
RESPONSE

CUMULATIVE BURDENS ON SECOND AMENDMENT RIGHTS[†]

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[†] An invited response to Timothy Zick, *Firearms and Fora: Constructing Public Carry Doctrine*, 106 B.U. L. REV. 365 (2026).

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INTRODUCTION

How should courts account for the cumulative burden of separately permissible regulations when evaluating constitutional claims? If a cumulative burden can trigger a constitutional violation, how should courts craft remedies?

Locational restrictions on the right to keep and bear arms present an especially useful lens through which to consider such questions.¹ Beginning with its decision in *District of Columbia v. Heller*,² the Supreme Court has repeatedly held that guns can be prohibited in “sensitive places such as schools and government buildings.”³ *New York State Rifle & Pistol Association v. Bruen*⁴ reiterated this holding, emphasizing that its historical-analogical test permits governments to forbid weapons in “legislative assemblies, polling places, and courthouses” as well as “new and analogous sensitive places.”⁵ Though there are deep divisions about which places should be regarded as sensitive and why, it is generally accepted that guns can be prohibited within them. Considered separately, then, sensitive place restrictions are constitutional.

But the proximity of multiple sensitive places can significantly shape a person’s ability to legally carry a gun in public. If one lives in a rural area, for example, it might be easy enough to avoid carrying a gun into a school zone, medical facility, government building, or other prohibited location because they will typically be separated by greater distances than they would be in a city. Avoiding sensitive places is likely more difficult in a densely populated urban area where such places are more often clustered together. When sensitive places are closely clustered, restrictions on guns in those places have a cumulative effect on gun rights. In other words, because of several sensitive places close in proximity, it may be that someone cannot possess their firearm for entire square miles of city space.

Take Times Square for example. In 2022, New York City implemented a “Gun-Free Zone” in Times Square and the several blocks surrounding it.⁶ The cumulative space covers thirty-four square blocks in Manhattan.⁷ But imagine

¹ See JOSEPH BLOCHER, JACOB D. CHARLES, JODY L. MADEIRA & DARRELL A. H. MILLER, *THE SECOND AMENDMENT: GUN RIGHTS AND REGULATION* 248 (2025) (“Even if sensitive place prohibitions might be constitutional if evaluated separately, should courts consider the cumulative burden that they place on gun owners? If the cumulative burden of sensitive place restrictions can render a location-based regime unconstitutional, what should the remedy be?”).

² 554 U.S. 570 (2008).

³ *Id.* at 626.

⁴ 142 S. Ct. 2111 (2022).

⁵ *Id.* at 2133.

⁶ The Second Circuit recently upheld the Times Square gun-free zone as a valid restriction under the Second Amendment. See *Frey v. City of New York*, 157 F.4th 118, 124 (2d Cir. 2025).

⁷ For the city blocks covered by the gun-free zone, see Erica Byfield, *New NY Gun Law Starts Thursday: This Map Shows Where You Can’t Carry in Times Square*, NBC N.Y. (Sep.

that because of schools, churches, bars, government buildings, health care facilities, museums, public parks (including Bryant Park, which sits at the bottom edge of the Times Square gun-free zone) and other sensitive places, the overall perimeter of New York's gun-free zone is even broader. Or consider that possession is broadly prohibited on the Capitol Grounds in Washington, D.C.⁸ In *Class v. United States*,⁹ a person convicted of leaving his gun in a parked car on Capitol Grounds raised a Second Amendment challenge, arguing inter alia that the Grounds are “not a small pocket of the outside world,” but cover roughly three hundred acres of D.C., making it hard for him to carry a weapon anywhere in D.C. for purposes of self-defense.¹⁰

Such locational restrictions have become all the more important in the wake of *Bruen*, which limited governments' authority to require licenses for concealed carry. States like New York and California responded to *Bruen* in part by passing sensitive place laws that prohibit guns in twenty or more types of locations, including not only schools and government buildings but other places like health care facilities and businesses where alcohol is served.¹¹ Commentators and critics have emphasized how many *types* of places these laws designate as gun-free, but from the perspective of a gun owner what matters most is not the length of the list but how many prohibited locations there are in a particular area.¹²

Even if such sensitive place prohibitions might be constitutional when evaluated separately, should courts consider the aggregate burden that they—and related locational restrictions¹³—place on gun owners? There is an intuitive case for doing so, and scholars have explored the case for cumulative-burden

1, 2022, at 01:39 ET), <https://www.nbcnewyork.com/news/local/times-square-gun-free-zone-map-released-what-nyc-wants-you-to-know-about-new-state-carry-law/3845891/>.

