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ARTICLE

ANCILLARY RIGHTS

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Many constitutional rights would be useless if certain conduct ancillary to those rights was not also protected. The Second Amendment protects the right to keep and

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bear arms, but the right could be rendered meaningless if the government could ban the possession of bullets. The Sixth Amendment's right to the assistance of counsel has been held to imply the right to use one's lawfully obtained money to pay a lawyer. Across a variety of domains, judges and scholars recognize that the full exercise of constitutional rights often warrants extending that protection to related conduct. But how far, and to what kinds?

This Article takes up these questions about what it terms "ancillary rights." The Article first illustrates the concept using examples in First, Second, and Sixth Amendment jurisprudence and then creates a taxonomy of ancillary rights in four categories: Necessary, Facilitative, Correlative, and Prophylactic. That is, some ancillary conduct is protected as necessary to the right's exercise (e.g., obtaining bullets); other activities are protected because they enable the right to be more effectively exercised (e.g., access to court proceedings); while still other conduct is protected as the corollary to the right(e.g., self-representation in a criminal case) or as a prophylactic measure that gives breathing room to the right (e.g., Miranda *warnings).*

After this survey and categorization, the Article draws an analogy to the implied powers doctrine under the Constitution's Necessary and Proper Clause to understand one way to identify and limit implied protection for ancillary rights. The Article then proposes that courts should adjudicate ancillary rights claims by focusing on the extent to which their regulation burdens the underlying constitutionally-specified right from which they ultimately derive.

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INTRODUCTION

The Constitution expressly protects a variety of conduct. It guarantees that individuals will not be restricted in the "free exercise" of their religion,[1] inhibited from exercising "the freedom of speech,"[2] denied "the equal protection of the laws,"[3] and so on. But for constitutional rights to be meaningful, adjacent and related activity must sometimes also receive protection.[4] In other words, for constitutional rights to work—or work effectively—the Constitution must sometimes be construed to extend to conduct that is not itself constitutionally-specified.[5] Novel and undertheorized questions persist about what extensions—extensions this Article terms "ancillary rights"—can also lay claim to constitutional protection. This question is urgent. As one court recently reported about developing Second Amendment doctrine, cases involving entitlements that "have variously been termed 'ancillary,' 'corollary,' 'subsidiary,' 'implied,' or

1 U.S. CONST. amend. I.

2 *Id.*

3 U.S. CONST. amend. XIV, § 1.

4 *See infra* Part II; *cf.* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure." (citations omitted)).

5 *E.g.*, Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 165-66 (2015) ("Sometimes activities are covered by the Constitution even though—in fact, because—they are peripheral to other activities that are explicitly protected. It is possible that they are protected either instrumentally, because they are useful to effectuate a core interest, or penumbrally, because they constitute some lesser-but-still-constitutional interest."); Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1092 (1997) (discussing how penumbral reasoning in constitutional cases "draw[s] logical inferences by looking at relevant parts of the Constitution as a whole and their relationship to one another").

'corresponding' rights" have proliferated in that context.[6] The same can be, and indeed has been, said about free speech cases.[7]

The concept has arisen in a number of settings. Take just a few examples from the Supreme Court's modern case law. In the First Amendment context, the Court has protected not only speaker but also audience rights, declaring that the right to *receive* information is "an *inherent corollary* of the rights of free speech and press that are explicitly guaranteed by the Constitution."[8] The Court has held that the Sixth Amendment's protection for the assistance of counsel "*implies* the right" to use one's resources to pay for that lawyer.[9] Justice Scalia has argued that the Sixth Amendment's "Confrontation Clause guarantees not only what it *explicitly* provides for—'face-to-face' confrontation—but also *implied and collateral rights* such as cross-examination, oath, and observation of demeanor."[10] Justice Alito has argued that the Second Amendment's right to keep a handgun in the home for self-defense entails "*necessary concomitant[s]*" like "the right to take a gun outside the home for certain purposes[,]" such as taking it to a repair shop or a gun range.[11] As Ashutosh Bhagwat notes, "the Court undoubtedly has regularly recognized that a constitutional provision is best understood to protect conduct beyond what the bare text would require, if that protection is necessary to effectuate the textual right."[12]

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6 Barris v. Stroud Twp., 310 A.3d 175, 183 (Pa. 2024); *see also* R. George Wright, *Core and Periphery in Constitutional Law*, 64 WM. & MARY L. REV. ONLINE 53, 56 (2023), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1039&context=wmlronline [https://perma.cc/ZSG8-G9UT] (acknowledging, but criticizing, the distinction between protecting core and peripheral rights).

7 *E.g.*, Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIA. L. REV. 1, 17 (1989) (citations omitted) ("[T]he Court has construed freedom of speech to protect other rights that it found to be 'corollary' rights, 'complimentary components' of the right, 'concomitant rights,' 'corresponding rights,' 'peripheral rights,' or rights that are 'implicit in,' 'presupposed' by, 'indispensable to' or 'a necessary predicate' to the exercise of the right of freedom of speech.").

8 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (emphasis added); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion) ("Free speech carries with it some freedom to listen."). Although the Supreme Court recently rejected a broad, free-floating "right to listen," it nonetheless acknowledged that it had previously found a "cognizable injury" of First Amendment interests under such a theory "where the listener has a concrete, specific connection to the speaker." Murthy v. Missouri, 144 S. Ct. 1972, 1996 (2024).

9 Luis v. United States, 578 U.S. 5, 25 (2016) (Thomas, J., concurring in the judgment) (emphasis added).

10 Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (emphasis added). Here, Scalia was reconstructing what he understood the majority to argue, but he noted his agreement with this particular proposition. *Id.*

11 New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting) (emphasis added).

12 Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1055 (2015).

Scholars too have argued about the existence and limits of various ancillary rights. They have debated ancillary rights under the First Amendment, like rights to gather information,[13] record sound and audio,[14] and resist involuntary mental health treatment.[15] They have analyzed ancillary Second Amendment rights to hunt,[16] train with firearms,[17] sell firearms,[18] make firearms,[19] and transport firearms around town.[20] Likewise, scholars have discussed Sixth Amendment ancillary rights for criminal defendants, such as the rights to be appointed post-conviction counsel[21] and access a law library.[22] In each context, scholars have recognized that these

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13 *See, e.g.*, Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 256 (2004) (outlining "some preliminary proposals for creating a cohesive and workable right to gather information under the First Amendment"); Mallory B. Rechtenbach, Comment, *More Than Mere "Constitutional Window Dressing": Why the Press Clause Should Protect a Limited Right to Gather Information*, 98 NEB. L. REV. 188, 208 (2019)("[A] structural analysis of the First Amendment lends support for recognizing newsgathering as a systemic right.").

14 *See, e.g.*, Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 997-98 (2016)(arguing video recording in public places, on private property with the consent of those recorded, or recording a matter of public concern is protected by the First Amendment); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339 (2011) ("In today's world, personal image capture is part of a medium of expression entitled to First Amendment cognizance.").

15 *See, e.g.*, Winick, *supra* note 7, at 9 (arguing for a First Amendment right to resist mental health treatment).

16 *See, e.g.*, Blocher, *supra* note 5, at 165-66 (suggesting that hunting may be *peripherally* protected by the Second Amendment); *see also* Michael L. Smith, *Shooting Fish*, 12 KY. J. EQUINE, AGRIC., & NAT. RES. L. 187, 232-41 (2020) (exploring the potential viability of a "Second Amendment [r]ight to [s]hoot [f]ish").

17 *See, e.g.*, Joseph G.S. Greenlee, *The Right to Train: A Pillar of the Second Amendment*, 31 WM. & MARY BILL RTS. J. 93, 94-95 (2022) (noting the existence of judicial disagreements, and the dearth of historical analysis studying, surrounding the right to train).

18 *See, e.g.*, Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 907 (2011) ("[C]ould a firearms manufacturer, distributor, or other corporate entity claim a right to be free from government restriction in the same way that the press is free under the First Amendment?").

19 *See, e.g.*, Graham Ambrose, Note, *Gunmaking at the Founding*, 77 STAN. L. REV. 235, 240-42 (exploring the historical support for a right to make guns).

20 *See, e.g.*, Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248-49 (2012) (framing the right to travel with a firearm as a potential "auxiliary protections" under the Second Amendment).

21 *See, e.g.*, Aaron Riggs, Note, *Avoiding the Byzantine Morass:* Martinez v. Ryan *and the Constitutional Right to Post-Conviction Counsel*, 55 U. LOUISVILLE L. REV. 105, 107 (2017) (suggesting the Court "missed an opportunity" in failing to find a Sixth Amendment right to post-conviction counsel).

22 *See e.g.*, Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1207-08 (2013) ("Despite all the talk of constitutional requirements, there has never been a consensus about where in the Constitution to anchor the law library right. Courts have tied the right to no fewer than six provisions: Due Process, Equal Protection, the Petition Clause, the Privileges and Immunities Clause, the fundamental rights doctrine, and the Sixth Amendment right to self-representation."); *see also* Joseph A. Schouten, Note, *Not So*

rights must be implied because they are not express on the face of the Constitution.[23]

Despite cross-cutting work in specific rights contexts, little work has sought to assess the structure and function of ancillary rights as a whole.[24] For example, Jud Campbell has explored the nature of ancillary rights to non-expressive speech-facilitating conduct in the context of the First Amendment.[25] Joseph Blocher has explored the concept of one type of ancillary right—rights *not to* engage in particular conduct[26]—and an ancillary right to hunt in the Second Amendment context.[27] Nancy Leong has emphasized the importance of the procedural, remedial, and factual context within which courts "make constitutional rights," using a Fourth Amendment case study.[28] Charlotte Garden has explored the "meta rights," like *Miranda* rights, that exist to protect other rights.[29] And Michael Steven Green has

Meaningful Anymore: Why A Law Library Is Required to Make A Prisoner's Access to the Courts Meaningful, 45 WM. & MARY L. REV. 1195, 1197-98 (2004) ("[F]ailing to provide an adequate law library violates the Equal Protection and Due Process Clauses by placing a bar on the access of certain prisoners because of their indigency.").

23 *E.g.*, Blocher, *supra* note 5, at 165 (discussing theories for recognizing penumbral, implicit, or instrumental rights that are not "explicitly protected" in the Constitution).

24 As Ashutosh Bhagwat underscored after analyzing implied speech production rights, "The larger question raised by my analysis is the extent to which constitutional provisions generally . . . should be understood to extend beyond their literal text and to create penumbral principles which are necessary to make the central constitutional protections meaningful." Bhagwat, *supra* note 12 at 1081. In a similar vein, Adam Lamparello has criticized the Supreme Court's doctrine for failing to distinguish among what he calls express rights, implied rights, and unenumerated rights. *See* Adam Lamparello, *Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause*, 49 AKRON L. REV. 179, 180-82 (2016)(arguing the Court incorrectly conflated implied and unremunerated rights rather than recognizing the three distinct categories they should: express, implied, and unenumerated). His account usefully underlines the distinction between rights implied from "a reasonable interpretation of the text" of the Bill of Rights, where such "implied rights are ancillary to and necessary for the full realization of the protections afforded by the Bill of Rights' express provisions" and "unenumerated fundamental rights," which "exist independently of the Constitution's text but have the same force as enumerated rights." *Id.* at 180. But Lamparello's focus is on the basis for identifying and securing *unenumerated rights*, a topic which this Article sets aside in focusing on the *implied* or *ancillary rights* that arise from enumerated rights.

25 *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 13 (2016) (explaining types of rights beyond expression or expressive conduct that the Court has protected).

26 *See* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 767-69 (2012) (identifying the criteria for recognizing rights not to engage in protected conduct).

27 *See* Blocher, *supra* note 5, at 165-68 (discussing the scope of the Second Amendment's protection for hunting); *see also* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 4-8 (2012) (exploring whether the Second Amendment protects a right to resist arms keeping or bearing).

28 *See generally* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012).

29 *See* Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 859 (2014) (arguing for the existence of meta rights that are "derived from the same source as the substantive rights that they protect").

explored certain "auxiliary rights" in the Second and Fifth Amendment contexts.[30]

Other scholarship has shed light on the nature of constitutional rights in general, but without keying into what makes ancillary protections different. Stephanie Barclay, for instance, has recently reconceptualized constitutional rights as protected reasons that exclude certain justifications for regulation,[31] while scholars like Daryl Levinson have argued that constitutional rights are reducible to and co-extensive with whatever remedies the Court might offer for violations.[32] Jamal Greene has forcefully critiqued the dominant understanding of rights as trumps in the contemporary United States,[33] while other scholars have defended more absolutist conceptions of constitutional guarantees.[34] And, of course, a rich and vast literature focuses on questions of constitutional interpretation regarding specific rights provisions and the appropriate theoretical frameworks for reviewing them.[35]

Unlike prior scholarship, this Article focuses on the unique features and implications of ancillary rights claims. This task is increasingly needed as courts more closely grapple with the ambit of the domain of rights. Judges'

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30 Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 133-34, 156-57 (2002).

31 *See* Stephanie H. Barclay, *Constitutional Rights as Protected Reasons*, 92 U. CHI. L. REV. (forthcoming 2025) (manuscript at 45–49) (on file with authors) ("[T]he constitutional right would allow the government to interfere with the identified constitutional interest . . . if and only if it did so for one of the identified permissible, non-excluded reasons.").

32 *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857-58 (1999) (denying the existence of any gap between "pure" constitutional rights and the remedies courts create); *see also* Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 VA. L. REV. 521, 527 (2024) (arguing for trans-substantive consistency in how the Court expounds remedies for different rights).

33 *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 89–90 (2021) (arguing against a rights absolutist approach and in favor of a rights mediation paradigm that mimics a kind of global proportionality review).

34 *See* Robert Leider, *What Is A Constitutional Right?*, U. CHI. L. REV. ONLINE (Nov. 15, 2018), https://lawreviewblog.uchicago.edu/2018/11/15/what-is-a-constitutional-right-by-professor-robert-leider [https://perma.cc/5V99-Y527] (arguing against an approach like that embodied in tiers of scrutiny that allows government reasons to sometimes overcome rights claims); *see also* J. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 73 (2019) (arguing the tiers of scrutiny framework should be abandoned because it is unsupported by the text or original meaning of the Constitution).

35 For a small sampling of recent influential works in that vast literature, see generally CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION (2023); GREENE, *supra* note 33; RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION, (2001); Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913 (2024); Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023); Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651 (2023); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018).

persistent references to "implie[d],"[36] "collateral"[37] or "concomitant"[38] rights raise questions about what to make of these invocations. This Article takes up that neglected question, exploring how these ancillary rights might be identified, classified, and adjudicated.[39] Excavating how courts and scholars discuss these rights, the Article contrasts ancillary rights with constitutionally-specified rights.[40]

As discussed in Part I, ancillary rights are derivative, contingent, and relational; they are implied from the text or purpose of individual rights' provisions and depend upon the underlying right for their existence.[41] Constitutionally-specified rights, on the other hand, are primary, independent, and express in the text.[42] The right to possess a handgun in the home for self-defense is a constitutionally-specified right (according to the Supreme Court).[43] The right to ammunition, however, is an ancillary right because the right is not constitutionally-specified—ammunition is neither an "arm[]"[44] nor included in the phrase "keep and bear"[45]—but instead must be *implied* from the right to keep and carry a gun.[46] It depends on and does not exist apart from the express right to have a firearm. So too would be ancillary Second Amendment rights to train, hunt, or open a gun shop.

After describing ancillary rights and uncovering examples in First, Second, and Sixth Amendment doctrine and scholarship, Part II creates a

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36 Luis v. United States, 578 U.S. 5, 25 (2016) (Thomas, J., concurring).

37 Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

38 New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting).

39 The Article thus engages in what Mark Tushnet calls "meta-doctrine," in both its descriptive and normative senses: "First, meta-doctrines include concepts that provide the structure or architecture within which more specific doctrines are located; the coverage/protection distinction is this type of meta-doctrine. Second, meta-doctrines include general prescriptions about what the structure of doctrine should look like." Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1076 (2017).

40 This Article sets aside questions about unenumerated rights, the boundaries of which are more difficult to map precisely because they do not have a textual hook. *See* Lamparello, *supra* note 24, at 180 (discussing reasons for distinguishing between rights implied from the Bill of Rights' express provisions and unenumerated rights).

41 *See infra* Part I.B.

42 *See* Lamparello, *supra* note 24, at 182 (identifying the rights to "free speech, the right to bear arms, the right to counsel, [and] freedom from cruel and unusual punishment" as "express" rights and "freedom of association, [and] effective assistance of counsel" as "implied" rights).

43 *See* District of Columbia v. Heller, 554 U.S. 570, 628-30 (2008) (stating a complete ban on possessing handguns in the home for protection "would fail constitutional muster" because it "makes it impossible for citizens to use them for the core lawful purpose of self-defense").

44 *See id.* at 581 (defining the term to include weapons of offense or defense).

45 *See id.* at 582-84 (defining the phrase to mean having and carrying weapons).

46 Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) ("[T]he right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." (internal quotation marks omitted) (citations omitted)).

taxonomy for understanding the variety of ancillary rights claims.[47] These map the conceptual ways that courts and commentators argue over implied protection. First, some ancillary rights are necessary; they constitute the implicit but essential ingredient for the exercise of a constitutionally-specified right (*e.g.*, the ancillary Second Amendment right to obtain ammunition). Second, other ancillary rights are facilitative, instrumentally useful to more fully effectuate the exercise of the right (*e.g.*, the ancillary First Amendment right to access court proceedings). Third, ancillary rights can also function as correlative rights, providing corollary protection for conduct that constitutes the flipside of the constitutionally-specified right (*e.g.*, the ancillary First Amendment right to listen). Fourth and finally, ancillary rights can be prophylactic: they can provide a protective hedge around the underlying right (*e.g.*, the ancillary Fifth Amendment right to *Miranda* warnings).

