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Bans

ABSTRACT. In the universe of legal restrictions subject to judicial review, those characterized as fully denying some aspect of a constitutional right—bans—are often subject to per se rules of invalidity. Whether the subject of the restriction is a medium of expression, the valuable use of property, or a class of weapons, courts in such cases will often short-circuit the standard doctrinal machinery and strike down the law, even if it might have survived heightened scrutiny. Identifying laws as bans can thus provide an end run around the tiers of scrutiny and other familiar forms of means-ends analysis.

And yet it is surprisingly difficult to identify what makes a law a ban and why that characterization should matter. Why are yard signs an “entire medium of expression” or assault weapons an “entire class of ‘arms’”? Why does it matter if they are completely prohibited? If the ban label is to have such important constitutional consequences, these questions must be brought to the fore.

Using the emerging jurisprudence of the Second Amendment as an illustration, this Article explores functional, formal, and purposivist answers. It argues that none of these answers can avoid judicial discretion in the way that some proponents of rules-based jurisprudence might wish. But the ban framework might nonetheless be defensible in a limited set of cases, especially on functional grounds, as a shorthand for the conclusion that a challenged law impermissibly interferes with rightsholders’ ability to effectuate their constitutional interests.

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INTRODUCTION

The adjudication of constitutional rights is typically understood to involve two steps: a threshold inquiry into the right's applicability, followed by some type of means-end scrutiny.¹ Such scrutiny comes in many different forms depending on the facts at issue. In the equal-protection context, racial classifications trigger strict scrutiny,² gender classifications trigger intermediate scrutiny,³ and nonsuspect classifications trigger rational-basis review.⁴ Free-speech challenges implicate different types of review depending on whether the relevant regulation involves commercial speech,⁵ content discrimination,⁶ a public forum,⁷ a nonpublic forum,⁸ a limited public forum,⁹ alleged libel of a public figure,¹⁰ and so on.

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1. See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995) (distinguishing between First Amendment coverage and protection); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765-66 (2004) (same).
 2. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (clarifying that racial classifications utilized by all levels of government actors, including federal, are subject to strict scrutiny).
 3. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).
 4. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486 (1955) (applying rational basis review).
 5. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (describing a four-part test for evaluating restrictions on commercial speech).
 6. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (applying strict scrutiny).
 7. Regulations of speech in such forums are subject to strict scrutiny, and the only acceptable restrictions are time, place, and manner restrictions or content-based restrictions that are narrowly drawn to serve a compelling state interest. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).
 8. Regulations on speech in nonpublic forums are acceptable so long as they are “reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).
 9. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7 (1983) (describing “limited” public forums).
 10. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

In some instances, however, courts pass right through these first two steps and apply per se rules of invalidity. The application of such rules can be complicated and subject to exceptions,¹¹ but, generally speaking, in these situations rights behave as Dworkinian trumps, immune to any kind of overt interest balancing.¹² Naturally, this makes it all the more important that the triggering conditions for such rules be carefully demarcated.¹³ Sometimes, the condition is constitutionally specified: the government may not ban jury trials in all criminal cases, for example, even if doing so would satisfy strict scrutiny.¹⁴ Forbidden government purpose can also serve as a triggering condition,¹⁵ as in the case of racial animus¹⁶ and viewpoint discrimination.¹⁷

Another trigger, at least for some constitutional rights, is the conclusion that a regulation constitutes a total prohibition on some aspect of the right – a ban on a constitutionally protected activity or item, for example. The “total” taking of property is one such example; a ban on the productive use of property automatically requires just compensation.¹⁸ Likewise, some courts have held that the Second Amendment categorically forbids prohibitions of an “entire class of arms.”¹⁹ And the Supreme Court has, by its own account, “voiced particular concern with

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11. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting) (“Like many bright-line rules, the categorical rule established in this case is only ‘categorical’ for a page or two in the U.S. Reports” before admitting of an exception.); *Dennis v. United States*, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring) (“Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules.”).
 12. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 96-117 (2018) (describing development of rights-as-trumps frame in U.S. constitutional law).
 13. See Joseph Blocher, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120 (2019).
 14. U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”). I am grateful to Eugene Volokh for the example.
 15. See Greene, *supra* note 12, at 127-29 (suggesting that the rights-as-trumps frame is appropriate where the paradigm cases involve “government bigotry, intolerance, or corruption”).
 16. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 (2012) (“The Court has held on numerous occasions that where a law is based on [racial] animus, it will not survive even the most deferential level of scrutiny under the Equal Protection Clause.”). In practice, this is not true of all forms of animus, though there are good reasons to think that it should be. See Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471 (2018).
 17. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (“Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.”).
 18. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992).
 19. See *infra* notes 30-39 and accompanying text.

laws that foreclose an entire medium of expression,²⁰ frequently striking down such laws without applying scrutiny.²¹ Bans, then, are clearly constitutionally impermissible, at least in some cases. But what makes a regulation a ban? What makes yard signs in residential neighborhoods “an entire medium of expression”²² or semiautomatic rifles a “class of arms”?²³ And why should a ban be *per se* invalid?

The question of how to describe a law – whether as a ban, a regulation, or merely an incidental burden – surfaces throughout constitutional law. And yet the Constitution does not always identify the baseline or denominator against which that impact should be measured. If the federal government forbids travel from eight named countries that are more than ninety percent Muslim, but that together represent less than ten percent of the world’s Muslim population, is that restriction a presumptively invalid “Muslim ban”?²⁴ If a state law effectively prohibits all economically beneficial use of a piece of property, does that constitute a total taking of the lot?²⁵ If a law restricts “an entire class of ‘arms,’” does that mean it is automatically unconstitutional, regardless of the weight of the government interest in question?²⁶

Although one could illustrate this challenge in virtually any area of constitutional law – free speech and takings provide ready examples²⁷ – such questions are especially pressing today in the Second Amendment context. Ten years after the Supreme Court’s decision in *District of Columbia v. Heller*, the law surrounding the right to keep and bear arms is taking shape,²⁸ and in some areas it has

20. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *cf.* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 337 (2010) (characterizing restrictions on corporate campaign spending as “an outright ban [on speech from a particular class of speakers], backed by criminal sanctions” en route to holding that restriction unconstitutional).

21. *See infra* Section I.B.

22. The law at issue in *Ladue* restricted the placement of signs in residential neighborhoods. 512 U.S. at 45, 55.

23. *See infra* notes 32-33 and accompanying text.

24. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2415-23 (2018) (answering in the negative); *infra* Section II.D.

25. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

26. *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning [handguns] from the home . . . would fail constitutional muster.”).

27. *See infra* Sections I.B, I.C.

28. *See generally* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018) (reporting results and content of more than one thousand post-*Heller* Second Amendment challenges).

incorporated bright-line rules of both validity and invalidity. For instance, in the course of striking down D.C.’s handgun regulation,²⁹ Justice Scalia’s majority opinion concluded that the law prohibited “an *entire class* of ‘arms’ that is overwhelmingly chosen by American society for [a] lawful purpose”³⁰ and was partly for that reason unconstitutional.³¹ Some judges have read this to mean that the Second Amendment flatly prohibits bans on certain categories of weapons.³² (Then-Judge Kavanaugh, for example, once compared bans on entire classes of arms to bans on categories of speech.)³³ Such a *per se* rule of invalidity would strike down such laws even if they would satisfy strict scrutiny,³⁴ presenting the inverse of the more common claim that certain weapons are entirely unprotected by the Second Amendment and that bans on them are therefore categorically valid.³⁵

But which classes of weapons, and why? If a law prohibits semiautomatic rifles that resemble military weapons,³⁶ or semiautomatic weapons with high-

29. The law was and is generally referred to as a ban, although, illustrating the central challenge of this Article, it actually was not a complete prohibition. D.C. CODE § 7-2502.01(b) (2015) (enumerating exceptions for law enforcement officers, dealers, recreational users, and others); *Heller*, 554 U.S. at 575 n.1 (dismissing exceptions as irrelevant to the challenge, which involved none of those categories).

30. *Heller*, 554 U.S. at 628 (emphasis added).

31. *Id.* at 628-29.

32. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“It follows from *Heller*’s protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.’s ban on them is unconstitutional.”); *see also* *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 702-07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment) (expressing concerns about “judge empowering” heightened-scrutiny review of Second Amendment claims); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting) (embracing an understanding of the Second Amendment grounded solely in “text, history, and tradition”), *withdrawn and superseded on reh’g*, 682 F.3d 361 (5th Cir. 2012).

33. *See Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting) (“A ban on a class of arms is not an ‘incidental’ regulation. It is equivalent to a ban on a category of speech.”).

34. *See id.* at 1271 (contrasting a test based on “text, history, and tradition” with a “balancing test such as strict or intermediate scrutiny”).

35. *See, e.g.*, 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, 1475-91 (2009) (describing “bans on weapon categories”).

36. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) (“New York and Connecticut ban only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features.”).

capacity magazines,³⁷ is that a ban or a restriction? The answer might depend on what one thinks the Second Amendment protects from regulation. “Arms” as a whole? The “lineal descendant[s]” of arms protected at the Founding?³⁸ Or should the question be whether the prohibited arms are necessary (or even just especially important) for self-defense, which the Court has said is the “core” and “central component” of the right to keep and bear arms?³⁹

The answers to those questions have implications for the shape of constitutional jurisprudence more broadly. Because the characterization of a law as a ban tends to trigger a per se rule of invalidity, it is a particularly useful move for those who prefer a categorical approach to constitutional law. For many of its supporters, the value of such an approach is that it does a better job restraining judicial discretion than interest balancing, proportionality, and other alternatives, including the tiers of scrutiny.⁴⁰ As the Court increasingly seems to favor rules over standards,⁴¹ we might begin to see more cases in which regulations are described

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37. See, e.g., CONN. GEN. STAT. ANN. § 53-202a(1)(E)(i)-(ii) (West 2018) (classifying as an “assault weapon” any “semiautomatic, centerfire rifle that has an ability to accept a detachable magazine” with at least one of several enumerated military-style features or any “semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds”); MD. CODE ANN., CRIM. LAW § 4-301(d)(3), (h)(1)(i)-(ii) (West 2018) (classifying as an “assault weapon” any not-otherwise-listed “semiautomatic centerfire rifle that can accept a detachable magazine” and has any two military-style features, or any not-otherwise-listed “semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds”).
38. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (describing the “modern handgun,” the rifle, and the “long-barreled shotgun”).
39. *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008); see also *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citing *Heller* for this proposition).
40. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating for general rules over discretion-conferring standards in the judiciary); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 27 (1992) (“The Justices of rules are skeptical about reasoned elaboration and suspect that standards will enable the Court to translate raw subjective value preferences into law.”); see also Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381-84 (2009) (discussing debates about rules versus standards and categoricalism versus balancing).
41. See, e.g., ANDREW NOLAN & CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R45293, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 19-21 (2018) (characterizing then-Judge Kavanaugh as having a preference for judicial formalism and the idea of the “rule of law as a law of rules”); ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R44778, JUDGE NEIL M. GORSUCH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 10-11 (2017) (noting then-Judge Gorsuch’s expressed preference for easily administered bright-line rules); Joseph Blocher, *Roberts’ Rules: The Assertiveness of Rules-Based Jurisprudence*, 46 TULSA L. REV. 431 (2011).

as bans. It is especially important, then, to know how such characterizations can be justified.

All laws are bans with regard to that which they prohibit—a driver’s-license requirement is a ban on driving without one. But it is hard to see why the label should be of any constitutional consequence if it is simply a way of restating that a law prohibits something. Indeed, the characterization might often escape notice precisely because it is a predicate to the familiar constitutional tests and standards, not a result of them.⁴² There are, of course, constitutional tests designed to evaluate whether a burden on protected conduct goes too far—whether it is “undue,” for example.⁴³ But in the context of bans, that doctrinal machinery never gets up and running. Characterizing something as a ban typically frames the challenged law as unconstitutional regardless of whatever scrutiny a court might apply.

This raises the risk that calling a law a ban may simply be an exercise of judicial power masquerading as restraint. If, for example, the definition of a class of weapons is no more certain than the outcome of an interest-balancing test, then invoking the ban framework will simply change—and perhaps obscure—the judicial power and discretion being exercised.

This does not mean that the concept of a ban should be banished from our constitutional jurisprudence, only that it must be brought to the fore and understood.⁴⁴ This Article identifies and evaluates three possible ways to do so:

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42. For an insightful consideration of “constitutional inputs,” see Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 747 (2018), which argues that the challenge of “input characterization . . . arises whenever we must characterize factual information . . . in terms of an abstract concept . . . which we then proceed to evaluate by reference to an operative criterion.” Coenen addresses a number of characterization problems in constitutional doctrine, *id.* at 763-86, though not exactly the problem I attempt to address here.
43. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).
44. Coenen, *supra* note 42, at 786 (“If characterization choices really influence the outcomes of constitutional cases as frequently as they appear to, then we need to think seriously about where those choices come from and how they should be made.”); see also Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002) (“The results of constitutional cases turn on the location, size, and shape of often-invisible transactional frames that are positioned prior to any deliberation over the meaning or purposes of constitutional rights. This is the basic problem of ‘framing transactions’ in constitutional law.”).

through functionalism,⁴⁵ formalism,⁴⁶ or purposivism.⁴⁷ Each approach offers a different way of identifying which regulations count as bans, and identifies why that characterization should matter.

Under the functional approach, to call a law a ban is simply shorthand for concluding that it imposes an impermissibly large burden on rightsholders' ability to effectuate their constitutionally guaranteed interests, such as the "core" Second Amendment interest of self-defense.⁴⁸ This explains why *Heller* treated as per se invalid a D.C. law prohibiting – banning – handguns, which the Court described as "the quintessential self-defense weapon."⁴⁹ It also explains why lower courts have generally declined to apply such per se rules to prohibitions on classes of arms – certain semiautomatic rifles and high-capacity magazines, for example – that are not quintessential self-defense weapons.⁵⁰

The formalist approach, by contrast, would define bans based not on their instrumental impact, but by reference to some other metric – a more purely historical approach, for example, or a conceptual identification of what elements of a right are essential and immune to prohibitions. It might be argued, for example, that "lineal descendants" of weapons protected at the Founding are immune to prohibition, not because of their contemporary utility, but because they are the "Arms" specified by the Second Amendment, and to deny them would be to flout the right entirely. Both of these approaches have been tried in class-of-arms cases, and the latter in particular may be useful where some conceptually essential aspect of a right is entirely prohibited, as might be the case for a law that totally prohibits the public carrying of arms, thus arguably eviscerating the right to "bear" arms.⁵¹ Nevertheless, in most instances, formalism will end up involving a fair bit of sub silentio functionalism, which raises concerns that it is not as transparent and discretion-restricting as supporters might suppose.

Finally, in some cases, the ban label can be shorthand for impermissible government purpose. If, for example, a law is significantly underbroad with regard to its stated purposes – prohibiting one disfavored thing but not other similarly

45. See *infra* Section II.B (analyzing functional bans).

46. See *infra* Section II.C (analyzing formal bans).

47. See *infra* Section II.D (analyzing animus bans).

48. *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008).

49. *Id.* at 629.

50. *Heller* itself noted that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.*

51. Illinois was the only state to have an explicit, statewide ban on public carry; it was struck down in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013).

situated things—then per se invalidity might be justified, not because of functionalism or formalism, but because the law’s structure demonstrates an impermissible government motive. The challenge to President Trump’s executive order limiting entry from certain Muslim-majority countries—commonly known as the “Muslim ban” or “travel ban”—is a case in point.⁵²

Each of these three ban frameworks has a role to play, and none will work in all contexts. Again, the Second Amendment provides useful illustrations. Functionalism works best when—as is usually the case—the question is whether a certain rightsholder has been impermissibly burdened in her ability to effectuate a constitutional right. Nearly all Second Amendment cases fall into this category, which suggests that courts in those cases should be forthright about the degree to which they are evaluating burdens even as part of a nominally bright-line analysis. Formalism, by contrast, is most appropriate where the essential sub-elements of a right—its necessary pieces—are historically or conceptually established, and a law threatens to deny one entirely. This is arguably the case, for example, for laws that totally prohibit public arms-carrying, which some say eviscerates the right to “bear” arms. Purposivism, in turn, is relevant if and when government motive matters. If, for example, it could be shown that a particular law is motivated by antigun bias, and that the Second Amendment is sensitive to such bias, then a law targeting guns more than other instruments or causes of violence might be constitutionally suspect.

Part I of this Article defines and situates the conceptual and doctrinal challenges that bans raise. These challenges are deeply intertwined with basic features of judicial review, including how to conceptualize the intersection of rights and regulations.⁵³ First Amendment jurisprudence illustrates that when such intersections are treated as “bans,” per se invalidity often follows.⁵⁴ Takings jurisprudence provides a few lessons about how to define bans in the first place,⁵⁵ but the use of bright-line rules based on poorly defined triggers nonetheless raises serious questions about judicial role.⁵⁶

Part II evaluates three possible answers: functionalism, formalism, and purposivism. Of the three, functionalism is generally the most descriptively accurate

52. See *infra* notes 334-342 and accompanying text (discussing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) and the framing of the “Muslim ban”).

53. See *infra* Section I.A.

54. See *infra* Section I.B.

55. See *infra* Section I.C.

56. See *infra* Section I.D.

and normatively desirable. It best accounts for how per se rules have been implemented in the free-speech and takings contexts, and seems especially well suited to evaluating most regulations of the right to keep and bear arms.