⁸ 40 U.S.C. § 5104(e)(1) (“An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm . . .”).

⁹ 930 F.3d 460 (D.C. Cir. 2019).

¹⁰ *Id.* at 466.

¹¹ See *Antonyuk v. James*, 120 F.4th 941, 1048 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025) (largely upholding New York's law); *Wolford v. Lopez*, 116 F.4th 959, 1002-03 (9th Cir. 2024), *cert. granted in part*, 146 S. Ct. 79 (2025) (upholding some but not all of California's and Hawai'i's laws).

¹² For an argument that cumulative harms should be analyzed “from the perspective of the right-holder,” see Nicolás Quaid Galván, Note, *Adopting the Cumulative Harm Framework to Address Second-Generation Discrimination*, 11 COLUM. J. RACE & L. 147, 170 (2021) (arguing this perspective is necessary because “[t]he Constitution protects individuals,” and rights should be viewed through the lens of the right-holder” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992))).

¹³ Timothy Zick, *Firearms and Fora: Constructing Public Carry Doctrine*, 106 B.U. L. REV. 365, 393 (2026) (“Although most of the legislative, scholarly, and lower court focus has been dedicated to solving the sensitive place puzzle, licensure laws and time, place, and manner regulations will also be critical parts of the public carry doctrine.”).

analysis in other contexts,¹⁴ including abortion¹⁵ and the Fourth Amendment.¹⁶ But there is no overarching doctrinal approach, and despite its intuitive simplicity, accounting for cumulative burdens raises hard questions about the relationship between rights and regulatory authority. For example, can otherwise valid regulations become less so because of adjacent regulations that are *also* valid? In the context of locational gun restrictions, for example, cumulative burden analysis would seemingly suggest that sensitive places become *less* sensitive when they are proximate to other sensitive places. Is a school any less sensitive because it sits next to a synagogue? If there are too many sensitive place regulations in an area, which ones must “give” in order to provide rightsholders with an adequate remedy?

In recent years, no one has written more thoroughly or thoughtfully about the relationship between rights and place than Professor Timothy Zick. His work on location, speech, and assembly is pathbreaking,¹⁷ and he has increasingly turned his attention to gun rights and regulations.¹⁸ This is a welcome development for those of us who work primarily on the Second Amendment because firearms law and scholarship must wrestle with questions of place.¹⁹ Though much attention is given to questions of *who* can carry weapons—Felons? The mentally ill? Regular users of controlled substances?²⁰—and *what* weapons are constitutionally protected—High capacity magazines? Assault weapons?—

¹⁴ See Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1316 (2017) (describing analysis of “aggregate harm”); Galván, *supra* note 12, at 150-53.

¹⁵ Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. REV. L. & SOC. CHANGE 121, 121-23 (2017).

¹⁶ Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 314 (2012).

¹⁷ See generally TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2008) (theorizing connection between place and public expression); TIMOTHY ZICK, MANAGED DISSENT: THE LAW OF PUBLIC PROTEST (2023); Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233 (2021) (highlighting rising civil costs and penalties of exercising free speech); Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515 (2009) (examining phenomenon of government regulating physical space to diminish constitutional rights).

¹⁸ See, e.g., Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65 (2023) (arguing Bruen, while claiming to comport with First Amendment principles, has created greater protections for Second Amendment); Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229 (2020) (assessing constitutional narratives around Second Amendment); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018) (assessing proposals to prohibit firearms at public protest).

¹⁹ See Joseph Blocher, Jacob D. Charles & Darrel A.H. Miller, “A Map Is Not the Territory”: *The Theory and Future of Sensitive Place Doctrine*, 98 N.Y.U. L. REV. ONLINE 438, 438-40 (2023).

²⁰ See, e.g., *United States v. Hemani*, No. 24-40137, 2025 WL 354982, at *1 (5th Cir. Jan. 31, 2025), *cert. granted*, 146 S. Ct. 326 (2025).

those questions play out against a backdrop of *where* the right can be exercised. On public transit?²¹ On private property where the owner has not given explicit permission?²²

Zick's most recent work, *Firearms and Fora: Constructing Public Carry Doctrine* provides a characteristically insightful and largely cautionary²³ set of lessons that the architects of Second Amendment doctrine can learn from the development of First Amendment doctrine, especially as each relates to public fora. He calls for judges and scholars to give locational restrictions on guns the kind of deep treatment that public forum doctrine received only decades after its development: "Like the public forum, the sensitive place sprang into existence with little theoretical, conceptual, or historical foundation."²⁴ Zick's article is a crucial step toward building sensitive place doctrine on a better foundation.