The following chart illustrates examples of what kind of ancillary rights might potentially claim constitutional protection, even though those rights are not constitutionally-specified. The chart is conceptual, not doctrinal. It is designed to show how the taxonomy works, even if some of the doctrinal bases for the statements are minority views or no longer constitute good law.

47 *See infra* Part II.

	First Amendment	Second Amendment	Sixth Amendment
Necessary	Think (*Ashcroft*[48]) / Ink (*Minneapolis Star*[49])	Possess Ammunition (*Jackson*[50])	Have Counsel Appointed (*Powell*[51])
Facilitative	Access Court Proceedings (*Richmond Newspapers*[52])	Access Shooting Ranges (*Ezell*[53])	Access Law Library & Legal Resources (*Milton*[54])
Correlative	Receive Information (*Pico*[55])	Exclude Guns[56]	Represent Oneself (*Faretta*[57])
Prophylactic	Gather News (*Branzburg*[58])	Operate a Gun Store (*Teixeira*[59])	Be Advised of the Right to Counsel (*Miranda*[60])

48 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.").

49 *See* Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 579, 585 (1983) (striking down a targeted tax on ink and paper used in publishing).

50 *See Jackson*, 746 F.3d at 967 (finding an "implie[d]" right to bullets).

51 *See* Powell v. Alabama, 287 U.S. 45, 72 (1932) ("[T]he right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.").

52 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion) ("[T]he First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.").

53 *See* Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

54 *See* United States v. Age, 944 F.2d 910, at *1 (9th Cir. 1991) ("In *Milton*, we held that a necessary corollary of a defendant's Sixth Amendment right to proceed pro se . . . is the right to have reasonable access to the resources necessary to prepare for his defense.").

55 *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (stating that the right to receive information is "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution").

56 While no court has held there is a Second Amendment right to exclude guns from one's property, there are powerful arguments for such an ancillary right. *See* Blocher, *supra* note 27, at 31 ("[T]he Second Amendment right not to keep guns should be coextensive with one's property-based right to exclude them.").

57 *See* Faretta v. California, 422 U.S. 806, 821 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation.").

58 *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

59 *See* Teixeira v. County of Alameda, 822 F.3d 1047, 1056 (9th Cir. 2016), *aff'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017) ("[T]he right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.").

60 *See* Miranda v. Arizona, 384 U.S. 436, 473 (1966) (finding the Fifth Amendment right to be informed of rights necessary to be able to effectively exercise those rights) *see also* Charles

Some of these specific categorizations may be contestable. The point here is not to cement these ancillary rights into place but to illustrate the categories and how they capture the (sometimes implicit) claims about the relation that ancillary rights bear to an underlying constitutionally-specified right.

Finally, Part III builds on this descriptive and analytical scaffolding to assess the coherence and utility of the way we argue over ancillary rights. The Article draws an analogy between the way courts and scholars talk about ancillary rights and how they decipher the scope of implied congressional power under the Necessary and Proper Clause.[61] Both contexts are predominantly concerned with how to make implications from textual enumeration, and the more firmly developed implied powers literature helps offer principles to guide courts in assessing both the breadth and limits of ancillary rights claims. Finally, the Article argues that once ancillary rights are identified, courts can apply a framework that focuses on how regulation burdens the underlying constitutionally-specified right to judge potential infringements.

I. SPOTTING ANCILLARY RIGHTS

This Part first uses three different rights-domains to illustrate various contexts in which judges openly assess whether to extend constitutional protection to conduct or activities that they themselves describe as ancillary to or implied from a given constitutionally-specified right. Next, it offers a sketch of how to understand these ancillary rights claims, distinguishing such protections from constitutionally-specified rights. In doing so, it acknowledges the inherent vagueness in the boundary-line. Still, the fact that courts analyze the issues in these terms is strong evidence that the distinction matters in practice, whether or not—as Part III explores—it can always be strictly maintained on a conceptual or theoretical basis.

A. *Ancillary Rights in Practice*

Examples from First Amendment, Second Amendment, and Sixth Amendment case law and commentary demonstrate how courts approach ancillary rights claims. This section unpacks the arguments that courts use when both accepting claims and rejecting them. The next Part builds on these illustrations and offers a taxonomy of the types of ancillary rights to which courts give credence.

Weisselberg & Stephanos Bibas, *The Right to Remain Silent*, 159 U. PA. L. REV. ONLINE 69, 75 (2010) (describing *Miranda* as a "prophylactic device to protect suspects' Fifth Amendment privilege").

61 *See infra* Part III.

1. First Amendment

The First Amendment has spawned a wide variety of arguments for speech-adjacent protection. Commentators have argued, for example, that the First Amendment may provide ancillary protection for rights to record,[62] to engage in scientific research,[63] to resist mandatory mental-health treatments,[64] to use psychedelic drugs,[65] to protect confidential sources,[66] and much more.[67] The Supreme Court has provided protection for expressive conduct[68] and even extended protection to what Jud Campbell calls "speech-facilitating conduct" that is not itself expressive but instead merely *facilitates* expressive activity.[69] This includes, he observes, cases finding a First Amendment right to newsgathering, to fund political campaigns, to avoid speaking, and to do scientific research.[70]

Consider *Branzburg v. Hayes*, in which the Court both recognized and resisted ancillary protection.[71] There, the Court considered three consolidated cases that involved the same fact pattern: reporters who covered potential criminal activity as part of their newsgathering role and who resisted on First Amendment grounds grand jury subpoenas seeking information about and identities of their sources.[72] As the Court described their claims, the reporters sought a right ancillary to the First Amendment's

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62 *E.g.*, Marceau & Chen, *supra* note 14, at 997–98 ; Kreimer, *supra* note 14, at 399 ; Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 188-89 (2017); Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 121 (2012).

63 *E.g.*, Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 985 (2005).

64 *See, e.g.*, Winick, *supra* note 7, at 9.

65 *See, e.g.*, DAVID POZEN, THE CONSTITUTION OF THE WAR ON DRUGS 126-29 (2024) (recounting these arguments).

66 *See, e.g.*, Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 154 (2006) ("The right of a reporter to gather information implies the corollary right to protect news sources, including confidential sources and information." (footnote omitted)).

67 *See, e.g.*, Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) ("While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive."); Kaminski, *supra* note 62, at 189 (2017) ("The Court has extended penumbral or corollary First Amendment protections not just to the act of printing a newspaper, but to various links in the distribution chain, including the distribution of handbills, acts of door-to-door solicitation, the operation of sound amplification equipment, and the placement of newspaper racks." (footnotes omitted)).

68 *See* Spence v. Washington, 418 U.S. 405, 409-10 (1974) (describing protection for expressive conduct).

69 Campbell, *supra* note 25, at 12-13.

70 *Id.* at 13 (identifying these rights and what they facilitate).

71 408 U.S. 665 (1972).

72 *Id.* at 667–79.

free speech and press guarantee.[73] They argued that newsgathering often requires granting anonymity or confidentiality to sources and that the forced revelation of that information would make future sources "measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."[74]

The Court did not wholesale reject their claimed ancillary right as too broad or insufficiently moored to the text.[75] In fact, the justices partially agreed.[76] The majority emphasized that it was not "suggest[ing] that news gathering does not qualify for First Amendment protection."[77] After all, "without some protection for seeking out the news, freedom of the press could be eviscerated."[78] In other words, the First Amendment has to extend protection to at least some antecedent or publishing-adjacent activity like newsgathering because otherwise the government could squelch free speech and press.[79] But, the Court ruled, requiring journalists to answer grand jury subpoenas and reveal information gained in confidence does not offend the Constitution.[80] So, although the First Amendment does indeed provide an ancillary right to engage in newsgathering, it does not create an additional ancillary right to withhold confidential information from grand juries.

The majority relied on several grounds to reject the reporters' claims to an ancillary right to withhold sources and information gained in confidence. The opinion first canvassed precedent, underscoring that the Court had never held that every government action imposing some incidental burdens on speech or press were unconstitutional.[81] The common law rules too supported rejecting a First Amendment right to refuse disclosure of confidential sources or information to grand juries.[82] The Court then highlighted the interest on the other side of the ledger: the grand juries' historic role in investigating wrongdoing.[83] It also noted that the majority of states had declined to create under their own law a privilege for reporters, even though a few had done so.[84]

Next, the Court noted that the requirement to provide truthful information to grand juries imposed only a modest burden on a reporter's

73 *Id.* at 679–80.
74 *Id.*
75 *Id.* at 681.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.* at 690-92.
81 *Id.* at 682–85.
82 *Id.* at 685-86.
83 *Id.* at 686–88.
84 *Id.* at 689.

ability to gather news (a small burden, we might say, on their ancillary right to newsgathering).[85] The Court further suggested there were no compelling reasons to create a prophylactic right to protect the underlying constitutional interests.[86] And finally, the Court stated that it would be exceedingly complex to implement the kind of ancillary right the challengers sought.[87] In sum, precedent, history, the importance of the government's interest, the lack of a state-level consensus, the minimal burden on constitutional interests, the absence of a need for prophylactic protection, and the practical difficulties involved in administering the privilege all counseled against recognizing an ancillary right to refuse disclosure of confidential sources.

Justice Stewart, in dissent, framed the question frankly as one of ancillary protection: "whether a reporter has a constitutional right to a confidential relationship with his source."[88] Posed that way, it is clear he was squarely confronting an ancillary rights claim. His question was not about whether such a right could be found on the face of the document (a fact he conceded), but whether the justices should *infer* from the constitutionally-specified rights to speech and press an ancillary right that would safeguard those rights. Joined by Justices Brennan and Marshall, he answered in the affirmative.[89] He did not derive that protection from the constitutional text, but from foundational First Amendment values: "[t]he reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public."[90] In other words, the dissent viewed this ancillary right as prophylactic, a right needed to safeguard the First Amendment inspired societal interest in information.

In *Branzburg*, all of the justices agreed that newsgathering merits at least some constitutional protection, even though that is a right concededly implied and not express in the text.[91] They disagreed on whether to also derive from the First Amendment a right to confidentiality that could defeat a grand jury subpoena, with the majority resisting that further extension.[92]

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85 *Id.* at 691–95.

86 *Id.* at 697 ("Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates.").

87 *Id.* at 703–04 ("The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order.").

88 *Id.* at 725 (Stewart, J., dissenting).

89 *Id.* at 725-27.

90 *Id.* at 725.

91 *Id.* at 681.

92 *Id.* at 682-83.

In a similar vein, the Court in *Globe Newspaper v. Superior Court* underscored that the First Amendment provides implied protection for public access to criminal trials.[93] That right is not mentioned in the text, the majority acknowledged, but the Court had "long eschewed any 'narrow, literal conception' of the Amendment's terms, for the Framers were concerned with broad principles."[94] It would undermine the "background of shared values and practices" against which the First Amendment was written to so cabin the right.[95] As a result, the Court said, "[t]he First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[96]

Recognizing a right to trial access served to enable citizens to engage in better informed discussions about their government.[97] It was a right embedded in historical practice and useful for holding government officials accountable in the conduct of criminal trials.[98] "In sum," the Court concluded, "the institutional value of the open criminal trial is recognized in both logic and experience."[99]

2. Second Amendment

Like the First Amendment, the Second Amendment has also been subject to a wide variety of arguments for extending protection to ancillary activity. Glenn Reynolds, for example, has argued that "Second Amendment penumbras" and "auxiliary protections" might safeguard ancillary rights like purchasing guns and ammunition and transporting them to other lawful places.[100] Scholars have debated whether the Second Amendment provides ancillary protection for a right to hunt,[101] or a right to train with weapons,[102]

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93 457 U.S. 596, 604 (1982).

94 *Id.* (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

95 *Id.*

96 *Id.*

97 *Id.* at 604-05.

98 *Id.* at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.").

99 *Id.* at 606.

100 Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248–49 (2012).

101 Blocher, *supra* note 5.

102 *See generally,* Greenlee, *supra* note 17.

or to manufacture one's own firearms,[103] and more.[104] Courts too have explored a wide variety of these arguments.[105]

The Pennsylvania Supreme Court's 2024 opinion in *Barris v. Stroud Township*[106] is illustrative. In that case, a man challenged a Pennsylvania township ordinance that prohibited firearm discharge except at a properly zoned shooting range.[107] Zoning restrictions made about two-thirds of township property ineligible for a shooting range, including the challenger's own residential property that he had used for range practice prior to the discharge ordinance.[108]

He sued, arguing that the Second Amendment protected his right to engage in firearm practice on his own property.[109] Specifically, he claimed that the Constitution "secures the right to bear arms *and the corresponding right* to learn and gain proficiency with and about firearms and obtain training required for firearm ownership."[110] After the trial court entered judgment in favor of the township, the intermediate appeals court reversed, vindicating his claim.[111] It adopted a broad view of ancillary rights, writing that the ordinance excessively burdened "an individual's right under the Second Amendment to maintain proficiency in firearm use via a personal shooting range on one's property."[112]

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103 *See, e.g.*, Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 496 (2014) ("The right to make arms can be viewed as constitutional guarantee to provide the means necessary to keep and bear arms. The creation of guns, by 3D printing, or other means, directly serves the right protected in *Heller*.").

104 *See, e.g.*, Heidi Li Feldman, *What It Takes to Write Statutes That Hold the Firearms Industry Accountable to Civil Justice*, 133 YALE L.J. F. 717, 734 (2024) (arguing that there is no textual, conceptual, or empirical basis for protecting a right to engage in firearms commerce); Dan Terzian, *The Right to Bear (Robotic) Arms*, 117 PENN ST. L. REV. 755, 790 (2013) ("Even if robots are not arms . . . they still may be entitled to protection under the Second Amendment's penumbra, as an auxiliary right.").

105 *See, e.g.*, Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. 2022) ("[T]he right to keep and bear arms implies a corresponding right to manufacture arms.").

106 Barris v. Stroud Twp., 310 A.3d 175 (Pa. 2024).

107 *Id.* at 177. The ordinance made other exceptions too, but those were immaterial to the challenge. *Id.*

108 *Id.* at 195.

109 *Id.* at 196.

110 *Id.*

111 Barris v. Stroud Twp., 257 A.3d 209, 225 (Pa. Commw. Ct. 2021), *rev'd and remanded*, 310 A.3d 175 (Pa. 2024).

112 *Id.* at 225. This broad reading proved too much for the dissent.

> Even if the right to bear arms carries with it the right to become proficient in the use of firearms, all that should require is that some practice facilities be allowed within a reasonable distance of the gun owner, not that they be permitted in every zoning district in the community, particularly residential districts.

Id. at 227 (Leadbetter, J., dissenting).

The Pennsylvania Supreme Court disagreed. There was some debate about how to frame the claimed ancillary right. Amici supporting the challenger squarely framed the ancillary right as a right to train with firearms.[113] The government framed the claim instead as being about a putative right to discharge a firearm at a particular place or to maintain a private range at one's residence.[114] Noting that *Bruen* required assessing whether the challenged regulation burdens "conduct" within the plain text of the Second Amendment, the court underscored the various descriptions of what conduct Barris was actually engaged in.[115] But, it said, "we find it doesn't matter which proposed framing is most accurate; we conclude Barris's conduct—whether viewed generally as his ability to gain proficiency with firearms or more specifically as his ability to do so on his own property—is covered by the Second Amendment's plain text."[116]

Curiously, though, the Court also said that it reached that result "without deciding whether the Second Amendment protects 'ancillary' rights related to the core right to self-defense, or if 'training' properly falls within that category."[117] But it did note the points in favor of recognizing such an ancillary right. Looking to precedent, it noted that *Heller* suggested the Second Amendment provides some protection for training with firearms.[118] Additionally, *Heller* struck down a firearm storage requirement that it said made it impossible for citizens to use their guns in self-defense, which the *Barris* Court stressed. "It's difficult to ignore how closely this reasoning resembles the concept of 'ancillary' rights."[119] Next, the Court cited a single justice statement in another ancillary-rights context that noted protection for firearms training.[120] Finally, the Court highlighted that "there are some reputable historical sources that support this position."[121] Ultimately, however, it decided that the ordinance implicated the Second Amendment on a circuitous and somewhat strained rationale: that because violation of the ordinance could result in firearm seizure, it directly implicated the right to

113 *See Barris*, 310 A.3d at 201 ("Amici explain they are 'interested in this case because training is an essential element of the right to keep and bear arms.'").

114 *Id.* at 204.

115 *Id.*

116 *Id.* at 204.

117 *Id.* at 204-05.

118 *Id.* at 205-06.

119 *Id.* at 206.

120 *Id.* ("[W]e acknowledge Justice Thomas has expressly endorsed (albeit pre-*Bruen*) the notion that firearm training is protected by the Second Amendment." (citing Luis v. United States, 578 U.S. 5, 26 (2016) (Thomas, J., concurring)))

121 *Id.*

"bear" arms.[122] That conclusion allowed it to sidestep a more difficult inquiry: "whether ancillary rights, including training with arms (either at home or elsewhere), are protected by the Second Amendment."[123]

Like the Supreme Court in *Branzburg*, the *Barris* Court's consideration of ancillary rights protection included examining history and precedent, though its conclusion that the Second Amendment was implicated on other grounds allowed it to skirt the more difficult analysis about ancillary rights.

