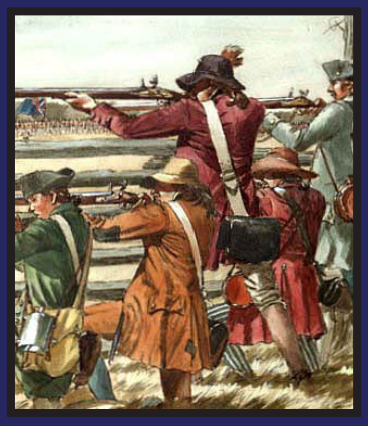
2023 SUPPLEMENT FOR

FIREARMS LAW AND THE SECOND AMENDMENT:

Regulation, Rights, and Policy

3rd Edition



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What an amazing time to study the Second Amendment! The Supreme Court's June 2022 decision in *New York State Rifle & Pistol Association v. Bruen* told lower courts to decide Second Amendment cases based on text and historical tradition (THT) instead of the interest-balancing test that most of them had previously been using. Many issues that had previously been litigated under interest-balancing will be relitigated under THT. Many cases will end up with the same result, while some may not.

Whatever one's personal views on which test is better, *Bruen* makes the Second Amendment field wide open. The current state of the Fourth Amendment is very different. While important new cases are decided every year, there is an enormous body of case precedent. In the vast majority of Fourth Amendment cases, a court can issue a decision based on prior cases, without looking into what the Fourth Amendment meant in the Founding Era, or at other historical times.

In contrast, for the Second Amendment, the legal history, starting in the colonial period, *is* the controlling precedent. Novel modern laws may be justified by analogy to older laws. Post-*Bruen*, litigants are now making pro/con arguments about analogies for particular laws.

To even make an analogy, one must know the baseline legal history. We believe that *Firearms Law and the Second Amendment* is the single best source for that legal history. It provides the legal history of arms control and arms rights from early England up to the present. Several of the online chapters cover other societies around the world, ancient and modern. Although these are not necessarily relevant in an American courtroom, they provide additional perspectives on the fundamental and enduring questions of social regulation of the use of force.

This 2023 Supplement begins with *Bruen*, including a short introduction setting up the case. Unlike for the 2022 Supplement (which is still available on the book's website), we have edited the case for this version.

Chapter 12.A of the textbook provides a summary of "Rules from *Heller* and *McDonald*." We do the same for *Bruen*. As post-*Bruen* cases are decided, you can observe how lower court opinions implement *Bruen*'s rules.

After the *Bruen* material, this Supplement then proceeds in the usual manner for supplements. For the sections in the textbook for which there is new material (mainly Chapters 8-9 and 13-16), a parallel section of the Supplement describes important new cases, statutes, regulations, or scholarship.

We have also updated the online chapters.

Of the statutory changes in the textbook was published, the most important was amendments of the main national gun control law, the Gun Control Act, in June 2022. Prof. Robert Leider describes the amendments and also considers some possible practical or interpretive problems.

The most important regulatory change was the 364-page "Frame or Receiver" regulation from ATF. It is explained in legal education materials

from the law firm Reeves & Dola. As this Supplement is written, that rule is presently the subject of a nationwide injunction, for not being compliant with the Gun Control Act's definitions of various items.

The vast majority of post-*Bruen* decisions thus far have been district court opinions on motions for a preliminary injunction or motions to dismiss. In this Supplement, we typically summarize those cases, rather than excerpting them.

We do provide excerpts from some leading decisions, including the Fifth Circuit's *Rahimi* case, which held 18 U.S.C. § 922(g)(8) to be facially unconstitutional. That case, involving civil restraining orders in domestic cases, will be heard by the U.S. Supreme Court in the term that begins in October 2023.

As this Supplement shows, the post-*Bruen* world is seeing a great deal of litigation on a wide diversity of issues. Many of these issues would be good topics for class papers or law journal articles. We wish you an enjoyable and successful semester of learning about one of the most dynamic and interesting fields of modern constitutional law.

The Authors

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NEW YORK STATE RIFLE & PISTOL ASSOCIATION v. BRUEN

A. BACKGROUND FOR BRUEN

The Supreme Court's 2008 *District of Columbia v. Heller* (Ch. 11.A) affirmed one's right to "keep" a functional and accessible firearm in the home. What about the right to "bear," or carry?

Before *Bruen*, most states had "shall issue" handgun carry licensing laws. That is, if an applicant met certain statutory criteria (*e.g.*, minimum age, passing a fingerprint background check, safety training), then the applicant "shall" be issued a concealed carry permit.

Several of the shall-issue states allowed for bounded discretion. For example, in Colorado a sheriff may deny a concealed carry permit to an applicant with a clean record if the sheriff has specific evidence that the applicant could be a danger to self or others. Should the applicant appeal the denial, the burden of proof is on the sheriff.

Between *Heller* and *Bruen*, the "bear arms" cases in the shall-issue states mainly involved secondary issues — such as whether State A had to recognize a permit by a traveler from State B, or whether a permit could be denied for a conviction of violating a statute that was later held unconstitutional.