In this short Response, we focus on the cumulative burden issue that Zick raises at the end of his article: the notion that "sensitive place laws cannot have the effect of nullifying or destroying the right"²⁵ to keep and bear arms.²⁶ Applying that intuitively appealing principle raises challenging questions about how we understand constitutional rights and constitutional remedies.²⁷

I. IDENTIFYING CUMULATIVE-BURDEN RIGHTS VIOLATIONS

The right to keep and bear arms, like nearly all rights, is subject to locational restrictions—place-specific rules that prohibit or otherwise regulate the carrying and use of guns. Such restrictions have generated a growing body of

²¹ See *Schoenthal v. Raoul*, 150 F.4th 889, 899 (7th Cir. 2025), *cert. denied*, No. 25-541, 2026 WL 922526 (Apr. 6, 2026) (upholding Illinois's prohibition on carrying firearms—except for unloaded and stored firearms—on public transportation).

²² This is the issue currently pending before the Supreme Court in *Wolford v. Lopez*, 146 S. Ct. 79 (2025).

²³ Zick, *supra* note 13, at 368 ("In this Article, the First Amendment is an occasional role model, but more often is a foil or counterexample.").

²⁴ *Id.* at 388.

²⁵ *Id.* at 427.

²⁶ See *infra* Part I.

²⁷ See *infra* Part II; see also Kerr, *supra* note 16, at 353 (arguing against adoption of cumulative harm framework in Fourth Amendment context because it presents "so many novel and difficult questions that courts would struggle to provide reasonably coherent answers").

scholarship,²⁸ and the Second,²⁹ Third,³⁰ and Ninth Circuits³¹ have all handed down major decisions generally upholding locational restrictions enacted by New York, New Jersey, and California in the wake of the Supreme Court's decision in *Bruen*.³²

As of this writing, the Supreme Court is considering *Wolford v. Lopez*,³³ a case about the constitutionality of a Hawai'i law requiring people to get affirmative permission from the property owner before carrying a firearm onto private property—including private property held open to the public.³⁴ Although *Wolford* is not technically a sensitive places case, the Court's decision will presumably provide further guidance about the permissible breadth and justification for locational restrictions. Until it does, the existing cases essentially set out two extremes.

On the one hand are sensitive place restrictions, which are treated as carve-outs from the Second Amendment where the government can completely prohibit weapons. Aside from something like an as-applied challenge involving an immediate need for armed self-defense in a sensitive place (a claim that would not necessarily depend on the Second Amendment anyway)³⁵ the government seems to have total regulatory authority in those locations.

On the other hand, the Court has emphasized that the authority to enact geographic prohibitions must have limits. In *Bruen*, for example, the majority acknowledged the legitimacy of sensitive place prohibitions but also warned that “there is no historical basis for New York to effectively declare the island of Manhattan a ‘sensitive place’ simply because it is crowded and protected

²⁸ See, e.g., Patrick J. Charles, *The Second Amendment and Heller's “Sensitive Places” Carve-out Post-Rahimi: A Historiography, Analysis, and Basic Framework*, 58 U. ILL. CHI. L. REV. 813, 834-88 (2025) (tracing history of sensitive place firearm regulations); Julia Hesse & Kevin Schascheck II, *The Expansive “Sensitive Places” Doctrine: The Limited Right to “Keep and Bear” Arms Outside the Home*, 108 CORNELL L. REV. ONLINE 218, 236-45 (2024) (providing historical analogues for firearm regulation based on place).

²⁹ See *Antonyuk v. James*, 120 F.4th 941, 1048 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025); *Frey v. City of New York*, 157 F.4th 118, 124 (2d Cir. 2025) (upholding New York licensing law).

³⁰ See *Koons v. Platkin*, 156 F.4th 210, 219 (3d Cir. 2025), *reh'g granted*, 162 F.4th 100 (3d Cir. 2025) (upholding New Jersey statute prohibiting firearms in certain sensitive places).