Teixeira v. County of Alameda[124] also illustrates ancillary rights reasoning. In that case, the Ninth Circuit confronted a county zoning ordinance that restricted the locations in which a gun store could operate.[125] In analyzing the scheme, the court stated that "the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense."[126] It then listed a series of cases in which it and other courts had found certain ancillary rights implicated:

- "the sale of certain types of ammunition,"[127]
- "banning firearm ranges within the city,"[128] and
- "the ability to acquire arms"[129]

In the case before it, the court rejected the prospective gun store operator's challenge.[130] The court held that, in advancing the third-party claims of individuals wishing to purchase firearms, the gun store had not adequately alleged that the county ordinance actually restricted the right of residents to buy guns in the county because many other gun shops existed within the jurisdiction.[131]

The *Teixeira* court cited an earlier Ninth Circuit case, *Jackson v. City and County of San Francisco*,[132] which confronted local regulations on certain types of ammunition. At the threshold, that court noted that the Second Amendment "does not explicitly protect ammunition," but underscored that "without bullets, the right to bear arms would be meaningless."[133] Thus, "[a]

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122 *Id.* at 206-07 ("[A]lthough the express purpose of the ordinance is to regulate when and where firearms may be discharged, if violated, it operates to physically disarm violators . . . . In this way, the discharge ordinance 'impedes . . . on [Barris's right to] bear[] arms[.]'") (alternation in original). The right to "keep" an arm seems like a more natural textual hook for that complex argument.

123 *Id.*

124 873 F.3d 670 (9th Cir. 2017).

125 *Id.* at 673.

126 *Id.* at 677.

127 *Id.* (citing Jackson v. City and Cnty. of San Francisco, 746 F.3d 953, 968 (9th Cir. 2014)).

128 *Id.* (citing Ezell v. City of Chicago, 651 F.3d 684, 704-06 (7th Cir. 2011)).

129 *Id.* at 677-78 (citing Ezell v. City of Chicago, 651 F.3d 684, 704-06 (7th Cir. 2011)).

130 *Id.* at 680-81.

131 *Id.* at 679-81.

132 746 F.3d 953 (9th Cir. 2014).

133 *Id.* at 967.

regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose."[134]

In all of these cases, courts confronting questions about the ambit of Second Amendment protection reasoned through ancillary rights questions explicitly. They recognized the question as one step removed from the express right to keep and bear arms. As the Fifth Circuit said in a challenge to regulations governing commercial firearms sales: "Of course, the words 'purchase,' 'sale,' or similar terms describing a transaction do not appear in the Second Amendment. But the right to 'keep and bear arms' surely implies the right to purchase them."[135]

3. Sixth Amendment

In the Sixth Amendment context, the Court has explored a range of rights that are implied by—ancillary to—a defendant's constitutionally-specified right to "the assistance of counsel."[136] This section highlights just a few of the salient cases in which the Court extended its conception of what the right to counsel entails. It is true the Court later trimmed back on some of these pronouncements, but the important point for the purposes of this section is not the current state of doctrine but the methods and arguments for recognizing (or resisting) ancillary rights. In articulating the right to counsel, the Court has held or left open the question whether the right implies ancillary rights to (1) appointed counsel,[137] (2) counsel paid for by the government,[138] (3) effective counsel,[139] (4) represent oneself pro se,[140] (5)

134 *Id.*

135 Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 127 F.4th 583, 589-90 (5th Cir. 2025).

136 U.S. CONST. amend. VI.

137 *See* Powell v. Alabama, 287 U.S. 45, 72 (1932) ("In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.").

138 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that the goals underlying the right to counsel "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him").

139 *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668, 685 (1984)(citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942)) ("[A]ccess to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.").

140 *See* Faretta v. California, 422 U.S. 806, 819 (1975) ("Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment."); McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) ("*Faretta*'s holding was based on the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment.").

access materials to assist in one's defense,[141] (6) be present in court,[142] (7) make closing statements to a jury,[143] and (8) use one's money to pay for a lawyer.[144] It has described the recognition of these ancillary rights as, variously, the "corollary"[145] of the right to counsel or as "implied"[146] by that constitutionally-specified right.

Take *Faretta v. California*.[147] In that case, Anthony Faretta sought to represent himself *pro se* against charges of grand theft, as he had done in a previous case.[148] Faretta told the trial judge that he did not want a public defender appointed to represent him because he believed the public defender's office was too overloaded with cases.[149] After initially allowing Faretta to proceed on his own behalf, the trial court changed course.[150] The court appointed a public defender to represent him, refused Faretta's request to act as co-counsel, and would not accept motions Faretta himself offered.[151] A jury found him guilty.[152] He appealed, arguing that the Sixth Amendment's right to the assistance of counsel includes an implied correlative right to self-representation.[153]

At the Supreme Court, Justice Stewart began the majority's analysis by recognizing that in federal courts, a defendant's right to represent himself was deeply rooted in historical practice dating back to the founding.[154] Many states provided a right in their own courts[155] and dicta in previous Supreme Court cases suggested such a right existed as a matter of federal constitutional

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141 *See* Kane v. Garcia Espitia, 546 U.S. 9, 10 (2005) ("The federal appellate courts have split on whether *Faretta*, which establishes a Sixth Amendment right to self-representation, implies a right of the pro se defendant to have access to a law library.").

142 *See* Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (assuming that a "defendant has the privilege . . . to be present in his own person whenever his presence has a relation, . . . to the fulness[sic] of his opportunity to defend against the charge."); Schwab v. Berggren, 143 U.S. 442, 450 (1892) ("The constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. That is his trial. This, of course, implies that he shall have a right to be present.")

143 Herring v. New York, 422 U.S. 853, 857-58 (1975).

144 Luis v. United States, 578 U.S. 5, 23 (2016).

145 Powell v. Alabama, 287 U.S. 45, 72 (1932).

146 Faretta v. California, 422 U.S. 806, 819 (1975); *see also Schwab*, 143 U.S. at 450 ("This of course implies that [the defendant] shall have a right to be present.").

147 422 U.S. 806 (1975).

148 *Id.* at 807.

149 *Id.*

150 *Id.* at 808-10.

151 *Id.* at 810.

152 *Id.* at 811.

153 *Id.* at 811-12.

154 *Id.* at 812-13.

155 *Id.* at 813.

law.[156] One previous case, said Justice Stewart, "recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'"[157] Underlining that lower federal courts had protected such a right, the majority stated that this stack of persuasive authority "form[s] a consensus not easily ignored."[158] Thus, the majority asserted that "we confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[159]

Only after this survey did the Court turn to the Sixth Amendment's text, drawing inferences about a defendant's rights from its express guarantees.[160] "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[161] It would subvert the purpose and "violate[] the logic of the Amendment" to force an attorney on a defendant who wants to represent himself.[162] Thus, "when naturally read," said the Court, the Sixth Amendment "*implies* a right of self-representation."[163]

After surveying this set of prior Supreme Court dicta, state-level consensus, lower federal court authority, and the text of the Constitution, the Court turned to English and early American history to confirm the Sixth Amendment's protection for self-representation.[164] The Court began in a register of historical argument that Jack Balkin has called an authority-constructive critical use of history.[165] The Court emphasized that in all of English history, the despised Star Chamber was the only court that adopted a practice of forcing a lawyer on an objecting accused.[166] After that, obligatory counsel disappeared and self-representation became the norm.[167] The common law rule was that counsel could not be forced on the defendant.[168]

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156 *Id.* at 814.

157 *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

158 *Id.* at 817.

159 *Id.*

160 *Id.* at 818-820.

161 *Id.* at 820.

162 *Id.*

163 *Id.* at 821 (emphasis added).

164 *Id.*

165 *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 26 (2024) (describing this mode of argument as "[c]laiming legal authority through aversive history or by negative example").

166 *Faretta*, 422 U.S. at 821-22.

167 *Id.* at 823.

168 *Id.* at 826.

This practice continued in the colonies and newly independent states.[169] And the lack of any record of forced appointments in American history spoke volumes to the majority.[170] Based on their knowledge of this history, "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[171]

The primary dissent chastised the majority's implied-rights theory,[172] criticizing the notion that a right to self-representation is lurking "tucked between the lines of the Sixth Amendment."[173] True, the dissent conceded, prior cases had suggested in dicta that a defendant could waive his right to the assistance of counsel.[174] "But . . . the power to *waive* a constitutional right does not carry with it the right to insist upon its opposite."[175] And history, said the dissent, did not support the Court's view.[176] Finally, the dissent faulted the majority for failing to grapple with the practical consequences of its decision.[177]

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In the cases canvassed in this section, courts are openly grappling with the recognition that some conduct that is not itself encompassed within the bare

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169 *Id.* at 826-29.

170 *See id.* at 832 ("No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable."). The Court's argument is about the silence of the historical record, but it supports an inference from silence with reasons for why it might be valid. *See id.* ("If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none."). Justice Blackmun, in dissent, drew the opposite inference from the silence. *See id.* at 850 (Blackmun, J., dissenting) ("I believe it is at least equally plausible to conclude that the Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language.").

171 *Id.* at 832.

172 *See id.* at 844 (Burger, J., dissenting) ("[I]t would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication.").

173 *Id.* at 837 ("The most striking feature of the Court's opinion is that it devotes so little discussion to the matter which it concedes is the core of the decision, that is, discerning an independent basis in the Constitution for the supposed right to represent oneself in a criminal trial.").

174 *Id.* at 840-41.

175 *Id.*

176 *See id.* at 845 ("[H]istory ought to lead judges to conclude that the Constitution leaves to the judgment of legislatures . . . the question whether criminal defendants should be permitted to conduct their trials *pro se*.").

177 *See id.* ("Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered. However, such considerations are conspicuously absent from the Court's opinion in this case.").

text of the Constitution should be constitutionally protected because the conduct is so intertwined with the underlying right itself. They use various modalities of constitutional interpretation in deciphering the dividing line between rights that should and should not be implied from the express text.[178] The next section focuses on how to understand courts' analyses in more holistic terms.

B. *Ancillary Rights in Theory*

Because debates over constitutional rights in general would require—indeed have inspired—book-length treatments, this Article focuses narrowly on enumerated constitutional rights and their ancillary protections.[179] It understands those enumerated constitutional rights as especially fundamental norms or values included in our country's founding document.[180] To understand what courts are doing in ancillary rights cases, the Article starts with a baseline concept of *constitutionally-specified rights*.

Constitutionally-specified rights are rights that are specified in the Constitution. These are what some other scholars have referred to as "express rights," those enumerated on the face of the document.[181] The Second Amendment's "right to keep and bear arms" means that possessing a gun is a constitutionally-specified right. The First Amendment's protection for "the

178 *Cf.* PHILIP C. BOBBITT, CONSTITUTIONAL FATE 7-8, 93-94 (1982) (identifying and elaborating on six primary modalities at use in constitutional interpretation).

179 The discussion of ancillary rights in this context might, however, also shed light on how to address ancillaries to *unenumerated* rights. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("[I]f appellee's right to procreate means anything at all, it must *imply* some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.") (emphasis added); Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) ("[T]he Fourteenth Amendment's recognized liberty interest in an individual's right to refuse medical treatment carries with it a *concomitant right* to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment" (emphasis added)); Pavan v. Smith, 137 S. Ct. 2075, 2078-79 (2017) (per curiam) (holding that *Obergefell*'s right to same-sex marriage implies a right to issuance of birth certificates with parentage listed on the same footing as opposite-sex couples).

180 As Jud Campbell, Jonathan Gienapp, and others have shown, the Founder's conception of fundamental rights did not primarily rest on their specific textual enumeration. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1436 (2020) (explaining this distinction between modern and contemporary understandings of rights); JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE, 12 (2024) ("The Founding generation committed their constitutions to writing, but because of how they understood both constitutions and fundamental law, they did not assume that writing constitutional principles down automatically erected sharp textual boundaries around those constitutions."). These accounts challenge how courts today address rights claims. The treatment in this Article takes current doctrine as it stands, with the contemporary focus on textual enumeration and modern forms of judicial rights enforcement.

181 Lamparello, *supra* note 24, at 183 (discussing the distinction between "express" and "implied" rights).

freedom of speech" means that talking to a friend on the street corner is a constitutionally-specified right. At least that is how the Supreme Court has interpreted the language of the First and Second Amendments. I certainly do not mean to imply that constitutionally-specified rights are always "plain" or "clear" or require no interpretation to understand or implement. I mean only that they do not require multiple levels of implication to derive.[182]

To say that some rights are constitutionally-specified and that some are ancillary may seem to rely on a stilted and literalistic form of textualism. Although that critique has some bite, two responses justify the distinction. First, as shown above, courts *themselves* talk as if they are engaged in different tasks when determining express and implied rights.[183] That alone makes the distinction worth tracking, if only for the descriptive insights it provides into how courts perceive their task in these kinds of cases.

Second, and more fundamentally, it is not necessary to adopt a hidebound literalism to distinguish between express and implied rights. Sometimes the express, constitutionally-specified right itself can be quite capacious. The First Amendment's text has been held to encompass a wide variety of expressive activity—as a matter of the phrase "the freedom of speech."[184] Nude dancing,[185] flag burning,[186] and armband wearing[187] have all been protected as constitutionally-specified rights.[188] Cases reading the scope of First Amendment coverage for expressive activity expansively are still

182 *See* Oakland Tactical Supply, LLC v. Howell Twp., 103 F.4th 1186, 1196 (6th Cir. 2024) (noting that "in the context of implied corollary rights," the court's "analysis begins one step removed from the plain text").

183 *See infra* Section I.B.

184 *See* Jared Mullen, *Information Gathering or Speech Creation: How to Think About a First Amendment Right to Record*, 28 WM. & MARY BILL RTS. J. 803, 820 (2020) ("In the Court's conception, free speech involves an extremely broad array of conduct."); Spence v. Washington, 418 U.S. 405, 409-10 (1974) (analyzing whether the challenger's "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments").

185 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

186 Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that flag burning is protected expressive conduct).

187 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (holding that wearing an armband out of protest is a protected "symbolic act" that is "closely akin to 'pure speech'").

188 The right to lie has also garnered protection. *See* David S. Han, *Categorizing Lies*, 89 COLO. L. REV. 613, 614-15 (2018) (exploring constitutional protection for false statements of fact); David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 73 (2012) ("[I]f the self-definition interest has any distinct constitutional force, then circumstances would surely exist under which autobiographical lies merit First Amendment protection."); *see also* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013) ("Laws targeted at false campaign speech regulate political speech at the core of the First Amendment and run the risk of doing more harm than good.").

focused on the express right because they are about what *expression* is entitled to constitutional protection.[189]

These kinds of questions about constitutionally-specified rights are meaningfully different from questions about whether the First Amendment extends ancillary protection to action that is not itself even claimed to be *expressive*.[190] Take the ancillary right to record information. Like other ancillary rights,[191] it is generally claimed to be a right implied or derived at a level removed from the expressive-speech right specified in the First Amendment.[192] As the Third Circuit recently noted, "[t]he First Amendment protects actual photos, videos, and recordings, and *for this protection to have meaning* the Amendment must also protect the act of creating that material."[193] In other words, the implied right to, for example, use your phone to record videos of law enforcement arises from and gives meaning to the constitutionally-specified right to engage in expressive activity through broadcasting those captured photos, videos, and recordings (say, on social media).[194] Thus, as another court concluded in a similar setting, rather than constituting an express right, "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a *corollary* of the right to disseminate the resulting recording."[195]

Constitutionally-specified rights are primary, express, and independent. Ancillary rights, on the other hand, are derivative, contingent, and relational. What distinguishes ancillary rights from constitutionally-specified rights is

189 *E.g.*, *Johnson*, 491 U.S. at 404 (asking "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play").

190 *See* McDonald, *supra* note 13, at 270 (arguing that information gathering "through the assistance of electronic devices such as cameras, video recorders, or computers" would "be difficult to describe as 'expressive activity' when they are being used to simply record, store, and process information for dissemination at a later point"); ACLU of Ill. v. Alvarez, 679 F.3d 583, 592 (7th Cir. 2012) (distinguishing between cases when "only derivative speech rights are at stake" like "a third-party 'right to receive' [information] case" and when direct speech rights in expressive activity are at stake).

191 *See* Oakland Tactical Supply, LLC v. Howell Twp., 103 F.4th 1186, 1196 (6th Cir. 2024) (noting that "in the context of implied corollary rights," the court's "analysis begins one step removed from the plain text.").

192 *See Alvarez*, 679 F.3d at 597 (holding that "[a]udio and audiovisual recording" technologies are protected under the First Amendment because "they enable speech" and criminalizing use of these technologies "necessarily limits the information that might *later be* published or broadcast") (emphasis added).

193 Fields v. City of Philadelphia, 862 F.3d 353, 358 (3d Cir. 2017) (emphasis added).

194 *Id.* at 358-59 (stating that it need not address the argument for an express right, such as "that the act of recording is 'inherently expressive conduct,' like painting, writing a diary, dancing, or marching in a parade").

195 *Alvarez*, 679 F.3d at 595 (second emphasis added).

their relation to the text and to each other.[196] That derivative, contingent, and relational nature of ancillary rights requires further unpacking.

