplace-of-violence model is descriptively and rhetorically powerful, there are important distinctions between the application of marketplace logic in the contexts of speech and guns. Those distinctions might render one or the other more normatively desirable or analytically useful. Many people undoubtedly perceive the stakes to be higher—or at least more immediate—in the context of guns and personal violence than speech.<sup>314</sup> Even justified acts of self-defense generally are seen as a regrettable necessity, not as the same kind of unalloyed benefit as a “good” idea. Moreover, the actual competition between ideas imposes relatively few costs and may even be a benefit (the lifeblood of public discourse, after all, is exactly this kind of competition). By contrast, the competition between guns—even from the perspective of those who believe in strong gun rights—is more of a necessary evil than a positive good. Indeed, from one perspective, the marketplace of violence could be nothing less than a failure of one of the central purposes of the state—preventing prisoner’s dilemmas by claiming a monopoly on the legitimate use of violence.<sup>315</sup>

*Heller* and *McDonald* represent a bookend to the first generation of Second Amendment theorizing, which focused on whether the Amendment is limited to militias. But they also set the stage for another round of theoretical debate. The task now is to flesh out, as scholars have done for generations with the First Amendment, what the new Second Amendment right is really about. As we have tried to show here, the scope of permissible gun regulation—whether or not it is labeled as such—depends on the answer.

## CONCLUSION

Justice Owen Roberts famously provided a draftsman’s model of judicial review: all a judge must do is lay the Constitution

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<sup>314</sup> Of course, some might argue to the contrary that free speech is the single most important value in a well-functioning democracy.

<sup>315</sup> See Green, 84 Notre Dame L Rev at 152 (cited in note 37). Professor Michael Steven Green argues that the more-guns theory leads to an arms race—a classic prisoner’s dilemma—and that “a primary purpose of a government’s authority is overcoming prisoner’s dilemmas.” Id. See also Max Weber, *Politics as a Vocation*, in David Owen and Tracy B. Strong, eds, *The Vocation Lectures* 32, 33 (Hackett 2004) (Rodney Livingstone, trans) (“[T]he state is the form of human community that [ ] lays claim to the monopoly of legitimate physical violence.”) (emphasis omitted).

beside the law and “decide whether the latter squares with the former.”<sup>316</sup> But as the pressure of Second Amendment litigation increases, the most difficult and consequential choice for judges will be not about squaring constitutional proportions but about whether to pick up the Constitution in the first place. We have described various tools that judges and others can use, as well as theories that they will need, to perform that increasingly essential task.

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<sup>316</sup> *United States v Butler*, 297 US 1, 62 (1936).