

Regulating Gun Rentals

Ira P. Robbins



ABSTRACT

A machine gun overpowers a nine-year-old girl, erratically spraying bullets and accidentally killing her instructor; a perturbed mother slays her son and then takes her own life; a convicted felon circumvents federal prohibitions to access a firearm to commit suicide; and, perhaps most notably, Navy SEAL war veteran Chris Kyle, focus of the movie *American Sniper*, is murdered while attempting to help another veteran recover from post-traumatic stress disorder. We have all seen the headlines, but we have largely ignored the source of this heartbreak. The ramifications of these examples are not merely cinematic, but also involve families suffering from grievous loss. Much ink has been spilled over these news stories, yet only a minimal amount of attention has been paid to the legal issues involved. Other than preventable tragedy, what is the common denominator in these stories? All of these misfortunes took place at a law-abiding gun range.

Few debates are as heated as those involving the Second Amendment right to bear arms and the role of the state in regulating that right. Despite this extensive discussion, the issue of firearm violence on gun ranges has been left unexamined. Loopholes in the regulatory framework for gun ranges endanger our loved ones and threaten public safety across the country.

This Article argues that, unlike gun ownership, on-premises gun rental does not implicate the core protections of the Second Amendment as defined in *District of Columbia v. Heller*. *Heller* explains that the Second Amendment confers an individual right “to keep and bear Arms” for the purpose of self-defense in the home. This right, however, refers only to ownership, and renters—by definition—do not own rented firearms. Moreover, gun rentals are, at best, only tangentially related to an individual’s right to self-defense.

To close the loopholes in the current regulatory framework, this Article proposes rational gun rental regulations that will ultimately increase safety on gun ranges and minimize the loss of life that has become all too familiar, but often overlooked, in many areas of the country. These regulations include: (1) treating on-premises and off-premises gun rentals the same; (2) requiring National Instant Criminal Background Check System checks for non-gun owners who borrow weapons; (3) limiting the types of guns permitted for rental; and (4) imposing minimum age requirements. Because gun rental regulations do not implicate any ownership or self-defense interests, this Article argues that these regulations should receive rational basis constitutional review only. Given the government’s strong interest in ensuring public safety and the relatively minor burden imposed on gun renters, gun rental regulations would easily pass muster under this standard. Further, even if a court were to find that gun rental regulations warrant intermediate constitutional scrutiny, this Article demonstrates that these regulations would also survive a heightened level of review.

AUTHOR

Barnard T. Welsh Scholar and Professor of Law and Justice and Co-Director, Criminal Justice Practice and Policy Institute, American University, Washington College of Law. A.B. University of Pennsylvania; J.D. Harvard University. I am more than ordinarily grateful to my superb and indispensable research assistants—Kennan El Khatib, Amanda Humphreville, Veronica Jae, Mark Levy, Kiley Sanders, Lisa Southerland, and Nancy Turner—whom I consider to be my colleagues and my friends, and to the American University Law School Research Fund for providing summer financial support. Copyright © 2017 by Ira P. Robbins. All rights reserved.

TABLE OF CONTENTS

INTRODUCTION.....416

I. GUN RENTAL VS. GUN OWNERSHIP: DEFINING THE LIMITS
OF THE SECOND AMENDMENT419

II. ESTABLISHING THE CONSTITUTIONALITY OF GUN RENTAL
REGULATIONS.....428

A. Gun Rentals Do Not Receive the Same Protections
as Gun Ownership Under the Second Amendment.....428

1. The Right to Keep and Bear Arms Protects
Only Ownership.....429

2. The Self-Defense Justification for the Second
Amendment Does Not Exist for Gun Rentals433

B. Gun Rental Regulations Should Receive Rational Basis Review.....435

III. PROPOSED REGULATIONS ON GUN RENTALS439

A. Regulating On-Premises and Off-Premises Rentals the Same.....439

B. Requiring NICS Checks for Non-Gun Owners Who Borrow
Weapons443

C. Limiting Types of Rented Guns.....445

D. Minimum Age Requirements for Gun Rentals447

CONCLUSION449

INTRODUCTION

In an Oscar-nominated and controversial role in *American Sniper*, actor Bradley Cooper portrayed Chris Kyle, a former U.S. Navy SEAL who was killed on February 2, 2013 by Eddie Ray Routh, a schizophrenic ex-Marine with post-traumatic stress disorder (PTSD).¹ Kyle, along with his friend Chad Littlefield, volunteered to help Routh through his emotional turmoil² as part of Kyle's efforts to assist veterans in overcoming PTSD.³ On February 2, Kyle and Littlefield picked up Routh and drove to Rough Creek Lodge, a resort that offers hunting expeditions and shooting ranges.⁴ Less than two hours after Kyle and Littlefield arrived on the range, a resort employee discovered their bodies.⁵ Routh shot Kyle six times; Littlefield, seven. Routh was later arrested and admitted to the killings.⁶

In another well-publicized tragedy, a nine-year-old girl accidentally shot and killed Arizona range instructor Charles Vacca with a rented Uzi.⁷ The girl

-
1. See Manny Fernandez & Michael Schwartz, *Untouchable in Iraq, Ex-Sniper Dies in a Shooting Back Home*, N.Y. TIMES (Feb. 3, 2013), http://www.nytimes.com/2013/02/04/us/chris-kyle-american-sniper-author-reported-killed.html?_r=0 [<https://perma.cc/HUR9-LYXL>] (reporting on Routh's arrest for capital murder); Ed Lavandera et al., *'American Sniper' Trial: Defense Makes Case for Eddie Ray Routh*, CNN (Feb. 25, 2015, 12:44 PM), <http://www.cnn.com/2015/02/18/us/american-sniper-chris-kyle-trial> [<https://perma.cc/TM9M-K36C>] (reporting that Routh was on at least "nine [different] medications, including mood elevators, anti-psychotic medications and sleep aids"). Routh had previously been in and out of psychiatric wards and had threatened to kill himself as well as his family. Abby Phillip, *Trial of Eddie Routh, Killer of Chris Kyle, Will Be Darkest Chapter of 'American Sniper'*, WASH. POST: POST NATION (Jan. 22, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/22/the-trial-of-eddie-routh-the-man-who-killed-chris-kyle-will-be-american-snipers-darkest-chapter> [<https://perma.cc/SXP9-LDNY>].
 2. Phillip, *supra* note 1. Routh's threats toward himself and his family were taken so seriously that a fellow Marine confiscated all of Routh's weapons for safety. *Id.*
 3. Lavandera et al., *supra* note 1.
 4. During the drive to Rough Creek Lodge, Kyle texted Littlefield stating, "This dude is straight-up nuts." Dan Lamothe, *The Fatal Intersection of Navy SEAL Chris Kyle and the Marine Veteran Who Killed Him*, WASH. POST (Feb. 13, 2015), <http://www.washingtonpost.com/news/checkpoint/wp/2015/02/13/first-days-of-american-sniper-murder-trial-leave-questions-unanswered/?hpid=z3> [<https://perma.cc/T3LY-76LZ>]. Littlefield agreed and texted Kyle to ask him to watch his back. *Id.* Prosecutors allege that Routh had been drinking alcohol and smoking marijuana before Kyle and Littlefield picked him up. *Id.*
 5. *Id.*
 6. *Id.* For the 911 call that Routh's sister placed after Routh admitted to the murders, see *911 Call After 'American Sniper' Killed*, WASH. POST (Feb. 11, 2015, 12:00 PM), http://www.washingtonpost.com/posttv/national/911-call-after-american-sniper-killed/2015/02/11/b4049cd8-b211-11e4-bf39-5560f3918d4b_video.html [<https://perma.cc/KKP3-ZTES>].
 7. See Adam Nagourney, *Arizona Police Report Says Parents Didn't Realize Daughter Had Shot Gun Instructor*, N.Y. TIMES (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/us/parents-didnt>

and her family were visiting a shooting range that allowed juveniles to access firearms, including automatic weapons, as long as the child was at least eight years old and the instructor believed the child was suitable to fire the weapons.⁸ Vacca initially helped the young girl handle the submachine gun, but when he allowed her to fire the weapon herself, the recoil overpowered her and the Uzi jerked upward. A bullet from the gun struck Vacca in the head.⁹

The Chris Kyle and Charles Vacca tragedies are not isolated incidents; violence on gun ranges is a national problem. On ranges across the country, individuals have used rented firearms in suicides, as well as in accidental and intentional killings. Each of these tragedies could have been avoided had the shooters been processed through the National Instant Criminal Background Check System (NICS) or subject to reasonable regulations prior to accessing weapons on the gun ranges.¹⁰ While NICS checks are currently required for the purchase and

realize-gun-instructor-had-been-shot-police-say.html?_r=1 [https://perma.cc/V7JG-QTMW]. An Uzi is a type of Israeli-designed submachine gun. *History, UZI*, <http://www.uzi.com/history> [https://perma.cc/4EX7-P6R5].

8. Meghan Keneally, *Parents of Girl in Uzi Accident Devastated by 'Life Changing Tragedy'*, ABC NEWS (Sept. 2, 2014, 2:26 PM), <http://abcnews.go.com/US/parents-girl-uzi-accident-devastated-life-changing-tragedy/story?id=25217043> [https://perma.cc/J5EG-DTW9]; see *Family of Instructor Killed by 9-Year-Old With Uzi Speaks*, CBS NEWS (Aug. 29, 2014, 10:39 AM), <http://www.cbsnews.com/news/family-of-instructor-killed-by-9-year-old-with-uzi-speaks> [https://perma.cc/7PYF-R6QZ] (stating that, following this incident, the gun range changed its regulations to require shooters to be at least five feet tall or twelve years old). Although the facility has since changed its age policy, the owner maintains that “there really wasn’t an awful lot of safety improvement.” Julie Turkewitz, *Year After Death, Business as Usual at Arizona Gun Range*, N.Y. TIMES (Aug. 22, 2015), <http://www.nytimes.com/2015/08/23/us/year-after-death-business-as-usual-at-gun-range.html> [https://perma.cc/3865-GKRY].
9. See Mark Berman, *Girl Who Accidentally Shot Her Instructor With an Uzi Said Gun Was Too Much for Her*, WASH. POST: POST NATION (Sept. 2, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/02/girl-who-accidentally-shot-her-instructor-with-an-uzi-said-the-gun-was-too-much-for-her> [https://perma.cc/D52H-B5ZM] (acknowledging that video footage shot by the girl’s mother shows that Vacca set the gun to “automatic” before he was killed). See generally Michelle Rindels & Jacques Billeaud, *Gun Tourism Grows in Popularity in Recent Years*, SALON (Aug. 28, 2014, 3:15 AM), http://www.salon.com/2014/08/28/gun_tourism_grows_in_popularity_in_recent_years [https://perma.cc/TFS9-WSGR].
10. Christopher Bizilj, an eight-year-old boy, accidentally shot himself in the head with a borrowed Uzi at a Massachusetts gun fair. Mary Plummer, *Father Twice Told Uzi Too Powerful for 8-Year-Old Christopher Bizilj*, ABC NEWS (Jan. 7, 2011), <http://abcnews.go.com/US/father-christopher-bizilj-died-firing-uzi-urged-son/story?id=12565132> [https://perma.cc/9SPG-Q62V]. Marie Moore had a documented history of mental illness and was still able to rent a gun to kill her son and herself, despite being required to fill out forms attesting to her criminal history and mental stability. *Mom Kills Son, Then Self at Shooting Range*, NBC NEWS (Apr. 8, 2009, 2:56:18 PM), http://www.nbcnews.com/id/30109090/ns/us_news-crime_and_courts/t/mom-kills-son-then-self-shooting-range/#.U8kvEfldUTh [https://perma.cc/57E3-R8WM]. Mark Sobie, a convicted felon, was able to rent a firearm and became the second person to commit suicide at Silver Bullet Firearms in four years. Heidi Fenton, *Shooting Range Suicide Victim’s Family Calls for Gun Rental Background Checks*, MICH. LIVE (Nov. 8, 2012, 7:16 PM), <http://www.mlive.com/news/grand->

possession of firearms, they are not required for on-premises gun rentals (i.e., gun rentals for use on-site, such as at a shooting range).¹¹ This lack of regulation allows individuals who would otherwise be prevented from possessing firearms to access and handle rented weapons.