1. Derivative

Ancillary rights are derivative because they *derive* from a constitutionally-specified right. As the examples in Section I.A attest, courts bring their full toolkit of constitutional modalities to argue about whether to derive ancillary rights from constitutionally-specified ones.[197] That derivation may be made from a series of textual inferences, as when a court focuses on the words of the constitutional right at issue to conclude that it also protects conduct concededly not express in the text. For example, courts in Second Amendment cases have held that the Constitution protects an ancillary right to *receive* a weapon (like purchasing one at a gun store) because that is implied by the right to "keep" a firearm.[198] Indeed, on one understanding, "implied constitutional rights—like a [First Amendment] right to gather information—should at least be 'fairly inferable' from the textual provisions of the Constitution."[199]

The derivation might also arise from the nature of the underlying value secured through the Constitution. For example, Justice Brennan derived a right to receive information from the purposes of the First Amendment's

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196 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.").

197 *See infra* Section II.B; *see also* BALKIN, *supra* note 165, at 3 ("When people interpret the Constitution, they employ a collection of standard types of constitutional argument."). For canonical work on the modalities of constitutional interpretation, see generally BOBBITT, *supra* note 178; PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (listing five main categories); Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145 (2018) (listing eleven main types). These are, of course, historically contingent modes of arguing about constitutional meaning. As Jack Balkin describes it,

> The evolution of special topics in constitutional law is the history of legal analysis and problem solving by people arguing about the Constitution. New doctrinal and theoretical categories are added all the time, while others fall into desuetude. But the most basic of these special topics—the modalities—have been with us from the beginning.

Id. at 182.

198 *E.g.*, United States v. Quiroz, 629 F. Supp. 3d 511, 516 (2022) ("[T]he plain meaning of the verbs 'have' or 'possess' include the act of receipt. For example, 'to have' means 'to be in possession of . . . *something received*.' Therefore, 'to have weapons' would encompass the past receipt and the current possession of those weapons." (footnote omitted)).

199 McDonald, *supra* note 13, at 324 n.263.

right to free speech.[200] In the context of the rights of school children to access library books, he wrote that "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[201]

2. Contingent

Ancillary rights are contingent. First, and related to the derivation point, they are contingent in that they do not exist independently of the constitutionally-specified right and so, in that sense, hinge on the latter's existence. Without a constitutionally-specified right to keep and bear arms, for instance, there would be no freestanding right to bullets. They are also contingent in the sense that ancillary rights are not inherent and unchanging aspects of constitutionally-specified rights; instead, they depend on the fact-based and functional operation of those rights in the world today. Bullets, once again, are necessary for the right to keep and bear arms, but only because now the most common form of "arms" used to exercise that right—firearms—use bullets. In a world of laser guns (or where swords, stun guns, or knives were the sole or dominant weapons) the necessary ingredients would look quite different, entailing different ancillary arms rights.[202]

As Adam Lamparello underscores, this dependence-relation is an important but often overlooked distinction between those rights that are implied from constitutionally-specified rights and unenumerated constitutional rights that are not reliant on an underlying express right.[203] He argues, for example, that the Supreme Court's unenumerated-rights jurisprudence is incoherent in large part because the court has not carefully distinguished between these two concepts. "[I]mplied rights," he says, "are those that, based on a reasonable interpretation of the text, are inferable from the first eight amendments of the Bill of Rights."[204] They owe their existence to their host right. But unenumerated rights, he observes, are "fundamental

200 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867-68 (1982) (plurality opinion).

201 *Id.* at 868.

202 *See, e.g.*, Master Sgt. Christopher L. Hartzell, *Future Weapons Technology of 2040*, NCO J., July 2023, at 1-2, https://www.armyupress.army.mil/Portals/7/nco-journal/images/2023/July/Future-Weapons/Future-Weapons-Technology-of-2040.pdf [https://perma.cc/F6DU-HJJG] (discussing next-generation weaponry and highlighting the potential for laser-equipped drones).

203 *See* Lamparello, *supra* note 24, at 180 (noting that the Supreme Court tends to conflate implied and unenumerated rights).

204 *Id.*

rights [that] exist independently of the Constitution's text."[205] While Lamparello elaborates on the basis for these independent unenumerated rights, this Article focuses on the contingent ancillary rights that are tied to constitutionally-specified ones.

3. Relational

Ancillary rights are relational in that they stand in a specific type of relationship to the constitutionally-specified right from which they derive and on which they are dependent. In Part III, the Article classifies these relationships in a taxonomy of ancillary rights. Briefly, ancillary rights stand in one of four relationships to constitutionally-specified rights: (1) as necessary preconditions, (2) as facilitators of the constitutionally-specified rights' exercise, (3) correlative guarantees, or (4) as prophylactic safeguards.[206] As discussed there, however, these are conceptual guideposts for thinking about the purposes that ancillary rights serve, not hermetically sealed categories in which no overlap can occur. Because ancillary rights are derivative, their outgrowth depends on the relationship they share with the constitutionally-specified right. That relationship, in turn, may guide determinations about the kind of protections to which ancillary rights are entitled.

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Although the line between constitutionally-specified rights and ancillary rights may not always be clear, neither will it always be opaque.[207] The concept of ancillary rights plays an important role in understanding what courts are doing in a set of cases considering whether to extend constitutional protection to adjacent conduct. Other related concepts bear on this understanding, but they do not capture the whole picture.

For example, ancillary rights as discussed by courts and commentators cannot always be reduced to *peripheral rights*, at least not in the sense that their protection is far from the "core" of a constitutional right.[208] The right to bullets is ancillary to the Second Amendment's right to keep and bear arms because it is derivative, contingent, and relational and must be implied from

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205 *Id.* at 191.

206 *See infra* Part III.

207 *Cf.* Richard H. Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 65 (1997) ("In emphasizing that constitutional tests frequently either overenforce or underenforce constitutional norms, I do not mean to suggest that it is always easy to draw the line between a constitutional norm and its implementing doctrine, or even that it would typically be sensible to attempt to do so.").

208 *See* Wright, *supra* note 6, at 56 (discussing the core vs. periphery distinction).

that constitutionally-specified right, but no one could deny that ammunition is core and not peripheral to the exercise of gun rights.[209] And, on the other side of the spectrum, there are surely constitutionally-specified rights that are in fact peripheral to what the Court has described the "core" and "central component" of the Second Amendment: armed self-defense.[210] For example, a collector of antique revolvers who displays his collection in a glass case above the fireplace mantle is assuredly "keep[ing]" an "arm" within the meaning of the text, but this hobbyist is not exercising the right's core function.

Nor are ancillary rights reducible to *prophylactic rights*.[211] To be sure, some ancillary rights are prophylactic, in the sense that they are grounded at least in part on the notion that, "primary constitutional rights must often be hedged with derivative, prophylactic rights designed to forestall infringements before they happen."[212] But it would be a mistake to reduce all ancillary rights to the debates over prophylactic rules.[213] Some extensions protect antecedent and necessary preconditions to the exercise of a right; they do not simply provide a protective hedge to create breathing room.[214]

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209 *Cf., e.g.*, Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) ("[W]ithout bullets, the right to bear arms would be meaningless. . . . Thus 'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them.").

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

211 For perhaps the most influential account of prophylaxis in constitutional law, see generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (cataloging frequent instances of prophylactic rules in constitutional law); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (questioning the propriety of prophylactic rules).

212 David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 17 (1999).

213 These debates often include arguments over the nature and role of rights versus remedies. For the debate between these frameworks, compare Fallon, *supra* note 35, at 67 ("[T]he Court must craft doctrine in light of judgments about what the Constitution means, but determinations of constitutional meaning do not always, or perhaps even typically, dictate with full precision what constitutional doctrine ought to be."), Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8 (2004) ("[N]ow that scholars and courts have come increasingly to appreciate that judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning (or at least may not be), it is high time to concentrate on developing a functional taxonomy of that doctrine."), *and* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 221 (2006) (discussing two conceptually distinct judicial outputs: "judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning"), with Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999) ("There is no such thing as a constitutional right, at least not in the sense that courts and constitutional theorists often assume."), and Roderick M. Hills Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 174 (2006) ("[T]he size of the gap between meaning and implementation might vary with doctrinal context; the Court might be willing to enforce some constitutional principles directly, without reducing them to manageable implementing doctrines.").

214 *See infra* Part III.

Finally, restrictions on ancillary rights are not simply reducible to an analysis of *incidental burdens*.[215] Instead, restrictions on ancillary rights can sometimes be direct, not incidental, as when a locality enacts a specific zoning ordinance governing shooting ranges,[216] gun sellers,[217] or firearm manufacturers.[218] They can also be incidental, as when a general noise ordinance limits a person's right to train with firearms on their own property.[219] But there's no necessary connection between ancillary rights and incidental burdens.

Ultimately, the distinction is worth attending to because this is how courts talk. They describe their task as seeking to discover whether the recognition of a constitutionally-specified right to φ entails, implies, or otherwise gives rise to a valid claim to be entitled to χ. The language they use is diffuse and imprecise. But they are unmistakably clear in the question they confront: should we recognize a right to do more than what is specified in a given rights provision?[220]

II. CLASSIFYING ANCILLARY RIGHTS

This Part provides a schema for considering the ancillary rights claims that courts are already entertaining. It creates a taxonomy of four different kinds of ancillary rights that courts have recognized or scholars have

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215 *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (discussing the concept of incidental burdens generally); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016) (analyzing incidental burdens on the Second Amendment in particular).

216 *See* Ezell v. City of Chicago, 651 F.3d 684, 690 (7th Cir. 2011) (granting a preliminary injunction against a Chicago ordinance that mandated firearms range training but prohibited firing ranges in the city).

217 B & L Prods., Inc. v. Newsom, 104 F.4th 108, 110 (9th Cir. 2024) (upholding state law barring gun sales on state property).

218 *E.g.*, N.Y. Gen. Bus. Law § 898-b(2) (McKinney 2024) ("All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.").

219 *See* Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 600 (2022) (discussing gun rights' proponents attempts to exempt firing discharge from general noise ordinances); Adhiti Bandlamudi, *On the Edge of Suburbia: Where Noise Pollution and Gun Rights Collide*, GUNS & AM. (June 20, 2019), https://gunsandamerica.org/story/19/06/20/on-the-edge-of-suburbia-where-noise-pollution-and-gun-rights-collide [https://perma.cc/EP3M-GPA5] (reporting on conflicts between one neighbor's "backyard sanctuary" and other neighbors' desires to fire guns on their private property).

220 The Constitution's text is sparse, and so it does not include all those principles and values necessary to its effectual implementation. For a discussion on the importance of understanding sources outside the Constitution's text, see generally AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

proposed: Necessary, Facilitative, Correlative, and Prophylactic. It uses ancillary Second Amendment claims to explain the labels and illustrate examples that might fall into each category because the topic is especially pressing and increasingly important in that context. The goal here is not taxonomy for its own sake. Rather, drawing these lines helps make descriptively clear what courts and scholars are arguing over and may assist decisions about how courts should confront the implementation questions raised in Part III.

But it should be emphasized here that the categories are not meant to be completely separate silos. The right to bullets, for example, is surely necessary to operate a gun but it also of course facilitates the right to use that gun. The point of the categorization is to identify, at a high level, different functions or purposes that ancillary rights can serve. Individual classifications may themselves be contestable,[221] and select kinds of ancillary rights might serve multiple functions.

A. *Necessary Ancillary Rights*

Necessary ancillary rights are those that are essential to the exercise of a constitutionally-specified right. Without protection for these activities, the constitutionally-specified right could be made empty or meaningless. This includes rights that are strictly necessary (a firearm cannot function without ammunition) and those that courts or commentators have described as necessary preconditions for the actual exercise of the right. In the First Amendment context, for instance, some scholars have argued that the text implies it "should be read more broadly than the strict acts of speaking or publishing, to include any acts that are also necessary to engage in those activities as commonly understood—such as thinking or mentation."[222]

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221 For example, Jud Campbell argues that the First Amendment right to gather news "facilitates publishing news" and thus would likely classify that ancillary right as facilitative, though *Branzburg* could also plausibly be read to suggest the right is prophylactic because it is designed to safeguard the free flow of information. *Compare* Campbell, *supra* note 25, at 13, *with* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). With respect to a right to engage in scientific research, Barry McDonald describes how some scholars find such an ancillary right "protected by the First Amendment because it is conduct that is an essential precondition of scientific speech," thus signaling a likely label as a necessary ancillary right. McDonald, *supra* note 63, at 983. Other scholars might consider such a right instead to be facilitative because the exercise of that right "facilitates publishing scientific articles." Campbell, *supra* note 25, at 13.

222 McDonald, *supra* note 63, at 99; *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."). *But see* NITA FARAHANY, THE BATTLE FOR YOUR BRAIN: DEFENDING THE RIGHT TO THINK FREELY IN THE AGE OF NEUROTECHNOLOGY 4 (2023) ("[N]othing in the US Constitution, state and federal laws, or international treaties gives individuals even rudimentary sovereignty over their own brains").

For the Second Amendment, courts and commentators have considered several types of activity to be necessary preconditions to the exercise of one's constitutionally-specified right to keep and bear arms. This Section focuses on two in particular: the right to obtain ammunition and the right to receive a weapon.

1. Ammunition.

The Second Amendment expressly protects the ability to keep and bear arms. Conceivably, one could keep and carry an unloaded firearm, and perhaps even gain great benefit from doing so. After all, the vast majority of defensive gun uses do not involve firing a weapon.[223] Displaying or aiming it at a person is enough in most cases to deter would-be wrongdoers.[224] And, as Tim Zick writes, carrying an unloaded firearm during a protest or demonstration may amply convey the intended message without the possibility of unintended harm (or intended but unjustified harm).[225] Yet no one doubts that the ammunition necessary to make the gun fire is an essential ancillary right.[226] The issue has arisen in cases challenging laws regulating the type of ammunition individuals can possess and requiring background checks for ammunition purchases.

Take *Jackson v. San Francisco*.[227] When San Francisco banned hollow-point ammunition, a resident sued to invalidate the law.[228] The Ninth Circuit tested the ordinance to determine whether it implicated the Second Amendment at all. The court noted that "[t]he Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition."[229] Although the court's opinion places "weapons" and "firearms" in quotation marks, neither term appears in the Second Amendment's text. [230] Rather, the court appears to be distinguishing between rights that are constitutionally-specified (even if not part of the literal text) and those that must be implied. The right to firearms and weapons is constitutionally-specified because they

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223 *See* Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1176 (2021) ("Most self-reported defensive gun uses, for example, involve the simple display of a gun, not its actual discharge.").

224 *See id.* (acknowledging the deterrence factor associated with brandishing a firearm).

225 *See* Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 264 (2018) (analyzing the First and Second Amendment implications of laws that restrict openly carried firearms at public demonstrations).

226 *Cf. id.* at 265 ("[M]anner regulations that effectively disarm an individual may raise serious Second Amendment concerns.").

227 Jackson v. City & Cnty. of San Francisco, 746 F.3d 953 (9th Cir. 2014).

228 *Id.* at 958.

229 *Id.* at 967.

230 U.S. CONST. amend. II ("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.").

constitute 'arms,' but the right to bullets is ancillary. Indeed, as the court continued, "without bullets, the right to bear arms would be meaningless" and thus "[a] regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose."[231] Therefore, because bullets are necessary to a gun's functioning, the constitutionally-specified "right to possess firearms for protection *implies a corresponding right* to obtain the bullets necessary to use them."[232]

Or take the cases challenging California's background-check requirement for ammunition purchases.[233] In assessing California's law, one district court first made plain that "[t]he right to possess firearms includes a corresponding right to obtain ammunition."[234] Although "the Second Amendment does not explicitly mention ammunition," the court acknowledged, it must be read to "*implicitly protect* those closely related acts necessary to" the exercise of the constitutionally-specified right to keep and bear arms.[235] The Second Amendment right could be defeated if the government were able to prohibit the ingredients to make weapons function.[236] Plus, the court continued, the *Heller* standard applies both to laws that regulate weapons and those that regulate ammunition.[237]

In a later ruling in the same case, post-*Bruen*, the court added historical precedent for this view, quoting a 19th century state court opinion explaining that "'[t]he right to keep arms, necessarily involves the right to . . . purchase and provide ammunition suitable for such arms.'"[238] Indeed, no party in the case questioned that the Second Amendment protected a right to obtain bullets, describing it as an "ancillary right"[239] or "corresponding right."[240]

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231 *Jackson*, 746 F.3d at 967.

232 *Id.* (internal quotation marks omitted) (citations omitted) (emphasis added).

233 New York's attempt to implement similar background-check requirements "has encountered significant, perhaps fatal, implementation problems." James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking-New York's Safe Act*, 79 ALB. L. REV. 1327, 1353 (2016).

234 Rhode v. Becerra, 445 F. Supp. 3d 902, 925 (S.D. Cal. 2020), vacated and remanded sub nom. Rhode v. Bonta, 2022 WL 17099119 (9th Cir. Nov. 17, 2022).

235 *Id.* at 929-30 (emphasis added) (quoting Luis v. United States, 578 U.S. 5, 26 (2016) (Thomas, J., concurring)).

236 *See id.* (underlining the Constitution's broad protection of ammunition).

237 *See id.* at 930 ("As applied to laws prohibiting ammunition, the simple *Heller* test would ask: is the ammunition commonly used by law-abiding citizens for a lawful purpose? If yes, then it is protected ammunition.").

238 Rhode v. Bonta, 713 F. Supp. 3d 865, 874 (S.D. Cal. 2024) (quoting Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871)).