The Article concludes by describing how the Court could resolve the pending Second Amendment case *New York State Rifle & Pistol Ass'n v. City of New York* (*NYSRPA*) using a functionalist approach.⁵⁷ Petitioners have described the case as involving a “ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits.”⁵⁸ The central argument of this Article is that the Justices should not uncritically accept that characterization, nor the implication that the regulation is therefore per se invalid. Regardless of the particular outcome in *NYSRPA* (there is a good argument that the case should be dismissed as moot, since New York has changed the challenged law), constitutional-rights adjudication will continue to face the question of what bans are and why they matter.⁵⁹

I. TRIGGERS FOR TRUMPS: BURDENS AND THE NATURE OF JUDICIAL REVIEW

When and why rights should behave as trumps is a fundamental question of both jurisprudence and doctrine. But the choice is not all-or-nothing with regard to constitutional law as a whole, nor even with regard to any particular right. No right behaves like a trump all the time; almost all of them do some of the time. Within a given right's doctrinal machinery, some factual situations will lead to the application of a bright-line rule, while in other scenarios that same right will implicate weighted interest balancing. The question is what triggers the trumps. The answer, at least for some rights, is a conclusion that the challenged law constitutes a ban.

57. No. 18-280, 2019 WL 271961 (U.S. Jan. 22, 2019).

58. Petition for Writ of Certiorari, *NYSRPA*, 2018 WL 4275878, at *1 (No. 18-280); see *infra* Conclusion.

59. The Court recently denied the respondents' Suggestion of Mootness, though it indicated that the mootness claim would receive further consideration at oral argument on December 2, 2019. Order Denying Respondent's Suggestion of Mootness, *NYSRPA*, (No. 18-280) (Oct. 7, 2019).

A. *Rights as Occasional Trumps*

When exercising the power of judicial review in the context of constitutional rights, a court must determine at least two things: (A) the reach of the challenged government action, and (B) the reach of the constitutional right. A challenge will fail at the threshold if these two do not intersect, a result that courts can engineer by steering either away from the other – by narrowly defining the constitutional entitlement, for example⁶⁰ – or by imposing a saving construction on the statute.⁶¹ Where the government action and the constitutional right do not intersect, the law is valid – at least on its face.

What happens if the threshold is crossed? For rights absolutists in the mold of Justice Black,⁶² a finding that (A) and (B) intersect is the end of the inquiry, and the law must be struck down.⁶³ On this account, rights are entirely vulnerable to regulation outside of their domains, but entirely immune within them. The only task for a judge is, to repurpose Justice Owen Roberts’s famous dictum, to lay a statute alongside an article of the Constitution to see if the former “squares” with the latter.⁶⁴

But what does it mean to square? Descriptively speaking, Black’s absolutism has not carried the day: many laws burden a constitutional right and yet are constitutional. This means that finding an intersection between (A) and (B) is only the beginning of the analysis; one must next ask whether the regulation impermissibly burdens the right. This is evident in the oft-invoked distinction between “coverage” and “protection.”⁶⁵ Coverage refers to the threshold question

60. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

61. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (“Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.”) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)).

62. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874-75 (1960) (“[O]ne of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas – whatever the scope of those areas may be.”).

63. Greene, *supra* note 12, at 38-56 (providing examples of this characterization in U.S. constitutional-rights law).

64. *United States v. Butler*, 297 U.S. 1, 62 (1936). Justice Roberts’s account did not age well, see George D. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948), and is surely incomplete, but is also not entirely wrong. This Article is in some sense an effort to explore in more detail what it means to lay a statute and an article of the Constitution beside each other, and to ask if they “square.”

65. See, e.g., Post, *supra* note 1, at 1250; Schauer, *supra* note 1, at 1769.

of whether a particular person, activity, or thing triggers constitutional analysis at all. Some forms of “speech,” to take an easy example, do not implicate the First Amendment. With possible exceptions for cases of improper government motive,⁶⁶ these forms of speech can be banned without any further constitutional analysis – they are not covered by the First Amendment.

But even if a type of speech is covered, that does not mean it cannot be regulated at all. An activity might still be subject to regulation or even prohibition, depending in part on the level of protection it receives – the type of applicable scrutiny, for example. If all rights were absolute, coverage and protection would be the same, and courts would never resort to the doctrinal tests that have become the bread and butter of constitutional adjudication. Instead, the typical case involves two steps: an initial inquiry (sometimes assumed) regarding coverage, followed by a protection analysis that often involves means-end scrutiny.

This is not to say that Justice Black’s absolutism is entirely absent. One might argue that the function of means-end scrutiny is to identify the situations in which the constitutional right has been implicated, not solely those in which it has been violated. On this view, means-end scrutiny helps identify the boundaries of constitutional rights, rather than evaluating which trespasses are permissible. A law that survives scrutiny is, in effect, one that does not intersect with a constitutional entitlement; a law that fails strict scrutiny is one that does.

This characterization may have a kind of attitudinal appeal, to the degree that it preserves an image of rights as pristine and pure, even if not all-encompassing. Justice Hugo Black’s free-speech absolutism, for example, was sometimes described and defended as expressing a particular orientation toward rights,⁶⁷ even though he was not always a free-speech maximalist.⁶⁸ But as a tool for understanding doctrine, denying the interaction between regulations and rights is not particularly helpful. In practice, courts regularly evaluate laws’ constitutionality in terms of the burdens they impose – precisely what Justice Black (and, later, Ronald Dworkin)⁶⁹ would forbid. This would not make sense if rights were always trumps and all burdens were unconstitutional.

66. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 418 (1992) (noting that even “low-value” speech cannot be targeted on the basis of viewpoint discrimination).

67. Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and Bill of Rights*, *HARPER’S MAG.*, Feb. 1961, at 63–64 (cited in Greene, *supra* note 12, at 90).

68. William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 *CALIF. L. REV.* 107, 114 n.15 (1982) (collecting cases in which Justice Black “vote[d] to sustain many laws believed to be unconstitutional . . . even by more conservative colleagues not sharing his ‘absolute’ commitment to the [F]irst [A]mendment”).

69. DWORKIN, *supra* note 12, at 192.

Moreover, the particular methodology that a court chooses to employ often depends largely on how it characterizes the burden on the right: as minor;⁷⁰ substantial;⁷¹ significant;⁷² incidental;⁷³ or, in the case of a “ban,” complete.⁷⁴ This characterization generally comes after courts identify an intersection between a law and a constitutional right, but before they apply scrutiny or whatever other doctrinal test is found to be appropriate.⁷⁵

Such analysis, even if guided by doctrine, does not directly evaluate the constitutionality of the government action. It is classificatory, telling the court to apply one test or another. Content discrimination triggers strict scrutiny in First Amendment cases, for example.⁷⁶ But what constitutes content discrimination is

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70. See, e.g., *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (holding that a law requiring semiclosed primaries imposed only a “minor” burden on First Amendment associational rights and therefore did not warrant strict scrutiny).
71. *Volokh*, *supra* note 35, at 1454 (“[R]eligious freedom provisions that secure a substantive right to religious exemptions apply only to ‘substantial burden[s]’ on religious practice.” (internal citation omitted)).
72. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 683-84 (2000) (Stevens, J., dissenting) (concluding that only a law that “serious[ly] burden[s],” “significant[ly]” “affect[s],” or “substantial[ly] restrain[s]” a group’s ability to express its views should be seen as violating the right of expressive association).
73. *Emp’t Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (limiting the scope of the right by holding that neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment). Whether and how similar rules apply in the context of the Second Amendment is an interesting and largely open question. See Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 296 (2016); Michael C. Dorf, *Incidental Burdens and the Nature of Judicial Review*, 83 U. CHI. L. REV. ONLINE 97 (2016); see also Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 946-47 (2017) (exploring how the Second Amendment interacts with “private” restrictions on gun ownership).
74. There are exceptions to this sorting-by-burdens approach, including in equal-protection doctrine, where the Court tends to apply scrutiny based on the lines that are drawn (i.e., race-based or not) rather than the burdens that are imposed.
75. See generally Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (examining analysis of constitutional violations through the lens of the undue-burden standard from *Planned Parenthood of Se. Pa. v. Casey*, 505 US 833 (1992)).
76. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (describing the Court’s First Amendment jurisprudence).

hardly straightforward, and it has been the subject of various attempts at doctrinal innovation.⁷⁷ The same is true of the rule that heightened scrutiny in equal protection cases is triggered only when a government action has both discriminatory impact and discriminatory intent.⁷⁸ Such classificatory choices are often (albeit not always)⁷⁹ outcome determinative. Likewise, the characterization of a law as a ban generally precedes – and, in fact, moots – further evaluation of the law’s constitutionality.

Two important principles are worth emphasizing so far. First, it is not enough to say that a law burdens a constitutional right. That is the beginning, not the end, of evaluating its constitutionality.⁸⁰ Second, that evaluation will in many cases turn on how the burden is characterized. The type and significance of the burden will often determine what kind of means-end scrutiny a court will employ. Most constitutional-rights challenges will be resolved by one of these two steps: either they fail at the threshold because no right is burdened, or they are resolved at the second step, the stringency of which depends on the nature of the burden.

But sometimes courts sidestep means-end scrutiny and apply a bright-line rule of *per se* invalidity. These are the situations in which a right truly behaves as a trump: the triggers and consequences are set out *ex ante*, and to find them applicable is to apply them.⁸¹ Precisely because such rules are outcome determinative, it is especially important to understand what brings them into play and why. The answers will be specific to the right in question – free speech has its

77. See *Reed*, 135 S. Ct. at 2227. For commentary, see Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65 (2017); and Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233.

78. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

79. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003).

80. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803-04 (1984) (“[T]o say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation. It has been clear since this Court’s earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.” (emphases removed) (internal quotation marks omitted) (citation omitted)); cf. *District of Columbia v. Heller*, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting) (“[H]istorical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry.”).

81. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (defining a “rule” as “a legal direction which requires for its application nothing more than the determination of the happening or non-happening of physical or mental events – that is, determinations of *fact*”); *supra* notes 11-17 and accompanying text.

own unique concerns – but there might also be transsubstantive themes that illuminate what, in general, triggers the rights-as-trumps frame.

In his recent *Harvard Law Review* Foreword, *Rights as Trumps?*, Jamal Greene explores “two competing frames [that] have emerged for adjudicating conflicts over rights.”⁸² In the first, which corresponds with that of rights as trumps, “rights are absolute but for the exceptional circumstances in which they may be limited.”⁸³ In the second, which generally corresponds with proportionality review, “rights are limited but for the exceptional circumstances in which they are absolute.”⁸⁴ Greene argues that the first frame has been broadly employed by the Supreme Court in recent decades, but that it “has special pathologies that ill prepare its practitioners to referee the paradigmatic conflicts of a modern, pluralistic political order.”⁸⁵

Greene explains that the rights-as-trumps frame results not only from preferences for rules over standards, but from an understanding of the relevant rights regime.⁸⁶ Despite his general skepticism of the framework, Greene notes that it might be suitable where the paradigm cases are “pathological” and “courts must defend the very existence of individual rights against government bigotry, intolerance, or corruption.”⁸⁷ This would presumably include, for example, cases where government animus is a serious concern.⁸⁸ By contrast, proportionality review is appropriate where the paradigm cases “arise from the potential overreach or clumsiness of a government acting in good faith to solve actual social problems.”⁸⁹

Greene’s account is powerful and persuasive. And yet in some cases, courts employ the rights-as-trumps frame based not on the government’s apparent bigotry, intolerance, or corruption, but on the impact of a particular regulation.⁹⁰ Even cases of “clumsiness” may be subject to invalidation – including through per se rules that operate as trumps – when they go too far. This raises a different

82. Greene, *supra* note 12, at 30.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 96-119 (describing “contingent origins” of the rights-as-trumps frame in U.S. constitutional law).

87. *Id.* at 127-28.

88. In my framework, these cases fall under the purposivist header. See *infra* Section II.D.

89. Greene, *supra* note 12, at 128.

90. See generally Blocher, *supra* note 13 (arguing that proponents of rights-as-trumps often attempt to justify this approach in a particular instance by characterizing the burden on the right as total).

set of questions: not which government motives are impermissible, but which burdens amount to bans and why they must be invalidated.

This Article's approach shares much with Black and Greene, but also diverges both in its approach and its ultimate normative aims. Like Black and Greene, the ban framework endorses bright-line absolutism in some constitutional-rights cases. But I would define that set of cases differently. Rather than putting all the emphasis on whether a right intersects with a regulation—an inquiry that I think necessary but insufficient—or focusing exclusively on the pathological cases—which must be included, but not by themselves⁹¹—the ban framework described here can hopefully accommodate a sensitive consideration of both rights and government interests. *Per se* rules of invalidity are indeed appropriate where, for example, a regulation so burdens the core of a right that it cannot be justified, regardless of the government interest involved. The hard question is how to identify those situations.

The project of this Article is to suggest answers, and Part II does so through the lenses of functionalism, formalism, and purposivism. But first, it may be helpful to consider in more detail what the consequences are of labeling a law a ban, an issue that has received perhaps its most thorough treatment in free-speech jurisprudence, and when a law's impact can be described as total, an issue of particular interest to takings law.

B. Bans on Bans: Prohibitions on Mediums of Expression

Free-speech jurisprudence provides ready examples of the constitutional consequences of labeling something a ban. Cases involving restrictions on particular categories of speech are frequently characterized by disagreement about whether the challenged law is a ban. Yet the consequence of affixing the label is often clear—*per se* invalidity—even when the conditions for it are not. As the Ninth Circuit has put it, “a total ban of a means of expression” may be “*per se* unconstitutional,” but “the interplay between the Court's often rigid statements about total bans on modes of expression and its traditional ‘time, place, or manner’ test is not entirely clear.”⁹²

That interplay is indeed unclear, though the Court has generally moved from a formalist approach (striking down as bans those laws that prohibit a “means of expression”) to a more functionalist one (applying the ban label based on how severely a law interferes with the overall ability of speakers to communicate).

91. See Blocher, *supra* note 13, at 123–25.

92. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010) (striking down a law under intermediate scrutiny and thus avoiding the question of *per se* invalidity).

Whatever its precise mechanism, calling something a ban seems to matter. The Supreme Court has struck down laws that, by its own characterization, “completely banned”⁹³ the distribution of pamphlets within a municipality,⁹⁴ handbills on the public streets,⁹⁵ the door-to-door distribution of literature,⁹⁶ and live entertainment.⁹⁷ In fact, the Ninth Circuit opinion quoted above concluded that *Kovacs v. Cooper*—upholding a prohibition on the use of sound amplifiers that emitted “loud and raucous noises” on public streets—is “the only case in which the Supreme Court has upheld a total ban on a medium of communication.”⁹⁸

The accuracy of that description depends on how one defines “medium of communication”—a challenge that the next Section explores in the realm of takings doctrine. But there can be little doubt that where the Court sees a ban, it is more likely to strike the law down. To take one prominent example, in *Citizens United v. FEC*, the majority acknowledged the government interests underlying the challenged restriction on corporate campaign spending, but concluded that “[a]n outright ban on corporate political speech during the critical preelection period [wa]s not a permissible remedy.”⁹⁹ In response, the dissent noted that “the majority invokes the specter of a ‘ban’ on nearly every page of its opinion.”¹⁰⁰

To what end? Why does it matter if a law is described as a ban? Sometimes, the Court has suggested that bans are subject to a kind of super-strict scrutiny, in which only perfect tailoring suffices: “A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.”¹⁰¹ Such a rule makes it particularly important to understand the

93. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (characterizing the following cases as such).

94. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking down as facially invalid an ordinance that prohibited “the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager”).

95. *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

96. *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider v. New Jersey*, 308 U.S. 147, 164-65 (1939).

97. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981).

98. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1067 (9th Cir. 2010) (citing *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949)).

99. *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

100. *Id.* at 415 (Stevens, J., concurring in part and dissenting in part) (“This characterization is highly misleading, and needs to be corrected.”).

101. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). Justice Brennan, who dissented in *Ward* but voted to uphold similar bans in many other cases, nonetheless provided a somewhat more qualified statement of the rule—limiting it to “important” mediums of communication. See *Members of the City Council v.*

relationship between the definition and treatment of bans. If bans are defined narrowly—as only those laws reaching a particularly broad class of protected conduct, for example—then super-heightened scrutiny (or, for that matter, *per se* invalidity) seems like a sensible approach.¹⁰² In other contexts, however, the perfect-tailoring requirement seems unnecessarily strong. All laws prohibit what they prohibit, after all, and can thus be described as bans, but they cannot all raise the same kinds of fundamental concerns. Otherwise, rights really would function as absolute trumps and the public interest in regulation would never even be taken into consideration. Even the First Amendment’s overbreadth doctrine applies only to laws that are substantially overbroad.¹⁰³

In practice, the application of the complete-ban rule has been more forgiving than its phrasing suggests. In *Frisby v. Schultz*—the same case in which the Court claimed that “[a] complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil”¹⁰⁴—the Court upheld a municipal ordinance banning protests outside of residences, reasoning that “the ‘evil’ of targeted residential picketing . . . is ‘created by the medium of expression itself’” and thus a “complete ban of that particular medium of expression is narrowly tailored.”¹⁰⁵

Similarly, in *Members of the City Council v. Taxpayers for Vincent*, the Court upheld a citywide ordinance banning all signs on public property.¹⁰⁶ According to the majority, “the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.”¹⁰⁷ Thus, “the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.”¹⁰⁸ This seems

Taxpayers for Vincent, 466 U.S. 789, 824 (1984) (Brennan, J., dissenting) (“A total ban on an important medium of communication may be upheld only if the government proves that the ban (1) furthers a substantial government objective, and (2) constitutes the least speech-restrictive means of achieving that objective.”).

102. *Cf.* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (noting that in a traditional public forum, “the government may not prohibit all communicative activity”).

103. *United States v. Williams*, 553 U.S. 285, 301-02 (2008).

