

# HAVE GUN—WILL TRAVEL?

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## AUTHOR'S NOTE

*This Article was submitted to Law & Contemporary Problems in December, 2019, before the Court had held oral arguments in New York Rifle. It was almost through the editorial process when, on April 27, 2020, the U.S. Supreme Court issued a per curiam opinion in which it concluded that the case was moot because the law had been changed to grant the relief that the appellants sought. The Article has not been changed substantially to reflect that development. Nevertheless, I think that the Article still makes a modest contribution to the literature on hybrid rights cases. I'm unaware of any other commentary on New York Rifle that views the case through a hybrid rights lens. Had the Second Circuit appreciated that aspect of the case and adjusted its analysis accordingly—as I argue that it should have—a different result might have been obtained.*

## I

### INTRODUCTION

In *New York State Rifle & Pistol Association v. City of New York*, the Second Circuit confronted the constitutionality of a New York City rule that prohibited those licensed to possess a firearm in their residence from transporting that firearm to shooting competitions or gun ranges outside New York's five boroughs.<sup>1</sup> The plaintiffs challenged it as a violation of their Second Amendment rights, the right to travel, the dormant Commerce Clause doctrine (DCCD), and the First Amendment. The Second Circuit rejected all of their constitutional challenges; the plaintiffs then petitioned for certiorari, which the U.S. Supreme Court granted. If the case is not now moot,<sup>2</sup> gun rights supporters might look forward to the first major Second Amendment decision in a decade—one that might expand the scope of the right to keep and bear arms, conferring a measure of protection for arms bearing outside the home.

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1. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *vacated as moot*, 140 S. Ct. 1525 (2020) (per curiam).

2. The State amended its law to allow premises permittees to travel within the state; the City also apparently indicated it would no longer enforce its rule. Stephen Wermiel, *SCOTUS for Law Students: Battling Over Mootness*, SCOTUSBLOG (Aug. 29, 2019), <https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness/> [<https://perma.cc/82RZ-Y9EN>].

Even if the case is moot, *New York Rifle* furnishes an opportunity to examine how courts analyze cases in which multiple constitutional rights are implicated. The U.S. Supreme Court has, from time to time, explicitly held<sup>3</sup> or suggested implicitly<sup>4</sup> that governmental action implicating two or more independent constitutional rights might trigger a heightened standard of scrutiny than either right would trigger by itself. The notion of hybrid rights, however, remains controversial and undertheorized.<sup>5</sup>

I argue here that the Second Circuit erred in separating the constitutional claims—the Second Amendment and the right to travel in particular—and in examining each in isolation. The court’s characterization of the right to travel, moreover, was much narrower than that given to it by the Court’s contemporary right-to-travel cases. Drawing on the work of Michael Coenen,<sup>6</sup> I argue that the right to travel (itself a product of hybrid rights analysis), combined with the Second Amendment, should have resulted in the New York rule being subject to more searching scrutiny than that applied by the Second Circuit.

Part II discusses the origins of the “right to travel,” its early treatment by the Court, and the Court’s contemporary right-to-travel jurisprudence. The shifting textual basis for the right, I argue, is due to the fact that a careful reading of the recent cases shows the right to travel to be a combination of rights, or a hybrid right. Part III surveys the *New York Rifle* case itself, especially the Second Circuit’s treatment of the Second Amendment and right-to-travel claims. Part IV argues that the court erred in separating the two rights, analyzing each separately, and concluding that the New York rule violated neither the Second Amendment nor the right to travel. The court should have analyzed the rule using a higher standard of review associated with other hybrid rights cases where, at the least, New York should have borne the burden of showing how its rule was necessary to further its state interests. A brief conclusion follows.

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3. See *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (suggesting that Free Exercise claims in which the Court applied strict scrutiny were “hybrid rights” cases that implicated constitutional rights such as free speech *in addition to* free exercise rights).

4. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–05 (2015) (holding that restricting the fundamental right to marry to male-female couples violated the Due Process and Equal Protection rights of same-sex couples; suggesting interdependence between the two).

5. See, e.g., Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2007); Michael P. O’Shea, *The Second Amendment Wild Card: The Persisting Relevance of the “Hybrid” Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597 (2014); Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175 (2015); Bradley L. Davis, Comment, *Compelled Expression of the Religiously Forbidden: Pharmacists, “Duty to Fill” Statutes, and the Hybrid Rights Exception*, 29 U. HAW. L. REV. 97 (2006).

6. See generally Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016).

## II

## THE RIGHT(S) TO TRAVEL

This Part sketches a brief history of the right to travel, which has roots in the Anglo-American legal tradition dating back to the Magna Carta. It then traces the evolution of the right from the Articles of Confederation (which explicitly mentioned the right to travel) and the Constitution of 1787 (which did not). As we shall see in this Part, there is no single “right to travel”; the right instead encompasses at least four distinct rights, only one of which—mobility inside the United States—is implicated by *New York Rifle*. But that aspect of the right to travel, in turn, has been invoked by the Court when invalidating distinct laws held to infringe aspects of that interstate mobility right. For its part, the U.S. Supreme Court has been, as John Hart Ely memorably put it, “almost smug” in its refusal to identify a specific textual source for the right.<sup>7</sup> Early cases gestured in various directions, before contemporary Courts settled on the Commerce Clause, the Privileges and Immunities Clause of Article IV, and even the Fourteenth Amendment’s Privileges or Immunities Clause as sources—depending on which aspect of interstate mobility was impinged in a particular case. I argue that the reason for the lack of a *single* textual basis for the right is simple: the right to travel represents a particular combination of different constitutional clauses—hybrid rights, in other words.<sup>8</sup>

## A. Origins

The Magna Carta, the fundamental charter of rights first signed in 1215,<sup>9</sup> included two provisions touching on a right to travel. First, “merchants” were given the right to “enter or leave England unharmed and without fear,” and could “stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions” except enemy aliens during time of war.<sup>10</sup> In addition, the charter pronounced it “lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us . . . for some short period, for the common benefit of the realm.”<sup>11</sup> Again, there was a wartime exception.