239 *Id.* at 873.

240 *Id.*

2. Weapon Receipt.

There has similarly been no disagreement that the Second Amendment provides ancillary protection for another unenumerated necessity: receiving or acquiring a weapon. In the years since the Court's decision in *Bruen*, the question has arisen in more than a dozen cases analyzing the constitutionality of the federal law barring individuals under felony indictment from shipping or receiving weapons.[241] This law makes the contrast especially clear because it does not prohibit firearm possession or carrying—an individual under felony indictment is not prohibited from literally *keeping* or *bearing* a firearm.[242] Instead, the individual is only forbidden from acquiring (or shipping or transporting) one. Because the Constitution protects the right to *keep* a weapon, the ability to acquire that weapon must be an implicit, ancillary right.

Consider *United States v. Quiroz*.[243] There, Jose Quiroz was convicted of violating 18 U.S.C. § 922(n) because he was under indictment for felony burglary when he bought a gun from a local dealer.[244] He sought to set aside the verdict, arguing that the law violated his Second Amendment right to keep and bear arms.[245] At the threshold, the court concluded that receipt of firearm is a necessary ancillary right.[246] First, the court seemed to suggest a textual conclusion, that the right to "keep" a weapon linguistically encompasses the right to receive one.[247] But that does not seem to follow from the definition of possession since *having* something and *getting* it are conceptually (and textually) distinct, a conclusion reinforced by the fact that federal gun laws distinguish between possession and receipt prohibitions.[248] Instead, the court's alternative point—that "logically, excluding 'receive' makes little sense"—comports better with the common meaning of the

241 *See* Jacob Charles, *The Most Disputed Federal Law Post-*Bruen, DUKE CTR. FOR FIREARMS L. (May 3, 2023), https://firearmslaw.duke.edu/2023/05/the-most-disputed-federal-law-post-bruen [https://perma.cc/Z7LL-7KCG] (discussing the judicial split over the constitutionality of 18 U.S.C. 922(n)), which bans people under felony indictment from shipping or receiving firearms through interstate commerce).

242 *See* 18 U.S.C. 922(n) (criminalizing *only* the shipment or receipt of firearms/ammunition).

243 629 F. Supp. 3d 511 (W.D. Tex. 2022).

244 *Id.* at 513-14.

245 *See id.* at 514 ("Defendant's motion hinges on the constitutionality of § 922(n) because if the provision is unconstitutional, then Defendant's false statement during the purchase of the firearm is immaterial.").

246 *See id.* at 516 ("[T]he plain meaning of the verbs 'have' or 'possess' include the act of receipt . . . . [L]ogically, excluding 'receive' makes little sense . . . .").

247 *Id.*

248 *See* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 654 n.102 (2022) (noting how federal law initially barred only receipt of firearms by prohibited categories not possession).

terms.[249] That is, "[t]o receive something means 'to take into . . . one's *possession*.'"[250] "How," the court asked, "can one possess (or carry) something without first receiving it? Receipt is the condition precedent to possession—the latter is impossible without the former."[251] In other words, the right to receive a firearm is not *linguistically encompassed* by the term keep but is *logically necessary*[252] to possess a gun. As another court reviewing the same law said, "[i]f receiving a firearm were illegal, but possessing or carrying one remained a constitutional right, one would first need to break the law to exercise that right."[253]

Necessary ancillary rights, then, are those pre- or co-requisites without which the constitutionally-specified right cannot adequately function. A right to guns would be functionally meaningless without a right to ammunition, even though the right to ammunition is not itself separately enumerated in the text.[254]

B. *Facilitative Ancillary Rights*

Facilitative ancillary rights are those ancillary rights that are not strictly essential to the exercise of a right—one can speak or use a gun without them—but that make the rights' exercise more easily accessible or effective. Crucially, "that does not mean that every activity that facilitates a constitutional right is itself constitutionally protected."[255] As Blocher notes, the right to education could surely facilitate one's free speech rights, but it does not garner First Amendment protection.[256] Instead, to the extent a right is a facilitative ancillary right, it must be derived from the constitutionally-specified right. A right to education might be protected as an independent and free-standing unenumerated right (say under the Ninth Amendment or substantive due process), but it is not an ancillary First Amendment right

249 *Quiroz*, 629 F. Supp. 3d at 516.

250 *Id.*

251 *Id.*

252 Or perhaps it is simply *practically necessary*; one could build their own firearm and hence possess firearms they never received.

253 United States v. Hicks, 649 F. Supp. 3d 357, 360 (W.D. Tex. 2023); *see also* United States v. Stambaugh, 641 F. Supp. 3d 1185, 1190 (W.D. Okla. 2022) ("The United States does not dispute that the Second Amendment's plain text covers receiving a firearm—receipt is the condition precedent to keeping and bearing arms."); United States v. Kelly, No. 3:22-cr-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022) ("[T]he act that Kelly was actually indicted for——receipt——is impossible to separate from the concept of 'bearing' a firearm.").

254 It is worth emphasizing, however, that some states *do* in fact call out ammunition in their state constitutions. *See, e.g.*, IDAHO CONST. art. I, § 11 ("No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition.").

255 Blocher, *supra* note 5, at 167.

256 *Id.*

because it cannot be derived from the right to free speech (i.e., it is not derivative and contingent, even if it bears some attenuated facilitative relationship to speech).

Cases of facilitative ancillary rights often involve rights to access the instruments or locations that foster the right's meaningful exercise. In *Richmond Newspapers*,[257] for example, the Court recognized an ancillary First Amendment right of court access to facilitate speech and press rights. "[T]he First Amendment can be read as protecting the right of everyone to attend trials *so as to give meaning to* those explicit guarantees."[258] The Ninth Circuit has suggested likewise for law library access to facilitate the Sixth Amendment right to pro se representation. Specifically, it has held "that a necessary *corollary* of a defendant's Sixth Amendment right to proceed pro se . . . is the right to have reasonable access to the resources necessary to prepare for his defense."[259] And in the Second Amendment context, courts have recognized an ancillary right of access to range training. "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right *wouldn't mean much* without the training and practice that make it *effective*." [260]

The Sixth Circuit recently confronted this issue in *Oakland Tactical Supply v. Howell Township*.[261] There, a company leased a tract of land to build a commercial shooting range that would offer long-distance target practice.[262] But the local zoning laws did not permit such a shooting range on that property.[263] The company, along with several residents who desired to use the proposed range, sued.[264] They argued that the zoning laws violated their ancillary Second Amendment right to engage in range training.[265]

The Sixth Circuit first determined that the Second Amendment does indeed protect the general right to train with firearms,[266] and the further right to engage in commercial range training.[267] The court was clear it reached this conclusion "not as a matter of plain text, but because it is a *necessary corollary*

257 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

258 *Id.* at 575 (plurality opinion) (emphasis added).

259 United States v. Age, No. 90-50269, 1991 WL 188651, at *1 (9th Cir. 1991) (emphasis added).

260 Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (emphasis added).

261 103 F.4th 1186 (6th Cir. 2024).

262 *Id.* at 1189.

263 *Id.* at 1190.

264 *Id.* at 1189-90.

265 *See id.* at 1192 ("Plaintiffs' challenge to the Zoning Ordinance centers on their ability to provide or engage in firearms training.").

266 *Id.* at 1192.

267 *Id.* at 1197 n.7 ("We agree with Plaintiffs that constitutional protection for firearms training cannot be limited to non-commercial training. Otherwise, only those who own or have access to private land suitable for training would be entitled to exercise their Second Amendment rights effectively.").

to the right defined in *Heller*."[268] Although the court spoke in terms of necessity, its reasoning suggests it was less about impossibility and more about how, as it later said, "protecting firearms training is necessary to the *effective exercise* of Second Amendment rights."[269] In other words, while one can engage in armed self-defense without range (or any other) training, that kind of training makes the exercise of the right more effective. And yet, the court continued, that did not mean that the specific type of training the challengers sought in that case was also protected.[270] Answering that question required focusing on how a regulation affects the constitutionally-specified right to keep and carry arms in case of confrontation—a focus that it emphasized was "especially true in the context of *implied corollary rights*, where our analysis begins one step removed from the plain text."[271]

Ultimately, the majority held, the particular ancillary rights asserted by the plaintiffs were not the general right to train with firearms but more specific rights to engage in long-distance range training and to be able to access a conveniently located commercial shooting range.[272] And, as to those, the court said, the plaintiffs simply had not convincingly shown that the broader "right to engage in commercial firearms training as necessary to protect the right *to effectively bear arms* in case of confrontation . . . extends to training in a particular location or at the extremely long distances Oakland Tactical seeks to provide."[273]

Ancillary rights that facilitate the exercise of a constitutionally-specified right are not strictly necessary, but they are protected when they are needed to ensure the right is not simply a parchment guarantee, but works effectively in the real world.

C. *Correlative Ancillary Rights*

Correlative rights include those ancillary rights that are in some sense the inverse of or logical counterpoint to the constitutionally-specified right. These are, in other words, the flipside of the constitutionally-specified right. This category encompasses but also extends beyond "rights not to" engage in certain conduct, a type of rights-framework that Joseph Blocher has

268 *Id.* at 1192. (emphasis added).

269 *Id.* at 1193 (emphasis added); *see also id.* ("Although prohibiting training does not make it wholly impossible to use firearms the way requiring inoperability does, it inhibits the ability to use them enough to fall within the principle laid out in *Heller*.").

270 *Id.* at 1197.

271 *Id.* at 1196 (emphasis added).

272 *Id.* at 1197.

273 *Id.* (footnote omitted) (emphasis added).

exhaustively explored.[274] The First Amendment's right to free speech, for example, implies an ancillary right *not to* speak.[275] In that sense, the right against compelled speech is one example of a correlative ancillary right that is not the same as a claim involving the *suppression* of speech.[276] But the Supreme Court has also suggested that the Free Speech Clause additionally protects the right *to receive* information.[277] That right, too, is correlative to the right to speak. Indeed, the justices described such an ancillary right as the "corollary" of the speech right.[278] In other words, the opposite legal relationship of the right to free speech is *both* a right to listen/receive information *and* a right not to speak at all. If someone is entitled to speak, I have a right to listen (and I also have a right against compelled listening[279]).

The right *not* to keep or bears arms might be an example of this type of ancillary Second Amendment right.[280] And it could have real world purchase. A handful of localities, for example, have (unenforced) laws on the books *mandating* that all households in the jurisdiction keep firearms in the home.[281] Those surely interfere with individual choices about self-defense and personal safety, the very interests the Supreme Court has held that the Second Amendment protects.[282] Or consider parking-lot laws that require property owners to allow guns to be stored in vehicles on their property.[283]

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274 *See generally* Blocher, *supra* note 26 (analyzing what he calls "choice rights" primarily through the lens of the Second Amendment).

275 Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 977-80 (2009). *See generally* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent, and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1 (2020) (proposing a framework for understanding the right against compelled speech).

276 *See* Amar & Brownstein, *supra* note 275, at 4 (arguing that, as the doctrine is invoked more aggressively, "the Court needs to develop new doctrinal tools and strategies—new rules of engagement—for responding to claims of compelled speech" rather than simply turning to conventional First Amendment doctrine).

277 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).

278 *Id.*

279 *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) ("The notion that, in certain circumstances, the unwillingness of persons to receive a message outweighs another's right to speak has been a part of First Amendment analysis for over fifty years.").

280 *See* Blocher, *supra* note 27, at 31 ("Because of the symmetry of the constitutional interests involved in keeping and not keeping [arms], it makes sense that the right not to keep should, prima facie, extend as far as the right to keep."). The "right not to be shot" may also be a type of corollary. *See generally* Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187 (2016) (finding a right not to be shot that exists within the broader constitutional right to live).

281 *See* Blocher, *supra* note 27, at 37-38 ("Mandatory gun possession is not widespread, but some communities have either proposed or passed laws embracing it.").

282 See District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (describing self-defense as "the central component" of the right).

283 *See* Charles, *supra* note 219, at 601-02 (describing these laws).

Some property owners forced to allow firearms access may have good reason for concern, like the domestic violence shelters who sued to invalidate West Virginia's parking-lot law.[284] The shelters argued that the law violated the fundamental "right to protect one's personal security on one's own property and the corollary right to protect one's personal security by controlling the conditions under which someone may enter one's property."[285] Although they couched this right in substantive due process terms[286] and not as a correlative Second Amendment right, the argument itself sounded in the same kind of values undergirding affirmative Second Amendment rights.

Consider one last way an ancillary right not to keep and bear arms might be relevant. In the aftermath of *Bruen*, New York state revised its licensing laws to add a provision that switched the default property rule from allowing gun carrying on private property absent complaint to forbidding gun carrying on private property absent permission.[287] One rationale New York proffered in a challenge to this law could be understood as grounded in implementing the ancillary right not to keep and bear arms. There, the state argued that studies showed most people would choose a default rule that kept out armed guests who had not secured express permission.[288] New York pointed to a 2020 study by Ian Ayres and Spurthi Jonnalagadda finding that "less than a third of respondents support a 'carry' default for service providers (27.8%) or friends and family (32.1%) with regard to home residences."[289] Majorities in various geographic regions preferred a default rule that barred guns absent permission.[290] Of course, not all of these respondents rejected guns, but many apparently wanted to control access to firearms on their property, something that can be understood as involving the exercise of an ancillary right *not* to keep arms.

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284 *See* W. Virginia Coal. Against Domestic Violence, Inc. v. Morrisey, 689 F. Supp. 3d 272, 282 (S.D.W. Va. 2023) (noting that parking-lot laws raise concerns about safety for domestic violence shelters)

285 *Id.* at (internal quotation marks omitted) (alteration omitted)

286 *Id.*

287 N.Y. Penal Law § 265.01-d ("A person is guilty of criminal possession of a weapon in a restricted location when such person possesses a firearm, rifle, or shotgun and enters into or remains on or in private property where such person knows or reasonably should know that the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or by otherwise giving express consent.").

288 *See* Antonyuk v. Hochul, 639 F. Supp. 3d 232, 347 n.137 (N.D.N.Y. 2022), and aff'd in part, vacated in part, remanded sub nom. Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023) ("The Court's finding is not changed by a 2020 nation-wide survey of 2,000 individuals cited by the State Defendants, which shows at most that . . . 54.6 percent of those in the Northeast would favor a 'no carry' default rule.").

289 Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. MED. & ETHICS 183, 186 (2020).

290 *Id.* at 186-87.

Correlative ancillary rights build from the intuition that constitutionally-specified rights exist in part to guarantee autonomy in decision-making. Sometimes that autonomy is best expressed not through the exercise of the specified right, but through exercising its opposite, as in the case of declining to speak or resisting mandatory arms-keeping or forgoing appointed counsel and representing oneself.

D. *Prophylactic Ancillary Rights*

Prophylactic rights are ancillary entitlements that provide an extra layer of protection to the constitutionally-specified right. They help ensure breathing room for that express right. To be sure, other types of ancillary rights—like correlative rights to listen, or facilitative rights to access court proceedings—could also be seen as prophylactic. And, in a similar way, prophylactic rights can be understood as facilitative, as the right to be informed about one's Fifth Amendment right to counsel surely facilitates exercising that right. The point of breaking these out into a separate category is to emphasize the primary function of specific types of ancillary rights. The prophylactic kind are likely all facilitative (as necessary ancillary rights are too), but they merit separate treatment because they serve a distinct goal: crafting an extra layer of protection that does not *merely* make exercising the right easier.[291]

Miranda and its progeny are the paradigmatic case of prophylactic ancillary rights.[292] What Charlotte Garden calls "meta rights" often fall into this category—those ancillary rights that entitle a person to notice about their constitutionally-specified rights.[293] They may also include doctrinal mechanisms like anti-evasion doctrines that Brannon Denning and Michael Kent describe as protective hedges to safeguard primary implementing rules.[294] In this way, prophylactic rights might be considered a subset of

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291 *See* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 533-34 (2023) (describing what he calls a nondelegation doctrine for individual rights questions that "operates as a prophylactic, precluding grants of discretion to the executive when that discretion could be used in a way that infringes upon an individual liberty guaranteed by the Bill of Rights" that arises from the Court's focus on "the constitutionality of the underlying delegation of discretion to violate an enumerated right . . . as opposed to resting a finding of unconstitutionality solely on the impairment of the liberty itself" (emphasis omitted)).

292 *See* Strauss, *supra* note 211, at 195 (arguing that criticisms of *Miranda* as exceptional are misplaced).

293 Garden, *supra* note 29, at 859.

294 *See* Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776 (2012) ("[Anti-evasion doctrines] seek to prevent officials from complying with the form of the previously announced rule, while subverting the substance of the constitutional principle the rule sought to implement. Put differently, they attempt to optimize constitutional enforcement by curbing circumvention of constitutional principles."); Brannon P.

facilitative rights. After all, paradigmatic prophylactic rights like *Miranda* "make[] rights invocation easier (and therefore more likely) by informing those undergoing custodial interrogation that they are entitled to choose to remain silent and that making a different choice may have negative consequences."[295]

In the Second Amendment context, one type of prophylaxis might be the ancillary right to operate a gun store—or more broadly to engage in the commercial sale of firearms.[296] In a few challenges to sales restrictions in California, the Ninth Circuit has confronted related questions about the protection for firearms commerce. Note that while protecting a right to sell firearms might facilitate the constitutionally-specified right to keep and bear arms, it operates at a different level than, say, the right to train. Training facilitates the use of the right; selling guns prophylactically keeps up the supply of guns available for purchase—it would work fully even if no one got "better" at armed self-defense.