The more fundamental cases, involving the core right to bear arms arose in the "may issue" states. Hawaii issued carry permits only to on-duty security guards. New Jersey and Maryland issued to applicants who proved they were facing a specific deadly threat from a particular individual. California, New York, and Massachusetts had much geographical variation. In some counties (California or New York) or towns (Massachusetts), permits were readily issued to qualified applicants, as in a shall-issue system. In others, permits were denied unless the individual could prove a unique risk of victimization, distinct from that of the general public.

Eventually, *Bruen* would hold the may-issue laws of the six above states unconstitutional. But before that, they all had been upheld by the decisions of the First, Second, Third, Fourth, and Ninth Circuits. The D.C. Circuit held the District of Columbia's may-issue system unconstitutional. The Seventh Circuit did the same for Illinois's then-unique no-carry law, under which public carry for ordinary citizens was banned.

The Circuit split on the right to bear arms had persisted for years, and the Court had never granted any of the many certiorari petitions on the issue. The cases are described in Chapter 14.A (Carrying Handguns for Self-Defense in Public Places) and Chapter 11.C.4 (post-McDonald dissents from cert. denials). Nevertheless persistent firearms-rights advocates brought new cases, knowing that they would quickly lose in the lower courts, and hoping to be vehicles for a certiorari grant. That strategy came up short in *Rogers v. Grewel*, involving a New Jersey bill that further reduced carry permits. By 7-2, the Supreme Court denied review in 2020, with a dissent from Justices Clarence Thomas and Brett M. Kavanaugh. Ch. 11.C.4.c. In 2021, the Court granted certiorari in the case now known as *New York State Rifle & Pistol Association v. Bruen*.

As you read *Bruen*, you will of course evaluate the strengths and weaknesses of the majority opinion and the dissent. Also look for what kinds of controls on arms-bearing *Bruen* authorizes or forbids. Perhaps most importantly, identify general rules that *Bruen* lays down for Second Amendment cases. Within the excerpt, cross-references (e.g., the majority's citation to a page of the dissent), are to the slip opinion.

B. THE BRUEN *DECISION*

N.Y. State Rifle & Pistol Ass'n v. Bruen

142 S. Ct. 2111 (2022)

Thomas, J., delivered the opinion of the Court, in which Roberts, C.J., and Alito, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Alito, J., filed a concurring opinion. Kavanaugh, J., filed a concurring opinion, in which Roberts, C.J., joined. Barrett, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion, in which Sotomayor and Kagan, JJ., joined.

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.

The parties nevertheless dispute whether New York's licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions

issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.

I

A

New York State has regulated the public carry of handguns at least since the early 20th century. . .

. . . It is a crime in New York to possess "any firearm" without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor. Meanwhile, possessing a loaded firearm outside one's home or place of business without a license is a felony punishable by up to 15 years in prison.

A license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a "licensing officer" — usually a judge or law enforcement officer — that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license." If he wants to carry a firearm *outside* his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." To secure that license, the applicant must prove that "proper cause exists" to issue it. If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines "proper cause." But New York courts have held that an applicant shows proper cause only if he can "demonstrate a special need for self-protection distinguishable from that of the general community." This "special need" standard is demanding. For example, living or working in an area "'noted for criminal activity'" does not suffice. Rather, New York courts generally require evidence "of particular threats, attacks or other extraordinary danger to personal safety."

When a licensing officer denies an application, judicial review is limited. New York courts defer to an officer's application of the proper-cause standard unless it is "arbitrary and capricious." In other words, the decision "must be upheld if the record shows a rational basis for it." The rule leaves applicants little recourse if their local licensing officer denies a permit. . .

II

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the

possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. . .

Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961).

A

Since *Heller* and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *E.g.*, *Kanter* v. *Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (internal quotation marks omitted). *But see United States* v. *Boyd*, 999 F.3d 171, 185 (3d Cir. 2021) (requiring claimant to show "'a burden on conduct falling within the scope of the Second Amendment's guarantee'"). The Courts of Appeals then ascertain the original scope of the right based on its historical meaning. *E.g.*, *United States* v. *Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). If the government can prove that the regulated conduct falls beyond the Amendment's original scope, "then the analysis can stop there; the regulated activity is categorically unprotected." *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (internal quotation marks omitted). But if the historical evidence at this step is "inconclusive or suggests that the regulated activity is *not* categorically unprotected," the courts generally proceed to step two. *Kanter*, 919 F.3d at 441 (internal quotation marks omitted).

At the second step, courts often analyze "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Ibid.* (internal quotation marks omitted). The Courts of Appeals generally maintain "that the core Second Amendment right is limited to self-defense *in the home*." *Gould*, 907 F.3d at 671 (emphasis added). *But see Wrenn*, 864 F.3d at 659 ("[T]he Amendment's core generally covers carrying in public for self defense"). If a "core" Second Amendment right is burdened, courts apply "strict scrutiny" and ask whether the Government can prove that the law is "narrowly tailored to achieve a compelling governmental interest." *Kolbe* v. *Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (internal quotation marks omitted). Otherwise, they apply intermediate scrutiny and consider whether the

Government can show that the regulation is "substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. [4] Both respondents and the United States largely agree with this consensus, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.