However, the guild system and various apprenticeship statutes greatly restricted movement—as a practical matter—within England itself in the Tudor, Elizabethan, and Stuart reigns.<sup>12</sup> These restrictions on freedom of movement caused frustration, which incentivized English citizens “to go to the great open

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7. JOHN HART ELY, *DEMOCRACY & DISTRUST* 177 (1980).

8. See Coenen, *supra* note 6, at 1078–82 (2016) (discussing “right/right combinations,” a particular type of hybrid rights); see also *infra* Part II.D.

9. See *MAGNA CARTA* (1215).

10. *Id.* at cl. 41; see also Leonard B. Boudin, *The Constitutional Right to Travel*, 56 *COLUM. L. REV.* 47, 47–48 (1956).

11. *MAGNA CARTA*, *supra* note 9, at cl. 42.

12. ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 163–65 (First Kansas Paperback 1968) (1956).

spaces in her American colonies.”<sup>13</sup> The locomotive freedom sought by emigres to America was apparently enshrined in colonial charters, which either expressly referenced freedom to travel or took “internal freedom of movement for granted.”<sup>14</sup> By the eighteenth century, Blackstone was including within the common law’s protection of personal liberty “the power of locomotion, of changing situation, or of moving one’s person to whatever place one’s inclination may direct.”<sup>15</sup> When King George III proclaimed the frontier west of the Appalachians closed in 1763, his decision was “steadily resented” and contributed to the colonists’ alienation from Great Britain.<sup>16</sup>

Following Independence, the new states “took freedom of movement as much for granted as when they were colonies,”<sup>17</sup> as evidenced by Article IV of the Articles of Confederation, which explicitly guaranteed the right to enter and exit the various states. Specifically, it provided for “free ingress and regress to and from any other State,” and afforded foreign residents, with certain limitations, “all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively . . . .”<sup>18</sup> Only “paupers, vagabonds, and fugitives from justice” were denied the right freely to travel.<sup>19</sup>

The Constitution of 1787, too, had an article—Article IV—that guaranteed interstate comity. Curiously, it omitted the explicit protections for travel, property ownership, and nondiscrimination contained in the Articles.<sup>20</sup> Charles Pinckney, a South Carolina delegate, later took credit for the inclusion of the provision and said that the Constitution’s more succinct Article IV was “formed exactly upon the principles of the 4th article” of the Confederation.<sup>21</sup> In *Federalist* 42, James Madison implied that the Constitution’s Article IV was an improvement on the Articles of Confederation version because the latter was confusing and redundant.<sup>22</sup> The important point was that free inhabitants of a state who were not citizens of that state were “entitled, in every other State, to all the privileges of *free citizens* of the latter; that is, to greater privileges than

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13. *Id.* at 166.

14. *Id.* at 173–74, 177.

15. 1 WILLIAM BLACKSTONE, COMMENTARIES \*134.

16. CHAFFEE, *supra* note 12, at 181–82.

17. *Id.* at 184.

18. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

19. *Id.*

20. U.S. CONST. art. IV, § 2 reads, in part, “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Section 1 is the “full faith and credit clause”; the remainder of Section 2 requires extradition of fugitives from one state to another, provides for the return of fugitive slaves. Section 3 prohibits the partition of existing states and empowers Congress to make “all needful Rules and Regulations” respecting its territories or property. Section 4 guarantees states a “Republican Form of Government” to protect them against invasion and domestic insurrection.

21. Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28<sup>th</sup> of May, 1787*, in 3 RECORDS OF THE FEDERAL CONVENTION OF 1788, at 106, 112 (Max Farrand ed., 1966).

22. THE FEDERALIST NO. 42, at 220 (James Madison) (George W. Carey & James McClellan eds. 2001).

they may be entitled to in their own state . . . .”<sup>23</sup> Nevertheless, the absence of an explicit textual foundation for the right has vexed both courts<sup>24</sup> and commentators.<sup>25</sup>

## B. Early Right to Travel Cases

As alluded to above, there are four different “rights” involving travel: (1) freedom of mobility within the United States; (2) freedom to emigrate; (3) freedom to enter; and (4) the right *not* to travel or be forcibly exiled.<sup>26</sup> In this Article, I am concerned only with the first, domestic mobility—the ability to move within and among states.

In early domestic mobility cases, the Court struggled to articulate a textual basis for a constitutional proposition that its Justices thought self-evident. When Nevada attempted to impose a one-dollar capitation tax on every person leaving the state by common carrier, one stage line owner refused to pay. In *Crandall v. Nevada*, decided in 1867, the Court sided with the owner.<sup>27</sup> Offered the choice between invalidating the statute as a violation of the DCCD or the Import-Export Clause,<sup>28</sup> it chose neither. Reasoning from structure<sup>29</sup> and citing the paradigmatic structural opinion, *McCulloch v. Maryland*,<sup>30</sup> the Court wrote that:

[The] government has a right to call to [the capital] any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country . . . . In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

. . . .

. . . . [T]he citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.<sup>31</sup>

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23. *Id.*

24. *See infra* notes 27–86 and accompanying text.

25. *See* CHAFFEE, *supra* note 12, at 184–85, 189–92.

26. *Id.* at 188.

27. 73 U.S. 35 (1867).

28. *See* U.S. CONST. art. I, § 10, cl. 2 (banning states from imposing imposts or duties on “imports and exports” without congressional permission).

29. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 16–22 (1969) (citing *Crandall* as an example of structural reasoning).

30. *See Crandall*, 73 U.S. at 45 (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819) as the leading authority for structural reasoning).

31. *Id.* at 43–44.