This Article proposes stricter gun rental regulations in order to increase public safety and provide for greater uniformity of gun range policies. Part I provides an overview of Second Amendment jurisprudence and the corresponding scrutiny that current firearm regulations have received. Part II distinguishes gun rentals from gun ownership, arguing that gun rentals are outside the scope of, or are on the fringes of, the Second Amendment; therefore, they should receive rational basis constitutional review, according to which the courts will uphold a law if it is rationally related to a legitimate government purpose. Part III proposes

rapids/index.ssf/2012/11/i_dont_think_thats_too_much_to.html [https://perma.cc/5KB7-5RYK]. The range granted him access because the state did not require employees to verify the information Sobie entered on the rental forms. *Id.* Because of the increasing number of suicides, Shoot Straight gun shop stopped gun rentals entirely “to prevent its eight Florida ranges from becoming suicide parlors.” Henry Pierson Curtis, *Florida’s Largest Gun Dealer Bans Gun Rentals in Wake of Suicides*, ORLANDO SENTINEL (Jan. 10, 2014), http://articles.orlandosentinel.com/2014-01-10/news/os-gun-rentals-stopped-shoot-straight-20140108_1_oak-ridge-gun-range-gun-range-suicides-shoot-straight [https://perma.cc/2VMT-975S]. Oak Ridge Gun Range responded by banning rentals to unaccompanied white males. *Id.* (“In the past 30 years, we’ve never had a suicide that wasn’t a white male Florida resident who came in alone.”); see Margot Sanger-Katz, *Gun Deaths Are Mostly Suicides*, N.Y. TIMES: THE UPSHOT (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/upshot/gun-deaths-are-mostly-suicides.html?mwrsm=Email> [https://perma.cc/5ALS-E89E] (“More than 60 percent of people in this country who die from guns die by suicide.”).

This Article also addresses the issue of circumventing National Instant Criminal Background Check System (NICS) checks by using borrowed firearms at ranges, a problem evidenced by Routh’s use of Kyle’s gun to commit murder. See *infra* Part III.B (proposing a mandatory NICS check for individuals borrowing weapons from gun owners who accompany them on the range).

11. President Obama’s recent executive actions on gun violence similarly make no provision for gun rentals. See Press Release, Office of the Press Sec’y, The White House, FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer (Jan. 4, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our> [https://perma.cc/C6ZL-F3A6] (“The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is making clear that it doesn’t matter where you conduct your business—from a store, at gun shows, or over the Internet: If you’re in the business of *selling* firearms, you must get a license and conduct background checks.” (emphasis added)). See generally BECKI GOGGINS ET AL., STATE PROGRESS IN RECORD REPORTING FOR FIREARM-RELATED BACKGROUND CHECKS: PROTECTION ORDER SUBMISSIONS 2 (2016), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249864.pdf> [https://perma.cc/A8PZ-WN8J] (describing the NICS as a national database created specifically to conduct firearm-related background checks with information from local, state, tribal, and federal agencies); JENNIFER C. KARBERG ET AL., U.S. DEPT OF JUSTICE, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2013–14-STATISTICAL TABLES 1–4 (2016), <http://www.bjs.gov/content/pub/pdf/bcft1314st.pdf> [https://perma.cc/BR75-UXQ7] (explaining that the NICS determines which prospective transferees are disqualified from receiving firearms).

sensible gun rental regulations aimed at combating the stream of suicides and homicides plaguing gun ranges. These regulations include treating on-premises and off-premises gun rentals the same, requiring NICS checks for non-gun owners who borrow weapons, limiting the types of guns permitted for rental, and imposing minimum age requirements. This Part defends the constitutionality of these regulations under rational basis review and, alternatively, under intermediate scrutiny, which requires that the law or policy being challenged furthers an important government interest by means that are substantially related to that interest. Finally, the Article concludes that implementing these proposed regulations would significantly increase safety on gun ranges without excessively burdening individuals' access to firearms under the Second Amendment.

I. GUN RENTAL VS. GUN OWNERSHIP: DEFINING THE LIMITS OF THE SECOND AMENDMENT

The Second Amendment to the U.S. Constitution reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹² It was not until 2008, in *District of Columbia v. Heller*,¹³ that the U.S. Supreme Court explicitly affirmed that the Second Amendment conveys an individual and fundamental right to keep and bear arms for the purpose of self-defense.¹⁴ While the Court recognized that the Second Amendment grants a fundamental right, it emphasized that the right is not unlimited; the Second Amendment does not give individuals the right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."¹⁵ Accordingly, the Court limited its decision to the right of law-abiding individuals to possess firearms in their homes for the specific purpose of self-defense.¹⁶ By endorsing such a strong right while confining it in such a specific way, the Supreme Court left unresolved the precise parameters of

12. U.S. CONST. amend. II.

13. 554 U.S. 570 (2008). Prior to *Heller*, the prevailing view was that the Second Amendment granted a collective right to bear arms. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 4 (2011).

14. *Heller*, 554 U.S. at 592.

15. *Id.* at 626–27 (providing a nonexhaustive list of limitations, such as prohibiting the possession of firearms by felons and the mentally ill, restricting the carrying of firearms in sensitive places such as schools and government buildings, and describing conditions and qualifications regarding commercial sale of arms). In addition, the Court analogized the Second Amendment to the First Amendment, which also creates fundamental rights that are subject to limitations. *Id.* at 595.

16. *Id.* at 595, 626–29.

the Second Amendment's protections, an issue that lower courts have been grappling with ever since.¹⁷

In reaching its holding, the Court performed a textual and structural analysis of the Second Amendment. The Court read “the right of the people” to convey an individual rather than a collective right, reasoning that the phrase grants an individual right in the three other instances in which it appears in the U.S. Constitution and the Bill of Rights.¹⁸ Similarly, in six other constitutional provisions,¹⁹ the phrase “the people” is used to refer to all members of the political community, not just an unspecified subset of individuals.²⁰ Next, the Court interpreted “keep . . . Arms” to mean “have weapons”²¹ and “bear Arms” to mean “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”²² By construing the Second Amendment in this manner, the Court emphasized that when used in conjunction with the word “arms,” the phrase “to bear” means more than just “to carry”; it means to carry a weapon for the specific purpose of being prepared for confrontation.²³ The Court affirmed the conclusion that the Amendment guarantees a fundamental individual right to possess and carry weapons in the home in case of confrontation when it extended this Second Amendment right to the states in *McDonald v.*

17. The U.S. Supreme Court recently declined an opportunity to provide further guidance. *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (denying certiorari on the question of whether cities and states can prohibit semiautomatic, high-capacity assault weapons, thus leaving intact an Illinois city's ban and signaling that the Court was not going to extend *Heller* any time soon).

18. *Heller*, 554 U.S. at 579–81. The phrase “the right of the people” also appears in the First Amendment's Assembly and Petition Clause and the Fourth Amendment's Search and Seizure Clause. *Id.* at 579. As the Court noted, the Ninth Amendment uses similar but not identical terminology—“rights . . . retained by the people.” *Id.* (quoting U.S. CONST. amend. IX).

19. *Id.* at 579–80 (stating that the six other constitutional provisions are the Preamble; Article I, Section 2; and the First, Fourth, Ninth, and Tenth Amendments).

20. *Id.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)) (explaining that “the people” refers to a class of persons who are part of the national community). The Court concluded that reading the Second Amendment to grant a collective right only to the militia fit poorly with the operative clause's use of “right of the people.” *Id.* at 580–81.

21. *Id.* at 582. The Court relied on the 1828 edition of Webster's *American Dictionary of the English Language*, the 1773 edition of Samuel Johnson's *Dictionary of the English Language*, and the 1769 edition of William Blackstone's *Commentaries on the Laws of England*. *Id.* The Court noted that Johnson's dictionary defined “keep” as “[t]o retain; not to lose” and “[t]o have in custody,” and that, similarly, Webster's dictionary defined “keep” as “[t]o hold; to retain in one's power or possession.” *Id.* (alterations in original).

22. *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). The Court noted that, during the eighteenth and early nineteenth centuries, nine state constitutions used the phrase “bear arms” to give citizens the right to use weapons for self-defense, further cementing its conclusion that the Second Amendment conveys an individual right, and “bear arms” means to carry for confrontation. *Id.* at 584–85.

23. *Id.* at 584.

City of Chicago.²⁴ In the wake of the narrow holding in *Heller*, lower courts have struggled to determine the boundaries of Second Amendment protection in cases not directly related to self-defense in the home; courts seem to agree, however, that a more relaxed constitutional standard than strict scrutiny applies²⁵ when a regulation does not burden this core protection of the Second Amendment—the right of the individual to have firearms in the home for self-defense.²⁶

Since *Heller*, courts have continually debated a broad spectrum of Second Amendment protections regarding gun ownership. For example, courts have confronted issues such as bans on large-capacity magazines that are capable of holding more than the normal amount of ammunition,²⁷ ownership by felons,²⁸ transportation of firearms,²⁹ ownership by perpetrators of domestic violence,³⁰ open- and concealed-carry laws,³¹ and age restrictions on

-
24. 561 U.S. 742, 791 (2010) (“[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”).
 25. See *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (holding that a state law that restricted individuals’ ability to carry firearms in public was subject to intermediate scrutiny because Second Amendment protections are not at their strongest outside the home); *United States v. Carter*, 669 F.3d 411, 416–17 (4th Cir. 2012) (finding that a ban on firearm possession by drug users was subject to intermediate scrutiny rather than strict scrutiny because only law-abiding citizens enjoy the core right of the Second Amendment); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (concluding that an all-out prohibition on firing ranges within city limits, in conjunction with a mandatory training requirement to own a gun, was subject to “a more rigorous showing than [intermediate scrutiny], if not quite ‘strict scrutiny’”).
 26. *Heller*, 554 U.S. at 630 (stating that the core protection of the Second Amendment is self-defense).
 27. See, e.g., *Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 790, 803 (D. Md. 2014) (upholding a state ban on assault weapons and large-capacity magazines, reasoning that the ban did not seriously limit the ability of an individual to defend himself).
 28. See, e.g., *Heller*, 554 U.S. at 626–27 (recognizing longstanding prohibitions on the possession of firearms by felons); *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (holding that a nonviolent convicted felon could not legally own a firearm).
 29. See, e.g., *United States v. Decastro*, 682 F.3d 160, 168–69 (2d Cir. 2012) (upholding 18 U.S.C. § 922(a)(3), which prohibits the transportation of firearms acquired out of state into one’s state of residence because the statute does nothing to keep someone from purchasing a firearm in his own state and therefore does not substantially burden Second Amendment rights).
 30. See, e.g., *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (upholding a law prohibiting a person convicted of domestic violence from possessing a weapon because there is a substantial relationship between the statute and the important government interest in “preventing armed mayhem”).
 31. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (invalidating a state ban that prohibited individuals from carrying “ready-to-use” guns in public, reasoning that such a ban violated the Second Amendment right to bear arms for self-defense). *But see Kachalsky v. County of Westchester*, 701 F.3d 81, 98–101 (2d Cir. 2012) (upholding a state statute that allowed a concealed-carry license only upon a showing of proper cause). In an important victory for gun control advocates, the Ninth Circuit recently ruled, contrary to *Kachalsky*, that “the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.” *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016)

ownership.³² While extensive jurisprudence on gun ownership exists, no court has ever commented on the legal protections, if any, that the Second Amendment provides to gun rental. Despite this lack of precedent, an analysis of the current jurisprudence suggests that reasonable gun rental regulations would not raise fatal constitutional concerns or trigger an elevated level of scrutiny.

Gun ownership and gun rental are fundamentally different concepts and therefore should be analyzed under different standards of review. As described by the Supreme Court, possession within the right granted by the Second Amendment implies ownership for the specific purpose of self-defense.³³ By contrast, the purpose of renting a gun is to use it for a finite amount of time either at a range for recreational activities such as target shooting,³⁴ or off premises for “lawful sporting purposes.”³⁵ Further, on-premises gun rentals are not considered sales,³⁶ and ranges that rent guns for use elsewhere require that the rented guns be returned after a specified period of time. Because gun ownership and gun rental have contrasting purposes and temporal natures, they have divergent relationships to the right protected under the Second Amendment and should therefore be analyzed under different standards of review.

Currently, there are two categories of gun rental regulations: on-premises and off-premises rentals. While off-premises rentals are subject to many of the same regulations as gun purchases, such as a background check through the NICS, on-premises rentals often involve significantly less

(en banc) (7–4 decision). The court did not reach the question “whether the Second Amendment protects some ability to carry firearms in public, such as open carry.” *Id.* at 927.

32. See, e.g., *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 206 (5th Cir. 2012) (holding that age restrictions on gun purchases “do not strike the core of the Second Amendment because they do not prevent 18-to-20-year-olds from possessing and using handguns ‘in defense of hearth and home’”).

33. *Heller*, 554 U.S. at 582, 584, 592.

34. See 27 C.F.R. § 478.97(b) (2016).

35. 27 C.F.R. § 478.97(a) (2016).