B

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

1

To show why *Heller* does not support applying means-end scrutiny, we first summarize *Heller*'s methodological approach to the Second Amendment.

In *Heller*, we began with a "textual analysis" focused on the "'normal and ordinary'" meaning of the Second Amendment's language. 554 U. S. at 576-77, 578. That analysis suggested that the Amendment's operative clause — "the right of the people to keep and bear Arms shall not be infringed" — "guarantee[s] the individual right to possess and carry weapons in case of confrontation" that does not depend on service in the militia. *Id.* at 592.

From there, we assessed whether our initial conclusion was "confirmed by the historical background of the Second Amendment." *Ibid.* We looked to history because "it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right." *Ibid.* The Amendment "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors." *Id.* at 599 (alterations and internal quotation marks omitted). After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found "no

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[4] See *Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J.*, 910 F.3d 106, 117 (3d Cir. 2018); *accord Worman v. Healey*, 922 F.3d 26, 33, 36-39 (1st Cir. 2019); *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 127-128 (2d Cir. 2020); *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194-195 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260, n.34 (11th Cir. 2012); *United States v. Class*, 930 F.3d 460, 463, 442 U.S. App. D.C. 257 (D.C. Cir. 2019).

doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595.

We then canvassed the historical record and found yet further confirmation. That history included the "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment," *id.* at 600-601, and "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605. When the principal dissent charged that the latter category of sources was illegitimate "postenactment legislative history," *id.* at 662, n.28, (opinion of Stevens, J.), we clarified that "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" was "a critical tool of constitutional interpretation," *id.* at 605, (majority opinion).

In assessing the postratification history, we looked to four different types of sources. First, we reviewed "[t]hree important founding-era legal scholars [who] interpreted the Second Amendment in published writings." *Ibid.* Second, we looked to "19th-century cases that interpreted the Second Amendment" and found that they "universally support an individual right" to keep and bear arms. *Id.* at 610. Third, we examined the "discussion of the Second Amendment in Congress and in public discourse" after the Civil War, "as people debated whether and how to secure constitutional rights for newly freed slaves." *Id.* at 614. Fourth, we considered how post-Civil War commentators understood the right.

After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Ibid.* For example, we found it "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" that the Second Amendment protects the possession and use of weapons that are "'in common use at the time.'" *Id.* at 627, (first citing 4 W. Blackstone, Commentaries on the Laws of England 148-49 (1769); then quoting *United States* v. *Miller*, 307 U.S. 174, 179, (1939)). That said, we cautioned that we were not "undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment" and moved on to considering the constitutionality of the District of Columbia's handgun ban. 554 U.S. at 627.

We assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition. Although we noted that the ban "would fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," *id.* at 628-29, we did not

engage in means-end scrutiny when resolving the constitutional question. Instead, we focused on the historically unprecedented nature of the District's ban, observing that "[f]ew laws in the history of our Nation have come close to [that] severe restriction." *Id.* at 629. Likewise, when one of the dissents attempted to justify the District's prohibition with "founding-era historical precedent," including "various restrictive laws in the colonial period," we addressed each purported analogue and concluded that they were either irrelevant or "d[id] not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.* at 631-632; *see id.* at 631-634. Thus, our earlier historical analysis sufficed to show that the Second Amendment did not countenance a "complete prohibition" on the use of "the most popular weapon chosen by Americans for self-defense in the home." *Id.* at 629.

2

As the foregoing shows, *Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.

Moreover, *Heller* and *McDonald* expressly rejected the application of any "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U.S. at 634, (quoting *id.* at 689-90, (BREYER, J., dissenting)); *see also McDonald*, 561 U.S. at 790-91, (plurality opinion) (the Second Amendment does not permit — let alone require — "judges to assess the costs and benefits of firearms restrictions" under means-end scrutiny). We declined to engage in means-end scrutiny because "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. We then concluded: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Ibid.*

Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt. Dissenting in *Heller*, JUSTICE BREYER's proposed standard — "ask[ing] whether [a] statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," *id.* at 689-690, (dissenting opinion) — simply expressed a classic formulation of intermediate scrutiny in a slightly different way, see *Clark* v. *Jeter*, 486 U.S. 456, 461(1988) (asking whether the challenged law is "substantially related to

an important government objective"). In fact, JUSTICE BREYER all but admitted that his *Heller* dissent advocated for intermediate scrutiny by repeatedly invoking a quintessential intermediate scrutiny precedent. *See Heller*, 554 U.S. at 690, 696, 704-05, (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, (1997)). Thus, when *Heller* expressly rejected that dissent's "interest-balancing inquiry," 554 U.S. at 634 (internal quotation marks omitted), it necessarily rejected intermediate scrutiny.