Justice Clifford, with Chief Justice Chase, dissented; not because they thought the law should be upheld, but because they thought the Court should have rested on the DCCD.<sup>32</sup>

*Williams v. Fears*, decided in 1900, suggests why the Court was reluctant to ground the right to travel in the Commerce Clause alone.<sup>33</sup> Georgia had imposed a tax on “emigrant agents”<sup>34</sup>—those who were “engaged in hiring laborers in Georgia to be employed beyond the limits of the state.”<sup>35</sup> The tax was challenged as a violation of the Due Process and Equal Protection Clauses, as well as of the DCCD. Turning aside the Due Process and Equal Protection challenges, the Court conceded that the right to travel within the domestic territory “[was] an attribute of personal liberty . . . secured by the 14th Amendment and by other provisions of the Constitution,”<sup>36</sup> but it rejected the argument that the tax violated the Commerce Clause because it did not think that any actual “commerce” between the states was involved.<sup>37</sup> Given that the Court, at the time and until the post-1937 era, made careful distinctions between commerce *qua* commerce and activities that preceded but were not a part of it,<sup>38</sup> the Commerce Clause provided an uncertain footing for any right to travel.

By 1941, however, the Court’s doctrine had evolved to the point that a majority of the Court had no problem rooting the right to travel in the Commerce Clause. Prior to *Edwards v. California*,<sup>39</sup> California had made it unlawful to bring “indigents” into the state. Edwards was prosecuted for bringing over his unemployed brother-in-law from Texas.<sup>40</sup> California defended its law—some version of which had been in effect since the mid-nineteenth century—as a valid exercise of its police powers.<sup>41</sup>

The Court first noted that “it is settled beyond question that the transportation of persons is ‘commerce,’ within the meaning of [the Commerce Clause].”<sup>42</sup> It further conceded that states nevertheless “are not wholly precluded

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32. *Id.* at 49 (Clifford, J., dissenting).

33. 179 U.S. 270 (1900).

34. *Williams v. Fears*, 179 U.S. 270, 273 (1900).

35. *Id.* at 276.

36. *Id.* at 274. The Court rejected the Due Process Clause argument, writing that if the tax “can be said to affect the freedom of egress from the state, or the freedom to contract, it is only incidentally and remotely.” *Id.* The plaintiff’s Equal Protection claim was based on the fact that recruiting workers who would remain in-state was not taxed. The Court ruled that treating businesses that recruited workers who would remain in the state differently than those who would induce workers to leave was reasonable and within the discretion of the state legislature. *Id.* at 276.

37. *See id.* at 278 (holding that the business of hiring laborers and the labor contracts themselves were too attenuated from interstate traffic to be considered interstate commerce, and that the tax on those agents did not overly burden interstate commerce).

38. *See, e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941) (distinguishing between production of goods by child labor and the commerce itself in those goods).

39. 314 U.S. 160 (1941).

40. *Id.* at 170–71.

41. *Id.* at 172–73.

42. *Id.* at 172.

from exercising their police power in matters of local concern even though they may thereby affect interstate commerce.”<sup>43</sup> But among the limits to the police power, wrote Justice James Byrnes, none “is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.”<sup>44</sup> Quoting Justice Cardozo’s observation that the Constitution was framed on the theory that the states had to sink or swim together, the Court concluded that “[i]t is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here . . . . The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute.”<sup>45</sup>

Not all the Justices were enthusiastic about using the Commerce Clause as the right to travel’s textual anchor. Justice Douglas seemed almost offended by the notion, writing that “the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”<sup>46</sup> Douglas, along with Justices Black, Murphy, and Jackson, favored the Privileges or Immunities Clause of the Fourteenth Amendment as the appropriate textual anchor for the right.<sup>47</sup>

While the Commerce Clause remains an important foundation for the right to travel, contemporary cases—as we will see in the next Subpart—have continued to draw on a multiplicity of textual clauses, as well as structural inferences, when guaranteeing various aspects of this right.

### C. The Contemporary Court’s Right to Travel

The contemporary right to interstate mobility has three separate components: (1) the right of citizens of State A to leave that state and enter State B; (2) “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State . . . .”; and (3) for those who wish to establish permanent residence, “the right to be treated like other citizens of that State.”<sup>48</sup>

#### 1. “Right to Enter and Leave” Cases

The right to enter and leave one’s own state as well as other states was established in the earlier cases discussed above. By 1969, the Court could state unequivocally that:

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43. *Id.* at 172–73.

44. *Id.* at 173.

45. *Id.* at 174. For good measure, the Court repudiated language in *City of New York v. Miln*, 36 U.S. 102, 142 (1837), suggesting that states could exclude “paupers, vagabonds, and possibly convicts” as the equivalents of “physical pestilence.” *Edwards*, 314 U.S. at 176.

46. *Id.* at 177 (Douglas, J., concurring).

47. Black and Murphy joined Douglas’s opinion; Jackson concurred separately. *Id.* at 182 (Jackson, J., concurring).

48. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

The nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.<sup>49</sup>

Few state governments then, or now, would enact blatant attempts to interfere with entry into or exit from a state by taxing emigration or making migration to the state a crime. However, states have attempted to restrict access to services for out-of-state residents, have imposed various durational residency requirements on those from other states, and have sought to treat long-term residents more favorably than new arrivals. Invoking a variety of different constitutional provisions, the Court has declared that many of these laws interfere with the right to travel and struck them down.<sup>50</sup>

## 2. “Welcome Visitor” Cases

This category is exemplified by *Edwards*.<sup>51</sup> While it is true that the would-be migrants themselves were not subject to criminal prosecution,<sup>52</sup> the Court noted that the “indigents” were “the real victims of the statute” because they were “deprived of the opportunity to exert political pressure on the California legislature to obtain a change in policy . . . .”<sup>53</sup>

Consider as well *Doe v. Bolton*,<sup>54</sup> in which the Court in 1973 invalidated a Georgia law that made Georgia residency a prerequisite for receiving an abortion. The appellants argued it violated the right to travel.<sup>55</sup> Citing the Privileges and Immunities Clause of Article IV, Section 2, the Court wrote that just as that clause “protects persons who enter other States to ply their trade . . . so it must protect persons who enter Georgia seeking the medical services that are available there.”<sup>56</sup> Otherwise, “a State could limit to its own residents the general medical care available within its borders.”<sup>57</sup>

## 3. “Equal Treatment” Cases

Somewhat more common are cases in which the Court has held that a state has interfered with the right to travel by imposing durational residency

49. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

50. *See infra* notes 54–87 and accompanying text.