104. 487 U.S. at 485; *see also* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 814 (2000) (“[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”).

105. 487 U.S. at 487-88 (citations omitted).

106. 466 U.S. at 789.

107. *Id.* at 810.

108. *Id.*

somewhat more deferential than one might expect from the perfect-tailoring rule quoted above. What else could have been driving the Court’s analysis?

Notably, *Vincent* evaluated the ban functionally, taking the perspective of would-be speakers. The Court focused on investigating, as time-place-manner cases typically do, the adequacy of the alternatives the law left open: “[T]he findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles.”¹⁰⁹ The impact of the ban on public posters was less troubling, then, because “nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees’ ability to communicate effectively is threatened by ever-increasing restrictions on expression.”¹¹⁰ Likewise, in *Clark v. Community for Creative Non-Violence*, the Court acknowledged that a ban on sleeping on the National Mall was indeed a “limitation[] on the manner in which the demonstration could be carried out.”¹¹¹ And yet, citing *Kovacs* and *Vincent*, it concluded that “the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.”¹¹²

As explored in more depth below,¹¹³ this functional approach suggests that the underlying question in any case involving an alleged ban is what practical impact it has on a rightsholder’s ability to effectuate his or her constitutional interests. That was the main theme of *City of Ladue v. Gilleo*: “Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech.”¹¹⁴ The Court struck down the challenged ordinance, which restricted the use of yard signs, because it “completely foreclosed a venerable means of communication that is both unique and important.”¹¹⁵

Of course, focusing on mediums that are “unique and important” – for communication, self-defense, or whatever other constitutional interests are at stake – raises the question again of what bans are. Any law that has bite in a particular case is a ban as to that which it prohibits. What about bans on drone

109. *Id.* at 812.

110. *Id.*

111. 468 U.S. 288, 294 (1984).

112. *Id.* at 297.

113. See *infra* Section II.B (describing the functional approach to definition and evaluation of bans).

114. 512 U.S. 43, 55 (1994).

115. *Id.* at 54.

videography?¹¹⁶ Recording the police?¹¹⁷ Robocalls?¹¹⁸ Tattooing?¹¹⁹ Front yard gardens?¹²⁰ Are these bans problematic only if one thinks that the mediums are unique and important?

Again, the Supreme Court's free-speech jurisprudence provides illustrative examples. In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court considered a challenge to a Minnesota State Fair rule requiring organizations wishing to sell or distribute goods and written material to do so from an assigned location on the fairgrounds.¹²¹ The Court rejected the argument that this was "a total ban on protected First Amendment activities in the open areas of the fairgrounds." Because organizations were allowed to solicit funds and distribute and sell literature from a fixed location within the fairgrounds, the Court treated the regulation as a time-place-manner restriction.¹²²

It is hard to read this as anything other than a determination that the law permitted adequate alternatives — precisely the kind of analysis that a rule of per se invalidity would forbid where a ban is involved. So which part of the analysis comes first? Characterization of the burden, or choice of a doctrinal test? In *Ashcroft v. ACLU*, the Court struck down the Child Online Protection Act, which in relevant part made it illegal for any commercial sources to allow minors access to "harmful" content (with the latter being defined roughly as that which is constitutionally obscene).¹²³ In his concurrence, Justice Kennedy wrote, "[I]t is no

116. Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIR. 57, 69 (2013) ("A wholesale ban of drone videography would thus likely not be found constitutional, because it would ban an entire medium of expression.")

117. Jacqueline G. Waldman, Note, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, 2014 U. ILL. L. REV. 311, 345 (arguing against the constitutionality of bans on police recording).

118. Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 244 (2009) ("An outright ban [on robocalls] would frustrate and block such informative uses of robocalls. A statute cannot 'foreclose an entire medium of expression.'" (citation omitted)).

119. Laura Markey, *Repairing the Rusty Needle: Recognizing First Amendment Protection for Tattoos*, 21 KAN. J.L. & PUB. POL'Y 310, 327 (2012) (arguing that "[a] complete ban on tattooing would eliminate the entire medium of expression" and would thus be unconstitutional).

120. Jaime Bouvier, *The Symbolic Garden: An Intersection of the Food Movement and the First Amendment*, 65 ME. L. REV. 425, 454 (2013) (arguing that prohibitions on front-yard gardens would be constitutional).

121. 452 U.S. 640 (1981).

122. *Id.* at 655 n.16.

123. 535 U.S. 564 (2002).

answer to say that the speaker should ‘take the simple step of utilizing a [different] medium,’” citing the “entire medium of expression” passage from *Ladue*.¹²⁴ The plurality disputed not the rule, but its applicability: “COPA does not, as Justice Kennedy suggests, ‘foreclose an entire medium of expression’ It only requires that such material be placed behind adult identification screens.”¹²⁵ Again, the consequences, and in some sense the constitutional conclusion, turned on a characterization of the law’s impact as a ban.

What seems to be at work here is a version of the levels-of-generality problem familiar throughout constitutional law,¹²⁶ albeit in a somewhat new guise. In most cases, narrowly defining the constitutional interest at issue spells doom for the challengers, as in *Bowers v. Hardwick*, where the Court characterized the question as whether the Constitution “confers a fundamental right upon homosexuals to engage in sodomy.”¹²⁷ But although a broad characterization of the interest can establish that a case does in fact involve constitutional coverage,¹²⁸ the opposite is true for a ban. Assuming constitutional coverage, the more narrowly the right can be described—whether a right of homosexuals to engage in sodomy, or of law-abiding citizens to possess high-capacity magazines—the more likely it is that a particular law will entirely eviscerate that right and thus be an impermissible ban.

The problem is therefore both normative and definitional. The free-speech cases demonstrate that the characterization of a law as a ban can carry serious consequences (or at least is often accompanied by them),¹²⁹ but, as we have seen, what it means for a law to be a ban is often disputed. In some of the early cases,¹³⁰

124. *Id.* at 596 (Kennedy, J., concurring).

125. *Id.* at 583 n.14 (plurality opinion) (internal quotation marks omitted) (citations omitted).

126. See generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (arguing that the level-of-generality problem asks “at what level of generality should the Court describe the right previously protected and the right currently claimed?”).

127. 478 U.S. 186, 190 (1986); see also Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) (arguing that the level of generality should be based on the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”); Coenen, *supra* note 42, at 804 (“A right is more likely to qualify as fundamental when we characterize that right as a lofty abstraction rather than a particularized grievance . . .”).

128. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward [The statutes in *Bowers*] have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”).

129. I hedge a bit here, because—as much of the discussion is meant to show, see, e.g., *infra* notes 188–189 and accompanying text—causation is hard to prove.

130. See *supra* notes 94–96.

the Court treated various mediums of communication (handbills, pamphlets, door-to-door distribution of literature) as immune to prohibition without discussing in any detail the impact that such a prohibition would have on rightsholders' abilities to communicate. The analysis was basically formal; each medium was treated as intrinsically valuable.

But in later cases, the Court evaluated and often struck down such bans using a more functional approach. *Ladue's* explanation (worth quoting again), makes that quite clear: "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."¹³¹ The flexible application of the alleged perfect-tailoring requirement in *Frisby* and *Vincent* likewise suggests that the underlying consideration is, as the Court said in *Vincent*, whether the law blocks a "uniquely valuable or important mode of communication, or . . . appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression."¹³² This is a straightforwardly functional analysis.

Neither approach has commanded an explicit or obvious consensus. To return to the case with which this Section began, this debate was central to *Citizens United*. While Justice Kennedy's majority opinion "invoke[d] the specter of a 'ban' on nearly every page of its opinion," Justice Stevens's dissent argued that this "ominous image" was "highly misleading, and needs to be corrected."¹³³ In the dissent's account, the law "functions as a source restriction or a time, place, and manner restriction."¹³⁴ Of course, "[s]uch laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a 'ban' aims at a straw man."¹³⁵ Justice Stevens argued that the challenged restrictions did not impose severe burdens, and that, like those upheld in prior cases, they "leave open many additional avenues for corporations' political speech."¹³⁶

Despite nearly a century of case law involving the ban framework, First Amendment doctrine has yet to develop a doctrinal machinery with which to evaluate whether *Citizens United* involved a ban. That is unsettling, considering

¹³¹. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

¹³². *Id.* at 54 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)).

¹³³. *Citizens United v. FEC*, 558 U.S. 310, 415 (2010) (Stevens, J., dissenting).

¹³⁴. *Id.* at 419.

¹³⁵. *Id.*

¹³⁶. *Id.* at 416.

the potentially outcome-determinative nature of the debate. There is, however, one area of law in which the Court has consciously and diligently tried to answer that question: the law of takings.

C. *Defining Bans: The Denominator Problem in Takings Law*

Ever since Justice Holmes’s observation that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,”¹³⁷ courts have struggled to establish what constitutes “too far.”¹³⁸ Volumes have been written on the shape and development of takings law,¹³⁹ including the Supreme Court’s efforts to develop doctrinal rules for identifying when a regulation goes too far.¹⁴⁰ Those efforts illustrate some of the main doctrinal challenges in identifying what constitutes a ban. To characterize a law as a ban, after all, usually means concluding that it fully deprives someone of some component of a constitutional entitlement. That, in turn, means identifying which components matter—the denominator against which the law’s impact should be measured. And that turns out to be a very difficult problem even with regard to a seemingly concrete legal entitlement like property.

In the takings context, an “outcome[-]determinative”¹⁴¹ question is “how to define the unit of property ‘whose value is to furnish the denominator of the fraction,’”¹⁴² when measuring how much a regulation burdens a property owner’s interests. In *Pennsylvania Coal Co. v. Mahon*, a case often regarded as having inaugurated regulatory-takings jurisprudence, the Court considered whether a regulation that prevented removal of coal-supporting above-ground

137. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

138. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (“Courts apply the ‘test’ [of *Mahon*] but actually decide cases on the basis of undisclosed, ad hoc judgments of the kind and extent of diminution that constitutes takings.”).

139. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013); Christian R. Buset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CALIF. L. REV. CIR. 187 (2013).

140. See, e.g., Gary Lawson et al., “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 3 (2005) (noting broad dissatisfaction with takings framework).

141. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

142. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

structures went “too far” and thus constituted a taking.¹⁴³ Justice Holmes said yes, because the support estate was “recognized in Pennsylvania as an estate in land,”¹⁴⁴ was severable from the surface estate and was owned by a different party.

In effect, this was the equivalent of defining yard signs as “an entire medium of expression”¹⁴⁵ or handguns as an “entire class of ‘arms’,”¹⁴⁶ the prohibition of which triggers a per se rule. (In the takings context, the rule triggers the requirements of public use and just compensation rather than per se invalidity, but the challenges are otherwise analogous.) But Holmes’s analysis can also be understood as fundamentally functionalist, rather than formalist—a matter of experience rather than logic, as it were. He notes that it “is a question of degree—and therefore cannot be disposed of by general propositions” and that “[o]ne fact for consideration in determining such limits is the extent of the diminution” of the property’s value.¹⁴⁷ This attention to the regulation’s actual impact, rather than to historical or conceptual formalism, is the hallmark of the functional approach described below.¹⁴⁸

Much of the Court’s subsequent regulatory-takings jurisprudence can be understood through a similarly functional lens. Although the “too far” inquiry remains central in takings law, the Court has generally evaluated the impact of regulations on the value of the parcel as a whole, rather than on any subpart of ownership rights. In *Penn Central Transportation Co. v. City of New York*,¹⁴⁹ the Supreme Court was again confronted with the question of whether interests in a parcel of land (air rights, this time, instead of a support estate) were severable for the purposes of a takings claim.¹⁵⁰ The Court said no: “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”¹⁵¹ The Court held that takings claims should instead be assessed according to “the nature and extent of the interference with rights in the *parcel as a whole*.”¹⁵² In

143. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

144. *Id.* at 414. Justice Holmes added that it was “a very valuable estate.” *Id.*

145. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

146. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

147. *Mahon*, 260 U.S. at 413, 416.

148. See *infra* Section II.B.

149. 438 U.S. 104 (1978).

150. *Id.* at 130.

151. *Id.*

152. *Id.* at 130-31 (emphasis added).

doing so, courts were to engage in an “essentially ad hoc, factual inquir[y],”¹⁵³ taking into account the “character of the governmental action”;¹⁵⁴ the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations”;¹⁵⁵ and the nature of the public purposes or interests involved.¹⁵⁶

Penn Central preserved some room for bright-line inquiries, but really only at the threshold. The multifactor test, the Court noted, was applicable only after an initial inquiry; uses in which individuals cannot have a “reasonable expectation[]” of a property interest¹⁵⁷ or those that are incompatible with the public welfare simply do not constitute “property” for the purposes of a takings claim.¹⁵⁸ *Penn Central* thus, in effect, applies the basic two-step coverage-protection test described above: a bright-line threshold followed by means-end scrutiny, the contours of which depend in part on the burden the regulation imposes.¹⁵⁹

Penn Central’s multifactor balancing test has prompted a great deal of subsequent litigation, much of it focused on the development of per se rules to address total deprivations of property rights—the equivalent of bans. Just as a medium of expression or class of arms must be defined against some background class, so too must courts identify the denominator against which to measure the impact of a property regulation.¹⁶⁰ This was the underlying challenge in the debate

153. *Id.* at 124.

154. *Id.*

155. *Id.*

156. *See id.* at 124–27 (noting that the imposition of restrictions on property use for the protection of public health and welfare often will not amount to a taking unless it obliterates the entirety of the property’s value).

157. *See id.* at 124–25.

158. *See id.* at 125–26 (citing cases observing there is no property interest in navigable waters or a high-flow rate for tail waters of a dam and invoking the example of zoning laws, which may even “prohibit[] the most beneficial use of the property” because they safeguard “the health, safety, morals, or general welfare”).

159. *See supra* Section I.A.

160. *See, e.g.,* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 337 (2002) (declining to treat the right to develop during a particular time period as the denominator); *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (effectively treating the right to devise property as the denominator); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 499–502 (1987) (declining to treat the “support estate” as the denominator even though it was a distinct property interest under state law); *Andrus v. Allard*, 444 U.S. 51, 64 (1979) (declining to treat the right to sell property as the denominator).

about “temporary takings,” whereby a landowner is deprived of all use for a limited time, and “total takings,” whereby a landowner is deprived of all economically beneficial use of the land.¹⁶¹

In the temporary takings cases, the denominator problem involves time. Imagine that a holder of a one-hundred-year lease is deprived of that property for five years. Is this a five percent deprivation of the one-hundred-year lease (subject to *Penn Central*'s multifactor test)? Or is it a one hundred percent deprivation of five years' worth of ownership (subject to a bright-line rule)? In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Supreme Court held that a church was entitled to compensation when an ordinance temporarily prohibited it from rebuilding a camp for handicapped children in a flood plain.¹⁶² In dissent, Justice Stevens argued that the challenge failed at the threshold, since the very use that was prohibited ran counter to the long-recognized precept that “all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.”¹⁶³ Moreover, Justice Stevens argued that the Court had erred by recognizing the possibility of temporary takings claims in the first place.¹⁶⁴ Justice Stevens predicted—as he would again in *Heller*—that the decision would generate a great deal of unproductive litigation.¹⁶⁵

161. In practice, these categories are not always easily distinguishable, as temporary takings are just total takings where the asserted denominator is a period of time as opposed to a partial or use interest in land. Even *Lucas* was, arguably, a temporary-takings case on its facts. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1061-62 (1992) (Stevens, J., dissenting) (“If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction.”).

Justice Marshall's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.* is the other leading example. 458 U.S. 419, 441 (1982) (“We affirm the traditional rule that a permanent physical occupation of property is a [per se] taking.”).

162. 482 U.S. 304, 322 (1987).

163. *Id.* at 325 (Stevens, J., dissenting) (quoting *Keystone*, 480 U.S. at 491-92).

164. *Id.* at 322.

165. *See id.* at 322 (“The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process.”); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 680 (2008) (Stevens, J., dissenting) (“I do not know whether today's decision will increase the labor of federal judges to the ‘breaking point’ envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.”); *Lucas*, 505 U.S. at 1061 (Stevens, J., dissenting) (“Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of ‘regulatory takings.’”).

Fifteen years after its attempt to lay down a bright-line rule in *First Evangelical*, the Court retreated to a more flexible interest-based analysis in another temporary-takings case: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁶⁶ The Court explained that “defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.”¹⁶⁷ Thus, the Court clarified that temporary-takings claims could succeed, but must be assessed using “careful examination and weighing of all the circumstances”¹⁶⁸ under *Penn Central*.¹⁶⁹

The second notable category of per se takings jurisprudence involves so-called “total takings,” which are subject to the rule of *Lucas v. South Carolina Coastal Council*.¹⁷⁰ In that case, the owner of two beachfront lots was prohibited from building homes on them. He argued, and the South Carolina district court held, that this prohibition had rendered his land “valueless.”¹⁷¹ Based on that suspect factual holding,¹⁷² Justice Scalia announced a bright-line categorical rule subject to historically indicated exceptions, just as he would later do in *Heller*.

The per se rule of *Lucas* requires that compensation be paid “where regulation denies all economically beneficial or productive use of land.”¹⁷³ When, in other words, a taking is “total,” compensation will always be required, regardless of how the other *Penn Central* factors might be applied—a per se rule, triggered by a total deprivation. Relying on the trial court’s characterization of the “coastal-zone construction ban,” Justice Scalia found that the rule applied to *Lucas*’s own case.¹⁷⁴ However, as Justice Stevens’s dissent pointed out, *Lucas* was

166. 535 U.S. 302 (2002).

167. *Id.* at 331; see also *id.* (“Petitioners’ ‘conceptual severance’ argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.”).

168. *Id.* at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

169. *Id.* at 335-36.