In sum, the Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny. We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg*, 366 U.S. at 50 n.10.

C

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. 554 U.S. at 582, 595, 606, 618, 634-35. In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. *See Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 620, n.9 (2003). And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections. See, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 468-471 (2010) (placing the burden on the government to show that a type of speech belongs to a "historic and traditional categor[y]" of constitutionally unprotected speech "long familiar to the bar" (internal quotation marks omitted)).

And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to "be confronted with the witnesses against him," U.S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right. See, *e.g.*, *Giles* v. *California*, 554 U.S. 353, 358 (2008) ("admitting only those exceptions [to the Confrontation Clause] established at the time of the founding" (internal quotation marks omitted)). Similarly, when a litigant claims a violation of his rights under the Establishment Clause, Members of

this Court "loo[k] to history for guidance." *American Legion* v. *American Humanist Assn.*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion). We adopt a similar approach here.

To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." *McDonald*, 561 U.S. at 803-804, (Scalia, J., concurring). But reliance on history to inform the meaning of constitutional text — especially text meant to codify a *pre-existing* right — is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field. *Id.* at 790-791 (plurality opinion).[6]

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*, 554 U.S. at 635. It is this balance — struck by the traditions of the American people — that demands our unqualified deference.

D

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the

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[6] The dissent claims that *Heller*'s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to "resolv[e] difficult historical questions" or engage in "searching historical surveys." *Post*, at 26, 30. We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 809, 810-811 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Courts are thus entitled to decide a case based on the historical record compiled by the parties.

Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Heller itself exemplifies this kind of straightforward historical inquiry. One of the District's regulations challenged in *Heller* "totally ban[ned] handgun possession in the home." *Id.* at 628. The District in *Heller* addressed a perceived societal problem — firearm violence in densely populated communities — and it employed a regulation — a flat ban on the possession of handguns in the home — that the Founders themselves could have adopted to confront that problem. Accordingly, after considering "founding-era historical precedent," including "various restrictive laws in the colonial period," and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional. *Id.* at 631; *see also id.* at 634 (describing the claim that "there were somewhat similar restrictions in the founding period" a "false proposition").

New York's proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: "handgun violence," primarily in "urban area[s]." *Ibid.* Following the course charted by *Heller*, we will consider whether "historical precedent" from before, during, and even after the founding evinces a comparable tradition of regulation. *Id.* at 631. And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution — and a Second Amendment — "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland*, 17 U.S. 316 (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. See, *e.g.*, *United States* v. *Jones*, 565 U.S. 400, 404-05 (2012) (holding that installation of a tracking device was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted").

We have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only [to] those arms in existence in the 18th

century." 554 U.S. at 582. "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Ibid.* (citations omitted). Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. *Cf. Caetano* v. *Massachusetts*, 577 U.S. 411, 411-12 (2016) (*per curiam*) (stun guns).

Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy — a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." C. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993). . . .

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599); *see also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"). Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "'*central*'" considerations when engaging in an analogical inquiry. *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599.)[7]

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our

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[7] This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the "product of an interest balancing *by the people*," not the evolving product of federal judges. *Heller*, 554 U.S. at 635 (emphasis altered). Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent's assertion, there is nothing "[i]roni[c]" about that undertaking. *Post*, at 30. It is not an invitation to revise that balance through means-end scrutiny.

ancestors would never have accepted." *Drummond* v. *Robinson*, 9 F.4th 217, 226 (3d Cir. 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. . . .

Consider, for example, *Heller*'s discussion of "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited — *e.g.*, legislative assemblies, polling places, and courthouses — we are also aware of no disputes regarding the lawfulness of such prohibitions. *See* D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229-36, 244-47 (2018); *see also* Brief for Independent Institute as *Amicus Curiae* 11-17. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define "sensitive places" in this case, we do think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law. In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." Brief for Respondents 34. It is true that people sometimes congregate in "sensitive places," and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. *See* Part III-B, *infra*. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

Like *Heller*, we "do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." 554 U.S. at 626. And we acknowledge that "applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1275 (CADC 2011) (Kavanaugh, J., dissenting). "But that is hardly unique to the Second Amendment. It is an essential component

of judicial decisionmaking under our enduring Constitution." *Ibid.* We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims.

III. . .

A

It is undisputed that petitioners Koch and Nash — two ordinary, law-abiding, adult citizens — are part of "the people" whom the Second Amendment protects. *See Heller*, 554 U.S. at 580. Nor does any party dispute that handguns are weapons "in common use" today for self-defense. *See id.* at 627; *see also Caetano*, 577 U.S. at 411-412. We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct — carrying handguns publicly for self-defense.

We have little difficulty concluding that it does. Respondents do not dispute this. Nor could they. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the "textual elements" of the Second Amendment's operative clause — "the right of the people to keep and bear Arms, shall not be infringed" — "guarantee the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. *Heller* further confirmed that the right to "bear arms" refers to the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello* v. *United States*, 524 U.S. 125 (1998) (Ginsburg, J., dissenting); internal quotation marks omitted).