36. 18 U.S.C. § 922(b)(3) (2012) (carving out an express exception in the laws governing gun sales and transfers for “the loan or rental of a firearm to any person for temporary use for lawful sporting purposes”); 27 C.F.R. § 478.97(b) (2016); see also Nancy L. Othón, *Gun Range Owner Is Cleared*, SUN SENTINEL (Jan. 19, 2002), http://articles.sun-sentinel.com/2002-01-19/news/0201190213_1_atf-gun-control-act-federal-law [<https://perma.cc/KXC3-L6M6>] (emphasizing that on-premises gun rental is not a “sale or delivery” and is not subject to the Gun Control Act); Matt Valentine, *The Gun-Rental Loophole: The Little Discussed Suicide Problem at America's Firing Ranges*, POLITICO (Aug. 4, 2014), <http://www.politico.com/magazine/story/2014/08/the-gun-rental-loophole-109687?o=0> [<https://perma.cc/GZT9-Y5KM>] (explaining that individuals who rent guns to use on a range are not expected to take them off the premises, and therefore gun rental regulation is not subject to the same restrictions and judicial scrutiny as gun sales).

stringent requirements and do not mandate such a check.³⁷ On-premises renters are typically required only to fill out a form, which generally goes unchecked,³⁸ or to show a form of identification.³⁹ The absence of a requisite background check for on-premises gun rentals has permitted individuals to rent firearms⁴⁰ when they otherwise would be prohibited from accessing them.⁴¹

While there is little explanation for the current disparate treatment of on-and off-premises gun rental,⁴² there are significant public policy and

-
37. Compare 27 C.F.R. § 478.97(a) (2016) (“A licensee may lend or rent a firearm to any person for temporary use off the premises of the licensee for lawful sporting purposes: *Provided*, That [sic] the delivery of the firearm to such person is not prohibited by § 478.99(b) or § 478.99(c), the licensee complies with the requirements of § 478.102, and the licensee records such loan or rental in the records required to be kept by him under Subpart H of this part.”), with § 478.97(b) (“A club, association, or similar organization temporarily furnishing firearms (whether by loan, rental, or otherwise) to participants in a skeet, trap, target, or similar shooting activity for use at the time and place such activity is held does not, unattended by other circumstances, cause such club, association, or similar organization to be engaged in the business of a dealer in firearms or as engaging in firearms transactions. Therefore, licensing and recordkeeping requirements contained in this part pertaining to firearms transactions would not apply to this temporary furnishing of firearms for use on premises on which such an activity is conducted.”).
 38. See Curtis, *supra* note 10 (stating that gun range owners have no way to check mental health records and that Florida state law does not require background checks for gun rentals); Fenton, *supra* note 10 (noting that background checks are costly).
 39. See, e.g., *Indoor Range FAQs*, BLACK WING SHOOTING CTR., http://www.blackwingssc.com/pistol_and_rifle_range/pistol-and-rifle-range-faqs.php [<https://perma.cc/Y8J4-XAFQ>] (stating that gun renters need either valid photo identification or a member card); Valentine, *supra* note 36 (“State laws vary, but . . . most firing ranges require customers to show identification, fill out a waiver of liability and sign a form indicating that they’re mentally competent (which isn’t verified by anybody).”).
 40. While forms are generally required to rent guns on-premises, there is no system in place to verify renter-provided information. Corky Siemaszko, *Unbelievable Photo: Moment Before Marie Moore Shoots Son at Shooting Range*, N.Y. DAILY NEWS (Apr. 9, 2009), <http://www.nydailynews.com/news/world/unbelievable-photo-moment-marie-moore-shoots-son-shooting-range-article-1.362058> [<https://perma.cc/G5WL-8K5D>]; see, e.g., *Mom Kills Son, Then Self at Shooting Range*, *supra* note 10 (detailing Marie Moore’s murder-suicide and noting that she was able to rent a gun despite having a documented history of mental illness).
 41. See generally 18 U.S.C. § 922(d), (g) (2012); 27 C.F.R. § 478.99(b)–(c) (2016) (inter alia, listing persons prohibited from selling or disposing of firearms or ammunition, including convicted felons, persons who have been adjudicated as mentally defective or who have been involuntarily committed to a mental institution, convicted domestic abusers, persons under eighteen, and persons under twenty-one for any weapon other than a shotgun or rifle).
 42. Before 1968, all firearms rentals were treated in the same manner. In 1968, however, federal law codified a distinction between on-and off-premises gun rental regulations following a public hearing on the proposed rulemaking. See Gun Control Act of 1968, Pub. L. No. 90-618, § 178.97, 82 Stat. 1213 (1968) (“A licensee may loan or rent a firearm to any person for temporary use off the premises of the licensee for lawful sporting purposes”); U.S. TREASURY DEPT. INTERNAL REVENUE SERV. ALCOHOL & TOBACCO TAX DIV., INDUSTRY CIRCULAR NO. 68-33: FIREARMS REGULATIONS AND PROCEDURES (1968), http://www.ttb.gov/industry_circulars/archives/1968/68-33.html [<https://perma.cc/36MP-VNG4>] (“The furnishing of

administrative efficiency considerations for treating both as off-premises rentals. Perhaps the greatest impetus for treating on- and off-premises rentals the same stems from the government's interest in promoting greater safety on gun ranges, which are inherently dangerous areas.⁴³ Gun range violence is a substantial public safety concern, and equal treatment of on- and off-premises rentals represents a minimally burdensome remedy for achieving such an objective.⁴⁴ Regulating on-premises rentals like off-premises rentals guarantees that the information on-premises renters provide goes through the same verification process, ensuring that someone who is restricted from possessing guns is also restricted from renting them.

Certainly these new regulations would impose no additional burdens on gun range owners who already offer off-premises rentals. Although the regulations would mean new administrative procedures for gun range owners who do not rent weapons off premises, any increased administrative burden falling on gun range owners would merely be incidental to carrying out the legitimate government interest of public safety served by the regulations.⁴⁵ Stricter federal regulation of gun rentals would also promote greater consistency and compliance among the states. Providing a baseline federal rule would discourage gun range owners from implementing their own, potentially discriminatory, policies.⁴⁶

ammunition to participants in a skeet, target, trap or similar shooting activity, instructional session, competition, etc., by a club, association or other sponsoring organization does not constitute the sale or delivery of ammunition if the ammunition is expended on the premises where and at the time such activity is held.”). Despite great efforts to locate the transcript of the public hearing, including contacting the Department of Treasury's and Bureau of Alcohol, Tobacco, and Firearms' librarians and the Department of Justice's director of library staff who searched their respective archives, its location remains unknown. Therefore, the exact reasons for the change in federal law are unknown. *But see* Valentine, *supra* note 36 (reporting that, because on-premises gun renters do not take the guns off premises—meaning they do not “possess[] or receiv[e]” the firearms—NICS checks cannot be conducted).

43. At least with respect to indoor ranges, individuals are generally aiming and firing guns in close proximity to one another in an enclosed space with a limited number of exits.
44. NICS checks can take as little as thirty seconds. Elaine Vullmahn, Comment, *Firearm Transaction Disclosure in the Digital Age: Should the Government Know What Is in Your Home?*, 27 JOHN MARSHALL J. COMPUTER & INFO. L. 497, 505 (2010) (noting that “[t]he system can return one of three responses: proceed, denied, or delay”).
45. The administrative burdens would consist of retaining acquisition and disposition logs of the rented guns. 27 C.F.R. § 478.97, 478.125 (2016).
46. *See, e.g.*, Curtis, *supra* note 10 (reporting that, in response to suicides, Oak Ridge Gun Range changed its policy to prohibit gun rentals to white male Florida residents who visit alone); John Prager, *Using Her 'Discretion,' Owner of Arkansas Gun Range Declares It a 'Muslim Free Zone'*, AMERICANS AGAINST THE TEA PARTY (Sept. 30, 2014), <http://aattp.org/owner-of-arkansas-gun-range-uses-her-discretion-and-declares-it-a-muslim-free-zone> [<https://perma.cc/5LXY-4SCR>] (describing a gun range owner's implementation of a Muslim ban after hearing a religious ringtone featuring the phrase “Allahu Akbar [‘God is greatest’]” from a customer's cell phone because, according to the owner, “one mistake in [her] judgment could ‘cost innocent people their

Equal treatment of on- and off-premises rentals would continue to provide law-abiding citizens with access to firearms rentals, while increasing safety on gun ranges.

Moreover, because gun rental regulations would not touch the core Second Amendment protection of self-defense in the home and would concern rental rather than ownership, any regulation should receive, and will survive, rational basis constitutional review.⁴⁷ To determine the proper level of scrutiny in the Second Amendment context, courts consider: (1) whether the restricted activity falls within the Second Amendment right to keep and bear arms for the purpose of self-defense in the home; and (2) whether the restriction infringes on that right and, if it does, the severity of the infringement.⁴⁸ A regulation that does not fall within the Second Amendment right under the first prong receives rational basis review. If it does fall within the scope of this right, however, the court turns to the second prong. Even then, the court will apply strict scrutiny only when the regulation both infringes and severely burdens the Second Amendment right.⁴⁹ For a regulation that imposes anything less than a severe burden, the court will apply intermediate scrutiny.⁵⁰

While some lower courts have reasoned that strict scrutiny should apply generally to gun laws because the Supreme Court recognized a fundamental right

lives”); see also Abby Ohlheiser, ‘Muslim-Free’ Gun Shop Teams With George Zimmerman to Sell Confederate Flag Prints, WASH. POST (Aug. 18, 2015), <http://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/18/facing-legal-bills-muslim-free-gun-shop-teams-with-george-zimmerman-to-sell-confederate-flag-prints> [https://perma.cc/4WCD-KJET] (stating that Florida Gun Supply sells George Zimmerman’s Confederate flag prints to help pay for its legal bills from a lawsuit brought by the Council on American-Islamic Relations).

47. Past case law used intermediate scrutiny when core protections were not implicated; however, those cases involved gun ownership rather than gun rental. See *supra* note 25; see also *infra* Part II.B (explaining that, while gun rental regulations would receive and pass rational basis review, they would also survive intermediate-level scrutiny).
48. See, e.g., *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (applying the two-pronged approach); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same); see also Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 281 (2016).
49. See, e.g., *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (applying intermediate scrutiny to a public-carry statute because it did not burden the Second Amendment right); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96–97 (2d Cir. 2012) (same); *United States v. Dorosan*, 350 F. App’x 874, 876 (5th Cir. 2009) (noting that a law prohibiting hand guns on U.S. Post Office property imposed no significant burden on Second Amendment rights).
50. See, e.g., *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999–1001 (9th Cir. 2015) (finding a ban on large-capacity magazines—“statutorily defined as a detachable ammunition feeding device capable of accepting more than ten rounds,” *id.* at 994—constitutional because it does not severely burden the right to self-defense in the home).

in *Heller*,⁵¹ the Court did not expressly apply strict scrutiny in its analysis. Gun rental regulations would not have any impact on law-abiding citizens' right to possess weapons for the purpose of self-defense in their homes. Accordingly, such regulations would not sufficiently burden the core right to self-defense in the home to warrant strict scrutiny.

In *United States v. Masciandaro*,⁵² for example, the U.S. Court of Appeals for the Fourth Circuit applied intermediate scrutiny because the challenged regulation outlawed possession only in an area outside of the home.⁵³ Additionally, in *United States v. Skoien*,⁵⁴ the U.S. Court of Appeals for the Seventh Circuit analyzed the regulation under intermediate scrutiny because Skoien, a misdemeanant with domestic violence convictions, was not entitled to receive the same Second Amendment protections as law-abiding citizens.⁵⁵ The *Skoien* court reasoned that the core right of the Second Amendment grants the greatest level of protection only to law-abiding citizens.⁵⁶ Even when courts applied strict or intermediate scrutiny, however, they faced challenges only to laws limiting gun ownership, not gun rental. Because gun rental is clearly distinguishable from gun ownership,⁵⁷ gun rental regulations fall outside the purview of the Second Amendment and would therefore receive rational basis review.

Rational basis review is the most deferential form of constitutional scrutiny, requiring only that a regulation be rationally related to achieving a legitimate government interest.⁵⁸ The Supreme Court has acknowledged that the preservation of public safety is such an interest.⁵⁹ In line with this objective, gun rental

51. See, e.g., *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009) (holding that reducing domestic violence was a compelling interest and the temporary prohibition on firearm ownership, which lasted only as long as the underlying court order was in effect, was narrowly tailored to address that compelling interest (quoting *United States v. Erwin*, No. 1:07-CR-556, 2008 WL 4534058, at *2 (N.D.N.Y. 2008))). But see *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ("All this suggests that a more rigorous showing than that applied in [*United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (intermediate scrutiny)] should be required, if not quite 'strict scrutiny.'").

52. 638 F.3d 458 (4th Cir. 2011).