170. 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting).

171. *Id.* at 1007-10 (majority opinion).

172. See *id.* at 1076-77 (Souter, J., dissenting) (labeling the state trial court’s factual conclusions “highly questionable” and arguing that the unreviewable nature of that suspect factual finding rendered the case an improper vehicle for clarifying the concept of total, categorically compensable takings).

173. *Id.* at 1015.

174. *Id.* at 1020-32.

arguably best understood as a temporary-takings case.¹⁷⁵ After all, the harm the property owner complained of was simply “the delay caused by the temporary existence of the absolute statutory ban on construction.”¹⁷⁶ As this example suggests, temporary takings are just total takings where the asserted denominator is a given period of time.

More generally, as Justice Blackmun observed in his dissent, the “dispositive inquiry” will always “depend on how ‘property’ is defined,” a definition that lacks an “objective” principle.¹⁷⁷ Justice Scalia in fact acknowledged that even “[c]onfiscatory regulations” need not be considered compensable takings if the restrictions they codify “inhere in the title itself,” such as restrictions on public nuisance.¹⁷⁸ In effect, then, common-law exceptions get omitted from the denominator when evaluating whether a restriction constitutes a total taking. And as Justice Stevens emphasized, this meant that “the categorical rule established in this case is only ‘categorical’ for a page or two in the U.S. Reports. No sooner does the Court state that ‘total regulatory takings must be compensated,’ than it quickly establishes an exception to that rule.”¹⁷⁹

Perhaps more importantly, those exceptions typically involve precisely the kind of malleability that a per se rule might be thought to eliminate; finding something a nuisance, after all, depends on factors such as whether a use is harmful.¹⁸⁰ The majority’s opinion thus shifted uncertainty and discretion away from the evaluation of the regulation, as in *Penn Central*, to the characterization of the interest itself. In either case, judges would be called upon to determine, *inter alia*, the harmfulness of a use.

In 2017, the Supreme Court revisited the denominator problem yet again in *Murr v. Wisconsin*.¹⁸¹ Property owners had come to own two adjacent parcels of

175. *Id.* at 1061–62 (Stevens, J., dissenting).

176. 505 U.S. 1003, 1062 (1992) (Stevens, J., dissenting).

177. *Id.* at 1054 (Blackmun, J., dissenting).

178. *Id.* at 1029 (majority opinion).

179. *Id.* at 1067 (Stevens, J., dissenting) (citation omitted).

180. *Id.* at 1054 (Blackmun, J., dissenting) (“Even more perplexing, however, is the Court’s reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful.”); *id.* at 1067–71 (Stevens, J., dissenting) (arguing that nuisance has long been a flexible and evolving doctrine but that the Court’s decision threatens to arrest it).

181. 137 S. Ct. 1933 (2017).

land, but were prohibited from building on the smaller of the two.¹⁸² The owners argued that this constituted a total taking of the value of the smaller lot. The state responded that state property law, which merged the two commonly owned parcels into one, should be the only determinant of the denominator.¹⁸³ In *Murr*, the Court formulated a new functional test to determine the denominator, asking “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts,” and considered (1) “treatment . . . under state and local law;” (2) “physical characteristics;” and (3) “value . . . under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.”¹⁸⁴

What can be gleaned from all of this? From *Mahon* to *Murr*, the Court has tried for nearly a century to generate doctrinal rules to determine whether a regulation has gone “too far,” and to characterize the impact of a regulation on property entitlements. In large part, this has meant focusing on the property interests themselves—the denominator, as it were. Sometimes, the Court has employed categorical rules, as in *Lucas*. But what counts as the denominator—and thus what counts as a total deprivation—has typically come back to an all-things-considered evaluation, as in *Murr*. In general, then, the Court has embraced the functionalist strain in *Mahon* and rejected the conceptual formalism of defining the denominator based entirely on background principles of state law.

D. *Ban-scendental Nonsense and the Functional Approach*

Given the complicated nature of the ban framework, it is worth asking whether any effort to flesh out the concept—or at least to give it legal weight—is doomed to failure. Would it be better to give up on the enterprise, and to banish the ban framework entirely?

Right around the time that the Supreme Court was issuing its formalist ban-on-bans decisions in First Amendment cases,¹⁸⁵ Felix Cohen published what remains one of the most famous and influential articles in legal theory, *Transcendental Nonsense and the Functional Approach*.¹⁸⁶ Cohen argued, to devastating effect, that threshold decisions about categorization (where is a corporation

182. *Id.* at 1939-42.

183. *Id.*

184. *Id.* at 1945-46.

185. See *supra* notes 93-97 and accompanying text.

186. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

located?) were in fact effectively decisions on the merits (is this corporation subject to in personam jurisdiction?) and that the forms of legal argument often obscure what is effectively an instrumentalist assessment. He summarized:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.¹⁸⁷

Would it not be better to engage the “social forces” directly, and give up on doctrinal conceptualism?

One need not be a full-fledged legal realist to recognize the possibility that calling something a ban reflects a conclusion of invalidity rather than a basis for it. A judge, litigant, or scholar who believes a law to be unconstitutional on whatever grounds might therefore call it a ban without necessarily believing it to be so. The challengers in *Trump v. Hawaii*,¹⁸⁸ for example, would not have dropped their case if it had been convincingly shown that President Trump’s executive orders should not be called “bans.”

It is entirely possible, in other words, that the ban framework is mostly rhetorical. But the same could be said of nearly any legal argument and should not be an excuse for ignoring how such arguments work.¹⁸⁹ Rhetoric can be unpacked and made transparent, and one can pursue rigor and clarity without becoming enchanted by transcendental nonsense.¹⁹⁰

Cohen’s message is still fundamental, though. At the very least, the lessons of First Amendment and takings law cast doubt on the notion that the ban framework will eliminate, or even reduce, the exercise of judicial discretion. Although per se invalidity may have a satisfyingly rule-like quality, it is almost inevitably triggered by characterizations that themselves involve significant judicial discretion. *Lucas* is a case in point. Justice Scalia’s majority opinion is perhaps

187. *Id.* at 812.

188. 138 S. Ct. 2392 (2018).

189. James Boyd White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (“Let us begin with the idea that the law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else?”).

190. It should be noted that Cohen himself authored a treatise (on Federal Indian Law), and presumably saw some value in the doctrinal enterprise. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 649 (2006).

the Court’s most notable effort to establish a per se takings rule. And yet the impact of that effort in *Lucas* itself was to compound an almost-certainly erroneous exercise of judicial power and discretion: the conclusion that denying Lucas the freedom to build seaside homes on his beachfront property had deprived him of the only economically beneficial use of that property.¹⁹¹ Rather than limiting judicial power, then, the *Lucas* rule effectively shifted it to a different stage: the characterization of the law’s impact—an inquiry that, as *Lucas* itself shows (and as Cohen perceived), can involve significant complications. The inevitability of judgment came full circle in *Murr*, as the Court returned to a “reasonable expectations” rule for defining the property interest against which a deprivation should be measured.¹⁹²

But even if the ban framework cannot cabin judicial discretion, it might still be useful for channeling judicial power toward a particular—and undoubtedly limited—set of cases in which per se rules are appropriate. The narrowness of that set is evident in the cases. In free-speech cases such as *Frisby* and *Vincent*, the Court went to great lengths to conclude that no per se rule was needed.¹⁹³ In *Tahoe-Sierra*, the Court explicitly reiterated the limited nature of those rules: “Anything less than a ‘complete elimination of value,’ or a ‘total loss,’” the Court emphasized, “would require the kind of analysis applied in *Penn Central*.”¹⁹⁴ Indeed, the circumstances under which *Lucas*’s rule would apply appear so vanishingly rare that they likely did not even occur in *Lucas* itself.

This suggests that even if bans appropriately trigger per se rules, what counts as a ban should be narrowly defined, whether in the context of takings or, for that matter, the right to keep and bear arms.¹⁹⁵ After all, applying a per se rule of invalidity to bans based on a threshold characterization of the law means that the

191. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1076-77 (1992) (Souter, J., dissenting).

192. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-46 (2017).

193. See *supra* notes 104-110 and accompanying text.

194. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992)).

195. See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650, 666-68 (D.C. Cir. 2017) (striking down Washington, D.C.’s good-cause concealed carry licensing standard under a “categorical approach,” upon finding that the law was applied in such a way to deny “the typical citizen” the freedom to carry a gun); *id.* at 668 (categorizing its holding as “rest[ing] on a rule so narrow that good-reason laws seem almost uniquely designed to defy it: that the law-abiding citizen’s right to bear common arms must enable the typical citizen to carry a gun”); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (noting that, with the exception of “broadly prohibitory laws restricting the core Second Amendment right,” courts are “left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights”).

public's interest in enacting the regulation – what Jamal Greene has recently described as “a democratic people's first-order right to govern itself”¹⁹⁶ – will receive no consideration whatsoever. This goes beyond even strict scrutiny, which holds out the possibility that even a total prohibition on some class of activity can be justified if the government's interest is sufficient and the law is properly tailored.¹⁹⁷

It is crucial, then, to get the definition of bans right. Cases like *Tahoe-Sierra* make clear that it is too simplistic to label a law a ban, in a constitutionally consequential sense, based solely on the fact that it prohibits a particular thing. As the Court has noted, “To the extent that any portion of property is taken, that portion is always taken in its entirety”¹⁹⁸ The decision to call a law a ban must turn on some broader assessment of the intersection of the regulation and the constitutional interest. What, for other rights, is the equivalent of the “parcel as a whole”? What is the denominator for evaluating the delays imposed by waiting periods for abortions or gun purchases?

At least three possibilities present themselves, each of which are outlined above¹⁹⁹ and will be more thoroughly explored in the following Part. First, one might take a formalist approach and declare that certain things are simply immune to prohibition, regardless of the public and private interests involved. That seems to be the approach the Court took in the early free-speech cases, effectively treating certain mediums of expression as intrinsically valuable.

But in both free-speech and takings law, the Court has generally moved in a more functional direction, evaluating bans based on the degree to which they interfere with rightsholders' ability to pursue their constitutionally guaranteed interests – expression, for example, or economic development of property. This is perhaps most evident in the free-speech cases, where the analysis has moved away from an intrinsic protection for mediums of expression and toward a more open consideration of the ends those mediums serve and the alternatives that challenged prohibitions leave open.

196. Greene, *supra* note 12, at 128.

197. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (upholding challenged speech restriction despite application of strict scrutiny); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25–39 (2010) (same).

198. *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993).

199. See *supra* notes 48–52 and accompanying text.

Finally, some of the cases contain elements of a third approach: one that uses bans as a proxy for impermissible government purposes. Such purposivist analysis is central to many First Amendment theories,²⁰⁰ and strains of it can be heard in *Citizens United*.²⁰¹ Perhaps more surprisingly, *Lucas*, too, provides a purpose-based justification for its total-deprivation rule:

[R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.²⁰²

The preceding discussion has attempted to shed some light on constitutional burdens and their role in adjudication. That is not a purely conceptual inquiry: the exercise of judicial review in any given case could very well turn on whether a court understands a law to be a ban. And yet the standard tools of constitutional and statutory analysis do not provide a clear way of characterizing those burdens or evaluating why that characterization matters. The following Part attempts to craft such tests.

II. IDENTIFYING AND EVALUATING BANS

Having explored the relevance of the ban label, the next challenges are to articulate potential methods of identifying bans and to explain what makes bans constitutionally problematic. Regulation of the right to keep and bear arms is a particularly useful and important context in which to do so.

Although Second Amendment doctrine is beginning to solidify in the lower courts,²⁰³ it remains open to a range of descriptive and normative accounts²⁰⁴

200. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“[N]otwithstanding the Court’s protestations in *O’Brien*, . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”).

201. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (arguing that the First Amendment is “[p]remised on mistrust of governmental power”); *id.* at 339 (concluding that the law’s “purpose and effect are to silence entities whose voices the Government deems to be suspect”).

202. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

203. See generally Ruben & Blocher, *supra* note 28.

204. Compare David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (arguing that empirical evidence shows some courts are underenforcing

and is the subject of intense disagreement.²⁰⁵ Moreover, it is relatively unconstrained by Supreme Court precedent,²⁰⁶ and there has been some judicial support for shaping its doctrine using per se rules rather than standards—or even the tiers of scrutiny.²⁰⁷ As Chief Justice Roberts put it at oral argument in *Heller*, “none of [the levels of scrutiny] appear in the Constitution;” instead, they “just kind of developed over the years as sort of baggage that the First Amendment picked up.”²⁰⁸ Characterizing a law as a ban is an easy way to leave that baggage where it lies.

After a brief overview of existing Second Amendment doctrine, and a more detailed focus on class-of-arms claims as triggers for trumps, this Part investigates the functional, formalist, and purposivist approaches described above. Although each of the three may have its place, the functional approach is generally the best way to transparently identify and evaluate serious burdens on constitutional rights. It is consistent with the constitutional-rights jurisprudence described in Part I and is especially well suited to address Second Amendment claims, which are rooted in concerns about the practical ability of gun owners to defend themselves.

Formalism may have a role to play in situations where some conceptually essential aspect of a right is being prohibited (the right to “carry” is an arguable example), but in most cases the supposedly formalist approach will end up involving functionalism in practice. Even when courts attempt to identify formal categories via historical analysis in Second Amendment cases, for example, they will almost inevitably have to rely on analogies regarding the effectiveness—that is, the functionality—of firearms.

the right to keep and bear arms), and George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. ONLINE 41, 43 (2018) (noting “evidence of judicial defiance” (footnote omitted)), with Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 59 (2018) (noting that “plausible explanations are available that have nothing to do with judges disliking gun rights, and existing data cannot rule out those alternatives” (footnote omitted)), and Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 621 (2019) (arguing against the Second Amendment’s “inferiority complex”).

205. See Joseph Blocher & Darrell A.H. Miller, *The Second Amendment as Positive Law*, 13 CHARLESTON L. REV. 103, 107 (2018) (describing a “constitutional alternative” to the standard political debate about guns).

206. See Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17 (2018).

207. See generally Blocher, *supra* note 40 (discussing *Heller*).

208. Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

Finally, the purposivist approach may be relevant in cases involving constitutional claims – free speech and equal protection, for example – where concerns about government animus are paramount. But there are good reasons to doubt that the Second Amendment, as interpreted in *Heller*, has the same animus sensitivity. The Court was clear that the “core” and “central component” of the Second Amendment is self-defense,²⁰⁹ not combatting antigun bias. And even if antigun bias were constitutionally salient, it is hard to show that gun rights or gun owners face the same kind or degree of animus or political-process failure as the kinds of claims for which constitutional law has traditionally shown special solicitude.²¹⁰

A. *The Second Amendment’s Denominator Problem*

Ten years after the Supreme Court’s landmark opinion in *District of Columbia v. Heller*, Second Amendment doctrine is taking shape. Although the Supreme Court has only intervened twice more – once to incorporate the right against the states,²¹¹ the second time in a per curiam decision overturning a case that strayed from *Heller*’s methodology²¹² – lower courts have now resolved more than one thousand Second Amendment challenges.²¹³ The cases do not articulate any single rule for evaluating the constitutionality of gun regulations, but that should not be surprising. No other constitutional right can be reduced to a single rule, and the right to keep and bear arms is intertwined with a particularly complex set of historical, doctrinal, structural, and normative considerations.²¹⁴

That said, all federal courts of appeals to have reached the question have endorsed a two-part test²¹⁵ that employs the standard coverage-protection structure of a bright-line threshold followed by means-end scrutiny. The first part of

209. *Heller*, 554 U.S. at 630; *id.* at 599 (emphasis removed).

210. See, e.g., Zick, *supra* note 204 (arguing that, if anything, the Second Amendment has been enforced even more rigorously after *Heller* than the freedom of speech was during its first decade of doctrinal development).

211. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

212. See *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam) (holding that the lack of common use of stun guns at the time of the Second Amendment’s enactment did not preclude their protection under *Heller*).

213. Ruben & Blocher, *supra* note 28, at 1507.

214. For a general overview, see JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018).

215. See, e.g., *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat’l Rifle Ass’n of Am. v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651

that test asks whether the challenged regulation reaches arms, people, or activities covered by the Second Amendment. Just as many forms of speech are not “speech” for purposes of the Free Speech Clause,²¹⁶ some gun regulations do not come under Second Amendment scrutiny, including (and with possible exceptions for narrow as-applied challenges)²¹⁷ those involving felons,²¹⁸ concealed carry,²¹⁹ and dangerous and unusual weapons.²²⁰ When a regulation does implicate the Second Amendment, courts move on to some kind of means-end scrutiny, the stringency of which typically depends on how close the law comes to the Amendment’s “core” and “central component” of self-defense.²²¹

The two-part test is flexible, widely adopted, and well suited to resolve many of the central questions in Second Amendment litigation. But it is not all there

F.3d 684, 703-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

216. See generally Frederick Schauer, *Speech and “Speech” – Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

217. See, e.g., *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 702-07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); *Binderup v. Attorney Gen.*, 836 F.3d 336, 350-53 (3d Cir. 2016) (en banc).

218. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”); see also C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 695-96 (2009) (discussing the prohibition on gun ownership for felons and its potential interaction with *Heller*).

219. *Heller*, 554 U.S. at 613; see also *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (“We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”).

220. *Heller*, 554 U.S. at 627; see also *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (holding that machine guns are “dangerous and unusual weapons” not covered by the Second Amendment).