In *B & L Productions v. Newsom*, the Ninth Circuit observed that the Second Amendment's plain text "says nothing about commerce, let alone firearm sales on state property."[297] But, it underscored, "our court has consistently held that the Second Amendment also 'protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.'"[298] Emphasizing an important distinction, the court noted that although the "the right to *acquire* firearms receives some Second Amendment protection," circuit precedent had previously clarified that "the right to *sell* firearms is not a protected ancillary right."[299] The point of protecting at least some ancillary rights is to prophylactically safeguard the self-defense values at the heart of the constitutionally-specified right. Thus, said the court, "[a]ncillary rights are protected to the extent necessary to serve those purposes; otherwise, the Second Amendment is not implicated by restraints on such rights."[300] It held there that "the ancillary right at issue in these

Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. STATE U. L. REV. 397, 399 (2014) ("[Anti-evasion doctrines] . . . share a common doctrinal purpose—i.e., to prevent indirect violations of a constitutional principle through formal compliance with the Court's decision rules.").

295 Garden, *supra* note 29, at 859.

296 Teixeira v. County of Alameda, 822 F.3d 1047, 1056 (9th Cir. 2016), *aff'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017) ("[T]he right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.").

297 B & L Prods., Inc. v. Newsom, 104 F.4th 108, 117-18 (9th Cir. 2024).

298 *Id.* at 118 (quoting *Teixera* 873 F.3d at 677).

299 *Id.* (citing *Teixera*, 873 F.3d at 673, 677, 683).

300 *Id.*

cases—the right to acquire firearms—" was not impermissibly burdened by a sales ban on state property.[301]

In a prior en banc case, *Teixeira v. County of Alameda*, the court rejected a prospective gun store operator's Second Amendment challenge to a county's denial of a conditional use permit.[302] The gun store asserted both its own Second Amendment right to operate a gun store and the derivative Second Amendment rights of its customers to purchase weapons.[303] As to the independent claim, the court held that the gun store had no free-standing Second Amendment right to sell guns.[304] "Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense," the court noted, "but the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them."[305] In other words, the Second Amendment protects the right to acquire weapons as a necessary ancillary right but does not protect the independent right to sell them "unconnected to the rights of citizens to keep and bear arms."[306]

That was true for textual, historical, and functional reasons. As to the text, the court found that "[n]othing in the specific language of the Amendment suggests that sellers fall within the scope of its protection."[307] And history, it said, supported that conclusion.[308] Firearm selling may be protected as a prophylactic means to preserving citizen access to firearms, as "the Founders were aware of the need to preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people."[309] But the ancillary right to sell guns had no independent purchase absent an impact on that underlying ability of the direct rights-bearers—people—to acquire weapons.[310]

Judges who disagreed with the result fought on this prophylactic terrain. Agreeing that there was no need to "find a freestanding right to sell firearms," Judge Tallman argued that the majority erred because "the ability of lawful gun owners to find a reasonably available source to buy, service, test, and properly license firearms is an attendant right to the fundamental right to

301 *Id.*

302 873 F.3d 670 (9th Cir. 2017) (en banc).

303 *Id.* at 673.

304 *Id.* ("A textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms.").

305 *Id.* at 682.

306 *Id.* at 686-87 (internal quotation marks omitted).

307 *Id.* at 683.

308 *See id.* at 684 (stating that the historical evidence "demonstrates that the right codified in the Second Amendment did not encompass a freestanding right to engage in firearms commerce divorced from the citizenry's ability to obtain and use guns").

309 *Id.* at 686.

310 *See id.* at 689-90 (rejecting the analogy of gun stores to bookstores because the latter are themselves engaged in constitutionally protected expressive activity).

bear arms."[311] "Throughout history and to this day," he underscored, "the sale of arms is ancillary to the right to bear arms."[312] Ancillary, we might say, because it ensures the availability of the underlying hardware that is constitutionally protected.

The panel majority, which the en banc court overturned, had spoken similarly. There, the panel connected the commercial activity to its role in prophylactically protecting the underlying right:

> If "the right of the people to keep and bear arms" is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear. Indeed, where a right depends on subsidiary activity, it would make little sense if the right did not extend, at least partly, to such activity as well.[313]

Quoting a First Amendment case dealing with ancillary rights, the panel highlighted that "[f]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined because such unarticulated rights are implicit in enumerated guarantees."[314]

Prophylactic ancillary rights provide a protective barrier around the underlying constitutionally-specified right to prevent encroachments from eroding the express right itself.

III. Implementing Ancillary Rights

After the descriptive, critical, and analytical work in Parts I and II, this Part turns to the normative. It addresses the question of how courts might go about identifying ancillary rights and assessing claims that they have been infringed. These proposals are tentative, beginning rather than trying to end a conversation about how best to more forthrightly confront the (inevitable) complexities arising from the recognition of ancillary rights. Section III.A focuses on how courts might go about finding (and limiting) ancillary rights; Section III.B turns to how courts that find those rights might think about doctrinal frameworks to adjudicate them—even perhaps by jettisoning use of the ancillary conceit altogether.

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311 *Id.* at 692 (Tallman, J., concurring in part and dissenting in part).

312 *Id.* at 693-94 (Tallman, J., concurring in part and dissenting in part).

313 Teixeira v. County of Alameda, 822 F.3d 1047, 1055 (9th Cir. 2016), *aff'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017).

314 *Id.* (quoting Richmond Newspapers v. Virginia, 448 U.S. 555, 579-80 (1980) (internal quotation marks omitted)).

A. *Identification*

The bifurcation between ancillary rights and constitutionally-specified ones requires a method of ascertaining what rights might qualify as ancillary and which should not. Not everything claimed to facilitate or provide prophylaxis for a constitutionally-specified right can or should qualify as an ancillary right protected against legislative action.[315] After all, in addition to legitimate floodgates concerns about wide recognition,[316] every judicial expansion of rights contracts the sphere of permissible democratic lawmaking.[317] One way to get traction on a framework for identifying when to extend ancillary protection (and when to resist extensions) is to draw on the resources developed to address a conceptually related issue: what implied powers Congress can exercise under the Constitution.[318]

Although these doctrines may seem quite dissimilar at first blush, the analytical structure of inquiries into implied rights and implied powers is strikingly aligned. When asking whether adjacent conduct merits constitutional protection, courts are typically asking questions of implication and efficacy.[319] What can we imply from the enumeration of specific guarantees in the text and what factors shape and mold those inferences? These mirror questions about implied powers and the scope of congressional authority.[320] Since at least *McCulloch v. Maryland*,[321] it has been common for judges and scholars to reason about congressional power not simply as a

315 *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting) ("The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.").

316 *See, e.g.*, Dorf, *supra* note 215, at 1178 (noting that, in the context of recognizing claims for incidental burdens on constitutional rights, floodgate concerns are a real worry).

317 At least on modern conceptions of individual rights as trumps. *See supra* note 180 and accompanying text; *cf.* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing that granting judges a power to decide ultimate rights questions "disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights").

318 *See* H. Jefferson Powell, *The Regrettable Clause:* United States v. Comstock *and the Powers of Congress*, 48 SAN DIEGO L. REV. 713, 715 (2011) (discussing the debate over "implied congressional power under the Necessary and Proper Clause"); Reginald Oh, *The Anti-Constitutionality of the Deeply Rooted Test in* Dobbs v. Jackson, 72 CLEV. STATE L. REV. 83, 87 (2023) (drawing a connection between unenumerated fundamental rights and implied powers jurisprudence derived from *McCulloch*). I am grateful to Daniel Rice for raising the initial prospect of this connection.

319 *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (implying a Second Amendment right to train with firearms in part because "the core right wouldn't mean much without the training and practice that make it effective").

320 *See* Trump v. Mazars USA, 140 S. Ct. 2019, 2037 (2020) (Thomas, J., dissenting) ("The Founders . . . understood that an enumerated power could necessarily bring with it implied powers. The idea of implied powers usually arises in the context of the Necessary and Proper Clause.").

321 17 U.S. (4 Wheat.) 316 (1819).

matter of express text, but also as a matter of the inferences and implications drawn from the text.[322]

In *McCulloch*, Chief Justice Marshall underscored that the Constitution speaks in broad and general language and must be given "a fair construction"[323] that permits the government to exercise "the most appropriate means" to make its enumerated ends effective.[324] Marshall rejected a reading of the Necessary and Proper Clause that would have limited congressional means to those that are "indispensable, and without which the power would be nugatory."[325] Rather, he wrote, the term *necessary* "imports no more than that one thing is convenient, or useful, or essential to another."[326] The government's authority to act in specified ways, like its power to carry mail and punish mail theft—authority implied from the express grant of power to establish post offices—is "essential to the beneficial exercise of the power, but not indispensably necessary to its existence."[327] Proper exercises of authority are simply those that do not transcend other constitutional boundaries.[328]

One way to conceptualize ancillary rights, then, is as a form of "necessary and proper" adjuncts to constitutionally-specified rights. Just as the Necessary and Proper Clause enables Congress to exercise those implied powers needed to make effective its enumerated powers,[329] so do ancillary

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322 *See* NEIL S. SIEGEL, THE COLLECTIVE-ACTION CONSTITUTION 25 (2024) ("It is widely agreed that the Constitution gives Congress implied powers, whether via an expansive interpretation of the enumerated powers themselves or via the grant of authority in the Necessary and Proper Clause . . . ."); Jinks v. Richland Cnty., S.C., 538 U.S. 456, 461 (2003) (underscoring that Congress has specific implied powers "[a]lthough the Constitution does not expressly empower Congress to" exercise them); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1746 (2013) ("Many federal powers exist only by implication. The Constitution does not explicitly mention that Congress can create corporations or cabinet-level offices to administer the law. It does not explicitly say that Congress can create civil and criminal liability for those who infringe most federal laws.").

323 17 U.S. (4 Wheat.) at 406.

324 *Id.* at 408; *see also id.* ("[A] government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.").

325 *Id.* at 413.

326 *Id.*

327 *Id.* at 417.

328 John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1132 (2014) (endorsing the view of other scholars that "for a law to be 'proper,' it must comport with essential principles of constitutional design and individual rights"). *But see* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 750 (2016) (arguing that the phrase "necessary and proper" is better understood as a "hendiadys" that does not impose separate standards); SIEGEL, *supra* note 322, at 47 (contending that *McCulloch* reads the two terms as only "imposing one requirement").

329 Mikhail, *supra* note 328, at 1132; GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 4

rights provide individuals protection for those activities necessary and proper to the exercise of constitutionally-specified rights. And just as this Article has argued that ancillary rights are derivative, contingent, and relational,[330] so too have courts and scholars characterized implied congressional powers as derivative,[331] contingent,[332] and relational.[333]

In fact, the language courts and scholars use to analyze both ancillary rights and implied powers is remarkably similar. Both contexts confront how "enumeration" affects the inferences one can draw about implied rights or powers from the text.[334] Alison LaCroix, for example, writes about congressional "shadow powers"[335] and "auxiliary powers"[336] in the General Welfare and Necessary and Proper Clauses. Jefferson Powell discusses certain implied powers as a "necessary concomitant" to enumerated powers.[337] William Baude considers Congress's "ancillary power"[338] and distinguishes between great, independent powers, and incidental ones, a historical distinction that he says helps resolve "the puzzle of implied powers."[339] Chief Justice Marshall described the ancillary authority residing in Congress as its

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(2010) (claiming that because of the Necessary and Proper Clause's centrality to disputes over federalism, separation of powers, and the scope of governmental authority, "[t]here is a good argument that it is the most important clause in the Constitution.").

330 *See supra* Section I.B.

331 *See* United States v. Comstock, 560 U.S. 126, 147 (2010) (highlighting, in reference to a set of implied powers that, "each of those powers . . . is ultimately 'derived from' an enumerated power") (quoting United States v. Hall, 98 U.S. 343, 346 (1878)); *id.* at 148 (underscoring that each federal criminal statute is an exercise of implied power that "must itself be legitimately predicated on an enumerated power"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (Roberts, C.J.) (stating that implied powers "involve[] exercises of authority derivative of, and in service to, a granted power").

332 *See* William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RSRV. L. REV. 513, 521 (2015) ("[T]he federal power to reach in-state commerce is ultimately contingent on circumstances. It depends on how that in-state commerce relates to federally enumerated powers."); *id.* at 523 ("The claim that state regulatory regimes should matter to federal power under the Necessary and Proper Clause is thus a subset of the claim that actual facts should matter.").

333 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819) ("Congress is not empowered by [the Necessary and Proper Clause] to make all laws, which may have relation to the powers conferred on the government, but such only as may be '*necessary and proper*' for carrying them into execution."); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 586 (2002) ("[T]he propriety standard is better read to regulate the relationship between a particular legislative measure and the congressional power on which it rests.").

334 *E.g.*, Teixeira v. County of Alameda, 822 F.3d 1047, 1055 (9th Cir. 2016), *aff'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017) (quoting Richmond Newspapers v. Virginia, 448 U.S. 555, 579-80 (1980)) (internal quotation marks omitted) (assessing the "unarticulated rights" that "are implicit in enumerated guarantees").

335 Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2053 (2014).

336 *Id.* at 2056-57 (discussing the view that "the necessary and proper power is best understood as an auxiliary power to Congress's primary powers under Article I").

337 Powell, *supra* note 318, at 715.

338 Baude, *supra* note 332, at 520.

339 Baude, *supra* note 322, at 1746.

"implied"[340] or "incidental"[341] powers. And the Supreme Court has referred to the powers conferred by the Necessary and Proper Clause as "non-enumerated or 'implied' powers,"[342] "corresponding authority,"[343] and noted how its case law upholding such powers "involved exercises of authority derivative of, and in service to, a granted power."[344]

As the preceding Parts show, ancillary rights too are often compared to shadowy "penumbras,"[345] "auxiliary protections,"[346] "necessary concomitant[s],"[347] "corresponding" rights,[348] and "implie[d]" privileges,[349] encompassing those adjacent activities that "are implicit in enumerated guarantees"[350] and considered "derivative"[351] of and in service to independent, underlying constitutionally-specified rights.

Yet it is more than just these telling linguistic similarities that connect the two debates. Both contexts share common interpretive problems of how and how far to make inferences from the written text.[352] They share concerns about how to protect the unwritten or implied additions that are needed to make the textual enumeration effective and yet prevent a limitless causal chain of inferences that would render the written codification superfluous. The richer doctrinal development of case law and scholarship on implied federal power might therefore provide lessons for fleshing out ways to deal

340 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819).

341 *Id.* at 418.

342 James Everard's Breweries v. Day, 265 U.S. 545, 558 (1924).

343 Sabri v. United States, 541 U.S. 600, 605 (2004).

344 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (Roberts, C.J.).

345 *See* Reynolds, *supra* note 20, at 248.

346 *Id.* at 248-49.

347 N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting) ("[A] necessary concomitant of this right is the right to take a gun outside the home for certain purposes."); *see also* United States v. Connelly, 668 F. Supp. 3d 662, 680 (W.D. Tex. 2023) (noting that the Second Amendment "necessarily entails other concomitant rights").

348 Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. 2022) ("[T]he right to keep and bear arms implies a corresponding right to manufacture arms.").

349 Luis v. United States, 578 U.S. 5, 25 (2016) ("The right 'to have the Assistance of Counsel,' . . . thus implies the right to use lawfully owned property to pay for an attorney.").

350 Richmond Newspapers v. Virginia, 448 U.S. 555, 579 (1980); *see also* Rhode v. Becerra, 445 F. Supp. 3d 902, 930 (S.D. Cal. 2020), *vacated and remanded sub nom.* Rhode v. Bonta, No. 20-55437, 2022 WL 17099119 (9th Cir. Nov. 17, 2022) (stating that the Second Amendment "implicitly protect[s] those closely related acts necessary to" the express right).

351 *See supra* subsection I.B.1.

352 *See* United States v. Comstock, 560 U.S. 126, 146 (2010) (describing how "from the implied power to punish" the Supreme Court has "*further* inferred both the power to imprison, . . . and . . . the federal civil-commitment power."). The distinction Marshall makes in *McCulloch* between the "great substantive and independent power" in the enumerated list of congressional authority and the "implied as incidental" powers to carry those into effect from the Necessary and Proper Clause are similar to this Article's distinction between constitutionally-specified rights (e.g., to own a gun) and the implied ancillary rights that must be inferred from those rights (e.g., to obtain bullets). *See supra* Section I.B; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

more expressly with ancillary rights.[353] This Section focuses on two themes drawn from that context: flexibility and limitation.[354]

1. Threshold Flexibility

First, flexibility. One key theme from the history, case law, and scholarship on implied congressional powers is the broad flexibility with which courts draw inferences from the text. The doctrine rejects a sterile literalism that would encompass no implied power beyond that absolutely essential to the operation of the express text. The Supreme Court has often reiterated this breadth of congressional decision-making and the deference it owes to

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353 Of course, there are important differences, which is why the whole doctrinal apparatus from one sphere should not be imported to the other. Importing doctrinal concepts is a common feature of constitutional borrowing, but it should be done cautiously. *See, e.g.*, Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 345-54 (2021) (discussing types of borrowing, including importing methodological frameworks and substantive law itself). Among the differences that affect borrowing is the fact that the Necessary and Proper Clause is itself enumerated, providing a textual hook for implied powers. But that difference should not be overstated. As LaCroix notes, "the overarching power . . . is plainly enumerated in the text of Article I. But the subjects to which that power should be applied, and the ends to which the power should be put, are not enumerated." LaCroix, *supra* note 335, at 2059.