³¹ See *Wolford v. Lopez*, 116 F.4th 959, 1002-03 (9th Cir. 2024) (“A State likely may ban firearms in museums but not churches; in restaurants but not hospitals; in libraries but not banks.”).

³² See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022) (describing analogical reasoning that outlines contours of Second Amendment right to bear arms outside the home).

³³ *Wolford*, 116 F.4th at 959, *cert. granted*, 146 S. Ct. 79 (2025).

³⁴ HAW. REV. STAT. ANN. § 134-9.5(a) (LexisNexis 2026).

³⁵ See, e.g., *United States v. Gomez*, 92 F.3d 770, 778 (9th Cir. 1996) (holding justification defense is available to felon convicted for possession of firearm when felon faced unlawful and imminent threat of death).

generally by the New York City Police Department.”³⁶ It would, the Court said, “define[] the category . . . far too broadly” to say that “all places of public congregation that are not isolated from law enforcement” qualify as sensitive places subject to gun prohibition.³⁷

There are at least two ways to understand this limitation. The Court might simply have been rejecting the notion that the entire island of Manhattan *qualifies* as a sensitive place. In other words, the reasons for giving the government power to prohibit weapons in sensitive places do not apply to the entire borough of Manhattan. As Zick notes, “[t]he Supreme Court is plainly aware of the threat overbroad sensitive place laws pose to public carry rights,”³⁸ and thus sensitive places—like, say, limited public forums—cannot be defined too broadly.

Such overbreadth concerns are conceptually different from the problem of cumulative burdens. Those burdens arise not from the overbroad designation of an entire city (or borough) as a sensitive place, but rather through the aggregation of individually permissible sensitive place restrictions. If, for example, every block in Manhattan has a school, medical facility, courthouse, or other sensitive place—and assuming that regulatory authority includes some kind of buffer zone like the sidewalks or parking adjacent to those places—then the island might effectively become a gun-free zone even without being designated as such. If anything, the latter—an aggregation of sensitive place restrictions—might be even more difficult to navigate given the challenge of keeping up with a multiplicity of prohibitions.³⁹

Criticism of sensitive place restrictions often focuses on the cumulative effect they have on gun-owners. For instance, Judge Lawrence VanDyke wrote in his *Wolford* dissent that when coupled with the fifteen categories of locational bans imposed by the Hawaiian statute at issue, Hawaiian law “prohibits, presumptively or outright, the carrying of a handgun on 96.4% of the publicly accessible land in Maui County.”⁴⁰ That cumulative burden, he says, has “effectively nullified the Second Amendment rights of millions of Hawaiians.”⁴¹

Such cumulative burden arguments are not unique to gun rights, of course, and scholars in other areas of law have made some initial headway in both

³⁶ *Bruen*, 142 S. Ct. at 2134.

³⁷ *Id.*

³⁸ Zick, *supra* note 13, at 427.

³⁹ In *Class v. United States*, the Capitol Grounds case, the D.C. Circuit considered and rejected a Due Process claim based on notice. 930 F.3d 460, 470 (D.C. Cir. 2019).

⁴⁰ *Wolford v. Lopez*, 125 F.4th 1230, 1233 (9th Cir. 2025) (VanDyke, J., dissenting).

⁴¹ *Id.* at 1236. The Ninth Circuit rejected that argument, writing:

[B]ecause Plaintiffs may take their firearms onto the public streets and sidewalks throughout Maui County (and elsewhere in Hawaii), as well as into many commercial establishments and other locations, the situation in this case is unlike the argument that *Bruen* rejected, which would have meant, effectively, that firearms could be banned from the entire island of Manhattan.

Wolford v. Lopez, 116 F.4th 959, 984 n.4 (9th Cir. 2024).

describing and critiquing the approaches that courts take in considering (or not considering) such burdens.⁴² In some areas of law, courts consider burdens piecemeal rather than in cumulative fashion. Zick notes that First Amendment doctrine tends to consider the constitutionality of restrictions individually.⁴³ And as Orin Kerr writes, “Fourth Amendment analysis traditionally has followed . . . [a] sequential approach: to analyze whether government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation.”⁴⁴

In other areas, however, the Court has required consideration of cumulative impact. In most of these areas, the broader doctrinal structure makes such impact legible. For example, a foundational principle of the Sixth Amendment’s right to counsel is that the “accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”⁴⁵ Since the unit of analysis is whether the *trial* is fair, it follows naturally that in evaluating a claim of ineffective assistance of counsel, a court “must consider the totality of the evidence before the judge or jury,”⁴⁶ not simply whether a particular decision by counsel was ineffective. The Court has similarly adopted a cumulative approach when evaluating claims of prosecutorial misconduct⁴⁷ or the Fourteenth Amendment’s guarantee of a fair trial.⁴⁸