221. See, e.g., *Heller II*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“As we observe that any law regulating the content of speech is subject to strict scrutiny, . . . we assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.” (first citing *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000); and then citing *Heller*, 554 U.S. at 626).

is to the doctrine. Even when they invoke the two-part test,²²² courts must answer a host of doctrinal questions: how to define the boundaries of the right to keep and bear arms;²²³ how and how much to invoke history, text and tradition;²²⁴ and when and how to defer to the judgments of the political branches.²²⁵ In any given case, these doctrinal choices will be shaped in large part by how the court characterizes the burden imposed by the challenged regulation.

In other words, at the protection stage, the significance of the burden determines the stringency of review. It is therefore especially important that one be able to account not only for how scrutiny is applied, but for how judges understand the burden that gun regulations impose. In some cases, it is the latter question, not the former, that is both disputed and dispositive of the outcome.

This dynamic is most apparent in cases involving restrictions or prohibitions on particular categories of weapons, which some judges see as bans, subject to per se rules of invalidity. In resolving these cases, courts often make determinations, explicitly or implicitly, about what constitutes a “class of arms” — perhaps the most prominent denominator problem in Second Amendment law. It is well recognized that some arms can be prohibited without resort to scrutiny of any kind.²²⁶ What is less recognized, but increasingly important, is the notion that some classes of arms cannot be banned regardless of scrutiny.

As to the former, *Heller* establishes that some types of weapons fall entirely outside the coverage of the Second Amendment. In particular, the Amendment covers only those weapons “in common use at the time,”²²⁷ and not those that

222. Ruben & Blocher, *supra* note 28, at 1501-02 (noting that the test is explicitly cited in about four-fifths of successful Second Amendment challenges in the federal courts of appeals, though it is probably applied more often than that).

223. *Id.* at 1480-81 (describing litigation regarding prohibitions on gun possession by certain categories of persons, including felons).

224. See generally Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013) (describing the difficulties of evaluating Second Amendment claims in a historical manner while avoiding a balancing approach).

225. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 260 (2008) (“There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process.”).

226. *Heller*, 554 U.S. at 625 (“[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . .”).

227. *Id.* at 624, 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

are “dangerous or unusual”²²⁸ or “dangerous and unusual.”²²⁹ (The majority opinion uses both formulations, and there is a debate as to which should be favored). The common-use test as a threshold for constitutional coverage raises difficult questions about what classes of weapons can be banned without implicating the Second Amendment.²³⁰ But so long as a law stays within the boundaries of those classes (if, for example, it prohibits a weapon not in common use), it is constitutional; a Second Amendment challenge will fail at step one of the two-part test.

Finding that a regulation does intersect with the right to keep and bear arms would typically move one into the second step of the test: means-end scrutiny. But some scholars and judges have concluded that certain laws should not be subject to such scrutiny – those that, to borrow the language of the takings cases, go “too far.” The claim is that, for prohibitions on particular classes of weapons, no scrutiny is necessary or appropriate, and the law must be subject to a rule of per se invalidity.²³¹

Effectively, this raises the inverse of the threshold question: what categories of weapons cannot be banned without categorically violating the Second Amendment? Again, *Heller* provides some guidance but no easy answers. In the course of striking down D.C.’s law without the application of any means-end scrutiny, the Court concluded that “[t]he handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”²³² As a result, when it comes to the lawful purpose of self-defense, handguns have no real analogues and no prohibition on them can be justified:

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most

228. *Id.* at 623.

229. *Id.* at 627; see also *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring in the judgment) (concluding that the test is a “conjunctive” one: “A weapon may not be banned unless it is both dangerous and unusual”).

230. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 135-36 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017) (mem.); *Volokh*, *supra* note 35, at 1480-81 (describing “[t]he difficulty with a ‘dangerous and unusual weapons’ test”).

231. See, e.g., *Volokh*, *supra* note 14 (making a similar argument regarding certain criminal procedure guarantees, such as the right to a jury trial).

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

popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.²³³

This was enough to render D.C.’s law unconstitutional, regardless of how well tailored it might have been to serve a government interest.

What arguably emerges from *Heller*, then, are three categories of arms – not two, as is commonly supposed. “Dangerous and unusual” weapons are categorically excluded from coverage and can be banned without any constitutional issue. Weapons “in common use” are constitutionally covered, so bans involving them must be subject to scrutiny. Finally, within the general set of constitutionally covered common-use weapons, some classes – including but maybe not limited to “quintessential self-defense weapon[s]”²³⁴ – cannot be banned, regardless of the efficacy of the law or the government interests involved. The last category includes the broad class of handguns. Are there other classes of arms that are similarly immune from bans?

This question has most often arisen in the context of bans on “assault weapons”²³⁵ and large-capacity magazines.²³⁶ Although such weapons have been used

233. *Id.* at 629.

234. As Eric Ruben notes, the link between handguns and self-defense (and even between the Second Amendment and self-defense) is not as tight as the *Heller* majority makes out. See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. (forthcoming 2020) (on file with author).

235. There is significant debate about the proper name for the class: assault weapons, high powered rifles, or modern sporting rifles. See *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of certiorari) (rejecting the characterization of AR-style weapons as “[a]ssault [w]eapons,” and instead insisting on the term “modern sporting rifles”). For present purposes, however, I am less interested in the label than the scope of the term. Legally, the definition varies from jurisdiction to jurisdiction, but most laws are drafted specifically to cover the AR-15 and similarly functioning models from other manufacturers, which have been used in many high-profile mass-shooting events. See Tim Dickinson, *All-American Killer: How the AR-15 Became Mass Shooters’ Weapon of Choice*, ROLLING STONE (Feb. 22, 2018), <https://www.rollingstone.com/politics/politics-features/all-american-killer-how-the-ar-15-became-mass-shooters-weapon-of-choice-107819> [<https://perma.cc/88RU-555B>] (describing the popularity of AR-15s and similar weapons in mass shootings).

236. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017) (mem.) (upholding a Maryland ban on assault-style semiautomatic rifles and large-capacity magazines on the grounds that such weapons were most useful in military service under *Heller*); *Heller II*, 670 F.3d 1244 (D.C. Cir. 2011) (upholding a D.C. ban on assault-style semiautomatic rifles and magazines holding more than ten rounds under intermediate-scrutiny review).

in many high-profile mass shootings,²³⁷ a ten-year federal ban on assault weapons was allowed to expire in 2004.²³⁸ Some states have passed laws restricting or prohibiting their use or sale, which, in turn, has generated a series of prominent Second Amendment challenges.²³⁹

Most federal appellate courts have upheld bans on semiautomatic assault weapons and associated large-capacity magazines.²⁴⁰ Some courts have reached this result under the coverage prong of the two-part test, concluding that, for example, assault weapons accepting large-capacity magazines are not “arms” within the meaning of the Second Amendment and that banning them therefore does not raise any constitutional questions.²⁴¹ But most have done so under the protection prong of the test, concluding or assuming that the Second Amendment is implicated, but that there is nonetheless an appropriate fit between the government’s means and ends in banning the weapons for public-safety purposes.²⁴²

237. See Bonnie Berkowitz, Denise Lu & Chris Alcantara, *The Terrible Numbers that Grow with Each Mass Shooting*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america> [<https://perma.cc/V8VG-9E3U>] (noting the use of assault-style weapons in mass shooting events at Aurora, Illinois; Newtown, Connecticut; Parkland, Florida; San Bernardino, California; and Las Vegas, Nevada).

238. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105(2), 108 Stat. 1796, 2000 (repealing 18 U.S.C. § 922(v) ten years after the enactment of the Act); see also Sheryl Gay Stolberg, *Effort to Renew Weapons Ban Falters on Hill*, N.Y. TIMES (Sept. 9, 2004), <https://www.nytimes.com/2004/09/09/politics/effort-to-renew-weapons-ban-falters-on-hill.html> [<https://perma.cc/4Z2Z-ZM8C>] (noting that opposition from the National Rifle Association scuttled renewal of the statute despite widespread public support). As with D.C.’s handgun regulation, the federal law was not a flat ban—among other things, it grandfathered existing weapons. Violent Crime Control and Law Enforcement Act of 1994 § 110102(a).

239. See, e.g., *Worman v. Healey*, 922 F.3d 26, 31 (1st Cir. 2019) (rejecting a Second Amendment challenge to a Massachusetts law, which was “modeled” on the federal law); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 248 (2d Cir. 2015) (rejecting a Second Amendment challenge to New York and Connecticut laws, which “closely mirrored” the federal law).

240. See, e.g., *NYSRPA*, 804 F.3d at 260-64 (holding that prohibitions on certain semiautomatic assault rifles and large-capacity magazines in a magazine are subject to intermediate scrutiny and do not violate the Second Amendment); *Heller II*, 670 F.3d at 1260-64 (same); see also *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (holding that the City of Chicago’s prohibition on assault weapons and large-capacity magazines did not violate the Second Amendment because the features of the prohibited weapons were not common at the time of ratification).

241. See, e.g., *Kolbe*, 849 F.3d at 135-37.

242. Often this means that the regulation passes muster under intermediate scrutiny. See *NYSRPA*, 804 F.3d at 260-64 (upholding assault weapon and large-capacity magazine ban under intermediate scrutiny); *Fyock v. Sunnyvale*, 779 F.3d 991, 998-1001 (9th Cir. 2015) (upholding large-capacity magazine ban under intermediate scrutiny); *Heller II*, 670 F.3d at 1260-64

Some have argued to the contrary that assault weapons not only are not the kind of “dangerous and unusual” weapon that can be banned, but in fact are an “entire class of arm” that cannot be banned under any level of scrutiny. That was a central issue in the D.C. Circuit’s decision in *Heller II*, which involved a D.C. law prohibiting certain semiautomatic rifles.²⁴³ The status and significance of this prohibition, and its relationship to *Heller*, was the subject of a lengthy colloquy between the majority and then-Judge Brett Kavanaugh in dissent.

Judge Kavanaugh argued that “[t]he fundamental flaw in the majority opinion is that it cannot persuasively explain why semiautomatic handguns are constitutionally protected (as *Heller* held) but semiautomatic rifles are not.”²⁴⁴ Judge Kavanaugh specifically rejected any use of the tiers of scrutiny, saying that the constitutionality of gun regulations should be evaluated based solely on “text, history, and tradition.”²⁴⁵ Judge Kavanaugh stressed that this approach would not rule out gun regulation, and in fact might permit more of it than heightened scrutiny would.²⁴⁶ And, indeed, history and tradition do provide ample evidence of gun regulation,²⁴⁷ some of it just as (if not more) stringent than that which exists today, although it is always hard to draw analogies between colonial and contemporary gun regulation.

For present purposes, the question is not who had the more capacious view of the right, nor whether D.C.’s law should have been upheld, but which method of evaluation – scrutiny or per se rules – was better justified. Judge Kavanaugh’s approach would seem to rule out any modern regulation lacking an analogue in history or tradition – to apply a rule of per se invalidity based on historical, rather than functional, analysis. But history itself does not provide strong support for this broad, formalist approach to bans and per se invalidity. As Eugene Volokh

(same). Some courts, however, have applied an adequate alternatives analysis. See *Wrenn v. District of Columbia*, 864 F.3d 650, 662-63 (D.C. Cir. 2017); *Friedman*, 784 F.3d at 410-11.

243. *Heller II*, 670 F.3d 1244.

244. *Id.* at 1289 (Kavanaugh, J., dissenting).

245. *Id.* at 1271 (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”); see also *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting) (noting that “*Heller* and *McDonald* dictate that the scope of the Second Amendment be defined solely by reference to its text, history, and tradition”), *withdrawn and superseded on reh’g*, 682 F.3d 361 (5th Cir. 2012).

246. *Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting) (“Indeed, governments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny.”).

247. See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 137-65 (2006).

noted soon after *Heller* was decided, “the mantra that not all regulations are prohibitions has been commonplace in American right-to-bear-arms law for over 150 years, with only a few departures.”²⁴⁸

Judge Kavanaugh traced his approach to *Heller* itself: “As to bans on categories of guns, the *Heller* Court stated that the government may ban classes of guns that have been banned in our ‘historical tradition’—namely, guns that are ‘dangerous and unusual’ and thus are not the ‘sorts of lawful weapons that’ citizens typically ‘possess[] at home.’”²⁴⁹ There is near-universal agreement on this point; it is part one of the two-part test.²⁵⁰ But it requires a great deal more work to show that only those categories of arms may be prohibited. The possibility that some prohibitions (like the handgun ban in *Heller*) go “too far” and trigger per se rules need not mean that all of them do.²⁵¹ This was the essence of the majority’s position in *Heller II*:

We do not . . . hold possession of semi-automatic handguns is outside the protection of the Second Amendment. We simply do not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles [T]he Court in *Heller* held the District’s ban on all handguns would fail constitutional muster under any standard of scrutiny because the handgun is the “quintessential” self-defense weapon. The same cannot be said of semi-automatic rifles.²⁵²

The majority applied intermediate scrutiny and upheld the restriction.²⁵³

248. Volokh, *supra* note 35, at 1461 (footnote omitted); *see id.* (“The judges who are most likely to take at least a moderately broad view of the right—judging by *Heller*, usually the more conservative judges—are also the judges who are most likely to take such traditions seriously.”).

249. *Heller II*, 670 F.3d at 1271-72 (Kavanaugh, J., dissenting).

250. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 130 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017) (mem.) (“We conclude . . . that the banned assault weapons and large-capacity magazines are *not* constitutionally protected arms.”); N.Y. State Rifle & Pistol Ass’n v. Cuomo, 804 F.3d 242, 255-57 (2d Cir. 2015) (concluding that prohibited weapons *were* in common use, and thus proceeding to step two).

251. *See, e.g.*, Volokh, *supra* note 35, at 1447 (“[E]ven if some kinds of gun bans are presumptively unconstitutional, under something like strict scrutiny or a rule of per se invalidity, it doesn’t follow that less burdensome restrictions must be judged under the same test.”).

252. *Heller II*, 670 F.3d at 1268-69 (citations omitted).

253. *Id.* at 1261-62. Judge Kavanaugh objected to this as well: “Even if it were appropriate to apply some kind of balancing test or level of scrutiny to D.C.’s ban on semiautomatic rifles, the proper test would be strict scrutiny, as explained above. That is particularly true where, as here, a court is analyzing a ban on a *class* of arms within the scope of Second Amendment protection.” *Id.* at 1288 (Kavanaugh, J., dissenting) (citation omitted).

It is important to emphasize that Judge Kavanaugh’s approach would not rule out all bans on classes of arms. He would have preserved the exception for “dangerous and unusual” weapons not in common use, for example. The similarity to *Lucas* is impossible to miss: a seemingly bright-line rule, subject to historically indicated exceptions (harmful uses of property; “dangerous and unusual” weapons) whose definition involves significant judicial discretion.²⁵⁴

The divisions in *Heller II* were deep with regard to interpretive methodology and doctrinal design. But for present purposes, what matters most is that the judges also disagreed about how to characterize the challenged regulation—whether to think of it as a ban on a “class of arms,”²⁵⁵ or merely “on a sub-class of rifles,”²⁵⁶ and whether either characterization should trigger per se invalidation. The answers to that disagreement are not readily to be found in the debates about originalism and nonoriginalism. They depend on how one understands the burden imposed by a particular restriction.

To make sense of the cases, then, let alone to predict the path of doctrine, it is important to understand what makes a gun regulation a ban, subject to per se invalidity. In takings, courts “compare the value that has been taken from the property with the value that remains in the property.”²⁵⁷ What is the equivalent in Second Amendment cases? How does one know which gun laws are “total” deprivations? And why should that matter? The following Sections consider these questions through the lenses of functionalism, formalism, and purposivism.

B. *Functionalism*

As explained above, one way to evaluate the constitutionality of a law is by considering how it functionally burdens a rightsholder’s pursuit of a constitutionally protected interest. Which interests count in this calculus will vary depending on the right. Free speech, for example, is typically conceptualized as necessary (or even just very important) to furthering ends such as democracy,

254. *See id.* at 1271 (Kavanaugh, J., dissenting) (arguing that, under *Heller*, “judges [may not] recalibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right”).

255. *Id.* at 1288.

256. *Id.* at 1268 (majority opinion).

257. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

truth, and personal autonomy.²⁵⁸ From a functional perspective, restrictions on speech are suspect because, and to the extent that, they interfere with the pursuit of those ends. If democracy is the lodestar of free speech, then political speech is of particular importance, and the majority's insistence on the ban label in *Citizens United* is easier to explain.²⁵⁹ Prohibitions on nonrepresentational art or instrumental music, by contrast, would be harder to describe as bans in a constitutionally relevant sense, since it is harder to argue that they are essential to democracy.²⁶⁰

Second Amendment theory is not yet as well developed as that of the First, but it, too, is often described in functional terms, with courts casting the right to keep and bear arms as necessary to preserve personal safety, prevent tyranny, or guarantee individual autonomy.²⁶¹ Gun regulations might similarly be evaluated based on how much they interfere with those ends. Restrictions on arms that are crucial for self-defense purposes, for example, would be subject to particularly heightened scrutiny. Weapons useless for self-defense would receive less protection, or might lack coverage entirely. On the antityranny view, by contrast, the relevant question would be whether the prohibited classes of weapons would be useful in deterring or resisting an oppressive government.

From the functional perspective, to call a law a ban (subject to per se invalidity) is just to say that it impairs the pursuit of a constitutional interest by depriving people of a particularly important means of doing so. As Volokh puts it,

[T]he 'entire medium' and 'entire class' formulations should be seen as shorthand proxies for an inquiry into the functional magnitude of the restriction: whether the measures 'significantly impair the ability of individuals to communicate their views to others,' or whether they significantly impair the ability of people to protect themselves.²⁶²

258. Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 6-16 (2016) (identifying "the most influential schools of free speech theory" as the acquisition of truth, political speech, and self-expression).