Second, in an implied powers case, Congress has already made the judgment that it has such a power by exercising it, and courts are asked to review that judgment, which has inspired calls for greater (or lesser) deference. *See* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78–83 (2014) (arguing in favor of broad deference to Congress). When dealing with ancillary rights, however, courts are themselves tasked with making that initial determination. But that distinction too can be overstated. After all, when reviewing a rights claim, courts are deciding whether a law or regulation transgresses individual rights, and vindicating such a claim displaces legislative judgment in a similar way. *See id.* at 78-79 (drawing an analogy to Thayer's clear error rule that laws should not be struck down unless there is a clear violation); David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 75 (2015) (noting that Chief Justice Marshall's reasoning in *McCulloch* supports a Thayerian approach).

Third, implied powers jurisprudence is about *federal power* whereas rights questions implicate local, state, and federal decisionmaking. True enough, but it is not clear that that restricted domain has much bearing on how the doctrine may be informative with respect to questions of textual implication and how to make enumerated guarantees effective.

354 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012) (Roberts, C.J.) (emphasizing an approach of both deference and boundary policing as the Court's "jurisprudence under the Necessary and Proper Clause has developed"); William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 42-43 (2014) (noting that *McCulloch* "adopted a generally broad and deferential test" but also imposed a set of "limitations" that can have large consequences); Powell, *supra* note 318, at 716 (advocating a simultaneously flexible and limiting understanding of implied congressional power, where "Congress has the constitutional authority to address any legitimate object of legislative concern even though the tools by which it does so are limited"). The doctrine concerning the Necessary and Proper Clause has itself gone through stages of expansive and limiting use. *See* LaCroix, *supra* note 335, at 2061 ("Perhaps [the] most surprising [doctrinal development] is the steady transmutation of the necessary and proper power from a regulatory and interpretive device that tended to expand federal power into a tool for checking that same power.").

congressional choice over the exercise of implied powers.[355] As Jefferson Powell argues, "[i]t is for Congress, not the Court, to determine whether the means Congress adopts are sufficiently conducive to the beneficial execution of its powers to justify their adoption."[356] In Marshall's famous words, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[357] Determining whether a congressional exercise of power complies with the Constitution in this way often requires understanding what interests Congress is trying to serve in exercising its powers.[358] The scope and nature of the enumerated power can thus help ascertain the degree of flexibility with which Congress can exercise its choice of implied means.[359]

In addition, implied powers doctrine is concerned about the fit between the implied and express power.[360] What role does an implied power play in protecting or advancing the underlying enumerated power—or, as Chief Justice Roberts has put it, how is the implied power both (1) "derivative of," and (2) "in service to" that express power?[361] Decisionmakers can derive implied powers through a series of inferences from the text,[362] even several steps removed,[363] but the underlying constitutionally-specified power is the ultimate source. In terms of how they functionally serve the express power, one might understand implied powers to track (even if imperfectly) the functional categories of ancillary rights; we can think of necessary implied

355 *See* United States v. Kebodeaux, 570 U.S. 387, 396 (2013) (noting that in the exercise of its implied powers, the Constitution "gives Congress the power to weigh the evidence and to reach a rational conclusion"); United States v. Comstock, 560 U.S. 126, 134 (2010) ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); Burroughs v. United States, 290 U.S. 534, 547-548 (1934) (endorsing a broad scope of congressional discretion).

356 Powell, *supra* note 318, at 723.

357 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

358 Though, of course, not everyone agrees that the Constitution grants broad discretion. *See* Baude, *supra* note 354, at 39 (arguing that "historical practice, *McCulloch v. Maryland*, and the text itself all *permit*, though may not require, a less deferential judicial interpretation than Manning advocates.").

359 *See* THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded.").

360 *See* McCulloch, 17 U.S. at 409–10 ("The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.").

361 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (Roberts, C.J.).

362 *See* United States v. Comstock, 560 U.S. 126, 146 (2010) (rejecting the notion that "when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power").

363 *Id.* at 148 (blessing an implied power a few steps removed from the enumerated power).

powers,[364] facilitative implied powers,[365] corresponding implied powers,[366] and even prophylactic ones.[367] Asking what an implied power *does* for the independent and express power to which it is attached helps shape considerations of whether a court should bless it.[368]

Another source for understanding what Congress can do is historical practice.[369] What were the kinds of powers traditionally implied by the granting of specific powers? Madison and Hamilton, for example, argued in *The Federalist* that the Necessary and Proper Clause was essentially redundant because concomitant powers would be implied from the grants of power themselves.[370] Along with the grant of a given power (say, to create post roads and offices) would be an understanding that Congress could act to safeguard those creations (say, by criminalizing mail theft).[371] With the power to create inferior courts comes along the power to punish perjury.[372] And so on. Longstanding practice and historical understanding can thus give rise to claims that specific implied powers might be properly inferred.[373]

From the attempts to derive these varied types of implied powers, we can draw a few benchmarks that courts can use to make initial determinations about ancillary claims. It bears repeating that this threshold inquiry requires flexibility, even if there might be other reasons to ultimately limit recognition

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364 *See McCulloch*, 17 U.S. at 413 (acknowledging the argument that Congress's "right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory" but rejecting a limitation to *only* those powers).

365 *See* Beck, *supra* note 333, at 605 (noting that "bank supporters read this grant of power more broadly, as permitting Congress to *facilitate* borrowing by incorporating a lending institution").

366 *See* Sabri v. United States, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare . . . .").

367 *See Comstock*, 560 U.S. at 147 (noting that the Court has held that "in aid of that implied power to criminalize graft of taxpayer dollars, Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been traceably skimmed from specific federal payments") (internal quotation marks omitted) (citations omitted).

368 *See* LaCroix, *supra* note 335, 2065–66 ("It is a hornbook axiom that Congress cannot regulate under the necessary and proper power alone; it must base an exercise of that power on an underlying enumerated power.").

369 *See* Baude, *supra* note 322, at 1807-08 (discussing the importance of history in understanding enumerated powers).

370 *See* Beck, *supra* note 333, at 588-591 (tracing this notion in Hamilton and Madison's arguments); *see also* Baude, *supra* note 332, at 521 ("Alexander Hamilton and James Madison both argued that the Necessary and Proper Clause was only 'declaratory' of how the enumerated powers would have been construed on their own.").

371 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (invoking this example).

372 *Id.*

373 *See* United States v. Comstock, 560 U.S. 126, 137 (2010) (upholding an exercise of implied powers partly on the grounds that it only marginally adds to laws passed pursuant to implied powers "that have existed for many decades"); *see also* Baude, *supra* note 322, at 1807-08 (describing how the history of Congress's eminent domain power helps elucidate the scope of that power).

of an implied claim. First, in making threshold determinations, courts can focus on the nature and purpose of the enumerated right or power and how the claimed ancillary extension fits with it. That consists in both understanding how the claimed ancillary right or power derives from the express right or power and how the former relates to the latter. Here, the taxonomy in Part II can be a useful guide to questions of fit and relation. Second, historical practice can be crucial, including reliance on the traditional sources that help elucidate what the right or power might properly extend to. As Jefferson Powell notes, however, while historical practice or understanding can help justify the exercise of implied power, that does not necessarily mean novel innovations should be viewed skeptically.[374] But along with these benchmarks under the flexibility heading, courts have also been quick to emphasize limits. In other words, even if the initial benchmarks point toward ancillary power or right recognition, there might be other reasons to pause.

2. Limitation

That brings us to the second theme: limitation. As much as the Court's implied powers jurisprudence stresses flexibility and breadth, it also emphasizes limits. The need for those limits arises from the same kind of slippery slope and floodgates concerns present in recognizing ancillary rights—concerns that to read powers (or rights) too flexibly could eviscerate the borders established in our constitutional system.[375] To counteract those concerns, implied powers jurisprudence imposes several limits on how robustly to infer power. As Will Baude underscores, Chief Justice Marshall's "limitations provide important support for the *McCulloch* Court's otherwise broad reading of the clause. The outer limits provide a backstop against what would otherwise be a potentially unacceptable consequence of the broad deference."[376] Put differently, the doctrine recognizes a broad and flexible threshold determination that is backstopped with manageable limits. These backstops address the floodgates problem of implied powers.

Some of those limits are conceptual. Baude, for example, notes a distinction between "great powers" that were considered too major to leave

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374 *See* Powell, *supra* note 318, at 730 (arguing that McCulloch does not support any inference that "a more innovative exercise of congressional power" is suspect).

375 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012) (Roberts, C.J.) (underscoring that, while the Court has granted Congress wide berth in using implied powers, it has "also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution"); *see also* Taylor v. United States, 579 U.S. 301, 312 (2016) (Thomas, J., dissenting) ("[I]f these limitations are not respected, Congress will accumulate the general police power that the Constitution withholds."). *But see* Beck, *supra* note 333, at 584 (arguing that federalism limits are not best read as part of the necessary and proper analysis).

376 Baude, *supra* note 354, at 43.

to implication and incidental powers that could be left implied, for future lawmakers and judges to infer from the grant of express power.[377] These conceptual limits are related to the garden variety practical concerns about bigness, about powers that seem "too sweeping."[378] On this latter point, Alison LaCroix underscores a trend in the more recent doctrine that is skeptical about invocations of the Necessary and Proper Clause "that appear[], in some vaguely defined way, to be simply too large in scale to be permitted by such a potentially expansive provision as the Necessary and Proper Clause."[379] The breadth of the implied power matters in the contemporary doctrine,[380] even if that limit is not altogether clear from the Court's early case law.[381]

Other limits are structural or institutional. Federalism concerns often motivate these limits.[382] Even if the flexibility factors point in favor of an implied power—for example, the claimed power provides a useful way to serve valid purposes, creates a better functioning government, and is historically indicated—structural backstops might still suggest it would go too far in the direction of eradicating the premises of dual sovereignty and the nature of limited and enumerated federal power.[383] This is one (contested)

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377 *See* Baude, *supra* note 322, at 1749 ("When a minor power is incidentally necessary to effectuating some explicit constitutional power, it could be implied. But some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power.").

378 *Comstock*, 560 U.S. at 146.

379 LaCroix, *supra* note 335, at 2080.

380 *See Comstock*, 560 U.S. at 146 (considering whether the statutory provision enacted by Congress is "too sweeping in its scope"); *Sebelius*, 567 U.S. at 560 (Roberts, C.J.) (invoking the mandate's breadth and faulting it because it "would work a substantial expansion of federal authority.").

381 *See* Powell, *supra* note 318, at 730 (criticizing the bigness limitation and arguing that "Chief Justice Marshall made nothing of the bank as a 'modest' change in federal law—the bank was one of the most socially consequential federal instrumentalities in the early Republic").

382 *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (stating that the Court's cases show that a law cannot be a "proper" exercise of implied power "when it violates a constitutional principle of state sovereignty" (internal quotation marks omitted) (citations omitted) (alterations omitted)).

383 *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1994) (arguing that historical evidence supports the principle that "a 'proper' executory law must respect the system of enumerated federal powers"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 813 (1996) (referring to the "federalism constraint" built into the Necessary and Proper Clause); *see also* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 773 (1997) (arguing for another structural limitation, that "[l]aws are improper if they violate the background rights retained by the people.").

premise of the Supreme Court's decisions in *Printz*,[384] *Alden*,[385] and on the Affordable Care Act's individual mandate.[386]

On the limitation side, then, we can see courts concerned about the conceptual or practical consequences of implying great and substantive power and the related structural or institutional concerns that help to limit recognition to proper constitutional boundaries.

Consider how these lessons, of flexibility and limitation, worked together in the Supreme Court's recent implied powers decision, *United States v. Comstock*.[387] There, prisoners challenged the federal government's power to civilly commit individuals in federal custody who were deemed sexually dangerous after the sentences for their convictions expired.[388] The sole question before the Court was whether Congress had the Article I power to exercise that authority.[389] Justice Breyer's opinion for the Court upheld the law as a permissible exercise of implied power under the Necessary and Proper Clause on the basis of five conjoint considerations.[390]

Those considerations combined twin themes of implied powers jurisprudence: flexibility and limitation.[391] First and foremost, the Court stressed the "broad authority" the Necessary and Proper Clause grants Congress "to enact federal legislation."[392] The Clause should not be interpreted parsimoniously, but instead with what we could call, in Randy Barnett's words, a "latitudinarian conception of necessity" that echoes down from *McCulloch*.[393] The Court should therefore apply a deferential form of rationality-based means-end scrutiny.[394] The breadth of this grant of implied

384 *See* Printz v. United States, 521 U.S. 898, 923-24 (1997) (explaining the majority's view that the structure of federalism limits congressional power and the dissent's disagreement with this notion); *see also* Beck, *supra* note 333, at 629 ("*Printz* thus treated commandeering of state officials as a means violating the *propriety* requirement of the Necessary and Proper Clause.").

385 *See* Alden v. Maine, 527 U.S. 706, 732-33 (1999) (asserting that the structure of federalism limits powers that Congress could otherwise exercise); *cf.* Baude, *supra* note 322, at 1816 (suggesting that a better defense of *Alden*'s conclusion would be that the implied power Congress had tried to exercise "is something that one ought to expect the Constitution to have done explicitly. Hence, it cannot be done by implication and is in other words a great power.").

386 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012) (Roberts, C.J.) (invoking structural principles to declare that even necessary laws—useful and beneficial ones—are not always proper).

387 560 U.S. 126 (2010).

388 *Id.* at 129.

389 *Id.* at 133 ("[W]e assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well.").

390 *Id.*

391 *Id.* at 133-35. *But see* Powell, *supra* note 318, at 727–36 (criticizing the Court's considerations).

392 *Comstock*, 560 U.S. at 133.

393 Barnett, *supra* note 383, at 763.

394 *Comstock*, 560 U.S. at 134 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether

authority authorized a chain of multiple layers of inferences from which an exercise of power could be inferred from the text, hopping from the express power that grounds implied federal criminalization power to the implied power to imprison lawbreakers to the implied power to treat and manage prisoners.[395]

Yet, despite that breadth, the Court emphasized limits. The second factor the Court stressed was that the exercise of power at issue was just "a modest addition" to powers of prisoner management that had been exercised for decades.[396] Third, the exercise of power was reasonably adapted to the government's interest in public safety.[397] Fourth, the statute accommodated federalism concerns by "properly account[ing] for state interests" in the design of the system it created.[398] And fifth, "the links" between the exercise of the implied power to civilly commit federal prisoners and Congress's express powers were "not too attenuated," nor was the law "too sweeping in its scope."[399]

In short, implied powers jurisprudence "contains both a deferential standard and limiting principles," reflecting dual themes that began in *McCulloch* itself.[400] So too should ancillary-rights jurisprudence contain both flexibility and limitation. Taking the principles from the threshold flexibility determination, focusing on questions of scope, nature, fit, and historical practice, and the backstops from the limitation side—conceptual and structural concerns—we can sketch out some preliminary thoughts on how ancillary rights doctrine can develop more coherently and cohesively. It should be clear, however, that these principles do not provide a mechanical test that spits out determinate results. Answers to these questions in the context of ancillary rights are likely to be no less contested and debatable than they have been for centuries in the context of implied powers.[401] The goal of

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the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.").

395 *Id.* at 137 ("Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things . . . .").

396 *Id.* at 137.

397 *See id.* at 142-43 ("[T]he Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose . . . . [the statute] is 'reasonably adapted' . . . to Congress' power to act as a responsible federal custodian . . . .").

398 *Id.* at 143.

399 *Id.* at 146.

400 Baude, *supra* note 354, at 43.

401 *See* GIENAPP, *supra* note 180, at 117-37 (describing how the debates over the extent of congressional power beyond that expressly delineated in Article I turned on extra-textual debates about the nature of the Union).

the framework is to channel and discipline the arguments, not guarantee a particular outcome.

3. Adapting the Framework

When flexibly reading constitutionally-specified rights to protect ancillary conduct, attention to questions of purpose, fit, and historical practice can help guide the threshold inquiry, while conceptual and structural principles can provide backend limitations. For example, one factor the court in *Rhode v. Bonta* gave for considering ammunition an ancillary Second Amendment right was that doing so "is the historically traditional view,"[402] citing an 1871 case concluding that "the right to keep arms, necessarily involves the right . . . to purchase and provide ammunition suitable for such arms."[403] Or note the grounds on which Chief Justice Burger rejected a Sixth Amendment implied right to self-representation, which sounds in Baudian great-powers terms: "it would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication."[404]

Consider further how the principles of flexibility and limitation might be applied to a claimed ancillary right to own a bump stock. The sketch of how this framework could apply to such a claimed right will be necessarily cursory. Each theme and principle would merit extended treatment, but this overview should help illustrate how the framework could be both informative and constraining, even if (as in implied powers cases) no one outcome is obvious or dictated by the inquiry.

Bump stocks are a type of firearm accessory that enables a semi-automatic firearm to fire at a rate of speed approximating that of automatic firearms.[405] Because bump stocks are not independently "weapons of offence or . . . defence,"[406] they are not part of the constitutionally-specified right to keep and bear arms.[407] The question then is whether their use is an implied or ancillary right. Are bump stocks "necessary and proper" to the exercise of the constitutionally-specified right to keep and bear arms?