A further example of cumulative burden analysis in constitutional rights law is the doctrine of what are often called regulatory takings. As Justice Holmes famously put it in *Pennsylvania Coal Company v. Mahon*,⁴⁹ “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁵⁰ In determining whether a piece of property has been regulated “too far,” courts might consider the cumulative burden of overlapping regulations, rather than doing so piece by piece. The Takings Clause probably facilitates this kind of cumulative burden analysis because the Clause also enumerates a remedy: that just compensation be paid.⁵¹

⁴² See source cited *supra* notes 14-16.

⁴³ Zick, *supra* note 13, at 428-30.

⁴⁴ Kerr, *supra* note 16, at 315.

⁴⁵ *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

⁴⁶ *Id.* at 695.

⁴⁷ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (“[W]e follow the established rule that the state’s obligation under *Brady v. Maryland*, to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government . . .” (citation omitted)).

⁴⁸ *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (“Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner’s further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.”).

⁴⁹ 260 U.S. 393 (1922).

⁵⁰ *Id.* at 415.

⁵¹ See U.S. CONST. amend. V.

In other areas, the argument for cumulative burden analysis is a little more complicated. In pre-*Dobbs* abortion cases, for example, it made sense to argue that “courts should consider the cumulative effects of all a state’s abortions restrictions—that is, the regulatory scheme as a whole—when applying the undue burden standard in the context of a facial challenge.”⁵² That is because the “undue burden” standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵³ provided that an abortion restriction is unconstitutional if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”⁵⁴ By focusing on the effect on individuals, *Casey*’s test made it natural to consider cumulative burdens. And yet *Casey* itself seemed to take a sequential approach: “We now consider the separate statutory sections at issue.”⁵⁵

But because it purports to rule out such consequentialism, *Bruen*’s historical-analogical test seems ill-suited to take such a burden-sensitive approach. *Bruen* describes its test as follows:

In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.⁵⁶

This is generally read as establishing a two-step test that asks first whether the challenged regulation implicates the “plain text” of the Second Amendment and then, if so, shifts the burden to the government to show that the regulation is consistent with historical tradition.⁵⁷ With regard to this second prong, the Court’s decision in *United States v. Rahimi*⁵⁸ clarified (over a solo dissent by *Bruen*’s author, Justice Clarence Thomas) that what matters are “the principles that underpin our regulatory tradition,”⁵⁹ not simply finding “historical twin[s].”⁶⁰

Bruen’s test raises a host of complications, as judges and scholars have chronicled in depth elsewhere,⁶¹ including the basic question of how sensitive

⁵² Svatek, *supra* note 15, at 122 (emphasis added).

⁵³ 505 U.S. 833 (1992).

⁵⁴ *Id.* at 877 (emphasis added).

⁵⁵ *Id.* at 879.

⁵⁶ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

⁵⁷ See Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 113-22 (2023).

⁵⁸ 144 S. Ct. 1889 (2024).

⁵⁹ *Id.* at 1898.

⁶⁰ *Id.*

⁶¹ See, e.g., Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. 1, 12-66 (2023); Jacob D. Charles, *The Dead Hand of a Silent Past:*

places cases should be evaluated. The “plain text” of the Amendment has no language about location one way or the other. *Heller*, invoking old dictionaries, defined “bear” to mean “carry,”⁶² and *Bruen* concluded that the right to carry must extend beyond the home.⁶³ One might therefore argue that *all* locational restrictions fall within the Second Amendment’s coverage, since by definition they restrict one’s ability to carry in such places. Though this is not the place for a thorough analysis of *Bruen*’s first prong, we observe that reading it in this fashion relies on arguments-by-implication that go beyond “plain text” and would essentially render the first prong meaningless. *Every* gun law impacts the ability to “keep” or “bear” (i.e., “have” or “carry”)⁶⁴ a weapon. If that is all one must show in order to put the burden on the government—a burden of historical evidence that is difficult to meet on a briefing schedule for practical reasons having little to do with the substance of regulatory tradition—effectively all gun laws are presumptively unconstitutional.