This definition of "bear" naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often "keep" firearms in their home, at the ready for self-defense, most do not "bear" (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections.

Moreover, confining the right to "bear" arms to the home would make little sense given that self-defense is "the *central component* of the [Second Amendment] right itself." *Heller*, 554 U.S. at 599; *see also McDonald*, 561 U.S. at 767. After all, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, and confrontation can surely take place outside the home.

Although we remarked in *Heller* that the need for armed self-defense is perhaps "most acute" in the home, *id.* at 628, we did not suggest that the need was insignificant elsewhere. Many Americans hazard greater danger outside the home than in it. *See Moore* v. *Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a

rough neighborhood than in his apartment on the 35th floor of the Park Tower"). The text of the Second Amendment reflects that reality.

The Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to "bear" arms in public for self-defense.

B

Conceding that the Second Amendment guarantees a general right to public carry, respondents instead claim that the Amendment "permits a State to condition handgun carrying in areas 'frequented by the general public' on a showing of a non-speculative need for armed self-defense in those areas," Brief for Respondents 19 (citation omitted). To support that claim, the burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct.

Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.

We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Heller*, 554 U.S. at 634-35 (emphasis added). The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. It is one thing for courts to "reac[h] back to the 14th century" for English practices that "prevailed up to the 'period immediately before and after the framing of the Constitution.'" *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (ROBERTS, C.J., dissenting). It is quite another to rely on an "ancient" practice that had become "obsolete in England at the time of the adoption of the Constitution" and never "was acted upon or accepted in the colonies." *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935).

As with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights. The common law, of course, developed over time. *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 533 n.28 (1983); *see also Rogers* v. *Tennessee*, 532 U.S. 451, 461 (2001). And English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution. Even "the words of *Magna Charta*" — foundational as they were to the rights of America's forefathers — "stood for

very different things at the time of the separation of the American Colonies from what they represented originally" in 1215. *Hurtado v. California*, 110 U.S. 516, 529 (1884). Sometimes, in interpreting our own Constitution, "it [is] better not to go too far back into antiquity for the best securities of our liberties," *Funk* v. *United States*, 290 U.S. 371, 382 (1933), unless evidence shows that medieval law survived to become our Founders' law. A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice.

Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. It is true that in *Heller* we reiterated that evidence of "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation." 554 U.S. at 605. We therefore examined "a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification." *Ibid.* And, in other contexts, we have explained that "'a regular course of practice' can 'liquidate & settle the meaning of ' disputed or indeterminate 'terms & phrases'" in the Constitution. *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)). . . . In other words, we recognize that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *NLRB* v. *Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment); *see also Myers* v. *United States*, 272 U.S. 52, 174 (1926); *Printz* v. *United States*, 521 U.S. 898, 905 (1997).

But to the extent later history contradicts what the text says, the text controls. "'[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them." *Gamble* v. *United States*, 139 S. Ct. 1960, 1987 (2019) (THOMAS, J., concurring); *see also* Letter from J. Madison to N. Trist (Dec. 1831), in 9 Writings of James Madison 477 (G. Hunt ed. 1910). Thus, "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting); *see also Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258-59 (2020).

As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." 554 U.S. at 614; *cf. Sprint Communications Co.*, 554 U.S. at 312 (ROBERTS, C.J., dissenting) ("The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]"). And we made clear in *Gamble* that *Heller*'s interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence "only after surveying what it regarded as a

wealth of authority for its reading — including the text of the Second Amendment and state constitutions." *Gamble*, 139 S. Ct. 1960, 1976 (majority opinion). In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established." *Ibid.*

A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. *See*, *e.g.*, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. 243 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. See, *e.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020) (slip op., at 7); *Timbs* v. *Indiana*, 139 S. Ct. 682, 686-87 (2019); *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. *See*, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 42-50 (2004) (Sixth Amendment); *Virginia* v. *Moore*, 553 U.S. 164, 168-69 (2008) (Fourth Amendment); *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 122-25 (2011) (First Amendment).

We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). *See*, *e.g.*, A. Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998); K. Lash, Re-Speaking the Bill of Rights: A New Doctrine of Incorporation (Jan. 15, 2021) (manuscript, at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917 ("When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings"). We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.

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With these principles in mind, we turn to respondents' historical evidence. Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is

there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.[9] We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement. Under *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional.

1

Respondents' substantial reliance on English history and custom before the founding makes some sense given our statement in *Heller* that the Second Amendment "codified a right 'inherited from our English ancestors.'" 554 U.S. at 599 (quoting *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897)); *see also Smith* v. *Alabama*, 124 U.S. 465, 478 (1888). But this Court has long cautioned that the English common law "is not to be taken in all respects to be that of America." *Van Ness* v. *Pacard*, 27 U.S. 137 (1829) (Story, J., for the Court). Thus, "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*," not as they existed in the Middle Ages. *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) (emphasis added); *see also United States* v. *Reid*, 53 U.S. 361 (1852).