53. *Id.* at 471. Masciandaro was arrested for violating a federal regulation that prohibited handguns inside national parks. *Id.* at 459, 470 ("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.").

54. 614 F.3d 638 (7th Cir. 2010).

55. *Id.* at 639, 641–42.

56. *Id.* at 639 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

57. See *supra* notes 33–36 and accompanying text.

58. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

59. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) ("We have . . . previously recognized the legitimacy of the government's interests in 'ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.'" (quoting *Schenck v. Pro-Choice Network of Western*

regulations would promote greater safety on gun ranges for both owners and users and would reduce the potential for gun violence on and off the range. Current off-premises rental regulations already prevent certain citizens from accessing firearms in order to reduce the misuse of guns,⁶⁰ so equal treatment of on- and off-premises gun rentals merely extends existing legitimate regulations to on-premises rentals. Because restricting ineligible citizens' access to rented firearms preserves public safety, on-premises gun rental regulations are rationally related to a legitimate government interest and would therefore pass rational basis review.⁶¹

Treating on- and off-premises rental regulations the same, however, still leaves significant gaps that can be addressed only by imposing additional regulations. Requiring background checks for nonowners, limiting the types of weapons that can be rented, and imposing a blanket minimum age requirement on handling and firing weapons would alleviate the trend of tragedies on gun ranges.⁶² Because general gun rental regulations do not concern ownership or self-defense, it necessarily follows that these more targeted regulations would not infringe on Second Amendment rights. Moreover, such regulations would pass constitutional muster: Nonowners do not have a protectable interest in owners' firearms;⁶³ "dangerous and unusual" weapons are not related to

N.Y., 519 U.S. 357, 376 (1997)); *Smith v. Doe*, 538 U.S. 84, 102–03 (2003) (holding that the Alaska Sex Offender Registration Act has a rational connection to a legitimate nonpunitive purpose—public safety—which is advanced by alerting the public to the risk of sex offenders in their community); *Craig v. Boren*, 429 U.S. 190, 199–200 (1976) (“Clearly, the protection of public health and safety represents an important function of state and local governments.”); *cf.* *Ry. Express Agency v. New York*, 336 U.S. 106, 109 (1949) (deferring to the judgment of the local authorities in determining that public safety is a legitimate government interest).

60. *See supra* note 41 (listing the groups of citizens prohibited from renting guns off premises).
61. Before and in the wake of *Heller*, state courts used a “reasonable regulation” standard in relation to the Second Amendment. TINA MEHR & ADAM WINKLER, *THE STANDARDLESS SECOND AMENDMENT* 6–7 (2010) https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf [<https://perma.cc/R28Z-X346>]. This standard “asks whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition, of the right.” *Id.* at 6. Rational basis review would theoretically permit complete weapons bans because public safety is always a legitimate government interest, and a total ban would be rationally related to achieving that goal; a complete ban on firearm rentals would not meet the reasonable regulation standard, however, because it would effectively destroy law-abiding citizens' access to firearms for self-defense. Because a complete ban would be invalid under the reasonable regulation standard, it follows that this standard is a heightened form of rational basis review. *See id.* at 6–7. Even if a court were to apply the reasonable regulation standard to assess the constitutionality of gun rental regulations, however, the regulations would survive because law-abiding citizens would still have access to gun rentals.
62. *See supra* notes 1–10 and accompanying text (describing gun range suicides, incidents involving children, and incidents involving assault weapons).
63. *See infra* Part II.A.1.

self-defense because they are not used for that purpose;⁶⁴ and children do not enjoy the same constitutional protections as adults.⁶⁵ Even applying intermediate scrutiny, such regulations would be upheld because they are substantially related to achieving the important government objective of public safety. Therefore, these proposed regulations would increase safety on gun ranges while upholding the fundamental constitutional right to keep and bear arms.

II. ESTABLISHING THE CONSTITUTIONALITY OF GUN RENTAL REGULATIONS

The courts should not apply identical levels of scrutiny to gun ownership and gun rentals because they are fundamentally different concepts. Gun rentals do not concern ownership or self-defense and thus, under existing case law, are outside the scope of any recognized Second Amendment interest. Even if a court determined that gun rental regulations infringe on the Second Amendment, such regulations would impose only a minimal burden on a gun owner's right to bear arms for the purpose of self-defense. Accordingly, gun rental regulations would survive any constitutional attack.

A. Gun Rentals Do Not Receive the Same Protections as Gun Ownership Under the Second Amendment

On-premises gun rental differs from gun ownership to such an extent that it is categorically outside the currently accepted scope of Second Amendment protection. Gun rentals involve temporary possession outside the home, and are thus clearly distinguishable from the ownership right recognized in *Heller*. Further, the absence of an immediate self-defense justification distances gun rental from the fundamental right to self-defense in the home. Gun rental regulations, therefore, warrant more deferential review than gun ownership regulations.

64. See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (recognizing the historical prohibition on carrying "dangerous and unusual" weapons).

65. *Vance v. Bradley*, 440 U.S. 93, 112 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976). But see Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 215 (2010) (stating that classifications based on age are seen as an "expedient and acceptable proxy for a variety of underlying human characteristics that policymakers wish to target for public policy interventions," but arguing against that view). Kohn cites as examples the legal drinking age, voting age, and driving age. *Id.* at 215, 278.

1. The Right to Keep and Bear Arms Protects Only Ownership

The core Second Amendment protections apply to ownership, not rental. The Court in *Heller* read “keep . . . Arms” and “bear Arms” together, concluding that the phrase “guarantee[d] the individual right to possess and carry weapons in case of confrontation.”⁶⁶ In the context of *Heller*, possession refers to ownership.⁶⁷ While under property law the term may refer to mere physical control over an item, the Court in *Heller* uses “possession” synonymously with “ownership.”⁶⁸ Because the Supreme Court limited its ruling to possessing weapons in the home,⁶⁹ the Court must have been considering gun ownership, not gun rental; rented guns, whether for use on or off premises, are generally not taken home.

Parts of Justice Scalia’s opinion in *Heller* suggest that the 5–4 majority understood the Washington, D.C. statute at issue to concern ownership even though the statute referenced only possession.⁷⁰ While the statute banned only “possession,” for example, Justice Scalia referenced “lawfully owned firearms” as being the subject of the statute.⁷¹ Moreover, in his dissent, Justice Stevens treated “use and possession” interchangeably with “use and ownership” in reference to the Second Amendment protections.⁷² The Supreme Court’s treatment of

66. *Heller*, 554 U.S. at 592.

67. The most natural reading of the word “keep” denotes ownership or permanent possession. At the time of the Second Amendment’s ratification, “keep . . . Arms” was “a common way of referring to possessing arms.” *Id.* at 582–83 (concluding that “keep . . . Arms” continues to mean “have weapons”). Several founding-era laws granting rights regarding arms and setting forth restrictions thereto also utilized the word “keep.” *Id.* at 583 n.7. In many of these laws, the word “keep” was used in conjunction with “in their homes,” which permits the inference that the Framers understood “keep . . . Arms” to protect an ownership interest. *Id.*

68. In the context of firearms, statutes also equate possession with ownership. For instance, the United States Code refers to machine gun parts “in the possession *or* under the control of a person.” 26 U.S.C. § 5845(b) (2012) (emphasis added). Using the rule against surplusage, a common statutory interpretation technique, the terms “possession” and “under the control” must be given separate, independent meanings. See *Surplusage Canon*, BLACK’S LAW DICTIONARY 1672 (10th ed. 2014) (defining the canon of interpretation as dictating that, “if possible, every word and every provision in a legal instrument is to be given effect”); Miles Coleman, Note, *Banning the Flames: Constitutionality, Preemption, and Local Smoking Ordinances*, 59 S.C. L. REV. 475, 485–86 (2008) (explaining that the rule against surplusage “is often used to determine the meaning of a word when compared to others in the same statute that could arguably subsume it”). Thus, the *Heller* Court’s concern for protecting the possession of a firearm contemplates ownership rather than mere control, such as possession through rental or borrowing.

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

70. See *id.* at 570, 636 (recognizing that many believe that a prohibition against handgun ownership is a solution to gun violence but finding that the Second Amendment does not allow a complete ban on private ownership).

71. *Id.* at 575.

72. *Id.* at 636–37, 651, 655, 660, 670, 677 (Stevens, J., dissenting).

“possession” in *Heller* therefore evinces an understanding that, in the Second Amendment context, “possession” means “ownership.”⁷³

Similarly, by accepting a considerable number of Second Amendment claims challenging statutes that restrict or prohibit possession by certain classes of people or in certain environments, lower courts seem to equate possession with ownership as they have accepted those challenges made only by lawful gun owners. For example, in *Ezell v. City of Chicago*,⁷⁴ the Responsible Gun Owners Ordinance mandated one hour of range training as a prerequisite to obtaining a firearm permit, yet also prohibited all firing ranges in the city.⁷⁵ The plaintiffs succeeded in obtaining a preliminary injunction against enforcement of the ordinance, in part because the Seventh Circuit accepted their argument that the regulations limited lawful gun owners’ ability to own handguns in Chicago.⁷⁶ Likewise, in *Kachalsky v. County of Westchester*,⁷⁷ the Second Circuit accepted a challenge to a concealed-carry ordinance based on the claimed right of handgun owners to carry their guns in public.⁷⁸

Conversely, courts have not accepted Second Amendment challenges from plaintiffs who failed to allege that they suffered harm as owners. In *Libertarian Party of Kansas v. City of Leawood*,⁷⁹ the state trial court found that the individual plaintiffs who had challenged an ordinance that restricted their ability to openly carry firearms lacked standing—in part because they failed to state that they actually owned any firearms.⁸⁰ By requiring the plaintiffs to establish their status as gun owners before they could allege an injury from a regulation that restricted

73. See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 27 (2012) (noting that gun ownership falls “within *Heller*’s ‘core’”); Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 615 (2012) (recognizing that *Heller* extended a strong protection to handgun ownership); see also Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951, 1036 (2011) (“Implicit in both the majority and dissenting view in *Heller* is the desire to limit violence stemming from firearm ownership.”).

74. 651 F.3d 684 (7th Cir. 2011).

75. *Id.* at 689–90, 695 (7th Cir. 2011). While the body of the ordinance addresses possession, the title reflects regulation of gun owners, providing further support that possession is synonymous with ownership. See *id.* at 690–91; see also *supra* notes 67–73 and accompanying text (arguing that the Court in *Heller* equated possession with ownership).

76. *Ezell*, 651 F.3d at 698–700.

77. 701 F.3d 81 (2d Cir. 2012).

78. *Id.* at 89; see also *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (7–4 decision) (concluding that the Second Amendment does not grant members of the general public a right to carry concealed firearms outside the home).

79. No. 12 CV 9838, 2013 WL 1651810 (Kan. Dist. Ct. Apr. 17, 2013).

80. See *id.* at *5–6 (finding that individual plaintiffs lacked standing because they did not assert that they were Leawood residents, firearm owners, or previously punished for violating this particular regulation).

possession, the court manifested its understanding that possession refers to ownership.

Relatedly, courts have never accepted Second Amendment challenges by possessors who would otherwise be unable to own a gun lawfully. In *Skoien*, the defendant unsuccessfully challenged a federal statute that restricted possession of firearms based on an individual's status as a misdemeanor convicted of domestic violence.⁸¹ In *United States v. Pruess*,⁸² the defendant argued that he had a Second Amendment right to own firearms because he was a nonviolent—as opposed to violent—convicted felon.⁸³ In both cases, the defendants were unsuccessful in asserting their Second Amendment claims because they could not lawfully own a firearm in the first place.⁸⁴ It is thus clear that lower courts post-*Heller* assume ownership in cases concerning possession arguments, thereby reading ownership into the Second Amendment right granted by *Heller*. It necessarily follows that possession as used in the relevant statutes has also been equated with ownership. A gun renter, therefore, does not possess firearms as that concept has been construed by courts since *Heller*, and hence does not receive heightened protection.

The above analysis should not be understood to mean that possession establishes ownership in all contexts. For example, to prove that a defendant is in possession of contraband, the government must prove only that the defendant is either in actual or constructive possession.⁸⁵ Direct physical control over contraband at a given time constitutes actual possession,⁸⁶ whereas constructive possession is established by proof that the defendant had control over the place where the contraband was located or ownership of the contraband itself.⁸⁷ While the gun range is in constructive possession of the firearm, the gun renter is in actual possession of the firearm once it is rented; the range and renter can be in joint possession.⁸⁸ Even though the renter is in actual possession of the firearm

81. *United States v. Skoien*, 614 F.3d 638, 639, 642, 645 (7th Cir. 2010).

82. 703 F.3d 242 (4th Cir. 2012).