Even setting aside the by-now-well-recognized complications of applying *Bruen*’s test, for present purposes it—whether at the plain text or historical prongs—lacks resources or a consistent methodology to evaluate claims of cumulative burden. Concerns about cumulative burden are fundamentally about the contemporary, practical, on-the-ground impact of a regulation, which is not the kind of claim that is readily answerable by reference to “plain text” or to historical tradition.

Perhaps one could argue that because there is a right to carry in public, a cumulative burden that makes that act impossible is definitionally unconstitutional. But at what level of generality? An entire city? A neighborhood? A city block? After all, if each sensitive place restriction in an area *is* consistent with the principles that underpin our regulatory tradition, then we are right back where we started: A right and a regulatory tradition that are *both* valid. Which one trumps, and how does one find an answer within the current doctrine?

A partial answer might be wrested from *Bruen*’s description of the “metrics” that courts should use when comparing historical and contemporary laws: “While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.”⁶⁵ This emphasis on the “how” and “why” sounds an awful lot like means-end scrutiny (as Justice Breyer pointed out in dissent, how and why are basically synonyms

Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 95-122 (2023); Brannon P. Denning & Glenn H. Reynolds, *Retconning Heller: Five Takes on New York State Rifle & Pistol Association, Inc. v. Bruen*, 65 WM. & MARY L. REV. 79, 91-109 (2023).

⁶² *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

⁶³ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2135 (2022).

⁶⁴ *Heller*, 554 U.S. at 582-84.

⁶⁵ *Bruen*, 142 S. Ct. at 2132-33 (emphasis added).

for means and end).⁶⁶ And it is not hard to imagine how a transparent scrutiny-type approach could account for cumulative burden arguments. Indeed, the two-part framework adopted throughout the federal courts in the years after *Heller* regularly calibrated the strictness of scrutiny based on how much a challenged law impinged on the “core” Second Amendment interest of self-defense.⁶⁷

But *Bruen* derided this test as having “one step too many”⁶⁸ and insisted that “*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.”⁶⁹ It therefore remains unclear how courts applying *Bruen* can straightforwardly consider the kinds of cumulative burden claims that are being advanced in cases like *Wolford*. As Zick points out, courts in First Amendment cases might do so “under the rubric of tailoring or alternative channels.”⁷⁰ Those rubrics are not available—at least not transparently—in Second Amendment cases.

That is, so long as a category of places falls within a historical tradition of prohibition, *Bruen*’s work appears to be done. Perhaps one might argue that historical tradition has *within it* an aggregation principle, but what would be the support for such a view? Even if it could be shown that, for example, no urban area had so many sensitive places as to effectively deny the right to carry guns in public (a claim whose support is anything but certain),⁷¹ that would not show that doing so was thought to be impermissible. Indeed, as Justice Barrett has noted, “assum[ing] that founding-era legislatures maximally exercised their power to regulate . . . adopt[s] a ‘use it or lose it’ view of legislative authority. Such assumptions are flawed, and originalism does not require them.”⁷²

The much more likely explanation would simply be that population centers were not dense enough for the issue to arise.⁷³ As historian Eric Monkkenon has explained, “[i]n both structure and form, the modern American city was born in the nineteenth century” as “local economic and population growth from 1830 to 1930 saw a dynamic and historically unprecedented expansion of cities—in

⁶⁶ *Id.* at 2170 (Breyer, J., dissenting).

⁶⁷ *Heller*, 554 U.S. at 628.

⁶⁸ *Bruen*, 142 S. Ct. at 2127.

⁶⁹ *Id.*

⁷⁰ Zick, *supra* note 13, at 429.

⁷¹ Traditionally, urban areas have regulated guns more stringently than rural areas, including total bans on gun-carrying. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 98–100 (2013); Joseph Blocher & Patrick J. Charles, *The History and Tradition of Firearm Localism*, 105 TEX. L. REV. (forthcoming 2027) (manuscript at 29) (on file with authors).

⁷² *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring).