Looking to the flexibility principles, we can ask about historical practice and understandings. Bump stocks of course are modern technological advances. That does not end the inquiry any more than a recording device's recency settles the question of whether there exists an ancillary First

402 Rhode v. Bonta, 713 F. Supp. 3d 865, 874 (S.D. Cal. 2024).
403 Andrews v. State, 50 Tenn. (1 Heisk.) 165, 178 (1871).
404 Faretta v. California, 422 U.S. 806, 844 (1975) (Burger, C.J., dissenting).
405 Garland v. Cargill, 602 U.S. 406, 411 (2024).
406 District of Columbia v. Heller, 554 U.S. 570, 581 (2008).
407 *Id.*

Amendment right to record.[408] To step up a level, then, what about historical understandings of a right to accoutrements that could make a weapon more powerful or dangerous? Some evidence suggests an understanding that the right encompasses not only firearms themselves, but "related items and accessories that made them usable, including ammunition, bayonets, and accouterments."[409] As one court said in assessing restrictions on another accessory—stabilizing braces:

> The history interwoven with the 'right of the people to keep and bear Arms,' indicates that the Second Amendment's text has long incorporated the right of personal gunsmithing, *i.e.*, the right of private individuals to modify or acquire modifications to lawfully bearable firearms so as to increase their accuracy and safety for a more effective exercise of self-defense.[410]

This is certainly a broad and flexible reading of the history, and it is not clear whether this analysis would apply equally to bump stocks.[411] Such a broad reading also pushes up against level-of-generality questions concerning just what modifications the historical record might encompass.[412] But the flexibility principles are meant to be a generous first pass, and the limiting principles may still turn out otherwise.

Second, we can focus on the nature and purpose of the constitutionally-specified right and its fit with the claimed ancillary extension. Because the Supreme Court has grounded the Second Amendment in self-defense,[413] items that modify firearms "for the purpose of enhancing the performance of self-defense" might fall under implied or ancillary rights.[414] It is not clear, however, that bump stocks advance the core purpose of the Second Amendment. A bump stock makes accuracy and precision more difficult,[415] and there are likely few real-world self-defense situations in which a person

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408 *Cf.* Caetano v. Massachusetts, 577 U.S. 411, 411-12 (2016) (rejecting an approach that provides less protection to contemporary weapons).

409 Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 54 (2016).

410 Mock v. Garland, 697 F. Supp. 3d 564, 583 (N.D. Tex. 2023) (citation omitted).

411 Andrew Willinger, *Bump Stocks and the Second Amendment*, DUKE CTR. FOR FIREARMS L. BLOG: SECOND THOUGHTS BLOG (Mar. 1, 2024), https://firearmslaw.duke.edu/2024/03/bump-stocks-and-the-second-amendment [https://perma.cc/96W7-LD94] (exploring arguments for and against Second Amendment protection for bump stocks).

412 *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (exploring these types of questions about rights).

413 District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

414 *Mock*, 697 F. Supp. 3d at 583.

415 Jacob Knutson, *What Makes Gun Bump Stocks So Deadly*, AXIOS (June 14, 2024), https://www.axios.com/2024/06/14/bump-stocks-supreme-court-ban-how-works [https://perma.cc/NUE2-H5WQ] (reporting that using bump stocks "lowers accuracy, so [using one] wouldn't be practical while hunting, or in accuracy and precision competitions").

would need to discharge a weapon more quickly than he or she could manually pull the trigger. Compare that to a stabilizing brace, which proponents argue is protected because it "makes the pistol more stable and the user more accurate."[416] To be sure, some have argued that bump stocks serve self-defense functions,[417] but their difficult handling and inaccuracy are strong challenges to that notion.

Along with the nature and purpose, the question of fit becomes crucial in thinking about both the derivation from and the relationship to the constitutionally-specified right. A right to bump stocks seems hard to derive from the right to keep and bear arms; it is no more than an accessory that attaches to a type of arm. This claimed right is also hard to categorize among the taxonomy. The most likely relationship is facilitative, but for the reasons above (lack of stability and need), a bump stock likely does not facilitate lawful self-defense; with its lack of precision, it may even *impede* it.[418] But even if a threshold determination on the flexibility side suggests protection for an ancillary right to bump stocks, the limitations principles are meant to ensure recognition stays within proper boundaries.

As with implied powers, limits on recognizing ancillary rights are also necessary. Once again, just because education facilitates speech rights does not mean there is an ancillary First Amendment right to education.[419] If all the conduct that facilitated or prophylactically protected constitutionally-specified conduct received protection as ancillary rights, the floodgates would open. One limit, then, is conceptual. Is this claimed ancillary right so "great" that we would expect it to be enumerated if included? To repurpose Baude, "some [rights] are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated [right]."[420] For education, it probably is the case that it is so great and substantive that it would be surprising if it were left to implication. For bump stocks, that's probably not the case.

Of course, even though the exact devices did not exist at the time of ratification, the Constitution could have granted a right to both arms and the accessories that would make them more powerful. Some states, in fact, expressly protect not just firearms but "accessories typical to the normal

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416 Mock v. Garland, 75 F.4th 563, 588 (5th Cir. 2023) (Willett, J., concurring).

417 Transcript of Oral Argument at 87-88, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976) [hereinafter *Cargill* Oral Argument Transcript] ("Bump stocks can help people who have disabilities, who have problems with finger dexterity, people who have arthritis in their fingers.").

418 *Cf. Mock*, 697 F. Supp. 3d at 583 ("The successful performance of armed self-defense entails not only deterring or neutralizing life-threatening perpetrators, but also preserving innocent life and preventing bodily injury to others as much as possible.").

419 Blocher, *supra* note 5, at 167.

420 Baude, *supra* note 322, at 1749.

function of such arms" in their own constitutions.[421] One conceptual dividing line governing the Second Amendment in particular is the distinction between unprotected "dangerous and unusual" weapons and protected weapons in "common use."[422] That conceptual terrain is still actively in flux, but once the case law settles more, it may impact a determination about accessories like bump stocks.[423]

Because of these conceptual concerns, there ought to be hesitation about implying rights that just seem too big, as there is on powers that are "too sweeping."[424] To repurpose Dorf's discussion of incidental burdens, "[h]ow can the law control the floodgates and still capture our intuition that some [regulations on ancillary rights] pose severe constitutional problems?"[425] His proposed solution is one this Article turns to below on the doctrinal tests to review ancillary claims, but the question is important for identification as well. There is a near-limitless variety of hardware that can be added to a firearm, not to mention "[e]merging technology for firearms—so-called 'smart guns' and related electronic firearm accessories."[426] Unless there are lines that can be drawn around bump stocks that include them while excluding others, the bigness limitation may weigh against inclusion.

Another limiting principle is similar to that in the implied powers context: a structural or institutional limitation. But in the rights context, the structural limitation is less about federalism than it is about institutional capacity, judicial review, and separation of powers. Would recognizing ancillary protection for bump stocks trench too far on the ability of state and federal lawmakers to regulate in the public interest? Which entity is best situated to make judgment calls about what accessories enable lawful self-defense? Although any answer here is debatable—and not unique to bump stocks—the less clear the flexibility factors favor protection, the stronger the argument for judicial deference to arguable legislative calls.

In short, implied powers doctrine provides a body of case law and scholarship for courts to draw from in thinking through ancillary rights. Both

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421 MO. CONST. art. I, § 23; *see also* Quinn Yeargain, *Ratifying* Bruen *in the States*, ARIZ. STATE L.J. (forthcoming 2025) (manuscript at 20) (on file with author) (collecting examples).

422 Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2497 (2022) (internal quotation marks omitted) (describing the doctrine and proposing a way to discipline it).

423 *See Cargill* Oral Argument Transcript, *supra* note 417, at 106 (stating that, with respect to the Second Amendment's protection for bump stocks, "[w]e don't have a position on that question because we didn't brief it, and also 'dangerous and unusual weapons' is vague enough that it's just not clear to us what the answer would be").

424 United States v. Comstock, 560 U.S. 126, 146 (2010).

425 Dorf, *supra* note 215, at 1178.

426 Dru Stevenson, *Smart Guns, the Law, and the Second Amendment*, 124 PENN STATE L. REV. 691, 692 (2020).

sets of doctrines pose similar problems of making inferences from spare constitutional text, respecting the boundaries of constitutional design, working within institutional and structural limits, and making the Constitution into a workable document that can endure through time. After all, whether in dealing with powers or rights, "we must never forget[] that it is a *constitution* we are expounding."[427] The text does not delineate everything needed for its fair operation.

B. *Regulation*

Now consider the regulation question. Assuming courts recognize an ancillary right, they still must determine how the government can permissibly regulate that right. One promising approach is suggested by how the Ninth Circuit recently confronted this very question in the context of analyzing a claimed ancillary right to engage in firearms commerce.[428] "Ancillary rights," the court said, "are protected to the extent necessary to serve those purposes" underlying the Second Amendment, like self-defense; "otherwise, the Second Amendment is not implicated by restraints on such rights."[429] Ancillary rights, in other words, do not garner the *same* protection as the constitutionally-specified rights to keep and bear arms. Instead, ancillary rights, like the right to sell firearms, bar only those regulations that impose "meaningful constraints on the right to acquire firearms."[430]

This kind of *Meaningful Constraints* test would focus on how regulating ancillary rights impacts the underlying purpose served by the constitutionally-specified right.[431] If, as in that case, barring certain types of firearms transactions in select locations hardly impacts anyone's right to keep and bear arms, then the regulation is not constitutionally problematic.[432] This test mimics the type of framework that Michael Dorf advocates for in the context of incidental burdens on fundamental rights.[433] There, he argues, laws that do not directly regulate constitutional rights, but only indirectly burden them, should not implicate heightened scrutiny unless (with exceptions not

427 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

428 B & L Prods., Inc. v. Newsom, 104 F.4th 108(9th Cir. 2024).

429 *Id.* at 118.

430 *Id.*

431 *Cf.* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1035 (2015) ("[T]he First Amendment should be read to provide some protection for producing speech, but that the protections cannot and should not be absolute, or even as strong as the protections accorded to actual communication.").

432 *See B & L Prods.*, 104 F.4th at 118.

433 Dorf, *supra* note 215, at 1179.

relevant here) they impose "substantial burdens" on the exercise of the right.[434]

Here, one might question why identification of ancillary rights matters at all if the real question about permissible regulation turns on the impact to constitutionally-specified rights.[435] One answer is suggested in the Ninth Circuit's decision on firearms commerce. If the threshold answer is that there's *no* ancillary right to sell a gun, then that's the end of the inquiry; no imposition on the ability to sell guns could give rise to a successful challenge. Recognition of the right is what generally kicks the constitutional framework into gear. Another answer is that ancillary rights questions directly impact standing determinations; if there's no ancillary right to sell a gun, then even if sales restrictions might burden the underlying right, the consumer as rights-bearer would be the proper claimant, absent some reason to give the seller third-party standing to raise its customer's claim.[436] Additionally, clarifying the ancillary right at issue aids in understanding just how and to what extent a regulation does in fact burden—or meaningfully constrain—the constitutionally-specified right.

Specifically, the category into which a claimed ancillary right fits within the taxonomy in Part II can help reflect the degree to which a regulation might burden the underlying right. Regulations that impact the kind of activities in the prophylactic and facilitative categories, for example, are more likely to impose smaller burdens than the other types.[437] Necessary ancillary rights are the types of activities whose regulation is likely to impose the severest burdens on the underlying right. Correlative rights may fall somewhere in between.

How would this approach work with some of the cases in Part II? Consider just a few examples from the taxonomy. A regulation on a necessary ingredient like ammunition would be reviewed for its impact on a person's right to keep and bear arms. Facts matter enormously.[438] The burden might be minimal if, for example, the regulation imposed a nominal sales tax on ammunition or outlawed one particularly harmful type of ammunition without restricting the availability of more typical kinds.[439] Or consider a

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434 *Id.* ("[L]aws having the incidental effect of substantially burdening fundamental rights to engage in primary conduct should be subject to heightened scrutiny").

435 I'm grateful to Tyler Lindley for articulating this objection.

436 *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1 (2021).

437 *Cf.* Dorf, *supra* note 215, at 1245 ("discounting burdens on merely facilitative conduct").

438 *Cf.* Baude, *supra* note 332, at 523 (noting that "facts should matter" in scrutinizing whether an exercise of congressional power exceeds the bounds of the Necessary and Proper Clause).

439 *See, e.g.*, Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 968 (9th Cir. 2014) (upholding a ban on the sale of hollow-point ammunition in the city where it imposed only a modest

burden on a claimed prophylactic ancillary right to operate a gun store. Because the right is prophylactic, a regulation would only impose a severe burden in exceptional circumstances.[440]

These inquiries will be fact-specific and contextual.[441] A zoning ordinance that limits where a gun store can operate may be particularly burdensome if no existing gun stores exist in the locale, it makes nearly all other local real estate unavailable, and no nearby areas can meet the demand for firearms. Absent those factors, the same regulation may not be as problematic.[442] A city that is saturated with enough gun stores to oversupply demand just will not, as a matter of fact, seriously hamper the right to keep and bear arms if the city enacts strict zoning laws that impede new store openings.

Similarly, a regulation on firearm discharge that bars firing guns in the city outside of lawful self-defense but makes no exception for gun ranges could significantly burden the right to bear arms because it might preclude a person from becoming skilled and proficient enough to use a firearm for its key purpose.[443] But an ordinance that only bars gun firing at specified times would not impose as significant a burden. The two ordinances' regulation of ancillary rights impacts the constitutionally-specified right differently, and so they should be judged differently—not by a framework that submits all types of regulation to the same scrutiny.

Other forms of review are possible, like the type of intermediate scrutiny that may have been applied to such cases prior to the Court's *Bruen* decision, which erased a decade of lower-court precedent and forbid the use of conventional tiers-of-scrutiny analysis for Second Amendment cases.[444] But the key focus in judging ancillary rights claims ought to be on the burdens they impose on the exercise of constitutionally-specified rights. A purely historical test for adjudicating rights—like *Bruen*'s history-and-tradition

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burden because "Jackson may either use fully-jacketed bullets for self-defense or obtain hollow-point bullets outside of San Francisco's jurisdiction").

440 *See* Teixeira v. County of Alameda, 873 F.3d 670, 679 (9th Cir. 2017) (en banc) (rejecting a gun store's claim in part because of the number of other stores in the county and noting that "residents may freely purchase firearms within the County").

441 *See* GREENE, *supra* note 33, at 89 ("The rights Americans enjoy should depend on what the government has done to us and why it has done it: Is the government motivated by bigotry? Is it responding to evidence? Is the benefit the government is seeking proportionate to the burden placed on those affected by its actions?").

442 *Teixeira*, 873 F.3d at 679 (pointing to these kinds of facts as relevant to the decision).

443 *See* Ezell v. City of Chicago, 651 F.3d 684, 690 (7th Cir. 2011) (striking down an ordinance requiring range training but banning in-city ranges).

444 Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 83-87 (2023) (describing the means-end scrutiny framework discarded in *Bruen*).

test—gives inadequate attention to the interstitial reality of ancillary rights.[445]

This conclusion suggests a third answer to the skeptic of the ancillary rights label: maybe courts should not be using that label at all. They undeniably use the language of ancillary rights in considering challenges to various regulations, but if I am right that the ultimate test of constitutionality should turn on the impact to constitutionally-specified rights, then maybe courts should do that directly without this extra conceptual apparatus. One form that deflationary approach could take is what Jamal Greene calls "rights mediation."[446] On that approach, instead of parsimoniously recognizing a small number of rights and granting them maximal protection, we could instead grant a large number of rights but provide them only that protection commensurate with the facts on the ground.[447] "Mediating rights," Greene explains, "would be shifting our collective emphasis from *whether* the Constitution includes particular rights to *what* the government is actually doing to people and why."[448] Burdens would be the central focus.[449]

Ultimately, however, the framework for identifying ancillary rights can be useful whether courts retain the separate language or not. Identifying the orbit of conduct that implicates constitutional values will be a necessary part of resolving any constitutional challenge, no matter the labels used to address them. Whether or not courts continue to use the language of ancillary rights, the framework outlined in this Article provides a way to channel that unavoidable analysis.

CONCLUSION

Ancillary rights exist to supplement the protection of constitutionally-specified rights. The problems of deciphering and implementing these rights have bedeviled courts for decades. This Article treats the question systematically, categorizing the types of claims and presenting a novel approach for how to identify them. Drawing on the way courts have addressed related questions about implied powers can direct and discipline the inquiry.

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445 *See* Francesca Procaccini, *The End of Means-End Scrutiny,* 75 DUKE L.J. (forthcoming 2025) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909510 (discussing "the astonishing and covert collapse of means-end scrutiny and the consequences of this collapse for rights and judicial review.").

446 GREENE, *supra* note 33, at xx.

447 *Id.*

448 *Id.* (emphasis added).

449 *Id.* at xxviii ("The degree of amelioration or investment required of the government shouldn't depend on cold dissections of commas or resurrections of ancient scrolls. It should depend on the real-world burdens on the people claiming rights and on the government's real-world motives, behavior, and constraints in denying them.").

Courts should use flexible principles borrowed from that doctrine in approaching the threshold determination of ancillary rights questions, checked by limiting principles that cabin recognition to cognizable boundaries. As courts increasingly find themselves adrift in open Second Amendment waters, the framework here can provide a stable anchor from which to construct a more coherent doctrine.