51. *See* *Edwards v. California*, 314 U.S. 160 (1941).

52. I suspect, however, that persons entering the state without visible means of support would have been, at the time, subject to charges of vagrancy or loitering. *See generally* RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016). For older treatments of vagrancy laws, see, for example, William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 *YALE L.J.* 1 (1960); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 *U. PA. L. REV.* 603 (1956); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 *HARV. L. REV.* 1203 (1953).

53. *Edwards*, 314 U.S. at 174.

54. 410 U.S. 179 (1973).

55. *Id.* at 200.

56. *Id.*

57. *Id.*

requirements or favoring long-term residents over new arrivals. Representative is *Shapiro v. Thompson*,<sup>58</sup> the first of a number of cases in which the Court invalidated one-year durational residency requirements imposed on welfare recipients.<sup>59</sup> In so doing, the Court relied on both the right to travel—which it characterized as a fundamental right<sup>60</sup>—and the Equal Protection Clause.<sup>61</sup> The Court rejected the notion that the rational basis test should apply, holding instead that because “appellees were exercising a constitutional right”—the right to move “from State to State or to the District of Columbia”—“any classification which serve[d] to penalize the exercise that right” needed to be “necessary to promote a compelling governmental interest . . . .”<sup>62</sup>

In 1999, the Court again invalidated a California law limiting new arrivals to the amount of public assistance they received in the state from which they migrated for one year.<sup>63</sup> In *Saenz v. Roe*, the Court acknowledged the variegated nature of the right to travel,<sup>64</sup> and that several separate constitutional provisions addressed themselves to different aspects of the right. It acknowledged the structural “right to go from one place to another” recognized in *Edwards*.<sup>65</sup> The Court also mentioned the Privileges and Immunities Clause of Article IV, which entitled “a citizen of one State who travels in other States, intending to return home at the end of his journey” to be free “from the . . . disabilities of alienage in the other States . . . .”<sup>66</sup> Finally, the Court noted that the Privileges or Immunities Clause of the Fourteenth Amendment guaranteed “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State”—a right “protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.”<sup>67</sup>

The third aspect of the right to travel—the right of the new arrival to equal treatment—was where the California law bit. California argued that “its welfare scheme affect[ed] the right to travel only ‘incidentally’ because the interstate

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58. 394 U.S. 618 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

59. *Id.* at 622–25; *see also, e.g.,* *Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (invalidating a durational residency requirement in order to receive non-emergency hospitalization at county expense); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invoking the language of strict scrutiny to strike down a one-year residency requirement for voting).

60. *See Shapiro*, 394 U.S. at 630 (“The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union.” (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))).

61. *Id.* at 633–38.

62. *Id.* at 634.

63. *Saenz v. Roe*, 526 U.S. 489 (1999).

64. *See id.* at 500 (“The ‘right to travel’ discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).

65. *Id.*

66. *Id.* at 501–02 (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1968)).

67. *Id.* at 502.

journey was complete.”<sup>68</sup> However, the Court reasoned that “since the right to travel embraces the citizen’s right to be treated equally in her new State of residence, the discriminatory classification [based on tenure of residency was] itself a penalty.”<sup>69</sup>

While it was unclear what particular standard of review the Court applied, and while it equivocated whether California’s fiscal justification was a legitimate interest, it said the question was whether “the State may accomplish that end by the discriminatory means it” chose.<sup>70</sup> It was clear that a state may not create classes of citizens based on length of residency, and “[i]t [was] equally clear that the [Privileges or Immunities] Clause [did] not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence.”<sup>71</sup>

In addition to being skeptical of durational residency requirements, the Court has condemned laws that advantage long-time residents over more recent arrivals. In *Zobel v. Williams*,<sup>72</sup> the Court held that an Alaska law distributing oil revenue to its citizens in varying amounts based on length of residence could not even survive rational basis scrutiny. While the majority opinion alluded to the right to travel in passing, it purported to rest its decision solely on the Equal Protection Clause, writing that “[t]he only apparent justification for the retrospective aspect of the program, ‘favoring established residents over new residents,’ is constitutionally unacceptable.”<sup>73</sup>

Similarly, the 1985 decision in *Hooper v. Bernalillo County Assessor*<sup>74</sup> involved a New Mexico state property tax exemption for those who served on active duty in the Vietnam War for at least ninety days, but which was limited to veterans who were residents of the state as of May 8, 1976.<sup>75</sup> The Court held that the statute was not rationally related to its stated objective to encourage Vietnam veterans to move to New Mexico: “The legislature cannot plausibly encourage veterans to move to the State by passing such retroactive legislation.”<sup>76</sup> But while the state *could* use benefits to reward veterans, it “may not favor established residents over new residents based on the view that the State may take care of ‘its own,’ if such is defined by prior residence.”<sup>77</sup> Citing right-to-travel cases like *Shapiro*, the Court reasoned that by becoming bona fide residents,

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68. *Id.* at 504.

69. *Id.* at 504–05 (citations omitted).

70. *Id.* at 506. California conceded that a “desire to fence out the indigent” would not be a constitutionally permissible goal. *Id.*

71. *Id.* at 506–07.

72. 457 U.S. 55 (1982).

73. *Id.* at 65 (citing *Vlandis v. Kline*, 412 U.S. 441, 450 (1973)). Interestingly, despite Chief Justice Burger having written the majority opinion employing a rational basis test, it appears there were also five votes for the proposition that Alaska’s scheme violated the right to travel.

74. 472 U.S. 612 (1985).

75. *Id.* at 614.

76. *Id.* at 619.

77. *Id.* at 623.