83. *Id.* at 244.

84. *Id.* at 247.

85. *E.g.*, *United States v. Battle*, 774 F.3d 504, 511 (8th Cir. 2014); *United States v. Ridolfi*, 768 F.3d 57, 61 (1st Cir. 2014); *United States v. Hagman*, 740 F.3d 1044, 1048 (5th Cir. 2014).

86. *E.g.*, *United States v. Newman*, 755 F.3d 543, 545 (7th Cir. 2014); *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012).

87. *E.g.*, *United States v. Perez*, 663 F.3d 387, 392 (8th Cir. 2011) (citing *United States v. Brown*, 634 F.3d 435, 439 (8th Cir. 2011)); *United States v. Melancon*, 662 F.3d 708, 713 (5th Cir. 2011) (quoting *United States v. Jones*, 484 F.3d 783, 788 n.11 (5th Cir. 2007)).

88. *E.g.*, *United States v. McCraney*, 612 F.3d 1057, 1065 (8th Cir. 2010); *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998).

on the gun range, mere possession in the gun rental context is not the same as ownership and, under *Heller*, Second Amendment rights only apply to owners.⁸⁹

Consider the following situation: John and Adam frequently go hunting together. Despite Adam's affinity for hunting, he does not own any guns; he simply borrows John's guns when they go hunting. This year, however, the state government enacts a new law that makes gun owners strictly liable for any claims that stem from a borrower's use of the owner's gun. Because of this new regulation, John informs Adam that he can no longer borrow John's guns. Can Adam challenge the regulation by asserting his Second Amendment right to borrow John's gun? Or consider an even more extreme scenario: Instead of making gun owners strictly liable for the behavior of anyone who borrows their weapons, the government enacts legislation stating that an individual can handle a gun that is registered only to him. Thus, Adam can no longer use John's guns lawfully when they go hunting.

In both of these situations, Adam could not challenge the regulation on Second Amendment grounds. He cannot step into John's shoes and assert John's Second Amendment rights as a gun owner.⁹⁰ Adam does not own a firearm; the regulation simply restricts Adam's ability to temporarily control a gun. Adam's ownership rights are not at issue; John's ownership rights are. In fact, this regulation does nothing to prevent Adam from purchasing his own firearm. Likewise, a gun renter would lack standing to challenge a statute regulating firearms at gun

89. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1449 (2009) ("Sometimes, a constitutional right isn't violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution. The restriction may still implicate some of the central concerns that prompted the recognition of the right, but the constitutional text, the original meaning, or our understanding of background constitutional norms may lead us to conclude that the right is narrower than its purposes may suggest.").

90. The *Heller* Court established that Second Amendment rights are individual rights. District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008). Similarly, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969). In *Rakas v. Illinois*, 439 U.S. 128 (1978), for instance, the prosecution entered into evidence a sawed-off rifle that police found in an automobile. *Id.* at 129. The defendants argued that police had seized the rifle illegally and that it should have been excluded from evidence. *Id.* at 130. The Court rejected the defendants' Fourth Amendment claim, however, reasoning that the defendants did not own the vehicle in which the rifle was found, and therefore the defendants could not act as the automobile owner and assert the owner's Fourth Amendment protection against unlawful search and seizure. *Id.* at 129–33 (rejecting the "[a]doption of the so-called 'target' theory," which "would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial"); see also *Wong Sun v. United States*, 371 U.S. 471, 492 (1963) (admitting narcotics evidence seized during an unlawful arrest and explaining that only the individual actually subjected to the unlawful arrest had a Fourth Amendment claim).

ranges.⁹¹ The regulation would not restrict the gun renter's ownership of his firearm because he does not own the firearm he wishes to rent. Furthermore, the regulation on gun ranges places a burden—although merely a minimal one—only on the gun range owner. As such, the gun renter, like Adam in the scenarios above, cannot step into the gun range owner's shoes and assert the owner's Second Amendment rights.

2. The Self-Defense Justification for the Second Amendment Does Not Exist for Gun Rentals

Even if the Second Amendment rights granted in *Heller* do not require ownership, the core justification behind the individual right to bear arms is self-defense, and self-defense is not the primary purpose of renting firearms at a gun range.⁹² While one purpose of gun rental is to maintain proficiency in use, the connection between maintaining proficiency through gun rental and the need to defend oneself is attenuated at best.⁹³ In practice, a mere renter's effort to improve his or her proficiency is futile if that gun renter owns no gun to use for self-defense. Further, regulating gun rental does not eradicate any law-abiding citizen's ability to practice and maintain proficiency on gun ranges. For this reason, maintaining proficiency through gun rental is only tangentially and remotely related to the right granted in *Heller*.

In the course of explaining the self-defense component of the Second Amendment right, the Court in *Heller* evinces an element of immediacy: "Surely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"⁹⁴ The Court suggests that individuals have the right to carry firearms because of the possibility that confrontation may arise while they are carrying the weapon. This

91. See *Libertarian Party of Kan. v. City of Leawood*, No. 12 CV 9838, 2013 WL 1651810, at *9–13 (Kan. Dist. Ct. Apr. 17, 2013) (holding that a plaintiff has suffered no injury, and therefore lacks standing to assert a Second Amendment claim, when he fails to assert ownership of or ability to own a weapon).

92. *Heller*, 554 U.S. at 599.

93. See *Ezell v. City of Chicago*, 651 F.3d 684, 713 (7th Cir. 2011) (Rovner, J., dissenting) ("A right to maintain proficiency in firearms handling is not the same as the right to practice at a live gun range.")

94. *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of *immediate* self-defense." *Id.* at 635 (emphasis added).

reading has protected the right of gun owners to keep their weapons at home and sometimes to carry them in public⁹⁵ because confrontations can occur in both settings.⁹⁶ The same justification of self-defense does not exist for gun rentals. When an individual is carrying a firearm on a range, there is no expectation of confrontation. Rather, gun rentals are largely motivated by recreational interests.⁹⁷ Individuals do not go to a gun range anticipating any immediate confrontation that would necessitate the use of self-defense.

The Second Amendment right is most firmly grounded in self-defense within the home. *Heller* described the home as being a place “where the need for defense of self, family, and property is most acute.”⁹⁸ Once outside the home, however, Second Amendment protection is diminished, and thus there is greater authority to regulate.⁹⁹ Many jurisdictions require a showing of proper cause, such as self-defense or for the protection of business owners who work in remote or dangerous areas,¹⁰⁰ in order to carry a gun outside the home.¹⁰¹ Most courts apply a standard less stringent than strict scrutiny when the legislation regulates,

95. *See, e.g., id.* at 635 (permitting gun owners to keep and bear arms in the home). *But see* *Peruta v. County of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (7–4 decision) (holding that the Second Amendment does not grant citizens the right to carry concealed firearms outside the home).

96. This Article recognizes that any time an individual has a firearm outside his or her residence he or she is in public; however, any reference to being “in public” refers to being out in the general public as opposed to being in an enclosed space outside the home, such as a gun range.

97. *See* 27 C.F.R. § 478.97 (2016) (stating that the statutory purposes of gun rentals are lawful sporting purposes and shooting activities); *see also* Linton Weeks, *Are Shooting Ranges the New Bowling Alleys?*, NPR (Jan. 31, 2013, 2:31 PM), <http://www.npr.org/2013/01/31/170391799/are-shooting-ranges-the-new-bowling-alleys> [<https://perma.cc/9RC2-H4KW>]; *Book a Party at FreeState*, FREESTATE GUN RANGE, <http://www.freestategunrange.com/book-your-party-at-freestate> [<https://perma.cc/D9G8-4R7A>] (“Whether it is a birthday, bachelor/bachelorette party, or even a corporate event, FreeState Gun Range is happy to accommodate your needs.”); *Special Events*, DFW GUN RANGE & ACADEMY, <http://www.dfwgun.com/about/specials.html> [<https://perma.cc/TRH2-RFR7>] (“We were listed as ‘The Best Place To Have a Bachelorette Party in Dallas’ in the 2012 Dallas Observer’s ‘Best of Dallas’ issue.”).

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

99. *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012).

100. *See, e.g., Peruta*, 824 F.3d at 926–27 (setting forth examples of good cause from the published policy of Yolo County, California).

101. *See, e.g., id.* at 942 (upholding a California law that required an applicant for a gun license to show “good cause” to carry a concealed firearm in public); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (upholding a New Jersey statutory requirement that applicants demonstrate “a ‘justifiable need’ to publicly carry a handgun for self-defense” because it did not excessively burden conduct within the scope of the Second Amendment); *Woollard v. Gallagher*, 712 F.3d 865, 880–82 (4th Cir. 2013) (applying intermediate scrutiny and upholding Maryland’s “good-and-substantial-reason” requirement); *Kachalsky*, 701 F.3d at 101 (upholding the New York statutory requirement of “proper cause”). *See generally* Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218 (2014).

rather than bans, carrying guns outside the home.¹⁰² Accordingly, because gun rentals at firing ranges are used outside the home, they would receive less protection than guns that are kept inside the home.

Even greater authority should exist to regulate firearm rentals on gun ranges than to regulate firearms in public. Courts have defended open- and concealed-carry statutes, recognizing that the Second Amendment guarantee of self-defense still exists in the public sphere¹⁰³ where law-abiding citizens face the prospect of conflict. On ranges, however, gun renters are not concerned with the immediate possibility of confrontation. Additionally, open- and concealed-carry statutes apply exclusively to gun owners, whereas gun renters enjoy only a temporary possessory interest. When an individual uses a firearm on a gun range, he or she may be practicing self-defense, not acting in self-defense. Further, an individual must return the rented firearm before exiting the range, effectively ending any possibility of using the firearm for the purpose of self-defense. Because the purpose of renting firearms on gun ranges is different from the purpose of carrying them in public, either gun rentals should receive no Second Amendment protection at all or gun rental regulations should receive a lesser standard of scrutiny. It all depends on later interpretations and applications of *Heller*.

B. Gun Rental Regulations Should Receive Rational Basis Review

Heller left unresolved what level of scrutiny to apply to laws and regulations that burden the right to bear arms outside the home.¹⁰⁴ The Court in *Heller* ruled out rational basis review for regulations of specific enumerated rights, reasoning that “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”¹⁰⁵ To do away with rational basis review for regulations on gun rentals, however, presupposes that gun rentals come within the ambit of the Second Amendment. Even if gun rentals are protected by the Second Amendment, courts have regularly upheld statutes that regulate aspects of firearm use falling outside the core

102. See, e.g., *Peruta*, 824 F.3d at 942 (dictum) (accepting argument of concurrence that intermediate scrutiny standard would apply if legislation regulates carrying guns outside the home rather than enacting an outright ban); *Drake*, 724 F.3d at 430 (applying intermediate scrutiny); *Woollard*, 712 F.3d at 876 (same); *Kachalsky*, 701 F.3d at 96–97 (same).

103. *Drake*, 724 F.3d at 440 (protecting public carry statutes by applying intermediate scrutiny); *Woollard*, 712 F.3d at 876 (same); *Kachalsky*, 701 F.3d at 96–97, 101 (same).

104. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (holding that Washington, D.C.’s handgun ban would be unconstitutional “[u]nder any of the standards of scrutiny”).

105. *Id.* at 628 n.27.

protections of the Second Amendment by applying a more relaxed standard than strict scrutiny.¹⁰⁶

Courts routinely recognize that, although the Second Amendment protects a fundamental right, strict scrutiny is not automatically applied to regulations concerning guns.¹⁰⁷ Accordingly, a firearm regulation that does not fall within the Second Amendment right to keep and bear arms for the purpose of self-defense warrants rational basis review, requiring only that the regulation be rationally related to a legitimate government purpose. If, however, a regulation does fall within the sphere of self-defense but is found not to severely impact that right, courts have generally applied intermediate scrutiny, requiring that the regulation being challenged further an important government interest by means that are substantially related to that interest.¹⁰⁸ Lastly, strict scrutiny, requiring that the law further a compelling governmental interest and be narrowly tailored to achieve that interest, is applied only when a regulation destroys or severely burdens the right of self-defense in the home.¹⁰⁹

Gun rental regulations warrant rational basis review because they do not implicate an individual's Second Amendment right to self-defense in the home. The Supreme Court in *Heller* was primarily concerned with "the need for defense of self, family, and property," which is "most acute" in the home.¹¹⁰ In contrast, a gun range is a nonconfrontational setting where individuals do not anticipate conflict. Instead, they primarily visit ranges for recreational and social purposes. Moreover, the "acute" "need for defense" does not exist at a gun range because it is not a private home.¹¹¹ One could argue that the restricted activity, gun rental, falls within the scope of the Second Amendment because it allows individuals to practice self-defense.¹¹² This activity, however, does not touch the core

106. See *supra* notes 99–103 and accompanying text.

107. See *supra* note 48 and accompanying text (explaining that, to determine the appropriate level of scrutiny, a court must consider whether the restricted activity falls within the Second Amendment right to keep and bear arms for the purpose of self-defense in the home, whether the restriction infringes on that right, and, if it does, the severity of the infringement).