We interpret the English history that respondents and the United States muster in light of these interpretive principles. We find that history ambiguous at best and see little reason to think that the Framers would have thought it applicable in the New World. It is not sufficiently probative to defend New York's proper-cause requirement.

To begin, respondents and their *amici* point to several medieval English regulations from as early as 1285 that they say indicate a longstanding

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[9] To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which "a general desire for self-defense is sufficient to obtain a [permit]." *Drake v. Filko*, 724 F.3d 426, 442 (3rd Cir. 2013) (Hardiman, J., dissenting). Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." *Ibid.* And they likewise appear to contain only "narrow, objective, and definite standards" guiding licensing officials, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969), rather than requiring the "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)—features that typify proper-cause standards like New York's. That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.

tradition of restricting the public carry of firearms. *See* 13 Edw. 1, 102. The most prominent is the 1328 Statute of Northampton (or Statute), passed shortly after Edward II was deposed by force of arms and his son, Edward III, took the throne of a kingdom where "tendency to turmoil and rebellion was everywhere apparent throughout the realm." N. Trenholme, The Risings in the English Monastic Towns in 1327, 6 Am. Hist. Rev. 650, 651 (1901). At the time, "[b]ands of malefactors, knights as well as those of lesser degree, harried the country, committing assaults and murders," prompted by a more general "spirit of insubordination" that led to a "decay in English national life." K. Vickers, England in the Later Middle Ages 107 (1926).

The Statute of Northampton was, in part, "a product of . . . the acute disorder that still plagued England." A. Verduyn, The Politics of Law and Order During the Early Years of Edward III, 108 Eng. Hist. Rev. 842, 850 (1993). It provided that, with some exceptions, Englishmen could not "come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." 2 Edw. 3 c.3 (1328).

Respondents argue that the prohibition on "rid[ing]" or "go[ing] . . . armed" was a sweeping restriction on public carry of self-defense weapons that would ultimately be adopted in Colonial America and justify onerous public-carry regulations. Notwithstanding the ink the parties spill over this provision, the Statute of Northampton — at least as it was understood during the Middle Ages — has little bearing on the Second Amendment adopted in 1791. The Statute of Northampton was enacted nearly 20 years before the Black Death, more than 200 years before the birth of Shakespeare, more than 350 years before the Salem Witch Trials, more than 450 years before the ratification of the Constitution, and nearly 550 years before the adoption of the Fourteenth Amendment.

The Statute's prohibition on going or riding "armed" obviously did not contemplate handguns, given they did not appear in Europe until about the mid-1500s. *See* K. Chase, Firearms: A Global History to 1700, p.61 (2003). Rather, it appears to have been centrally concerned with the wearing of armor. See, *e.g.*, Calendar of the Close Rolls, Edward III, 1330-1333, p.131 (Apr. 3, 1330) (H. Maxwell-Lyte ed. 1898); *id.* at 243 (May 28, 1331); *id.* Edward III, 1327-1330, at 314 (Aug. 29, 1328) (1896). If it did apply beyond armor, it applied to such weapons as the "launcegay," a 10- to 12-foot-long lightweight lance. *See* 7 Rich. 2 c.13 (1383); 20 Rich. 2 c.1 (1396).

The Statute's apparent focus on armor and, perhaps, weapons like launcegays makes sense given that armor and lances were generally worn or carried only when one intended to engage in lawful combat or — as most early

violations of the Statute show — to breach the peace. *See*, *e.g.*, Calendar of the Close Rolls, Edward III, 1327-1330, at 402 (July 7, 1328); *id.* Edward III, 1333-1337, at 695 (Aug. 18, 1336) (1898). Contrast these arms with daggers. In the medieval period, "[a]lmost everyone carried a knife or a dagger in his belt." H. Peterson, Daggers and Fighting Knives of the Western World 12 (2001). While these knives were used by knights in warfare, "[c]ivilians wore them for self-protection," among other things. *Ibid.* Respondents point to no evidence suggesting the Statute applied to the smaller medieval weapons that strike us as most analogous to modern handguns.

When handguns were introduced in England during the Tudor and early Stuart eras, they did prompt royal efforts at suppression. For example, Henry VIII issued several proclamations decrying the proliferation of handguns, and Parliament passed several statutes restricting their possession. *See*, *e.g.*, 6 Hen. 8 c.13, §1 (1514); 25 Hen. 8 c.17, §1 (1533); 33 Hen. 8 c.6 (1541); Prohibiting Use of Handguns and Crossbows (Jan. 1537), in 1 Tudor Royal Proclamations 249 (P. Hughes & J. Larkin eds. 1964). But Henry VIII's displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy. Henry VIII worried that handguns threatened Englishmen's proficiency with the longbow — a weapon many believed was crucial to English military victories in the 1300s and 1400s, including the legendary English victories at Crécy and Agincourt. *See* R. Payne-Gallwey, The Crossbow 32, 34 (1903); L. Schwoerer, Gun Culture in Early Modern England 54 (2016) (Schwoerer).