259. See *supra* notes 99-100, 133-135 and accompanying text.

260. The connection can still be made, of course, or at least explored, and such mediums might still be protected on other First Amendment grounds. See, e.g., MARK V. TUSHNET ET AL., *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 31-36, 99-100 (2017).

261. For a lengthier discussion of these three Second Amendment theories—which, it should be noted, echo the three major classes of free-speech theories—see BLOCHER & MILLER, *supra* note 214, at 148-72.

262. Volokh, *supra* note 35, at 1458 (footnote omitted).

Particular categories of activities or objects have no intrinsic value that would make their prohibition problematic; the practical impact on the rightsholder is paramount. The reason that the Court might have “particular concern with laws that foreclose an entire medium of expression,”²⁶³ for example, is that certain mediums of expression play a uniquely important role for speakers, and such laws therefore deny critical avenues of self-expression.

One obvious question for this approach is how to define the “functional magnitude” (to use Volokh’s phrase) that makes a restriction a ban.²⁶⁴ If the target of a restriction is unique and essential to achieving the constitutional interest itself, a law prohibiting it is effectively a prohibition on the right itself. *Heller* suggested as much of handguns and the “core” Second Amendment interest of self-defense; presumably the same could be said of “quintessential” mediums of First Amendment activity such as newspapers.²⁶⁵ Other classes of arms or expression might be less closely related, however – chemical weapons, perhaps, or sound trucks.²⁶⁶ If those classes of arms or mediums of expression are forbidden, the impact on rightsholders is not of a kind that would trigger per se invalidity.

As the example suggests, one natural implication of this view is that to call a regulation a functional ban, one must look not only at what it prohibits but what it permits.²⁶⁷ If the regulation leaves open adequate alternative avenues for furthering the constitutional interest underlying the right – whether it be self-expression or self-defense – then the burden it imposes should not be characterized as a ban. The law might still be troublesome, and might even be unconstitutional, but should be evaluated according to standard doctrinal machinery, rather than a per se rule. To do otherwise is to foreclose any consideration whatsoever of the public interest underlying the regulation.

The Second Amendment appears to lend itself well to this kind of functional analysis in most cases. Consider “class of arms” claims. Even under a broad understanding of the right to keep and bear arms, it is hard to see how weapons have intrinsic value. They are constitutionally significant precisely because of their function, whether that is self-defense against criminals or deterrence of a tyrannical government. That is why Dick Heller characterized D.C.’s safe storage

²⁶³. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

²⁶⁴. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000) (“The distinction between laws burdening and laws banning [constitutionally protected activity] is but a matter of degree.”).

²⁶⁵. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (noting that in a traditional public forum, “the government may not prohibit all communicative activity”).

²⁶⁶. See *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949).

²⁶⁷. This is essentially the *Trump v. Hawaii* debate. 138 S. Ct. 2392 (2018); see *infra* notes 334-342 and accompanying text.

requirement as a prohibition on “functional firearms within the home.”²⁶⁸ This does not make the right to keep and bear arms any less than fundamental, however; many constitutional rights are prophylactic or instrumental.²⁶⁹ The point is simply that burdens on such rights, including the evaluation of bans, should be understood and characterized in light of how they impact people’s ability to pursue their constitutional interests.

In Second Amendment cases, this would mean evaluating the importance of a particular class of arms to the core interest identified in *Heller*: self-defense.²⁷⁰ A class of weapons that is essential to vindicating that right might be subject to a per se rule of protection. *Heller* seems to make this point in concluding that “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”²⁷¹ Some courts, including the D.C. Circuit in *Heller II*, have read this sentence as holding that “the District’s ban on all handguns would fail constitutional muster under any standard of scrutiny *because* the handgun is the ‘quintessential’ self-defense weapon.”²⁷²

Again, one can see an analogy to takings: a total deprivation of self-defense (the Second Amendment’s core value) triggers per se invalidity, just as complete deprivation of economically beneficial use (a core value of property ownership) triggers the Fifth Amendment’s compensation requirement. In both contexts, application of the rule requires consideration of what alternatives are left open by the challenged law. This was precisely the debate in *Lucas*: the Supreme Court’s decision rested on the questionable lower court determination that South Carolina’s prohibition on house building actually was a total denial of all

268. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

269. For some discussion of the difference between instrumental and intrinsic rights, and the ways in which constitutional law sometimes treats them differently, see Joseph Blocher, *Rights to and Not to*, 100 CALIF. L. REV. 761, 802-14 (2012).

270. I assume for these purposes that self-defense – or personal safety more broadly – is indeed the central value of the Second Amendment; one could of course do the same exercise with some other value, like the prevention of tyranny.

271. *Heller*, 554 U.S. 629. One sees the same basic theme in *Heller*’s dramatic closing lines: “[W]hat is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.” *Id.* at 636.

272. *Heller II*, 670 F.3d 1244, 1268 (D.C. Cir. 2011) (emphasis added) (citing *Heller*, 554 U.S. at 629).

economically beneficial uses.²⁷³ The equivalent conclusion in a Second Amendment case would be that a prohibition on a class of weapons did not permit “law-abiding citizens [to] retain adequate means of self-defense.”²⁷⁴

Such adequate alternatives analysis appears elsewhere in constitutional law, including in First Amendment doctrine. The Supreme Court has long treated time, place, and manner restrictions as constitutional if “they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”²⁷⁵ For example, in *Kovacs v. Cooper*, the Court upheld a prohibition on the use of mobile loudspeakers in public streets in part because various other media like “voice,” “pamphlets,” and “newspapers” were adequate to communicate the message.²⁷⁶ Similarly, in *Gonzales v. Carhart*, the Court upheld the Partial-Birth Abortion Act of 2003 in part because it proscribed only a particular abortion procedure while preserving others.²⁷⁷

Of course, to say that one thing is an adequate alternative for another is not the same as saying that it is a perfect substitute,²⁷⁸ and current doctrines do not necessarily provide clear guidance on how similar a substitute must be to constitute an “adequate” alternative. Even without such guidance, it will sometimes be easy enough to conclude that a particular restriction has no apparent impact at all on the underlying constitutional interest, whether that be political expression, abortion, or self-defense. Functionally speaking, such a law would not be a constitutionally suspect “ban.” But to repurpose an example from Volokh, assume that guns of a certain popular color are entirely prohibited, while alternative colors are available. Although this would constitute a ban on an identifiable class of weapons in common use, it would likely be constitutional for the simple reason that it would have no functional impact on the interests underlying the right to

273. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); see *supra* notes 171-172 and accompanying text.

274. *Cf. Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015) (finding that a ban on a class of rifles did preserve such alternatives).

275. *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). For a thoughtful critique of this approach, see Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657 (2016).

276. 336 U.S. 77, 89 (1949) (plurality decision).

277. 550 U.S. 124, 134, 156-58 (2007).

278. *Cf. Kovacs*, 336 U.S. at 88-89 (“That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.”).

keep and bear arms; guns of other colors could be used for self-defense.²⁷⁹ The same should be true of a prohibition on guns with obliterated serial numbers, and for the same reason: prohibiting those guns does not meaningfully burden people's ability to defend themselves with arms,²⁸⁰ because a gun with serial numbers serves that function just as well as one without.

But those are easy examples. What if later developments in self-defense technology generate perfect nonlethal substitutes for firearms? Would that change the constitutional calculus with regard to laws that are today subject to per se invalidity, like handgun bans?²⁸¹ Or, to ask the question another way, how significant must a burden be before it is subject to per se invalidity? The fact that a law represents a ban from the perspective of a restricted individual cannot trigger a per se rule of invalidity, or else all legal restrictions – not just gun laws – would be invalid. An as-applied challenge might be appropriate in some circumstances,²⁸² but the availability of that route does not much depend on the ban characterization.

That is not to say that no regulation could ever constitute a functional ban, only that rules of per se invalidity should be reserved for those cases in which regulations deny essential or near-essential means of achieving the interests guaranteed by the right. In the Second Amendment context, the functionalist question should be whether a law denies people the ability to effectuate the “core” interest of self-defense with arms. Burdens that fall short of that should be subject to means-end scrutiny, which might be ratcheted up if the burden is significant or impacts the “core” of the right. The point here is simply that a prohibition on any particular class of arms should not be subject to per se invalidity if alternative means of armed self-defense are available. The mere fact that a law is not a ban, however, does not mean the regulation is constitutional.

By way of illustration, consider *Heller*'s emphasis on the uniqueness of handguns as a self-defense weapon. Although that conclusion may justify the Court's

279. I should note that the “would likely be constitutional” conclusion is my own; Volokh's point is simply that the ban characterization should not count one way or the other. See Volokh, *supra* note 35, at 1457–58 (“The constitutionality of this law should not be much affected by the historical or esthetic circumstance of whether black and silver handguns, or mechanical handguns, are the most popular form of weapon, or are seen as a separate ‘class of ‘arms.’”).

280. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (“Because the presence of a serial number does not impair the use or functioning of a weapon in any way, the burden on Marzzarella's ability to defend himself is arguably *de minimis*.”).

281. This argument is described in somewhat more detail in Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279 (2016).

282. See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); *Binderup v. Attorney Gen.*, 836 F.3d 336, 350–53 (3d Cir. 2016) (en banc).

per se invalidation of D.C.’s handgun prohibition, it makes it harder to justify the use of similar per se rules with regard to other classes of weapons, including high-powered rifles. Indeed, some of *Heller*’s amici emphasized that long guns are inadequate for self-defense,²⁸³ and – as discussed more below²⁸⁴ – the Court said “it was no answer” that long guns (including high-powered rifles) were available under the D.C. law.²⁸⁵ It follows logically that such rifles are not the kind of “quintessential” self-defense weapon that must be protected by a bright-line rule.²⁸⁶

Along the same lines, some of the debates regarding assault-weapons bans end up emphasizing those weapons’ nonfunctional characteristics. For instance, opponents of such regulations typically argue that bans on assault weapons only target cosmetic features.²⁸⁷ That might or might not be a convincing policy argument,²⁸⁸ but in terms of picking out a “class of weapons” immune from prohibition it is not just a dead end but a trap: if assault-weapons bans only reach

283. See, e.g., Brief for Amici Curiae Disabled Veterans for Self-Defense and Kestra Childers in Support of Respondent at 29-30, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting that rifles are more dangerous to keep in the home because of their relative muzzle velocity); Brief Amicus Curiae of the Heartland Institute in Support of Respondent at 16-17, *Heller*, 554 U.S. 570 (No. 07-290) (noting that “[t]he vast majority of American gun owners prefer handguns to other firearms for self-defense” and that “the FBI found that handguns accounted for over 83 percent of all firearms used in legally justified defensive homicides by private citizens, while shotguns and rifles together accounted for less than 7.5 percent of such”); Brief of Amici Curiae Southeastern Legal Foundation, Inc. et al. in Support of Respondent at 21, *Heller*, 554 U.S. 570 (No. 07-290) (listing reasons why “[h]igh powered rifles are not recommended for self-defense,” including (1) the fact that dialing 911 while aiming one is difficult, (2) they are awkward to get into action quickly, and (3) they are less useful in close quarters (internal quotations omitted)).

284. See *infra* notes 306-308 and accompanying text.

285. *Heller*, 554 U.S. at 629.

286. Cf. *Heller II*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (“The same cannot be said of semiautomatic rifles.”).

287. See, e.g., E. Gregory Wallace, “Assault Weapon” Myths, 44 SO. ILL. U. L.J. (2018); David Kopel, *Guns, Mental Illness and Newtown*, WALL ST. J. (Dec. 18, 2012), <https://www.wsj.com/articles/SB10001424127887323723104578185271857424036> [https://perma.cc/P532-C2TB] (“What some people call ‘assault weapons’ function like every other normal firearm – they fire only one bullet each time the trigger is pressed.”).

288. As compared to other classes of weapons, assault weapons (however defined) are more likely to be used in mass shootings, including many if not most of the high-profile shootings that garner national attention. Perhaps this is because the cosmetic features do have a “function” – inciting terror or making the shooter feel more powerful – or simply because of a copycat response. See William Cummings & Bart Jansen, *Why the AR-15 Keeps Appearing at America’s Deadliest Mass Shootings*, USA TODAY (Feb. 15, 2018), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002> [https://perma.cc/9W7V-66X9] (citing a firearms instructor’s belief that “mass shooters generally don’t know much about guns

cosmetic features, then they should have no functional impact at all on self-defense. This does not mean that such laws are automatically constitutional; they might fail scrutiny on the basis that regulating cosmetic features is not a sufficient government interest. But if assault-weapons bans really are simply prohibitions on appearances, then from a functional perspective they do not burden the ability of rightsholders to defend themselves to a high-enough degree to make them *per se* invalid.

An analogous set of questions has arisen in cases involving restrictions on public carry. Perhaps the most important and most divisive issue in Second Amendment law at the moment is whether and in what ways the right to keep and bear arms applies in public. *Heller* was clear that the Second Amendment includes a right to keep and bear a handgun for self-defense within the home, “where the need for defense of self, family, and property is most acute.”²⁸⁹ But how far that “core” extends beyond one’s front door has been the subject of intense debate in case reporters²⁹⁰ and law reviews.²⁹¹

Courts have overwhelmingly held or assumed that the right to keep and bear arms has some application outside the home.²⁹² Within the category of public carry, however, there is a major division between open and concealed carrying. *Heller* listed bans on concealed carry among the “longstanding prohibitions” that are presumptively lawful, noting that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were

and choose the AR-15 because of the reputation it has gotten from being used in other mass shootings”).

289. *Heller*, 554 U.S. at 628 (2008); *id.* at 629 (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

290. See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650, 660–61 (D.C. Cir. 2017) (holding that “the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment’s protections”); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”).

291. See, e.g., Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (arguing for a “home-bound” interpretation of the Second Amendment right); Volokh, *supra* note 35, at 1515–33 (criticizing that position).

292. See, e.g., *Drake v. Filko*, 724 F.3d 426, 430–32 (3d Cir. 2013) (assuming that the right to keep and bear arms has some application outside the home, but upholding a restriction on public carry nonetheless); *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (4th Cir.) (same); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (holding that the right to keep and bear arms has some application outside the home); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89, 101 (2d Cir. 2012) (assuming that the right to keep and bear arms has some application outside the home, but upholding a restriction on public carry nonetheless).

lawful under the Second Amendment or state analogues.”²⁹³ Courts applying *Heller* have overwhelmingly held that concealed carry falls outside the scope of the Amendment entirely.²⁹⁴

What, then, is the relationship between open and concealed carry when evaluating the constitutionality of restrictions on one or the other? In keeping with the functional analysis, some courts and scholars have concluded that a total prohibition on one is not subject to per se invalidity, so long as the other remains available.²⁹⁵ Conceptually, this is reminiscent of the debate in *Murr* about whether two adjacent parcels should be considered jointly (so that restrictions on the use of one parcel would not be a complete taking) or separately.²⁹⁶ Again, the question comes down to one of adequate alternatives. As with bans on classes of arms, prohibitions on particular means of carrying can be evaluated in functional terms. From that perspective, the ban label should be reserved for gun regulations that deny individuals a particularly important (perhaps even unique) means of self-protection.

One might ask whether, by evaluating the burden on a right as a means of identifying the level of scrutiny, the functional approach effectively puts the cart before the horse. This worry surfaced in a recent case in which the en banc Third Circuit upheld New Jersey’s prohibition on high-capacity magazines. After concluding that the regulation did not burden the core of the right to keep and bear arms, the majority subjected the regulation to intermediate scrutiny.²⁹⁷ In dissent, Judge Stephanos Bibas concluded that “[t]he law does not ban all magazines, so it is not per se unconstitutional.”²⁹⁸ But he went on to criticize the majority for choosing to apply intermediate scrutiny based on the burden the law imposed, saying “we never demand evidence of how severely a law burdens or how many people it hinders before picking a tier of scrutiny. . . . Deciding the

²⁹³. *Heller*, 554 U.S. at 626.

²⁹⁴. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (“In light of our nation’s extensive practice of restricting citizens’ freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment’s protections.”).

²⁹⁵. See, e.g., *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017) (upholding an open carry ban where the state generally allowed concealed carry); Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014) (arguing that open carry is covered by the Second Amendment, but concealed carry is not).

²⁹⁶. See *supra* notes 181-184 and accompanying text.

²⁹⁷. *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 122 (3d Cir. 2018) (en banc).

²⁹⁸. *Id.* at 128 (Bibas, J., dissenting).

severity of the burden before picking a tier of scrutiny is deciding the merits first.”²⁹⁹

And yet that is precisely what the ban characterization typically does. As the discussion here has attempted to show, the ban framework is essentially another way to use “the severity of the burden” to “decid[e] the merits,” albeit without resort to scrutiny of any kind. Bibas’s own approach, it should be noted, would avoid this problem—he would have applied strict scrutiny on the basis that the “core” of the right was burdened, rather than applying a per se rule of invalidity.³⁰⁰ The point here is simply that the horse-cart objection is magnified, not avoided, by the ban framework—including, as the following Section shows, the more formalist version of that framework that Bibas invoked.

To be clear, the functional approach to bans is not the same as ad hoc interest balancing. Rather, it is a way of identifying those classes of cases (handgun bans, for example) in which the burden on a right is so high that no possible assertion of government interest can save the challenged law.³⁰¹ The result is still per se invalidity; it is only that the trigger is identified by reference to the right-holder’s ability to pursue his or her constitutionally guaranteed interests. It follows that, whenever the question in a constitutional challenge is whether the government has gone too far in burdening a constitutional right, functionalism is to be preferred.

Put another way, the goal of the functional approach is to identify the essentials—the things that, if prohibited, would eviscerate the right itself. To do so is to protect not only the boundaries of constitutional rights, but their infrastructure; to mark the load-bearing walls and protect them from destruction.