108. See, e.g., *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999–1001 (9th Cir. 2015) (finding a ban on large-capacity magazines constitutional because, although it may implicate the core protection of the Second Amendment, it does not severely burden the ability of individuals to defend themselves in their home).

109. See *supra* note 104 and accompanying text (explaining that *Heller* applied strict scrutiny to a regulation because it completely banned firearms inside the home).

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

111. *Id.*

112. See *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (recognizing that "maintaining proficiency in firearm use" is a "corollary" to the "right to possess firearms for self-defense").

protection of the Second Amendment, nor does it directly implicate the asserted justifications for the Second Amendment right to keep and bear arms.¹¹³

The fleeting nature inextricably linked to gun rentals places them outside the principal protections of the Second Amendment. The weak connection between gun rental and immediate self-defense further distances gun rental regulations from the core right distilled in *Heller*.¹¹⁴ Gun rental regulations in no way impair gun ownership and do not limit law-abiding citizens' access to firearms on gun ranges.¹¹⁵ Therefore, gun rentals do not fulfill the first prong of the two-pronged approach—whether the restricted activity falls within the Second Amendment right to keep and bear arms for the purpose of self-defense in the home; consequently, the second prong—whether the restriction infringes on that right and, if it does, the severity of the infringement—is not implicated.¹¹⁶

In the alternative, even if a court were to determine that a gun rental regulation satisfied the first prong and therefore implicated an individual's Second Amendment right to own guns for self-defense, the court would still have to apply the second prong of the analysis. Under that prong, the regulation would trigger strict scrutiny only if it were to destroy or severely burden the core protection of the Second Amendment.¹¹⁷ Gun rental regulations, however, neither restrict individuals' ability to defend themselves nor prohibit certain firearms in their homes. Thus, because gun rental regulations would not severely burden an individual's Second Amendment right, the highest standard of review a court could impose would be intermediate scrutiny, not strict scrutiny.¹¹⁸

113. See *supra* Part II.A (arguing that the Second Amendment protects gun ownership and the ability of individuals to protect themselves, aspects to which gun rentals do not apply).

114. See *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (explaining that “outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense”).

115. See, e.g., *Jackson v. City and County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (“[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.”).

116. See, e.g., *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (declining to address the severity of the burden the regulation imposed on gun owners because the court found that the regulation did not concern the Second Amendment right to self-defense in the home). See *generally supra* notes 48–50 and accompanying text (discussing the two-pronged approach).

117. See, e.g., *id.* at 430 (applying intermediate scrutiny to a public-carry statute); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96–97 (2d Cir. 2012) (same); *United States v. Dorosan*, 350 F. App'x 874, 876 (5th Cir. 2009) (noting that a law prohibiting hand guns on U.S. Postal Service property imposed no significant burden on Second Amendment rights). But see *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 330–34 (6th Cir. 2014) (applying strict scrutiny to a law that prevented individuals previously committed to mental institutions from possessing a firearm), *reh'g en banc granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

118. This situation is comparable to the situations in First Amendment jurisprudence in which courts have found that certain speech and conduct, while still considered expressive under the First Amendment, contribute so little to the marketplace of ideas that they receive lesser protection. In

More specifically, in evaluating the second prong, some courts assess the nature of the infringement by analyzing whether it burdens or destroys a right. Courts often apply intermediate scrutiny to laws that regulate the carrying of firearms outside the home and laws that restrict possession of certain types of firearms and ammunition.¹¹⁹ The reason that these laws fall within the scope of the Second Amendment is that they affect either the ability of individuals to defend themselves or to keep certain firearms in their home.¹²⁰ Courts recognize that these laws generally leave open alternative methods of self-defense, however, because they do not prevent individuals from owning unrestricted guns or keeping guns in their homes, and thus do not severely burden Second Amendment rights.¹²¹ Under such an analysis, gun rental regulations will not trigger strict scrutiny. As previously discussed,¹²² gun rental regulations do not fall within the Second Amendment right to keep and bear arms for the purpose of self-defense; even if the regulations were found to implicate the Second Amendment, however, they would not severely burden that right. “Unlike strict scrutiny analysis . . . [the proposed regulations need not be] ‘narrowly tailored’ or the ‘least restrictive available means’”¹²³ Absent a total ban or functional equivalent, gun rental regulations do not sufficiently burden a gun owner’s ability to acquire a weapon for the purpose of self-defense in the home.¹²⁴

Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991), the Supreme Court recognized that nude dancing is expressive conduct but nevertheless upheld a public indecency statute prohibiting such activity. *Id.* at 565–67. The Court acknowledged that, while the regulation effectively banned a form of expression, these limitations were only incidental to the furtherance of important governmental interests. *Id.* at 567. Likewise, the recreational practice of firing guns on a range does not strengthen the ability of individuals to keep or carry weapons for the purpose of self-defense. To argue that gun rentals should receive staunch protection under the Second Amendment risks stretching the Second Amendment to limitless proportions, a position that the Supreme Court has rejected under the First Amendment. *See* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited.”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (stating that First Amendment rights are not limitless). A regulation must do more than merely concern firearms to trigger full Second Amendment protection.

119. *See supra* notes 102–103, 108 and accompanying text.

120. *E.g.*, *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999–1001 (9th Cir. 2015). *But see* *Drake*, 724 F.3d at 429–30 (asserting that the Second Amendment does not guarantee a right to publicly carry a handgun for the purpose of self-defense).

121. *Jackson v. City and County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014).

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

123. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015).

124. *See* *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (reasoning that a New York statute regulating the carrying of weapons outside the home did not impinge on the Second Amendment’s core protection of self-defense in the home, thus warranting a relaxed standard of review).

Gun rental regulations would receive rational basis review because they do not infringe on an individual's Second Amendment right to own a gun for self-defense in the home. On the contrary, such regulations would have no effect on lawful gun purchases. Even if gun rental regulations did interfere with gun owners' Second Amendment right, the interference would be minimal—imposing only a minor burden on renting a gun for recreation or to practice self-defense—and would therefore not severely burden the individual's right. Thus, at most, intermediate scrutiny—and not strict scrutiny—would be warranted.

III. PROPOSED REGULATIONS ON GUN RENTALS

Violence on gun ranges is a pervasive problem and is caused in large part by relaxed gun rental regulations. In order to combat this issue, gun ranges should be obligated to implement new standards for renting guns. To prevent restricted persons, such as convicted felons and the mentally ill, from using firearms, gun rental facilities should regulate on- and off-premises rentals the same way. This symmetry in firearm regulation will ensure that everyone handling and firing a weapon has passed a background check. In addition, gun ranges should require that non-gun owners using a borrowed gun at a range undergo a NICS check, thereby closing a loophole that otherwise would allow a restricted person access to a firearm. Further, there should be a restriction on the types of weapons available for rental; automatic weapons, encompassing machine guns and submachine guns, should be unavailable for rental. Such a restriction addresses the accidental deaths that sometimes occur when individuals rent powerful weapons without having the requisite training or skill. Finally, to address the shocking and often highly publicized tragedies involving children, gun ranges should impose minimum age requirements on gun rentals. Taken together, these regulations would reduce preventable tragedies and remedy the shortcomings of current gun rental policies, while respecting the Second Amendment right to keep and bear arms in the home for the purpose of self-defense.

A. Regulating On-Premises and Off-Premises Rentals the Same

The proposed regulation of treating on- and off-premises rentals the same requires that all gun renters undergo a background check under NICS. Current laws already mandate that gun owners and off-premises renters successfully pass NICS checks, thereby ensuring that the pending gun purchase or transfer is in

accordance with 18 U.S.C. § 922(g) and (n).¹²⁵ The underlying purpose of the background check is to prevent guns and other dangerous weapons from falling into the wrong hands.¹²⁶ The check prohibits individuals with past felony and domestic violence convictions, drug users, noncitizens, and individuals who have been treated for mental illness from possessing guns.¹²⁷ Existing NICS checks serve the governmental interests of increasing public safety, administrative efficiency, and uniformity.¹²⁸ The same justifications exist for extending NICS checks to on-premises gun rentals.¹²⁹

According to Stephen Fischer of the FBI Criminal Justice Information Services, however, a gun range may not run NICS checks on renters under current federal law because the renters are not “possessing or receiving’ the firearm for personal use off of the firearm owner’s property.”¹³⁰ Some states also prohibit NICS checks for gun rentals. For example, a Florida statute allows licensed importers, manufacturers, and dealers to conduct background checks on “potential buyers,” but makes it a felony to conduct a background check outside the

125. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102-03, 107 Stat. 1536, 1536-43 (1993) (codified as amended at 18 U.S.C. § 922 (2012)); *Fact Sheet*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> [<https://perma.cc/5ZKX-V6RR>] (“[T]he National Instant Criminal Background Check System (NICS) was established for Federal Firearms Licensees (FFLs) to contact by telephone, or other electronic means, for information to be supplied immediately on whether the transfer of a firearm would be in violation of Section 922 (g) or (n) of Title 18, United States Code, or state law.”).

126. *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics> [<https://perma.cc/7DDW-K8LB>] (“NICS[] is all about saving lives and protecting people from harm—by not letting guns fall into the wrong hands. It also ensures the timely transfer of firearms to eligible gun buyers.”); *see also* David B. Kopel, *Background Checks for Firearm Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 310 (2016) (explaining that NICS is so readily available and effective that states have started to rely on it to the point of getting rid of other, outdated means of waiting periods, licensing, and permit laws for firearm purchases).

127. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEPT’T JUST., OMB NO. 1140-0020, FIREARMS TRANSACTION RECORD PART I—OVER-THE-COUNTER (2012), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> [<https://perma.cc/5V62-LYAA>].

128. The constitutionality of NICS has never been challenged; thus, this Article presumes that it is constitutional. The constitutionality of § 922(g), however, which lists the categories of persons prohibited from purchasing, possessing, or transferring firearms, has been challenged and upheld several times. *See, e.g.*, *United States v. Carter*, 669 F.3d 411, 414, 416-17 (4th Cir. 2012) (rejecting a drug addict defendant’s challenge to § 922(g)(3) under intermediate scrutiny because the core right of self-defense extends only to law-abiding citizens); *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011) (concluding that § 922(g)(1) “substantially promotes an important government interest in preventing domestic gun violence” and thus survives intermediate scrutiny).

129. While treating on- and off-premises rentals the same adds the additional step of passing an NICS check for individuals who wish to rent guns on premises, it merely extends the same burden that already exists for gun owners, transferors, and off-premises renters to this more transient class of gun users.

130. Valentine, *supra* note 36.

purposes listed in section 790.065(1)(a), which does not include rentals.¹³¹ Additionally, a Wisconsin handgun regulation provides for a background check only in the event of a handgun purchase.¹³² This incongruent regulatory structure hinders effective and constitutionally valid restrictions. For example, it impedes gun range owners' ability to run background checks.¹³³ It also allows renters to effectively circumvent background check safeguards to which they would otherwise be subjected as purchasers. For purchases, which are strongly protected by the Second Amendment, imposing background checks is constitutional. Therefore, as Second Amendment protections are diminished for gun rental, such background checks at ranges would undeniably be constitutional.

The public safety concerns on gun ranges are not imaginary. Without an effective enforcement mechanism, convicted felons and individuals suffering from documented mental illnesses are essentially free to rent guns.¹³⁴ Marie Moore, who shot and killed her son and herself at a gun range, had a documented history of mental illness that would have prohibited her from renting a gun had the range conducted a NICS check.¹³⁵ Instead, Shoot Straight gun range in Casselberry, Florida rented Moore a handgun after she filled out a form with a series of questions that included whether she had been declared mentally unstable.¹³⁶ A manager of Shoot Straight admitted that the gun range had no way to verify the accuracy of the information provided.¹³⁷ Had Moore undergone the same background check as an off-premises gun renter, her involuntary committal to a mental hospital would have been discovered, prohibiting her from renting guns. Unfortunately, this tragedy does not stand alone.¹³⁸

131. FLA. STAT. § 790.065(1)(a), (12)(b) (2015); *see also* FLA. ADMIN. CODE ANN. r. 11C-6.009(17) (2015) ("Firearms that are rented for a specific purpose and do not leave the premises, do not require [a background check].").