“[n]ewcomers . . . became the State’s ‘own’ and [thus could] not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.”<sup>78</sup>

Finally, *Attorney General of New York v. Soto-Lopez*<sup>79</sup> involved a law adding points to civil service exams for honorably-discharged veterans who served during wartime and who were New York residents when they entered service.<sup>80</sup> Justice Brennan’s opinion referred both to the right to travel and the Equal Protection Clause, noting that when state laws treat classes of residents differently regarding the exercise of a constitutionally-protected right, “we undertake intensified equal protection scrutiny of that law” and “require[] the State to come forward with a compelling justification.”<sup>81</sup>

New York offered four justifications for the law: (1) to encourage residents to serve in the military; (2) to compensate veterans for wartime service; (3) to induce veterans to return to New York; and (4) to secure for the civil service those who “possess useful experience acquired through their military service.”<sup>82</sup> All those interests suffered from the same weakness: “[E]ach . . . could be promoted fully by granting bonus points to *all* otherwise qualified veterans.”<sup>83</sup> Justice Brennan observed that “[b]ecause New York could accomplish its purposes without penalizing the right to migrate . . . the State [was] not free to promote its interests through a preference system that incorporates a prior residence requirement.”<sup>84</sup>

#### D. The Right to Travel as a “Hybrid Right”

Hybrid rights cases have received renewed attention from scholars in the wake of cases like *Obergefell v. Hodges*,<sup>85</sup> in which the Court relied on the interaction between the Due Process and Equal Protection Clauses to strike down state laws banning same-sex marriage.<sup>86</sup> In a recent article, Michael Coenen observed that hybrid rights cases are merely one example of the Court combining constitutional clauses or doctrines in ways that “deriv[e] an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more constitutional provisions.”<sup>87</sup>

Coenen argues that all clausal combination arguments have common characteristics. First, they arise when courts refer to two or more independently

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78. *Id.*

79. 476 U.S. 898 (1986).

80. *Id.* at 900.

81. *Id.* at 904.

82. *Id.* at 909.

83. *Id.*

84. *Id.* at 910. Chief Justice Burger and Justice White concurred but on the *Zobel-Hooper* rational basis approach. *Id.* at 912 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring). Justice O’Connor dissented, arguing that the preference program neither implicated the right to travel nor rights guaranteed by the Privileges and Immunities Clause of Article IV. *Id.* at 925 (O’Connor, J., dissenting).

85. 135 S. Ct. 2584 (2015).

86. *Id.* at 2602–05.

87. Coenen, *supra* note 6, at 1070.

relevant provisions to resolve a constitutional question.<sup>88</sup> *Obergefell*'s invocation of both the Due Process and Equal Protection Clauses as relevant to the adjudication of same-sex marriage bans is a recent example. Second, they rely on two or more clauses "in conjunction with one another" to "support[] a particular judicial outcome . . . ."<sup>89</sup> Third, the clauses' relationship is a "coordinate" not a "derivative" one: "Combination arguments do not necessarily arise when one clause incorporates by reference the contents of another."<sup>90</sup> Examples here include the Court's reliance on the Necessary and Proper Clause in conjunction with another Article I power to uphold a federal law.<sup>91</sup> Fourth, "[c]ombination arguments group clauses together for the purpose of creating reasons for judicial results, not for the purposes of clarifying matters of semantic uncertainty."<sup>92</sup> Thus, "combination arguments might be distinguished from *in pari materia* or intratextual arguments regarding ambiguous words or phrases in the constitutional text."<sup>93</sup>

Coenen identifies four different combinations that the Court sometimes employs: (1) right/right combinations; (2) right/no-power combinations; (3) power/power combinations; and (4) subclausal combinations.<sup>94</sup> "Right/right combinations" describe the combinations in hybrid right cases and are the ones with the most relevance to the right-to-travel cases.<sup>95</sup>

In right/right cases, courts will combine two independent rights in ways that "sometimes yield[] a more restrictive set of limits on government action than what would exist in the combination's absence."<sup>96</sup> Discussing *Obergefell*'s invocation of both due process and equal protection, Coenen observes that in so doing, the Court "conveys a relatively simple idea: the Due Process Clause alone might fail to resolve the question of whether a ban on same-sex marriage is constitutional, but once the Equal Protection Clause is added to the picture, the question can come out only one way."<sup>97</sup>

It seems clear that nearly all of the right-to-travel cases are marked by right/right combinations. Consider the Court's description of the right to travel from *Soto-Lopez*:

The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration . . . has proved elusive. It has been variously assigned to the Privileges and Immunities Clause of Art. IV . . . to the Commerce Clause, . . . and to the

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88. *Id.* at 1075.

89. *Id.* at 1076.

90. *Id.*

91. *See, e.g.*, *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress may regulate intrastate activity if it is so closely related to interstate commerce that it is appropriate for Congress to do so; implicitly invoking the Necessary and Proper Clause).

92. *Id.* at 1077.

93. *Id.* For the leading example of the latter, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

94. Coenen, *supra* note 6, at 1078.

95. *Id.* at 1089 (citation omitted).

96. *Id.* at 1078.

97. *Id.* at 1079 (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

Privileges and Immunities Clause of the Fourteenth Amendment. . . . The right has also been inferred from the federal structure of government adopted by our Constitution. . . . However, in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision. . . . Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.<sup>98</sup>

The most recent right-to-travel case, *Saenz v. Roe*, likewise located the right in various constitutional provisions.<sup>99</sup>

In many of the cases described above—the durational residency requirements, for example—the Equal Protection Clause alone might have failed to resolve the cases in the challengers’ favor. Whatever else may be said about such requirements, they are hardly irrational; and they often were imposed in pursuit of legitimate goals like fiscal prudence or the husbanding of resources. But when the right to interstate migration is thrown in, such restrictions are subject at least to *heightened*, if not strict, scrutiny.

In Part IV, I argue that *New York Rifle* presents another right/right combination: the right to travel and the Second Amendment. This aspect of the case was not properly appreciated by the Second Circuit. I further argue that the combination should—as the right/right combination in the right-to-travel cases themselves did—cause the Court to apply strict scrutiny to the New York ordinance, even if the application of neither right in isolation would produce that result. At the very least, the Court should hold that New York presented insufficient evidence that its ordinance satisfied even intermediate scrutiny.