⁷³ Zick, *supra* note 13, at 429 (“Among other difficulties, it would likely be impossible to compare and assess the geographic scope of nineteenth-century and contemporary sensitive place laws. The footprint of the public square has changed dramatically, rendering comparisons across generations difficult and suspect.”).

absolute size, in proportion, and in number.”⁷⁴ New York, for example, had a population of only 33,000 in 1790; it was the nation’s largest urban area at the time.⁷⁵ But by 1880, more than 1.2 million people lived in the New York urban area.⁷⁶

In this respect, too, sensitive places and public forum doctrine have a common flaw. As Zick notes, “the public forum doctrine, as it exists, cannot account for significant changes to the public square over time. Despite massive social, demographic, technological, and many other changes over the past half century, public forum doctrine still recognizes only three types or categories of public places.”⁷⁷ Indeed, “[t]he Court’s use of history to construct public forum doctrine offers a cautionary tale about constructing place doctrines without a more accurate understanding of the evolutionary history of the public square.”⁷⁸

The central challenge, then, is reconciling this undeniable social change—one that, under *Heller* and *Bruen*’s test, expands the government’s regulatory authority to cover large swathes of public space—with the right to carry guns in public.⁷⁹ As Zick notes, Professors Will Baude and Robert Leider have argued that “[w]hen it comes to determining how expansively a legislature may prohibit weapons in specific locations, probably the most important principle is that the legislature cannot designate places (*either individually or when aggregated*) that operate to effectively deny people most of the right to bear arms outside the home.”⁸⁰ That argument flows from their “general law” approach to the Second Amendment, which argues that gun rights claims should be governed by a “two-part test” that would ask “whether the conduct fell within the scope of the right” and then, if so, “whether the legislature had reasonably regulated the right using its police power,” which would involve “some form of interest balancing.”⁸¹ That test has a lot to recommend it—indeed, it sounds a lot like the two-part framework that *Bruen* explicitly rejected⁸²—but it is hard to transparently

⁷⁴ ERIC H. MONKKONEN, *AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES AND TOWNS, 1780-1980*, at 4, 5 (1988); *see also* *Antonyuk v. Chiumento*, 89 F.4th 271, 322 n.35 (2d Cir. 2023).

⁷⁵ *See* Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, tbl. 2 (U.S. Census, Working Paper No. POP-WP027, 1998), <https://www.census.gov/library/working-papers/1998/demo/POP-twps0027.html> [<https://perma.cc/8TMD-83F7>].

⁷⁶ *Id.* tbl.11.

⁷⁷ Zick, *supra* note 13, at 385.

⁷⁸ *Id.* at 423.

⁷⁹ In some ways, the challenge is akin to a central question in structural constitutional law: How to reconcile the notion that Congress has only enumerated power and the reality that its Commerce Clause power has become nearly limitless given the expansion of commerce among the states since the founding. There, too, the legislative authority is pegged to a fact in the world that has changed significantly since the Founding.

⁸⁰ Zick, *supra* note 13, at 428-29 (quoting William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1508 (2024) (emphasis added)).

⁸¹ Baude & Leider, *supra* note 80, at 1488-89, 1491.

⁸² *See* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

operationalize principles like “effective denial,” “reasonable regulation,” and “interest balancing” under *Bruen*’s avowedly non-consequentialist test.

That said, *Bruen* is susceptible to different readings, some more friendly than others to the prospect of updating.⁸³ And especially in light of *Rahimi*’s endorsement of a “principles”-based approach to Second Amendment litigation, perhaps courts will be more comfortable openly considering consequentialist arguments. Whether or not they do so openly, the choices they make in framing such claims will almost certainly be driven by consequentialist considerations, including for example in the choice of denominator for determining whether a cumulative burden goes too far. Why not a neighborhood or block instead of a city as a whole? What about a military base that is larger than a town?⁸⁴

II. REMEDIES AS RIGHTS; RIGHTS AS REMEDIES

Assuming that the challenges above can be overcome, opening the door to cumulative burden-based analysis in Second Amendment cases, that sets up another difficult question: What should the remedy be? If a constitutional violation arises from the aggregate effect of, say, two dozen different overlapping restrictions,⁸⁵ which ones must or should a court strike down to provide relief?

In the context of some constitutional rights, the answer is reasonably straightforward. As noted above, the Takings Clause—unique among provisions in the Bill of Rights—prescribes its own remedy: that “just compensation” be paid when regulation goes too far.⁸⁶ For an aggregation of problems effectively denying someone their right to a fair trial (and assuming some kind of prejudice as a result), the sensible remedy is a new trial.

But such remedial units are not readily apparent when it comes to the cumulative burden imposed by a multitude of otherwise-valid sensitive places. The task of approving a set of sensitive places in that context is conceptually

⁸³ See Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 15-20) (identifying “two *Bruens*” latent in majority opinion, with one reading freezing regulatory authority in distant past and other permitting both rights and regulation to take new forms over time).