132. WIS. ADMIN. CODE Jus §§ 10.02(1), 10.03(13), 10.05(1), 10.06(2)(a) (2016).

133. *See, e.g.*, Nicole Flatow, *The Tragic Insanity of Gun Ranges*, THINKPROGRESS (Aug. 28, 2014), <http://thinkprogress.org/justice/2014/08/28/3476707/in-gun-ranges-outside-rules-dont-apply> [<https://perma.cc/XX3K-CLP3>] (explaining that the owner of Shoot Straight, Joerg Jaeger, attempted to implement a background check system in response to Marie Moore's murder-suicide but was prohibited by state law from doing so; following eleven further gun range suicides, Shoot Straight stopped renting guns at all of its locations).

134. These groups of individuals are otherwise prohibited from lawfully accessing or possessing firearms. 18 U.S.C. § 922(d), (g) (2012).

135. *Mom Kills Son, Then Self at Shooting Range*, *supra* note 10.

136. *Id.*

137. *Id.*

138. *See, e.g.*, Lamothe, *supra* note 4 (stating that Eddie Ray Routh, Chris Kyle's killer, suffered from several psychiatric disorders, including schizophrenia and psychosis, but was still able to access and use weapons at a shooting range); *see also infra* Part III.B (proposing a new regulation requiring background checks at shooting ranges for customers who wish to borrow guns from another gun owner instead of renting them from the range).

Similarly, convicted felons are able to rent guns on premises. Mark Sobie, a felon convicted of bank robbery, successfully rented a gun from Silver Bullet Firearms in Wyoming, Michigan and committed suicide on the shooting range.¹³⁹ As with Moore, Sobie would have failed a NICS check had on-premises rentals required such a background check.¹⁴⁰

The public safety concerns surrounding gun rental outweigh any perceived burden on gun renters. The only people who would be prevented from accessing gun rentals under this proposed system are individuals who are already disallowed from keeping or bearing arms at home or in public, even for the purpose of self-defense. In *United States v. McCane*,¹⁴¹ for example, a convicted felon argued that § 922(g)(1) infringed on his right to possess firearms for the purpose of self-defense.¹⁴² The Tenth Circuit disagreed, with Judge Timothy Tymkovich, concurring, writing: “[F]elons lose out on [the protections of] fundamental rights . . . and [restrictions on felons’ rights] need only survive rational basis review.”¹⁴³ Since gun rental regulations would fail to implicate fundamental Second Amendment rights, NICS check requirements for gun rentals would have to survive only rational basis review. Such a requirement would indeed pass rational basis review because preventing individuals who already are prohibited from owning guns from temporarily gaining access to them on gun ranges is rationally related to the legitimate government interest in public safety.

Even if courts decide to apply intermediate scrutiny, however, gun rental regulations would still survive. Passing intermediate scrutiny requires a “substantial, not perfect” fit between the regulation and the governmental interest.¹⁴⁴

139. Fenton, *supra* note 10; *see also* Jennifer Mascia, *Shooting of Firearms Trainer by NYC Woman Exposes Gun Range Loophole*, TRACE (July 10, 2015), <http://www.thetrace.org/2015/07/background-check-vermont-gun-range> [<https://perma.cc/KR6Z-H77X>] (reporting that Veronica Lewis was able to rent a .22-caliber handgun in Vermont despite her criminal record in New York because Vermont does not require background checks for on-premises gun rentals). After completing gun-safety training, Lewis shot and critically injured her firearms instructor, Darryl Montague, and absconded with the gun. *Id.*

140. Of course, background checks may not be popular among range owners, as they can cut into the range’s bottom line. *See* Fenton, *supra* note 10 (quoting Wyoming, Michigan Police Lieutenant Scott Beckman as stating, “Background checks would be costly with hundreds, possibly thousands, of people coming through the business each year, and the process is not required by the state for gun rental at a range”).

141. 573 F.3d 1037 (10th Cir. 2009).

142. *Id.* at 1047–48.

143. *Id.* at 1049 (Tymkovich, J., concurring); *see also* *United States v. Chester*, 847 F. Supp. 2d 902, 910–11 (S.D. W. Va. 2012), *aff’d*, 514 F. App’x 393, 394 (4th Cir. 2013) (holding that individuals convicted of violent misdemeanors face valid restrictions on Second Amendment rights).

144. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (noting that “[courts] afford ‘substantial deference to the predictive judgments of the legislature’” because, “[i]n the context of firearm regulation, the legislature is ‘far better equipped than the judiciary’” to make such

Although treating on- and off-premises rentals the same might place an additional burden on the ability to maintain proficiency in self-defense, regulating gun rental is substantially related to the important government interest in public safety.¹⁴⁵ These regulations will prevent certain individuals already deemed unsuitable for gun ownership from gaining access to rented guns. Individuals with felony convictions or mental illnesses have often committed violence on gun ranges. Restricting these individuals' ability to obtain firearms through on-premises rentals will substantially further public safety interests by closing off gun rentals as an easy way for individuals with a history of crime or mental illness to obtain firearms to harm others or themselves.

B. Requiring NICS Checks for Non-Gun Owners Who Borrow Weapons

While requiring gun renters to complete NICS checks will address many public safety issues, other issues remain. Currently, an individual who visits a gun range with a gun owner may use the gun owner's firearm without triggering any sort of background check. This situation presents a problem when the borrower would otherwise be prevented from renting or buying a gun. For example, Eddie Ray Routh was able to use Chris Kyle's guns on the range, despite Routh's history of PTSD and involuntary commitment to a mental institution.¹⁴⁶ Even if the range had treated on- and off-premises rentals in the same manner, the range would not have run a background check on Routh because he was not using a rented gun—he was merely borrowing one from a fellow veteran.¹⁴⁷ Under the proposed regulation, Routh would have undergone a background check that would have revealed his history of mental illness,¹⁴⁸ thereby barring his access to firearms. While this is only one instance of a gun falling into the wrong hands, the proposed regulation would close the loophole that currently allows restricted persons to access and handle firearms on gun ranges by borrowing them from a lawful gun owner.¹⁴⁹

policy determinations (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012))).

145. See *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999–1001 (9th Cir. 2015) (stating that Sunnyvale's interest in promoting public safety was an important government interest); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (observing that gun rights have always been more limited outside the home).

146. Lavandera et al., *supra* note 1.

147. *Id.*

148. *Id.*

149. The State of California—which generally bans gun loans when one of the parties is not a licensed dealer, CAL. PENAL CODE § 27545 (West 2011) (“Where neither party to the transaction holds a dealer's license . . . , the parties to the transaction shall complete the sale, loan, or transfer of that

The same public safety justifications for uniformly regulating gun purchases and gun rentals warrant extending NICS checks to those who seek to use borrowed firearms on gun ranges. This proposed regulation should receive rational basis review because, similar to treating on- and off-premises rentals equally, the regulation does not impose a severe burden on law-abiding citizens' access to firearms.¹⁵⁰ In order to borrow guns from an owner, borrowers who can already lawfully purchase guns will merely need to pass a quick NICS background check.¹⁵¹ Moreover, as previously discussed, gun rentals are on the fringes of Second Amendment protection and should accordingly receive rational basis review.¹⁵²

This regulation would still survive, however, even if it were to receive intermediate-level scrutiny. A regulation that is substantially related to an important governmental objective will withstand intermediate scrutiny, and imposing a NICS check on gun borrowers is substantially related to established public safety concerns. It is clear that gun rental facilities are susceptible to gun violence, and unfortunately tragedies like the one involving Chris Kyle are not uncommon.¹⁵³ Gun ranges have already recognized these types of threats and have instituted some safety procedures, such as requiring a “buddy system.”¹⁵⁴ The proposed regulation would supplement safety procedures by ensuring that no on-premises gun users are restricted persons. While requiring a NICS check for gun borrowers poses a slight burden, it will not prevent law-abiding citizens from gaining access to firearms. Given the major government interest served and the minor burden imposed, this regulation would pass intermediate scrutiny.

firearm through a licensed firearms dealer . . .”), who would perform a NICS check pursuant to CAL. PENAL CODE § 28160 (West 2011)—recently enacted legislation that creates a limited exception for loans to a spouse or registered domestic partner, or to a parent, child, sibling, grandparent, or grandchild. CAL. PENAL CODE § 27880 (West 2017) (enacted July 1, 2016; effective Jan. 1, 2017). In these situations, a background check is not required. The California law applies to gun loans generally, and not just to loans on gun ranges.

150. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (holding that the level of scrutiny in Second Amendment cases is determined by whether the restricted activity falls within the Second Amendment right to keep and bear arms for the purpose of self-defense, whether the restriction infringes on that right, and the severity of the infringement).
151. *See supra* note 44 and accompanying text.
152. *See supra* Part II.B (arguing that gun rental regulations warrant rational basis review).
153. *See, e.g.*, Louis Sahagun, *Man Borrowed Gun at Shooting Range to Kill Himself, Authorities Say*, L.A. TIMES (Jan. 19, 2014), <http://articles.latimes.com/2014/jan/19/local/la-me-ln-gun-club-suicide-20140119> [<https://perma.cc/BJ37-KJSA>] (reporting that a man shot himself in the head at a gun range with a borrowed handgun).
154. *See, e.g.*, Curtis, *supra* note 10 (mentioning Orlando Gun Club, a shooting range with a buddy policy that prevents adults from renting guns alone).

C. Limiting Types of Rented Guns

Unlawful gun renters are not the only danger associated with unregulated gun ranges: Automatic weapons are frequently available for rent. Machine guns, however, are not “Arms” within the meaning of the Second Amendment. The Supreme Court in *Heller* held that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”¹⁵⁵ “Dangerous and unusual weapons” are those that law-abiding citizens do not typically possess.¹⁵⁶ Weapons in common use, however, are afforded Second Amendment protections.¹⁵⁷ Due to the characteristics of machine guns,¹⁵⁸ they do not come within the reach of the Second Amendment.

Machine guns are military weapons capable of rapid fire—some can discharge up to one thousand rounds per minute.¹⁵⁹ Unlike handguns, rifles, and shotguns,¹⁶⁰ machine guns have been classified as dangerous and unusual weapons because they are likely to cause serious bodily harm and are not typically possessed by law-abiding citizens for lawful purposes.¹⁶¹ Moreover, machine guns are not readily available for private possession. These weapons continue to be used mostly in military operations and are generally available to civilians only through Bureau of Alcohol, Tobacco, Firearms and Explosives–approved transfers¹⁶² or through the

155. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

156. *Id.* at 627 (stating that the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” comports with the limitation of Second Amendment protections only to weapons “in common use at the time”).

157. *Id.*

158. See Aaron Blake, *Is It Fair to Call Them ‘Assault Weapons’?*, WASH. POST (Jan. 17, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/01/17/is-it-fair-to-call-them-assault-weapons> [<https://perma.cc/2CWQ-Z4TP>] (describing gun rights advocates’ contention that machine guns are “much more dangerous” than semiautomatic weapons).

159. See *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (“Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machine guns.”).

160. Congress defines a “machinegun” as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.” 26 U.S.C. § 5845(b) (2012). Machine guns should not be confused with assault weapons, which are typically defined as semiautomatic weapons. See Volokh, *supra* note 89, at 1484 (noting that “fully automatic weapons have long been heavily regulated”).

161. See *Heller*, 554 U.S. at 624–25 (noting that it would be “startling” for the Second Amendment to protect machine guns); *Henry*, 688 F.3d at 640 (recognizing machine guns as dangerous and unusual weapons).

162. *Henry*, 688 F.3d at 639 n.1; see *Machine Guns & Automatic Firearms*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/machine-guns-automatic> [<https://perma.cc/83MJ-XHNJ>] (“Although federal law now prohibits the possession of newly manufactured machine guns, it permits the transfer of machine guns lawfully owned prior to May 19, 1986, if the transfer is approved by ATF.”); see also 18 U.S.C. § 922(o)

black market.¹⁶³ Every federal circuit court of appeals that has been presented with a Second Amendment challenge to restrictions on machine gun possession has concluded that the nature of machine guns places them outside the scope of Second Amendment protections.¹⁶⁴ The Second Circuit has taken this a step further and banned assault rifles,¹⁶⁵ even though they are less lethal than machine guns.¹⁶⁶ Accordingly, prohibiting machine gun rentals on gun ranges is constitutionally permissible.

Further, courts have routinely recognized that states have an interest not only in preventing gun violence, but also in reducing the harm and lethality of gun violence.¹⁶⁷ Noting the particular lethality of machine guns and other weapons with high-capacity magazines, courts have found restrictions on some automatic and semiautomatic weapons to be a permissible means of reducing some of the harms associated with gun violence.¹⁶⁸

Numerous ranges rent out a variety of machine guns.¹⁶⁹ Even though most ranges offer on-site training and instruction, many do not require it.¹⁷⁰ Thus, under current conditions, an individual with no formal training in using or handling these particularly lethal weapons may fire them at a range for a relatively small

(2012) (prohibiting possession of machine guns, except for lawful transfers or possession of a machine gun that was lawfully possessed before 1986).