The next Part, however, describes New York’s premises permitting scheme and how it burdens both the Second Amendment and the right to travel. It also summarizes the Second Circuit’s decision to uphold the ordinance and reject the constitutional challenges to it.

### III

#### *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. CITY OF NEW YORK*

I begin with the facts of *New York Rifle* and a description of the Second Circuit’s analysis of the constitutional challenges brought against the New York rule. In this case, the plaintiffs alleged that the rule violated the Second Amendment, the right to travel, the DCCD, and the First Amendment. I focus primarily on the Second Amendment and right-to-travel claims, and discuss the DCCD claim only in passing.<sup>100</sup>

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98. Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902–03 (1986) (citations omitted).

99. *Saenz v. Roe*, 526 U.S. 489, 501–03 (1999).

100. The First Amendment challenge is beyond the scope of this Article and I omit analysis of it entirely.

## A. Facts

New York state law requires a license to possess a firearms—which include pistols, revolvers, assault weapons, as well as certain shortened rifles and shotguns.<sup>101</sup> In order to get a handgun license, one must apply to a “local licensing officer,” which in New York City is the city police commissioner.<sup>102</sup> One may either apply for a “carry” license or a “premises” license. As the terms imply, a carry permit allows you to carry a handgun without any occupational or geographic restrictions.<sup>103</sup> A premises permit, on the other hand, “is specific to the premises for which it has been issued” and “allows a licensee to ‘have and possess in his dwelling’ a pistol or revolver.”<sup>104</sup> The firearm may not, except in limited circumstances, be removed from the premises listed on the permit.<sup>105</sup>

The exceptions include transportation to and from an authorized small arms range/shooting club and when hunting. When in transit, the firearm must be unloaded and in a locked container, with the ammunition carried separately.<sup>106</sup> According to regulations, an “authorized small arms range/shooting club” is defined as one that is located in New York City.<sup>107</sup> There were seven such facilities in New York City, including at least one in each of the City’s five boroughs.<sup>108</sup>

Until 2001, the New York Police Department (NYPD) issued target licenses that allowed licensees “to take his or her handgun to shooting ranges and competitions outside New York City.”<sup>109</sup> After receiving “reports that licensees were using target licenses to carry weapons to many other locations, and not in the requisite unloaded and enclosed condition[.]” the NYPD “eliminated the target license . . . .”<sup>110</sup> The plaintiffs in the case wanted to travel to ranges and shooting competitions outside New York City, including ranges and competitions in other states.<sup>111</sup> In addition, one plaintiff wished to transport his firearm to a second home he owned outside New York City.<sup>112</sup> The Second Circuit rejected the plaintiffs’ Second Amendment, dormant Commerce Clause, and right-to-travel challenges to the rule.

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101. N.Y. State Rifle & Pistol Ass’n v. City of New York, 883 F.3d 45, 52 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019), and *vacated as moot*, 140 S. Ct. 1525 (2020) (per curiam).

102. *Id.*

103. *Id.* at 52–53.

104. *Id.* at 53.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 53–54.

110. *Id.* at 54.

111. *Id.* at n.4.

112. *Id.*

## B. Second Amendment Challenge

On the Second Amendment claim, the court applied a two-step inquiry that asked (1) whether the regulation impinged activity protected by the Second Amendment and (2) if so, what the appropriate level of scrutiny should be.<sup>113</sup> But the court skipped the first step, holding that the rule survived intermediate scrutiny.<sup>114</sup> In determining that intermediate, as opposed to strict, scrutiny was appropriate, the court was guided by two factors: (1) how much of the core Second Amendment right was implicated and (2) the severity of the burden on that right.<sup>115</sup> The core of the Second Amendment, as the court read *Heller*,<sup>116</sup> is the right to possess weapons like handguns in the home for self-defense.<sup>117</sup> The severity of the burden triggering heightened scrutiny, in turn, “is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”<sup>118</sup>

The plaintiffs complained that the rule violated their Second Amendment rights by preventing them from transporting their licensed handguns to their second home outside New York City and to shooting competitions or ranges beyond the five boroughs. The court rejected both arguments.

Comparing the restrictions to New York’s “may issue” regulatory regime for carry permits, the court wrote that the residence permit restrictions “impose at most trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense.”<sup>119</sup> Nothing in the transport rule impeded the plaintiffs in the exercise of their core Second Amendment rights. Because the plaintiff with the second home could obtain a separate residence permit for the second home, the court concluded that he had adequate alternatives for the exercise of the core right.<sup>120</sup> It added further that the plaintiff had not presented evidence that costs associated with securing a second premises license or firearm for the second home “would be so high as to be exclusionary or prohibitive.”<sup>121</sup>

As for the plaintiffs complaining of their inability to transport their guns to out-of-City ranges and shooting competitions, the court was equally unmoved. It conceded that “restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons” could potentially “rise to a level that significantly burdens core Second Amendment protection,” but rejected the argument that the right to practice was itself part of that core Second

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113. *Id.* at 55.

114. *Id.*

115. *Id.* at 56.

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

117. *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 56.

118. *Id.* (quoting *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012)).

119. *Id.* at 57.

120. *Id.*

121. *Id.*

Amendment right.<sup>122</sup> Burdens on acquiring and maintaining proficiency moreover would be protected “only to the extent that” regulations amounting “to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home.”<sup>123</sup> Here, the availability of ranges and the lack of evidence that the fees charged by the firing ranges were “prohibitively expensive” led the court to conclude that New York City had not “imposed an unreasonable burden on a resident’s ability to pursue firearms training” and thus did not raise constitutional concerns.<sup>124</sup>

Despite its doubts that the restrictions at issue did not approach the core of the Second Amendment, the court applied intermediate scrutiny to the rule in light of all of the plaintiffs’ claims. It held that the rule sought to serve the “substantial, indeed compelling” interest in “protecting public safety and preventing crime” by, among other things, preventing “road rage, ‘crowd situations, demonstrations, family disputes,’ and other situations ‘where it would be better to note have the presence of a firearm.’”<sup>125</sup> The court additionally acknowledged New York’s monitoring and enforcement rationales for the rule.<sup>126</sup>

By contrast, the Plaintiffs failed to demonstrate “that the Rule impose[d] substantial burdens on their protected rights,”<sup>127</sup> and therefore the court concluded that “the City ha[d] met its burden of showing a substantial fit between the Rule and the City’s interest in promoting public safety.”<sup>128</sup>

### C. The Court’s Right to Travel Analysis

After concluding that the Rule did not violate the DCCD,<sup>129</sup> the Second Circuit considered whether the rule violated the plaintiffs’ right to travel.