C. Formalism

As described above, under the formal approach, certain things or activities are constitutionally protected by per se rules regardless of what functions they serve, or how much they matter in effectuating constitutional interests. This approach may be particularly attractive where the rights claim at issue is not instrumental—that is, where the question is not how much a regulation interferes with a constitutional interest, but whether the target of the prohibition has some

299. *Id.* at 128–29; *id.* (“The availability of alternatives bears on whether the government satisfies strict scrutiny, not on whether strict scrutiny applies in the first place.”).

300. *Id.* at 129 (“[T]he only question is whether a law impairs the core of a constitutional right, whatever the right may be.”).

301. In this way, it is almost the inverse of the “definitional balancing” approach described by Melville Nimmer, which is typically invoked to determine what forms of speech are uncovered by the First Amendment. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. REV.* 1180, 1192–93 (1970).

standalone constitutional value. The government cannot, for example, ban a class of persons or a religion on the basis that others are available, because the Constitution does not treat people or religions as being instrumental to some other end; their constitutional protection does not depend on their ability to perform a particular function.

The question for the formal approach is to identify the classes – of arms, mediums of expression, and so on – that are protected by per se rules without reference to their functions. One can of course begin with the text of the Constitution, but it will rarely be determinate enough to provide useful bright lines. Surely the government cannot ban all speech or arms.³⁰² But it is equally clear that it can ban some subcategories thereof, either because they are not covered by the Constitution or because such a ban survives the requisite level of scrutiny. The question is how to separate these categories formally without resorting to functionalism.

Another possibility is to employ a kind of historical formalism: to find in history or tradition the categories of objects or activities that are protected from prohibition,³⁰³ in roughly the same way that courts have tried to identify the objects or activities that are subject to prohibition. In the Second Amendment context, courts already employ this approach when evaluating the threshold question of whether particular classes of arms or mediums of expression are covered by the Constitution. Longstanding prohibitions on guns – including bans on concealed carrying, possession by felons or the mentally ill, or for that matter “dangerous and unusual weapons” – are generally carved out of Second Amendment coverage and trigger no constitutional scrutiny at all.³⁰⁴ The same, at least

302. See, e.g., *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down an ordinance forbidding “all First Amendment activities” in the Los Angeles airport). Still, as Lawrence Tribe and Michael Dorf note, the law “did not, after all, purport to ban all ‘speech,’ but only those ‘First Amendment activities’ that take place in the Los Angeles airport.” Tribe & Dorf, *supra* note 126, at 1062.

303. Historicism and categoricism tend to travel together, though whether the presence of a rule triggers historical inquiry or vice versa is hard to say. Cf. Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1654 (2016) (“U.S. constitutional culture tends to rely on originalist methods in resolving questions about constitutional rules and tends to use nonoriginalist methods in resolving questions about constitutional standards.”).

304. For examples of courts finding that these carve-outs create bright-line exclusions, see *National Rifle Ass'n of America v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); and *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). See also *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (observing that “the first ten amendments to the constitution” protect rights that are “subject to certain well-recognized exceptions” and that the Second Amendment right “is not infringed by laws prohibiting the carrying of concealed weapons”). Some courts treat the exclusions as rebuttable presumptions. See,

according to some cases, is true of traditionally unprotected categories of speech, such as libel.³⁰⁵ One can imagine doing the same at the other end of the spectrum: using history to define not only the classes that are categorically unprotected, but those that are categorically protected.

Historical formalism is usually presented as an alternative to the functionalist approach. Again, *Heller* provides a useful illustration. Like the Court of Appeals, the Supreme Court had little patience for the argument that D.C.'s law permitted a wide range of arms that could be used in self-defense: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed."³⁰⁶ As noted above,³⁰⁷ one might read this as a conclusion that D.C.'s law was a functional ban, on the basis that handguns are uniquely and essentially valuable for self-defense; if the Court struck the law down because of the "burden" it imposed,³⁰⁸ *Heller* might best be understood as taking a functional approach to the right to bear arms.

But one might also read the majority as embracing a formalist approach. Recall that *Heller* carves out "dangerous and unusual" weapons from Second Amendment coverage, based on their historical regulation.³⁰⁹ One can imagine

e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 686, 690 (6th Cir. 2016) (en banc); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

305. See *supra* notes 65-66 and accompanying text.

306. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). At oral argument, the Chief Justice was even sharper: "So if you have a law that prohibits the possession of books, it's all right if you allow the possession of newspapers?" Transcript of Oral Argument at 18-19, *Heller*, 554 U.S. 570 (No. 07-290). The Court of Appeals reached a similar conclusion:

The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted.

Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007). Of course, to say that *some* alternatives are adequate for self-defense does not mean that all of them are—a shotgun might be a self-defense substitute for a handgun, even if a saber is not. Permitting bans on specific classes of weapons is not the same as allowing "total disarmament."

307. See *supra* text accompanying notes 283-286.

308. See, *e.g.*, *Heller*, 554 U.S. at 632 (distinguishing colonial gunpowder restrictions because "they do not remotely burden the right of self-defense as much as an absolute ban on handguns"); Volokh, *supra* note 35, at 1456 ("The Court did not discuss what analysis would be proper for less 'severe' restrictions, likely because it had no occasion to. But its analysis suggested that the severity of the burden was important.").

309. See, *e.g.*, *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) ("[T]he longstanding limitations mentioned by the Court in *Heller* are exceptions to the right to bear arms.").

a converse principle under which certain classes of arms are immune from prohibition because of how they were treated historically—regardless of whether adequate alternatives are available. The challenge, of course, would be in identifying those classes of arms in a principled manner without resorting to functionalism.

One could, for example, attempt to define these classes of arms based on whether they are “lineal descendant[s]” of arms protected at the Founding.³¹⁰ Such efforts, like others attempting to build analogical bridges across two centuries of social and technological change, demand a fair bit of judicial imagination.³¹¹ Is the modern AR-15 a “lineal descendant” of the colonial-era musket? Guns have no progeny, so one cannot trace their lineage directly through some kind of family tree. Instead, one must employ analogies,³¹² which depend on the identification of relevant similarities.³¹³

There is nothing necessarily nefarious about such an inquiry; analogies are an essential part of legal reasoning.³¹⁴ But it is hard to imagine what characteristics of firearms are relevant other than their functionality—how well they serve as self-defense weapons, for example. And if lineal descendants are to be defined based on their functional similarity, then formalism becomes little more than functionalism in disguise.

At least with regard to class-of-arms claims, then, it is difficult to see how a formal approach can identify per se protected categories based solely on historical analysis. At the very least, courts would have to engage in wide-ranging analogies dependent on judges’ perceptions of relevant similarities. And that, in turn, would most likely involve precisely the kind of judicial discretion that advocates of formalism typically seek to avoid.

310. *Parker*, 478 F.3d at 398.

311. See, for example, Justice Alito’s comments at oral argument in *Brown v. Entertainment Merchants Association*: “Well, I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?” Transcript of Oral Argument at 17, *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448).

312. *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (concluding that in cases involving modern weapons, “the proper interpretive approach is to reason by analogy from history and tradition”).

313. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 744 (1993) (“For analogical reasoning to work well, we have to say that the relevant, known similarities give us good reason to believe that there are further similarities and thus help to answer an open question.”). See generally LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005) (describing the use of analogies in legal argumentation).

314. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2 (1949) (“The finding of similarity or difference is the key step in the legal process.”).

Instead of relying on history, however, the formalist approach could instead focus on contemporary patterns of use. Perhaps handgun bans are per se invalid not because of handguns' functional utility (at least not directly), nor because of their historical lineage, but precisely because they are the "most popular weapon" for purposes of self-defense.³¹⁵ This would represent a kind of special case for the "common use" test, which courts generally employ as a threshold for determining whether an arm is covered by the Second Amendment at all,³¹⁶ but which could theoretically also be used to identify those weapons that are not only covered but immune from prohibition. In their dissent from denial of certiorari in *Friedman v. City of Highland Park* (a Seventh Circuit case in which Judge Easterbrook evaluated the availability of "adequate means of self-defense"),³¹⁷ for example, Justices Scalia and Thomas claimed that "*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist."³¹⁸

Friedman involved a prohibition on assault weapons, which appear to be popular with gun owners.³¹⁹ Some have argued that the popularity of assault weapons means they are in common use and thus covered by the Second Amendment.³²⁰ The *Friedman* dissent would take this a step further and hold that their popularity not only means that they are constitutionally covered, but also that they are immune from prohibition.

315. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

316. See, e.g., *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection . . ."); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136, 142 (3d Cir. 2016) ("[W]e repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes.").

317. 784 F.3d 406, 410 (2015).

318. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas & Scalia, JJ., dissenting from denial of certiorari).

319. See Kate Irby, *Nobody Knows Exactly How Many Assault Rifles Exist in the U.S.—by Design*, MCLATCHY D.C. (Feb. 23, 2018, 6:21 PM), <https://www.mcclatchydc.com/news/nation-world/national/article201882739.html> [<https://perma.cc/US32-GU8F>].

320. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir.) (en banc) (Traxler, J., dissenting) ("Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. . . . In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*."), *cert. denied*, 138 S. Ct. 469 (2017) (mem.).

An obvious difficulty with this approach is that it could worsen the well-recognized difficulties with the “common-use” test.³²¹ How popular must a weapon be to be in “common use”? By whom must it be used and for what purposes? Can popularity immunize classes of weapons that might otherwise be carved out of constitutional coverage, such as dangerous or unusual weapons? Does the rule operate as a one-way ratchet, only increasing the classes of arms immune from prohibition, or can the rarity of a weapon place it outside Second Amendment coverage? As with the historical-formal approach, answering these questions will inevitably involve judicial discretion. Moreover, and perhaps more troubling, a formal common-use approach would likely obscure the nature of that discretion.³²² If the analysis is ultimately a functional one involving significant judicial discretion, it seems preferable that this be acknowledged.

Formalism is especially ill-suited to resolving class-of-arms cases, for the simple reason that arms are instruments. They are constitutionally protected because of their function, and so a functional analysis seems the most intuitive way to resolve the question of whether a regulation impermissibly burdens their use. But other aspects of the right to keep and bear arms – which “people” it protects, for example, or what it means to “bear” – might be better suited to a historical-formal approach.

In cases restricting who can access or use arms, for example, it seems inappropriate to ask whether adequate alternatives exist: it is not particularly helpful to tell a litigant that she can be denied weapons because others can still use them. Some courts evaluating permitting requirements for public carry have thus used formalist analysis to approach this question. Again, the D.C. Circuit’s decisions are illustrative. Historically, some jurisdictions have required people to demonstrate good cause before receiving a permit to carry a gun in public.³²³ After D.C. adopted such a restriction in the wake of *Heller*, some D.C. residents argued that this requirement, as applied, amounted to an unconstitutional ban. In *Wrenn v. District of Columbia*, the majority of a divided D.C. Circuit panel agreed: “[I]f *Heller I* dictates a certain treatment of ‘total bans’ on Second Amendment rights, that treatment must apply to total bans on carrying (or possession) by ordinarily

321. See, e.g., Volokh, *supra* note 35, at 1480-81 (describing “[t]he difficulty with a ‘dangerous and unusual weapons’ test”).

322. See Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach, Florida*, 2013 SUP. CT. REV. 405, 422 (noting that people “draw their analogies . . . often without ever going to or even seeing the level of abstraction or generalization that . . . undergirds their judgments”).

323. See Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218-19 (2014).

situated individuals covered by the Amendment.”³²⁴ The panel struck down D.C.’s law using what it called a “categorical approach” but emphasized that its holding “rest[ed] on a rule so narrow that good-reason laws seem almost uniquely designed to defy it: that the law-abiding citizen’s right to bear common arms must enable the typical citizen to carry a gun.”³²⁵

Although good-cause restrictions have been nearly universally upheld,³²⁶ *Wrenn* was not entirely unique in its methodology or conclusion.³²⁷ A year later, in *Young v. Hawaii*, the Ninth Circuit used similar reasoning in evaluating Hawaii’s restriction, which—like the D.C. Circuit in *Wrenn*—it understood to be a ban.³²⁸ The Ninth Circuit concluded that “[t]he typical, law-abiding citizen in the State of Hawaii is . . . entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense.”³²⁹ Hawaii’s permitting law thus “amounts to a destruction’ of a core right, and as such, it is infirm ‘[u]nder any of the standards of scrutiny.’”³³⁰ This was not a functional analysis: the case does not turn on whether the law imposed too much of a burden on self-defense rights (although, as noted above, that is one way to evaluate the constitutionality of bans on either open or concealed carry).³³¹ Rather, the central question had to do with the scope of the Second Amendment itself—and, in particular, whether it guarantees the right of the “typical, law-abiding citizen” to carry guns in public. That is a question that can, at least in theory, be answered with regard to history or some other nominally formalist method. That, in turn, suggests that formalism might be preferable to functionalism in those situations where the scope of the right—or some essential subpart thereof—can be established on historical or conceptual grounds, and a law effectively prohibits its exercise.

324. 864 F.3d 650, 666 (D.C. Cir. 2017); *see also* *Peruta v. County of San Diego*, 824 F.3d 919, 946 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (describing a local good-cause restriction as “a total ban on the right of an ordinary citizen to carry a firearm in public for self-defense”).

325. *Wrenn*, 864 F.3d at 666–68.

326. *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 662 (1st Cir. 2018); *Peruta*, 824 F.3d 919; *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

327. *See* *Radich v. Guerrero*, No. 14-0020, 2016 U.S. Dist. LEXIS 41877, at *7 (D. N. Mar. I. Mar. 28, 2016) (striking down a restriction in the Northern Mariana Islands that prohibited most private individuals from possessing and importing handguns and handgun ammunition, noting that “the Commonwealth’s ban on handguns cannot be squared with the Second Amendment right described in *Heller* and *McDonald*”).

328. No. 12-17808, 2018 U.S. App. LEXIS 20525, at *64 (9th Cir. July 24, 2018).

329. *Id.* at *56–57.

330. *Id.* at *57 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

331. *See supra* notes 289–291 and accompanying text.

One might object to the premises and reasoning of these cases on Second Amendment grounds (i.e., that the “core” right does not extend outside the home), or on any of the grounds usually leveled against historical, rule-based jurisprudence. But with regard to the conceptual treatment of bans, *Wrenn*’s approach is at the very least defensible: if the word “bear” connotes a right of law-abiding citizens to carry weapons outside the home and D.C.’s law prevented that, then a rule of per se invalidity makes sense on formalist grounds. That puts a lot of pressure on the initial, definitional determination, and the reasoning behind that determination should be transparent. In any event, the debate is about the premises.

In sum, it seems that a formal approach to bans will in most cases – including those that begin with historical analysis – almost inevitably lead back to functionalism. And to the degree that this is so, the functional analysis should be transparent. But there are some constitutional claims, including in the Second Amendment context, that are fundamentally nonfunctional. Where the scope of the right can be established on a nonfunctional basis, and a regulation would deny it entirely, then a rule of per se invalidity is justified without resort to a functional analysis.

D. Purposivism

A final set of per se rules involves government restrictions that appear to be motivated by an improper purpose, such as animus. Under this purposivist framework, the ban label is typically shorthand for laws that – sometimes as a result of their underbreadth – impermissibly target viewpoints, racial groups, and the like.

As noted above, Jamal Greene has recently argued that “[t]he rights-as-trumps frame might well suit a rights regime whose paradigm cases are pathological, where courts must defend the very existence of individual rights against government bigotry, intolerance, or corruption.”³³² Whether a law can be called a ban could be relevant to that inquiry precisely because a law’s impact might be evidence of its purpose.³³³ If, for example, the burdens of a law fall exclusively on a particular activity or group of people (even if not all of them), that fact might be taken as evidence that the law is motivated by “government bigotry, intolerance, or corruption.” And that, in turn, might be especially relevant when

332. Greene, *supra* note 12, at 127–28.

333. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (striking down prohibition on door-to-door distribution of literature in part because “[t]he dangers of distribution can so easily be controlled by traditional legal methods . . . that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas”).

it comes to rights such as equal protection, free speech, and free exercise that are sensitive to government motive. In such cases, the ban characterization is a proxy for other kinds of constitutional harm.

The debate over President Trump's suspension of the entry of travelers from Muslim-majority countries provides a case in point. As a presidential candidate, Trump called for a "total and complete shutdown of Muslims entering the United States."³³⁴ The executive orders he signed upon taking office did not go quite that far, but—because they overwhelmingly burdened Muslims and Muslim-majority countries—were often described as a "Muslim Ban."³³⁵

In *Trump v. Hawaii*, the Supreme Court considered whether one of those executive actions—a proclamation restricting travel to the United States by citizens of seven named countries³³⁶—violated the Establishment Clause. At oral argument, Solicitor General Noel Francisco disputed the characterization of the Proclamation as a ban:

This is not a so-called Muslim ban. If it were, it would be the most ineffective Muslim ban that one could possibly imagine since not only does it exclude the vast majority of the Muslim world, it also omits three Muslim-majority countries that were covered by past orders, including Iraq, Chad, and Sudan.³³⁷

334. Press Release, Donald J. Trump for President, Donald J. Trump Statement on Muslim Immigration (Dec. 7, 2015), <https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [<https://perma.cc/BYW5-XSHN>]. The original press release was subsequently removed from the campaign website.

335. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2435-41 (2018) (Sotomayor, J., dissenting) (summarizing statements by the Trump Campaign or Administration expressing animus towards Muslims and explicitly identifying the policy as a "Muslim Ban"); Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally,'* WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally> [<https://perma.cc/2LKM-6NWC>].

336. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

337. Transcript of Oral Argument at 29, *Hawaii*, 138 S. Ct. 2392 (No. 17-965); see also *Statement by Press Secretary Sean Spicer*, WHITE HOUSE PRESS OFF. (Jan. 31, 2017, 1:09 PM EST), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sean-spicer-2> [<https://perma.cc/N9LP-CDCD>] ("It can't be a ban if you're letting a million people in. If 325,000 people from another country can't come in, that is by nature not a ban . . .").

Justice Alito signaled his agreement.³³⁸ Neal Katyal, arguing for the State of Hawaii, framed the issue differently: “This is a ban that really does fall almost exclusively on Muslims, between 90.2 percent and 99.8 percent Muslims.”³³⁹

Francisco took the world’s Muslim population as the denominator, emphasizing the Proclamation’s underbreadth with regard to that group. Katyal instead focused on the Proclamation’s impact and what it suggested about the government’s motive – it banned something, after all, and that something was, overwhelmingly, Muslims. Chief Justice Roberts’s opinion for a five-Justice majority appeared to adopt Francisco’s framing, concluding that the disproportionate burden on Muslims was not enough to demonstrate religious hostility,³⁴⁰ let alone to constitute a ban.

Many of the constitutional issues in *Trump v. Hawaii* were particular to the case: the relevance of official animus toward a religious group, for example,³⁴¹ and the relevance of campaign statements in demonstrating that animus.³⁴² But the same questions arise in other areas of constitutional law where the government’s motive is of paramount importance. The Equal Protection Clause is an obvious example. Some have argued that the Free Speech Clause should be interpreted in such a fashion as well.³⁴³

There are at least two ways to understand the relevance of government motive in these cases. One is that the presence of an impermissible purpose (coupled with at least some kind of impact) is itself fatal to the attempted regulation – the

338. Transcript of Oral Argument at 64, *Hawaii*, 138 S. Ct. 2392 (No. 17-965) (“I mean, there are . . . 50 predominantly Muslim countries in the world. Five . . . predominantly Muslim countries are on this list. The population of the predominantly Muslim countries on this list make up 8 percent of the world’s Muslim population.”).

339. *Id.* at 66.

340. See *Hawaii*, 138 S. Ct. at 2421 (noting that even though five of the seven nations have a Muslim majority, that fact alone “does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks”).

341. See *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1135 (D. Haw. 2017) (“The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment Clause analysis to a purely mathematical exercise. . . . ‘It is a discriminatory purpose that matters, no matter how inefficient the execution.’” (citations omitted)).

342. See *Hawaii*, 138 S. Ct. at 2435-41 (2018) (Sotomayor, J., dissenting) (summarizing statements by the Trump Campaign expressing animus towards Muslims and explicitly identifying the policy as a “Muslim Ban”).

343. See, e.g., Kagan, *supra* note 200, at 414 (“[N]otwithstanding the Court’s protestations . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”).

ban. That is true of the Equal Protection Clause, for example, since the substance of the guarantee is itself one against particular kinds of impact and intent.³⁴⁴ Indeed, the Court has emphasized that “a bare . . . desire to harm a politically unpopular group” can never constitute a legitimate government interest³⁴⁵ — effectively creating a per se rule against laws motivated by such a desire. Characterizing President Trump’s Proclamation as a ban was, from the challengers’ perspective, a way of attempting to trigger a per se rule of invalidity.

A second way that government motive and the ban label might interact is more forward looking. To call something a ban is to show government animus toward the constitutional entitlement and therefore to raise the specter of further and broader bans going forward.³⁴⁶ On this account, a ban that reveals animus or a lack of respect for the right should trigger per se invalidity (or something like it), because to do otherwise would be to invite the eventual evisceration of the right.

In the particular context of identifying government animus, the ban label tends to emphasize the action’s underbreadth with regard to its legitimate targets. Where a regulation solely or disproportionately reaches a particular class or category that does not coincide with the interest being asserted, the government’s motive might be questioned. This was the argument of the challengers in *Trump v. Hawaii*, who emphasized that more than ninety percent of the people denied entry were Muslim.³⁴⁷ One might say the same of, for example, stop-and-frisk policies that disproportionately impact minorities.³⁴⁸

Both kinds of argument (bias alone and slippery slope) often arise in the Second Amendment context. When the Senate considered expanding back-

344. See generally *Washington v. Davis*, 426 U.S. 229 (1976) (holding that disparate impact alone is insufficient to make an Equal Protection Clause claim).

345. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The past few years have seen an outpouring of important scholarship on the concept of animus. See, e.g., WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); Pollvogt, *supra* note 16, at 888.

346. Cf. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (upholding a ban on public posters in Los Angeles due in part to the fact that there is no evidence that “appellees’ ability to communicate effectively is threatened by ever-increasing restrictions on expression”).

347. See *supra* text accompanying note 339.

348. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (“Blacks and Hispanics are more likely than whites to be stopped within precincts and census tracts, even after controlling for other relevant variables.”).

ground-check requirements in the wake of the Newtown massacre—an overwhelmingly popular proposal, even among gun owners³⁴⁹—the NRA described it as part of “an anti-gun agenda that seeks to restrict firearm ownership in America—as much as they can, however they can, and as soon as they can.”³⁵⁰ Scholars continue to debate whether the high failure rate of Second Amendment claims evidences judicial hostility to gun-rights claims.³⁵¹ Some argue that the Second Amendment is being treated as a “second-class right”³⁵² or even, as Justice Thomas put it, a “constitutional orphan.”³⁵³

The NRA, in effect, has the same position as the challengers in *Trump v. Hawaii*. The argument is that laws targeting guns (and not targeting, or not targeting enough, other sources of crime and mayhem) are evidence of government bias against guns. The ban characterization suggests that judges must overcome their own biases against the right to keep and bear arms and maintain the starch in the rules when that right is under attack.³⁵⁴ It enlists constitutional doctrine

349. See Mark Glaze, Opinion, *Americans, Even NRA Members, Want Gun Reforms*, CNN (Feb. 1, 2013, 7:42 AM ET), <https://www.cnn.com/2013/01/31/opinion/glaze-gun-control> [<https://perma.cc/3P9R-EDA7>] (stating that “74% of NRA members” support background checks); Daniel Webster, Opinion, *N.R.A. Members vs. N.R.A. Leaders*, N.Y. TIMES: ROOM FOR DEBATE (Jan. 8, 2016, 1:43 PM), <https://www.nytimes.com/roomfordebate/2012/12/17/is-the-gun-lobby-invincible/nra-members-vs-nra-leaders> [<https://perma.cc/N6DF-YY6E>] (“[E]xtreme stances by the N.R.A. will certainly make some gun owners speak out for common sense reforms . . .”).

350. *Senate to Take Up Anti-Gun Legislation Soon!*, NRA INST. FOR LEGIS. ACTION (Apr. 5, 2013), <https://www.nraila.org/articles/20130405/senate-to-take-up-anti-gun-legislation-soon> [<https://perma.cc/V3ZL-FDJC>].

351. See sources cited *supra* note 204.

352. See, e.g., *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (en banc) (Ho, J., dissenting); *Peruta v. County of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc) (Callahan, J., dissenting); see also *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting) (“[T]he Court continues to ‘relegat[e] the Second Amendment to a second-class right.’” (second alteration in original) (quoting *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari))); *Samaha & Germano*, *supra* note 204, at 69 (evaluating data showing low rates of success for Second Amendment claims and concluding that there are alternative explanations besides second-class treatment).

353. *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

354. *Cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (“Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.”).

to protect what in Elysian terms might be called a political-process failure³⁵⁵ or to defend one side in what Justice Scalia called the “culture war.”³⁵⁶

It is certainly beyond the scope of this Article to establish whether there is bias (and, if so, how much) against the right to keep and bear arms.³⁵⁷ On the one hand, all branches of the federal government supported *Heller*’s central conclusion regarding the right to keep and bear arms for private purposes. Majorities in both houses of Congress filed briefs supporting the plaintiff’s reading of the Second Amendment, as did the Department of Justice (while arguing that D.C.’s law was consistent with that right). The decision was rendered in the midst of a presidential election, and both major candidates supported it.³⁵⁸ Perhaps most important, as noted above, a strong majority of Americans supports the private-purposes reading of the Second Amendment and opposes confiscatory gun control.³⁵⁹ In short, it is hard to make a purposivist case for heightened or bright-line rules of invalidity, given that gun-rights advocates do not appear to be suffering broad political-process failures in the gun debate.³⁶⁰ If anything, the balance seems to have been struck against the majority of Americans who support broader gun regulations.³⁶¹

Others, however, would argue that this is missing the forest for the trees, and that the hidden ambition of gun regulation is either to express disapproval of guns and gun owners³⁶² or ultimately to disarm them.³⁶³ After all, millions of

355. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

356. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”).

357. See generally BLOCHER & MILLER, *supra* note 214, at 183-91 (noting that some scholars, judges, Justices, and advocates argue that the Second Amendment is being treated as a second-class right, and questioning whether evidence supports this view).

358. See Dina Temple-Raston, *Supreme Court: Individuals Have Right to Bear Arms*, NAT’L PUB. RADIO (June 26, 2008), <http://www.npr.org/templates/story/story.php?storyId=91911807> [<https://perma.cc/Y386-JQ5Z>].

359. See Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx> [<https://perma.cc/8AUW-TQ4G>].

360. See Sunstein, *supra* note 225, at 260; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 303 (2009).

361. See Saad, *supra* note 359.

362. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 456-62 (1999).

363. See, e.g., Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 821-24 (2014) (collecting examples of such rhetoric).

Americans support stringent gun regulation,³⁶⁴ and many would just as soon see *Heller* overturned³⁶⁵ or the Second Amendment repealed.³⁶⁶ And those opinions tend to be concentrated in places – cities, primarily – that might pass stringent gun regulations.³⁶⁷ So it is not impossible to imagine a law being passed, and even justified, based on seeming hostility to the right to bear arms itself.

Still, the fact that some are hostile to the right to bear arms need not mean that the right is sensitive to government motive. For instance, one can imagine widespread opposition to the Sixth Amendment right to counsel in criminal cases. But that would not mean that the right was therefore sensitive to motive: the Sixth Amendment requires that indigent criminal defendants be provided counsel, regardless of the government’s motive for denying it.

This raises a deeper question: how much and in what ways is the Second Amendment sensitive to government motive? If the Second Amendment is centrally concerned with what Greene calls “government bigotry, intolerance, or corruption,”³⁶⁸ then focusing on bans might indeed be a good way to identify situations that – like viewpoint discrimination or racial animus – should trigger per se invalidity.

Although the rhetoric of animus is powerful, its application in Second Amendment cases does raise particular difficulties. Under most purposivist approaches, what is forbidden are laws directed at the constitutional right as such; those that incidentally burden the right while pursuing some other end are less

364. R.J. Reinhart, *Six in 10 Americans Support Stricter Gun Laws*, GALLUP (Oct. 17, 2018), <https://news.gallup.com/poll/243797/six-americans-support-stricter-gun-laws.aspx> [<https://perma.cc/7NZQ-QMG3>] (finding that sixty-one percent of Americans favor stricter gun control, and that twenty-eight percent favor handgun bans).

365. Justice Ginsburg, to take just one example, has called *Heller* a “very bad decision” and suggested that the Court reconsider it. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> [<https://perma.cc/5KDS-ZMXA>]; see also Chris W. Cox, *Justice Ginsburg Reminds Us What Is at Stake in November*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Feb. 13, 2012), <http://www.nra.org/news-issues/articles/2012/justice-ginsburg-reminds-us-what-is-at-stake-in-november.aspx> [<https://perma.cc/LB38-TEM8>].

366. See, e.g., Bret Stephens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html> [<https://perma.cc/25WG-HXYP>]; John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html> [<https://perma.cc/F8SU-5PR3>].

367. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 133-37 (2013).

368. Greene, *supra* note 12, at 128.

suspect.³⁶⁹ Thus, to use a familiar example, a flag burner can be prosecuted for littering, but not because of the viewpoint they mean to express.³⁷⁰ The hard question is what the equivalent inquiry would look like in a Second Amendment case, because nearly every gun regulation—as courts overwhelmingly recognize—can be characterized as furthering public safety, “a primary concern of every government.”³⁷¹ One might argue that such laws are ineffective or misguided, but that is not enough to show animus against the relevant constitutional interest. If the basic lodestar of the Second Amendment is the core interest of armed self-defense, then one would need to show that gun regulations are motivated by a desire to prevent armed self-defense as such—rather than, for example, that they do so incidentally as a means of furthering public safety. That seems a high bar, but it is beyond the scope of this Article to rule it out entirely.

As with the First Amendment, then, there is no single correct approach to bans in the Second Amendment context. The choice will depend (just as it does in the free-speech context) on the type of claim being raised, and one’s underlying theory of the right. Because the vast majority of Second Amendment claims allege that the government has deprived individuals of the ability to effectuate the right to keep and bear arms, a functional approach generally makes the most sense. Where a law makes it impossible for people to defend themselves with guns, for example, a per se rule is justified. But if a law simply prohibits one class of weapons, or one means of carrying them, then application of a per se rule will usually be inappropriate.

In a certain subset of cases, however, per se rules might be justified even without resort to functional analysis. If a law denies a conceptually essential part of the right—public carry, arguably—then the functional burden is irrelevant. But such cases are likely to be limited in the Second Amendment context, and in any event depend on the precise identification of such parts, which itself involves hard judicial work. The role of purposivism is even more limited.

369. See, e.g., Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court’s Jurisprudence*, 12 CONST. COMMENT. 401 (1995) (arguing that the Court’s incidental speech restriction cases reflect an effort to identify improper governmental motive).

370. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3-6 (1998).

371. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (“[A]lmost every gun-control regulation will seek to advance (as the one here does) a ‘primary concern of every government—a concern for the safety and indeed the lives of its citizens.’”).

CONCLUSION

As this Article was being finalized, the Supreme Court granted certiorari in a Second Amendment case for the first time in many years.³⁷² The case, *New York Rifle & Pistol Ass’n v. City of New York*, involves a challenge to a New York City rule that effectively made it illegal to transport a gun, even locked and unloaded, outside the city (including, for example, to a second home or a shooting range). Like the handgun bans struck down in *Heller* and *McDonald* (the only two of their kind), this one was apparently unique³⁷³ – and probably would have suffered the same fate, had New York City not done away with it after certiorari was granted. The more important question is whether and how the Court will decide to alter the existing Second Amendment framework more broadly.³⁷⁴

For present purposes, what is interesting is the framing of the case, which the certiorari petition describes as involving a ban.³⁷⁵ On which of the three approaches discussed above does this framing make the most sense? The petitioners have embraced the purposivist approach, repeatedly arguing that the Second Amendment is being treated as a “second-class right.”³⁷⁶ If the Court buys into this frame – which likely depends on whether it agrees that the “one-of-a-kind” New York City rule is nonetheless representative of broader trends³⁷⁷ – the decision could portend major changes to Second Amendment doctrine, including perhaps an increased reliance on per se rules across the board.

Alternatively, the Court might decline to endorse the motive-based analysis and approach the ban through a more formalist lens. For instance, the Court might hold that the right to travel with a gun is an essential element of the right to “bear” one. Like *Wrenn*,³⁷⁸ this case could be narrowly resolved as a per se invalid ban that – like a ban on publishing, perhaps – destroys a basic feature of the right itself. After all, New York City’s rule flatly prohibited people from

372. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), cert. granted, 139 S. Ct. 939 (2019).

373. Petition for Writ of Certiorari at 1-2, *NYSRPA*, 139 S. Ct. 939 (No. 18-280) (describing the law as “one-of-a-kind”); *id.* at 3 (describing the case as an “extreme outlier three times over”).

374. In the interests of full disclosure, I should note that I have filed a brief in support of neither side, generally defending the existing framework. Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party, *NYSRPA*, 139 S. Ct. 939 (No. 18-280).

375. Petition for Writ of Certiorari, *supra* note 373, at i (describing question presented).

376. *Id.* at 21 (“While this Court has declared that the right to bear arms is not ‘a second-class right,’ many local governments and lower courts continue to treat it as such.”).

377. *Id.* (“[T]hrough the City’s bizarre transport ban is one of a kind, it is exemplary of a broader push by local governments to restrict Second Amendment rights through means that would never fly in any other constitutional context.”).

378. See *supra* notes 324-325 and accompanying text.

transporting guns from a primary to a second residence outside the city, even though the core of the right under *Heller* is self-defense in the home.

But again, the functional approach has much to recommend it. After all, petitioners do not argue that the transport of weapons has any kind of intrinsic value—it would be an empty right that allowed them only to drive in and out of the city with locked and unloaded weapons. The potential problem with the law, and the reason it might be described as a ban, is that it places such a significant obstacle in the way of furthering the “core” constitutional interest of self-defense.

The point here, and the importance of the case, is more about method than result, and is more proscriptive than prescriptive. What the Court should not do is accept a simplistic characterization of the New York City rule as a ban and use that characterization as the basis for *per se* invalidation. If the Justices are drawn to a more rule-like Second Amendment jurisprudence—and there is reason to believe that they are, despite its difficulties—then the foundations must be laid with due care.

This Article has attempted to show the significance of characterizing a law as a ban, and to provide a framework for characterization going forward. Foregrounding these issues is important because the concept of bans does important work throughout constitutional rights law, but often without due attention to the questions of how to characterize a regulation as a ban and why this label matters. Nonetheless, the free-speech and takings doctrines provide some illuminating lessons with regard to the definitional and normative questions.

Those lessons, and a careful consideration of the structure of constitutional rights adjudication in general, suggest three possible approaches to evaluating bans: functionalism, formalism, and purposivism. Each has a role to play, though in the run of cases functionalism will generally be the most useful, transparent, and consistent method of effectuating constitutional rights without distorting the relevant interest or the role of the judiciary.