⁸⁴ Fort Bragg covers roughly 251 square miles. See *Military Bases in North Carolina*, N.C. DEP’T OF MIL. AND VETERANS AFFS., <https://www.milvets.nc.gov/benefits-services/military-bases-north-carolina> [<https://perma.cc/5R9F-CVQX>] (last visited Apr. 27, 2026). Private weapons are, unsurprisingly, subject to heavy regulation within it. See XVIII AIRBORNE CORPS AND FORT BRAGG REGULATION 190-11-1: PRIVATELY OWNED WEAPONS, AMMUNITION CONTROL AND PROHIBITED WEAPONS (Feb. 14, 2025), https://home.army.mil/bragg/1217/5459/0058/Fort_Bragg_190-11-1_14_FEB_25.pdf.

⁸⁵ Zick, *supra* note 13, at 428 (“[T]here are likely to be few historical analogs for something like California’s recently enacted law, which bans firearms in more than *two dozen* locations.”).

⁸⁶ U.S. CONST. amend. V. One could equally call this the substance of the right; for our purposes nothing really turns on the distinction and indeed it helps drive home the point of this section, which is the blending of rights and remedies.

more akin to reviewing a map for evidence of impermissible gerrymandering—a task that the Supreme Court, at least, is quite reluctant to perform.⁸⁷

One option would be to simply strike down the entire set of sensitive place restrictions and leave it to the jurisdiction to come up with something better. But without meaningful guidance about what is appropriate and what is not (like a rule saying that only 25% of the city can be deemed sensitive, though it is hard to imagine history and tradition supplying such a solution) that seems to create a situation in which legislatures—and for that matter gun owners—are left hanging. Should the jurisdiction simply pass a new law with a few places omitted? The ones that are physically largest? The ones which are the most heavily trafficked? The ones that are hardest to avoid?

Another possibility would be for courts to give gun owners something like a constitutional easement-by-necessity allowing them to traverse otherwise-forbidden ground in the interests of vitiating their public carry rights. Indeed, the First Amendment public forum doctrine that is Zick's primary focus has sometimes been described as creating a kind of easement such that a would-be speaker can use property even against the wishes of that property's owner (generally the government).⁸⁸ Of course, the *location* of such an easement is crucial, and it is not hard to imagine further litigation about whether a given public carry easement (A specific crosswalk in Central Park? A designated car on the subway?) is practically adequate to the task. Furthermore, if gun owners were permitted to carry firearms in sensitive places by way of easement, then sensitive place restrictions would be gutted.

Such an approach also raises interesting conceptual questions about the relationship between remedies and underlying rights. If a court were to strike down New York's sensitive place regime as imposing too much of a cumulative burden, or even to craft a constitutional easement along the lines described above, would that suggest that schools and government buildings in Manhattan are somehow less sensitive than those in Montana? Or should the question only be asked from the perspective of the would-be gun carrier—i.e., that the right is to carry a gun in public, and in Manhattan that simply means that the same regulations are less constitutional? Either way, the fact that the cases could come out differently in the two places—and perhaps not in an intuitive direction—is not necessarily a constitutional problem but does confirm the need for the Court to confront (as it has not so far) that the contours of constitutional rights vary based on place.⁸⁹

At an even more conceptual level, if sensitive places are locations in which the right to keep and bear arms simply does not exist (a reasonable description,

⁸⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“Judicial review of partisan gerrymandering does not meet th[e] basic requirements [of justiciability].”).

⁸⁸ See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (describing idea of “First-Amendment easement”).

⁸⁹ See generally Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479 (showing how federal constitutional rights differ from place to place).

given that guns are subject to total prohibitions in such places), then the outcome of the Manhattan-Montana comparison suggests that people in Manhattan have a *right* that people in Montana do not. And that right—to carry guns in schools, government buildings, or whatever else is necessary to relieve the impermissible cumulative burden—effectively derives from the remedy itself. Could New York thus eliminate a right to carry guns in schools by permitting carrying in enough other places to lessen (by how much?) the cumulative burden?

CONCLUSION

This interplay between rights, regulations, and remedies is nowhere near resolution in the Second Amendment context any more than it is fully resolved for the First. Timothy Zick's article usefully highlights some of the hydraulics at issue; perhaps the Supreme Court will take a step toward addressing them in *Wolford* or some other case soon.