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122. *Id.* at 58.

123. *Id.*

124. *Id.* at 60.

125. *Id.* at 62–63.

126. *See id.* at 63 (noting that the former Commander of the License Division’s affidavit documented “abuses” prior to adoption of the rule, where licensees were found with loaded firearms far from any authorized range, including on airplanes, and that those licensees, when discovered, would “create an explanation about traveling for target practice or shooting competition”).

127. *Id.*

128. *Id.* at 64.

129. I have omitted the Court’s DCCD analysis for the sake of space. In brief, the DCCD is the judge-made doctrine that infers limits on state and local governments’ ability to discriminate against or unduly burden interstate commerce from the Constitution’s grant of power over that commerce to Congress. U.S. CONST. art. I, § 8, cl. 3. For a description of the doctrine’s development, see generally Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 427–48 (2008). Under the modern doctrine, laws that “discriminat[e] against out-of-state goods or nonresident economic actors” must demonstrate a legitimate (that is, nonprotectionist) end, and that there are no less discriminatory means available to effectuate that end. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019). Truly nondiscriminatory—but burdensome—laws require challengers to demonstrate that the burden on interstate commerce “is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Interestingly, with one exception,<sup>130</sup> the court cited only its own prior cases, ignoring the extensive body of right-to-travel cases decided by the U.S. Supreme Court. According to the Second Circuit, while the right to travel is fundamental, “that local regulations ‘[m]erely hav[e] an effect on travel is not sufficient to raise an issue of constitutional dimension.’”<sup>131</sup> According to the court, the right is “implicated only when the statute ‘actually deters such travel, or when impedance of travel is its primary objective, or when it uses any classification which serves to *penalize* the exercise of that right.’”<sup>132</sup>

In the panel’s view, the rule did none of those things.<sup>133</sup> Rather, it simply restricted their premises-permitted weapons to those residences to which the permit applied: “The Constitution protects the right to travel,” the court wrote, “not the right to travel armed.”<sup>134</sup> Nor was the rule designed to impede travel; it was designed to protect city residents’ welfare.<sup>135</sup> Finally, the rule did not “impose a significant disincentive to travel, any more than any other regulation that limits the possession in one jurisdiction of items that may be more broadly permitted in another.”<sup>136</sup> The court concluded that the rule constituted at most a “minor restriction” on travel that did not rise to the level of a denial of a fundamental right.<sup>137</sup>

#### IV

##### NEW YORK RIFLE AS A HYBRID RIGHTS CASE

The Second Circuit did what many courts would do when presented with multiple constitutional challenges—it separated them and analyzed each claim separately. Indeed, in a forthcoming article discussing judicial responses to constitutional overlap, Michael Coenen argues that this ought to be the default rule.<sup>138</sup> But it is not the only possible response. Courts can *combine* overlapping clauses and treat the resulting combination “as a reason to ratchet up scrutiny of the government action under review” and to “eliminate redundancy.”<sup>139</sup> Finally,

130. The court quoted *United States v. Guest*, 383 U.S. 745, 757 (1966), in which the Supreme Court characterized the right to interstate travel as “fundamental to the concept of our Federal Union.”

131. *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 66 (quoting *Soto-Lopez v. N.Y.C. Civil Serv. Comm’n*, 755 F.2d 266, 278 (2d Cir. 1985)).

132. *Id.* at 66–67 (quoting *Soto-Lopez*, 755 F.2d at 279).

133. *See id.* at 67 (“Nothing in the Rule prevents the Plaintiffs from engaging in intrastate or interstate travel as they wish.”).

134. *Id.*

135. *See id.* (“The Rule was not designed to impede interstate travel and the history behind it ‘demonstrates that its purpose was not to impede travel but to protect the welfare of [city] residents.’”).

136. *Id.*

137. *Id.* The court also denied the plaintiffs’ claim that the rule infringed their First Amendment freedom of association rights. *Id.* at 67–68. This claim was not one on which the Supreme Court granted certiorari, so I omit discussion of it as well.

138. Michael Coenen, *Four Responses to Constitutional Overlap*, WM. & MARY BILL RTS. J. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3430030](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430030) [<https://perma.cc/R6YF-JYZ8>].

139. *Id.*

a court can *displace* overlapping constitutional rules by identifying *one* of the rules as “the exclusive avenue of constitutional inquiry.”<sup>140</sup> The classic example is where governmental action could be challenged under a specific provision of the Bill of Rights or cast as a substantive Due Process claim, the Supreme Court has held that the constitutional analysis should proceed under the more specific provision.<sup>141</sup>

The Second Circuit’s separate analyses of the plaintiffs’ Second Amendment and right-to-travel claims are open to criticism. For example, though the court purported to apply a form of intermediate scrutiny to the rule under the Second Amendment, it seemed to require the plaintiffs to prove that their rights were significantly burdened, instead of requiring New York to prove that the ban was substantially related to any important governmental interests. It accepted at face value the state’s claim that the earlier rule under which premises licensees could transport their guns outside the city was subject to abuse, rather than require it to demonstrate the magnitude of the abuse and why something short of a total ban of transport outside the city would not effectively address those issues.