Similarly, James I considered small handguns — called dags — "utterly unserviceable for defence, Militarie practise, or other lawful use." A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols (R. Barker printer 1616). But, in any event, James I's proclamation in 1616 "was the last one regarding civilians carrying dags," Schwoerer 63. "After this the question faded without explanation." *Ibid.* So, by the time Englishmen began to arrive in America in the early 1600s, the public carry of handguns was no longer widely proscribed.

When we look to the latter half of the 17th century, respondents' case only weakens. As in *Heller*, we consider this history "[b]etween the [Stuart] Restoration [in 1660] and the Glorious Revolution [in 1688]" to be particularly instructive. 554 U.S. at 592. During that time, the Stuart Kings Charles II and James II ramped up efforts to disarm their political opponents, an experience that "caused Englishmen . . . to be jealous of their arms." *Id.* at 593.

In one notable example, the government charged Sir John Knight, a prominent detractor of James II, with violating the Statute of Northampton because he allegedly "did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686). Chief Justice Herbert explained that the

Statute of Northampton had "almost gone in *desuetudinem*," *Rex* v. *Sir John Knight*, 1 Comb. 38, 38-39, 90 Eng. Rep. 330 (K. B. 1686), meaning that the Statute had largely become obsolete through disuse.[10] And the Chief Justice further explained that the act of "go[ing] armed *to terrify* the King's subjects" was "a great offence at the *common law*" and that the Statute of Northampton "is but an affirmance of that law." 3 Mod. at 118, 87 Eng. Rep. at 76 (first emphasis added). Thus, one's conduct "will come within the Act," — *i.e.*, would terrify the King's subjects — only "where the crime shall appear to be malo animo," 1 Comb., at 39, 90 Eng. Rep., at 330, with evil intent or malice. Knight was ultimately acquitted by the jury.[11]

Just three years later, Parliament responded by writing the "predecessor to our Second Amendment" into the 1689 English Bill of Rights, *Heller*, 554 U.S.

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[10] Another medieval firearm restriction — a 1541 statute enacted under Henry VIII that limited the ownership and use of handguns (which could not be shorter than a yard) to those subjects with annual property values of at least £100, see 33 Hen. 8 c.6, §§1-2 — fell into a similar obsolescence. As far as we can discern, the last recorded prosecutions under the 1541 statute occurred in 1693, neither of which appears to have been successful. See *King and Queen v. Bullock*, 4 Mod. 147, 87 Eng. Rep. 315 (K. B. 1693); *King v. Litten*, 1 Shower, K. B. 367, 89 Eng. Rep. 644 (K. B. 1693). It seems that other prosecutions under the 1541 statute during the late 1600s were similarly unsuccessful. See *King v. Silcot*, 3 Mod. 280, 280-281, 87 Eng. Rep. 186 (K. B. 1690); *King v. Lewellin*, 1 Shower, K. B. 48, 89 Eng. Rep. 440 (K. B. 1689); cf. *King and Queen v. Alsop*, 4 Mod. 49, 50-51, 87 Eng. Rep. 256, 256-257 (K. B. 1691). By the late 1700s, it was widely recognized that the 1541 statute was "obsolete." 2 R. Burn, The Justice of the Peace, and Parish Officer 243, n. (11th ed. 1769); see also, *e.g.*, The Farmer's Lawyer 143 (1774) ("entirely obsolete"); 1 G. Jacob, Game-Laws II, Law-Dictionary (T. Tomlins ed. 1797); 2 R. Burn, The Justice of the Peace, and Parish Officer 409 (18th ed. 1797) (calling the 1541 statute "a matter more of curiosity than use").

In any event, lest one be tempted to put much evidentiary weight on the 1541 statute, it impeded not only public carry, but further made it unlawful for those without sufficient means to "kepe in his or their houses" any "handgun." 33 Hen. 8 c.6, §1. Of course, this kind of limitation is inconsistent with *Heller*'s historical analysis regarding the Second Amendment's meaning at the founding and thereafter. So, even if a severe restriction on keeping firearms in the home may have seemed appropriate in the mid-1500s, it was not incorporated into the Second Amendment's scope. We see little reason why the parts of the 1541 statute that address public carry should not be understood similarly.

We note also that even this otherwise restrictive 1541 statute, which generally prohibited shooting firearms in any city, exempted discharges "for the defence of [one's] p[er]son or house." §4. Apparently, the paramount need for self-defense trumped the Crown's interest in firearm suppression even during the 16th century.

[11] The dissent discounts *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, because it only "arguably" supports the view that an evil-intent requirement attached to the Statute of Northampton by the late 1600s and early 1700s. But again, because the Second Amendment's bare text covers petitioners' public carry, the respondents here shoulder the burden of demonstrating that New York's proper-cause requirement is consistent with the Second Amendment's text and historical scope. To the extent there are multiple plausible interpretations of *Sir John Knight's Case*, we will favor the one that is more consistent with the Second Amendment's command.

at 593, guaranteeing that "Protestants . . . may have Arms for their Defence suitable to their Conditions, and as allowed by Law," 1 Wm. & Mary c.2, §7, in 3 Eng. Stat. at Large 417 (1689). Although this right was initially limited—it was restricted to Protestants and held only against the Crown, but not Parliament — it represented a watershed in English history. Englishmen had "never before claimed . . . the right of the individual to arms." Schwoerer 156. And as that individual right matured, "by the time of the founding," the right to keep and bear arms was "understood to be an individual right protecting against both public and private violence." *Heller*, 554 U.S. at 594.