163. *Henry*, 688 F.3d at 640.

164. *See id.* at 640, 641 n.4.

165. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 263 (2d Cir. 2015).

166. Blake, *supra* note 158 (describing gun rights advocates' contention that machine guns are "much more dangerous" than semiautomatic weapons).

167. *See, e.g., Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *Jackson v. City and County of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014).

168. *See, e.g., Fyock*, 779 F.3d at 999–1001.

169. *See, e.g., Machine Gun Rentals*, MIDWEST GUN & RANGE, <http://www.midwestgunandrange.com/machine-gun-rentals.cfm> [<https://perma.cc/NT87-TVD4>] (listing the guns available to rent, including a nonexhaustive list of twenty-three types of machine guns); *Rentals*, MACHINE GUN NEST, <http://www.themachinegunnest.com/rentals> [<https://perma.cc/94KQ-TR2B>] ("Have you ever wondered what it feels like to shoot a Browning M1919 like Arnold in Terminator 3? Or burn a few magazines through an MP5 like Brad Pitt and Angelina Jolie in Mr. and Mrs. Smith? How about Tony Montana's 'little friend', [sic] the M16?"). *But see, e.g., Firearm Rentals*, SILVER EAGLE GROUP, <http://silvereaglegroup.com/range-use/rentals> [<https://perma.cc/W8M7-5PF4>] (offering only handguns, shotguns, and rifles for rental).

170. *See, e.g., New Shooter FAQs*, FREESTATE GUN RANGE, <http://www.freestategunrange.com/new-shooter-faqs> [<https://perma.cc/ZWC7-L5G8>] (using the word "can" to describe training offerings to new shooters: "We can offer on-the-spot safety training to anyone who walks in the door."). *But see, e.g., Frequently Asked Questions*, BRISTLECONE, <http://www.bristleconeshooting.com/faq> [<https://perma.cc/5EL7-WSDD>] (requiring first-time gun users to attend a firearm rental safety course).

fee.¹⁷¹ In addition to being extremely dangerous, these weapons are typically incredibly powerful and can easily overpower an inexperienced user.¹⁷²

Because machine guns are outside the scope of the Supreme Court's interpretation of "Arms," their regulation will trigger only rational basis review. Federal law already bans the possession, sale, or transfer of machine guns made after 1986.¹⁷³ Extending this ban to gun ranges in no way alters the fact that machine guns are categorically outside the scope of "Arms." Further, the proposed regulation of banning machine gun rentals does not substantially burden an individual's Second Amendment right to self-defense. Law-abiding citizens will continue to have access to a myriad of firearms that are equally as effective for the purposes of maintaining proficiency in self-defense.¹⁷⁴ In addition, because federal laws prohibit the possession of most machine guns, training involving machine guns on gun ranges has no application once a user leaves the gun range. Banning machine gun use on firing ranges increases public safety without implicating or burdening the Second Amendment right. Therefore, this regulation should be accorded, and would survive, rational basis review.

D. Minimum Age Requirements for Gun Rentals

Imposing a uniform minimum age requirement for gun renters will further help prevent tragedies on gun ranges. Recently, a nine-year-old girl shot and killed gun range instructor Charles Vacca when she lost control of an automatic machine gun.¹⁷⁵ Despite supervision by both an instructor and her parents, the nine-year-old was incapable of handling the weapon safely. Imposing a minimum age requirement of fourteen when accompanied by an adult and eighteen years of age otherwise¹⁷⁶ will ensure that the user is more likely to have the size

171. See MACHINE GUN NEST, *supra* note 169 (stating that the range charges \$15–\$20 per hour to rent a semiautomatic rifle or shotgun and \$60 per hour to rent a Sten machine gun).

172. See, e.g., David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 402 (1994) ("People without a great deal of upper body strength may find a low-recoil gun to be the only kind they can successfully use for self-defense."); Berman, *supra* note 9 (reporting on the case of a nine-year-old girl who lost control of a rented Uzi due to the recoil).

173. 18 U.S.C. § 922(o) (2012).

174. See Volokh, *supra* note 89, at 1483–84. See generally Kopel, *supra* note 126 *passim*; Kopel, *supra* note 172 *passim*.

175. Nagourney, *supra* note 7. After the nine-year-old fired the weapon, she complained that "the gun was too much for her and it hurt her shoulder." *Id.* This experience reinforces the need for a regulation restricting the types of weapons that can be rented. See *supra* Part III.C (proposing a ban on machine gun rentals).

176. This Article proposes the minimum age requirement of fourteen when accompanied by an adult because state statutes governing minimum age requirements for hunting generally permit minors above the age of fourteen to obtain hunting licenses. See generally *Minimum Hunting Age Statutes*,

and strength necessary to discharge a firearm safely.¹⁷⁷ While many gun ranges already require that an individual be eighteen years old to use long guns and twenty-one years old to use handguns, a federal regulation specifying these minimum age restrictions will increase uniformity and alleviate some of the dangers associated with juvenile renters.¹⁷⁸

The Supreme Court recognizes a compelling state interest in protecting the well-being of minors.¹⁷⁹ Federal law already prohibits juveniles, defined as individuals under the age of eighteen, from transferring, purchasing, or possessing firearms.¹⁸⁰ Courts have upheld the constitutionality of federally imposed minimum age requirements by characterizing the burden on individuals younger than twenty-one as outside the Second Amendment's protection.¹⁸¹ It follows that,

NAT'L CONFERENCE OF STATE LEGISLATURES, <https://web.archive.org/web/20150905123420/http://www.ncsl.org/research/environment-and-natural-resources/minimum-hunting-age-statutes.aspx> (setting forth licensing requirements by state and indicating that Arizona, North Dakota, and Utah set the minimum age at fourteen for certain types of hunting licenses). Many states have different age requirements when the individual is accompanied by an adult of a specified age. *See, e.g.*, COLO. REV. STAT. ANN. § 33-4-117(2) (LexisNexis 2013) (under sixteen years of age when accompanied by an adult over eighteen years of age); CONN. GEN. STAT. ANN. § 26-38(a) (West 2008) (between twelve and sixteen years of age when accompanied by an adult over eighteen years of age); MISS. CODE ANN. § 49-7-20.1(2) (LexisNexis 2012) (under twelve years of age when accompanied by an adult over twenty-one); NEV. REV. STAT. ANN. § 502.010(1)(c) (2013) (eighteen years of age).

177. *See* Kimberly McGee & Fernanda Santos, *A 9-Year-Old at a Shooting Range, a Spraying Uzi and Outrage*, N.Y. TIMES (Aug. 27, 2014), http://www.nytimes.com/2014/08/28/us/arizona-firing-range-instructor-killed-by-girl-9-in-accident.html?_r=1 [https://perma.cc/B73E-N5DV] (quoting Genghis Cohen, the owner of an indoor shooting range, who said, "It was completely and utterly avoidable[,] and that he "would never let a girl of that size shoot a fully automatic gun of that size").
178. 18 U.S.C. § 922(x)(3)(a) (2012) (noting that restrictions that would ordinarily apply to juveniles do not apply to temporary transfers to such individuals); *see, e.g.*, *Shooting Range, AZ SHOOTER'S WORLD*, http://www.azshootersworld.com/go2/shooters_world_indoor_ranges.cfm [https://perma.cc/E8BU-5LQM] (requiring renters to be twenty-one to rent handguns and eighteen to rent long guns without adult supervision; the website does not indicate age requirements for individuals with adult supervision); *Indoor Range FAQs, supra* note 39 (same, but adding: "[Your child may shoot] if [the] child is 10 years of age or older and they can physically control the firearm. However, you must supervise your child's shooting activities, at all times."); *Firing Range Rules, TARGETMASTER*, http://www.targetmaster.com/range_rules.html [https://perma.cc/FJF8-8SN6] ("You must be 21 years old to shoot a handgun & 18 years old to shoot a long gun unless accompanied by parent or legal guardian at which the age is 12 to shoot either.").
179. *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).
180. 18 U.S.C. § 922(b)(1) (2012) (restricting dealers from selling long-gun firearms or ammunition to anyone under eighteen years of age and from selling handguns or handgun ammunition to anyone under twenty-one years of age).
181. *See, e.g.*, *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203–04 (5th Cir. 2012) (concluding that restricting individuals under twenty-one from purchasing handguns is "consistent with a longstanding, historical tradition [of age-based restrictions to

because individuals under the age of twenty-one do not have a recognized Second Amendment right to own firearms, they certainly do not have any constitutional right to rent them. Age restrictions on gun rentals would not implicate the core protections of the Second Amendment; therefore, these regulations would not present any additional Second Amendment issues.¹⁸²

The optimal outcome of enhanced public safety will be realized only through the effects of these regulations acting in concert. Implementing some, but not all, of these regulations creates the possibility that unlawful gun renters will be able to exploit loopholes in regulations. Because these regulations present no substantial constitutional concerns, there are few obstacles impeding their enactment and promulgation. These regulations present an efficient and constitutionally sound way to effectively prevent violence and tragedies on gun ranges.

CONCLUSION

While violence on gun ranges is a national problem, regulating gun rentals provides a clear remedy. The *Heller* Court's narrow definition of the fundamental, or core protections, of the Second Amendment—that the Amendment confers an individual right “to keep and bear Arms” for the purpose of self-defense in the home—leaves substantial room for Congress and state legislatures to regulate firearm use and allows lower courts to decide issues not covered by the Court's limited holding. Thus far, courts have addressed questions solely related to gun ownership, which implicates the *Heller*-approved core protections. In contrast, no court has addressed gun rental regulations, thereby raising the question of the level of scrutiny a reviewing court should apply to such regulations.

Traditionally, courts have applied heightened scrutiny to regulations that concern gun ownership, but the inherent differences between gun ownership and gun rental warrant only rational basis review for gun rental regulations. Gun rentals are temporary in nature, thus easily distinguishing them from the permanence of gun ownership. Although gun renters are in possession of rented firearms, in that they have physical control over the weapons, gun renters do not possess them for Second Amendment purposes, because the Court in *Heller* used possession synonymously with ownership. Further, the self-defense justifications

protect public safety], which suggests that the conduct at issue falls outside the Second Amendment's protection”); *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) (holding that the Second Amendment does not extend to juveniles because such access to firearms “can pose a serious threat to public safety”).

182. This regulation would apply only to firearm rental in a commercial setting; it would not affect personal use of firearms outside of gun ranges.

underlying the Second Amendment are absent from gun rental, as individuals rent guns largely for recreational purposes. Even those who rent guns to maintain and increase proficiency in use do so not for the purpose of self-defense in response to threatened confrontation, but rather—at best—only to prepare for *potentially* imminent confrontation. Collectively, these differences cast gun rentals outside or on the fringes of Second Amendment protections.

Because gun rental is so far removed from the core protections of the Second Amendment, the gun rental regulations proposed in this Article would receive only rational basis review. First, treating on- and off-premises rentals the same would require that all gun renters undergo a background check before gaining access to a firearm. Gun purchasers are already required to undergo a NICS check; thus, applying this same requirement to gun renters presents no additional burden on gun ownership. Second, requiring background checks for individuals borrowing weapons from gun owners who accompany them on the range is a logical outgrowth of requiring a NICS check for all gun renters and would close an obvious loophole that might still permit otherwise ineligible individuals to have access to firearms on gun ranges. Third, a ban on machine gun rentals would also increase safety on gun ranges because of the dangerous nature of these weapons. Rapid rates of fire and the difficulty of maintaining control of machine guns make them dangerous and unusual weapons wholly outside the scope of the Second Amendment. Finally, a minimum age requirement for gun rentals of fourteen years of age with adult supervision, and eighteen years of age without adult supervision, helps to ensure the likelihood that renters will physically be able to handle and discharge firearms safely. Alternatively, even if courts determine that gun rental regulations trigger intermediate scrutiny instead of rational basis review, these proposed regulations would survive because they are substantially related to the important government interest in public safety.

Acting in concert, the proposed regulations would close the loopholes in the existing federal framework. If these regulations had been in place, the tragedies cited in this Article might have been avoided: Eddie Ray Routh's history of mental illness would likely have been caught by a NICS check, rendering him unable to borrow Chris Kyle's or Chad Littlefield's guns; the nine-year-old girl who accidentally shot her instructor would have been proscribed from both firing an Uzi and using a rented gun altogether; Marie Moore would likely have failed her NICS check due to her documented history of mental illness, denying her access to the gun she used to kill her son and herself on a gun range. The regulations proposed in this Article would play a direct role in preventing heart-wrenching situations like these from occurring in the future.