The panel’s right-to-travel analysis was equally flawed. Curiously, it cited only one U.S. Supreme Court case for the general proposition that the right to travel was a fundamental one. It then quoted its own precedent for the proposition that the right is implicated only if (1) travel is actually deterred, (2) the primary purpose was to deter travel, or (3) travel is actually penalized.<sup>142</sup> Even on those terms, one might question the Second Circuit’s conclusion that the right to travel was not impacted or that it wasn’t intended to deter travel. I further question the Second Circuit’s narrow characterization of the right itself, which seems a more limited right than that recognized in the Supreme Court’s recent cases. Neither Alaska’s policy of distributing larger shares of its oil revenue to long-time residents,<sup>143</sup> nor California’s one-year limitation of welfare benefits to new arrivals to the amount received in their former state of residence<sup>144</sup> physically prevented or was even intended to significantly deter interstate migration. The same goes for adding points to the civil service exams of those who were residents when they entered the military.<sup>145</sup> Moreover, one might suspect whether the actual effect on decisions to travel were as incidental as the Second Circuit claimed they were in its opinion.

Further, in none of the right-to-travel cases did the Supreme Court treat the questions as involving, for example, “a right to travel to receive equal welfare benefits,” or “a right to travel to receive a veteran’s preference.” Rather, the Court considered *both* the right to travel *and* the right to equal treatment as

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140. *Id.*

141. *Id.* (discussing *Graham v. Connor*, 490 U.S. 386 (1989)).

142. *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 66–67.

143. See discussion of *Zobel v. Williams*, 457 U.S. 55 (1982), *supra* notes 75–76 and accompanying text.

144. See discussion of *Saenz v. Roe*, 526 U.S. 489 (1999), *supra* notes 66–74 and accompanying text

145. See discussion of *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986), *supra* notes 82–87 and accompanying text.

combining to require heightened scrutiny, even if the Court nominally employed a rational basis test in analyzing the government’s justification for the laws discussed above.

Likewise, it should have been no answer for the Second Circuit, in considering the merits of the plaintiffs’ right-to-travel claim, to say that the right to travel did not encompass “the right to travel armed.”<sup>146</sup> In fact, I would argue that it begged the question of whether the plaintiffs had stated a right/right claim that merited consideration of the right to keep and bear arms and the right to travel together.

Before answering that question, however, a little brush needs to be cleared. According to Coenen, there are “combination errors” that one should take care to avoid when employing this technique: (1) non-counting errors; (2) double-counting errors; (3) “failure to honor the negative implications created by one of the clauses” combined; and (4) disregard of “transactional unity.”<sup>147</sup> None of these errors plague the analysis I propose here and should not prevent the Justices from treating *New York Rifle* as a hybrid rights case, should it choose to address the merits.

*Non-counting errors* occur “when a court fails to notice the combination-based origins of a precedent on which it relies” and applies it to a case lacking that same combination of clauses thus resulting in “an artificial expansion of the prior holding’s scope . . . .”<sup>148</sup> *Double counting* occurs when a court combines “constitutional clauses that have already been combined.”<sup>149</sup> For example, Coenen argues, courts should not combine the First Amendment’s free speech and free press clauses because the strong presumption against prior restraints has incorporated press protections into the free speech clause already.<sup>150</sup> “A further type of combination error stems from a court’s failure to honor the negative implications created by one of the clauses it combines.”<sup>151</sup> It would be improper, he argues, to combine, say, the Copyright Clause—which speaks of a grant of copyright “for limited Times”—with the Commerce Clause to produce a perpetual copyright.<sup>152</sup> Finally, there is the “idea that separate and distinct constitutional events merit separate and distinct constitutional conclusions.”<sup>153</sup> A public school student suspended because of a risqué speech delivered at an assembly, who is then later disciplined for another incident in which he claims his Due Process rights were violated would not have a strong case for combination because of the lack of “*transactional unity*.”<sup>154</sup>

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146. *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 67.

147. Coenen, *supra* note 6, at 1121–30.

148. *Id.* at 1121.

149. *Id.* at 1122.

150. *See id.* at 1123 (“A moment’s perusal of the relevant case law reveals that the protections of the Press Clause have already been baked into the Court’s strong presumption against prior restraints.”).

151. *Id.* at 1125.

152. *Id.* at 1126.

153. *Id.* at 1128.

154. *Id.*

Taking these errors in reverse order, there is no question that transactional unity is present in *New York Rifle*. The court's very framing of the issue as a "right to travel armed" suggested that the panel itself yoked these two rights together and saw both affected by the rule. Nor are there any negative implications that my proposed combination of the right to travel and the right to keep and bear arms ignores as there would be if, say, the Second Amendment's text somehow implied that it was limited to the home. In fact, insofar as the text mentions a right to "bear" arms, it cuts the other way, suggesting some right to carry or transport outside the home. Double counting isn't an issue because none of the right-to-travel cases incorporate Second Amendment principles, and *Heller* made no mention of public carry. Finally, combining the right to travel and the Second Amendment would not artificially expand either the right-to-travel cases or the Second Amendment.

In fact, treating *New York Rifle* as a hybrid rights case and invalidating the New York rule on that basis would provide a relatively narrow ground for decision. Perhaps the biggest unanswered question about *Heller* is the extent to which it applies to the public carrying of arms. Instead of attempting to answer that question, with all of its attendant implications for state concealed- and open-carry laws, the Supreme Court could simply hold that, say, for the plaintiff with the second home, he has the right to travel with his unloaded, secured weapon to his second home so it is available for use in self-defense without having to go to the trouble and expense of securing a *second* weapon and a *second* premises permit. This would leave for another day—and perhaps for a better case—the question of the Second Amendment's scope beyond the home, on which the lower courts have split.

## V

### CONCLUSION

*New York Rifle* offered an opportunity for the Court to add to the universe of hybrid rights cases that clearly exists, but for which the Court has provided precious little in the way of either theorizing or guidance for lower courts in their identification and application. Alas, in all likelihood the Court will find the case moot and any explanation will have to await another day. That is unfortunate, because as recent scholarship has suggested, there are reasons to think that constitutional combinations—whether of rights and rights or rights and powers—yield some interesting answers to a number of doctrinal conundrums in constitutional law.