To be sure, the Statute of Northampton survived both *Sir John Knight's Case* and the English Bill of Rights, but it was no obstacle to public carry for self-defense in the decades leading to the founding. Serjeant William Hawkins, in his widely read 1716 treatise, confirmed that "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People." 1 Pleas of the Crown 136. To illustrate that proposition, Hawkins noted as an example that "Persons of Quality" were "in no Danger of Offending against this Statute by wearing common Weapons" because, in those circumstances, it would be clear that they had no "Intention to commit any Act of Violence or Disturbance of the Peace." *Ibid.*; *see also* T. Barlow, The Justice of Peace 12 (1745). Respondents do not offer any evidence showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people. In fact, the opposite seems to have been true. As time went on, "domestic gun culture [in England] softened" any "terror" that firearms might once have conveyed. Schwoerer 4. Thus, whatever place handguns had in English society during the Tudor and Stuart reigns, by the time we reach the 18th century — and near the founding — they had gained a fairly secure footing in English culture.

At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

2

Respondents next point us to the history of the Colonies and early Republic, but there is little evidence of an early American practice of regulating public carry by the general public. This should come as no surprise — English subjects founded the Colonies at about the time England had itself begun to eliminate restrictions on the ownership and use of handguns.

In the colonial era, respondents point to only three restrictions on public carry. For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation. In any event, even looking at these laws on their own terms, we are not convinced that they regulated public carry akin to the New York law before us.

Two of the statutes were substantively identical. Colonial Massachusetts and New Hampshire both authorized justices of the peace to arrest "all Affrayers, Rioters, Disturbers, or Breakers of the Peace, and such as shall ride or go armed Offensively . . . by Night or by Day, in Fear or Affray of Their Majesties Liege People." 1692 Mass. Acts and Laws no. 6, pp. 11-12; *see* 1699 N.H. Acts and Laws ch. 1. Respondents and their *amici* contend that being "armed offensively" meant bearing any offensive weapons, including firearms. In particular, respondents' *amici* argue that "'offensive'" arms in the 1600s and 1700s were what Blackstone and others referred to as "'dangerous or unusual weapons,'" Brief for Professors of History and Law as *Amici Curiae* 7 (quoting 4 Blackstone, Commentaries, at 148-149), a category that they say included firearms, *see also post* (BREYER, J., dissenting).

Respondents, their *amici*, and the dissent all misunderstand these statutes. Far from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself. For instance, the Massachusetts statute proscribed "go[ing] armed Offensively . . . in Fear or Affray" of the people, indicating that these laws were modeled after the Statute of Northampton to the extent that the statute would have been understood to limit public carry *in the late 1600s*. Moreover, it makes very little sense to read these statutes as banning the public carry of all firearms just a few years after Chief Justice Herbert in *Sir John Knight's Case* indicated that the English common law did not do so.

Regardless, even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of "dangerous and unusual weapons" — a fact we already acknowledged in *Heller*. *See* 554 U.S. at 627. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those "in common use at the time," as opposed to those that "are highly unusual in society at large." *Ibid.* (internal quotation marks omitted). Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." *Id.* at 629. Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

The third statute invoked by respondents was enacted in East New Jersey in 1686. It prohibited the concealed carry of "pocket pistol[s]" or other "unusual or unlawful weapons," and it further prohibited "planter[s]" from carrying all pistols unless in military service or, if "strangers," when traveling through the

Province. An Act Against Wearing Swords, &c., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881) (Grants and Concessions). These restrictions do not meaningfully support respondents. The law restricted only concealed carry, not all public carry, and its restrictions applied only to certain "unusual or unlawful weapons," including "pocket pistol[s]." *Ibid*. It also did not apply to all pistols, let alone all firearms. "Pocket pistols" had barrel lengths of perhaps 3 or 4 inches, far smaller than the 6-inch to 14-inch barrels found on the other belt and hip pistols that were commonly used for lawful purposes in the 1600s. J. George, English Pistols and Revolvers 16 (1938); *see also*, *e.g.*, 14 Car. 2 c. 3, §20 (1662); H. Peterson, Arms and Armor in Colonial America, 1526-1783, p.208 (1956) (Peterson). Moreover, the law prohibited only the *concealed* carry of pocket pistols; it presumably did not by its terms touch the open carry of larger, presumably more common pistols, except as to "planters."[13] In colonial times, a "planter" was simply a farmer or plantation owner who settled new territory. R. Lederer, Colonial American English 175 (1985); New Jersey State Archives, J. Klett, Using the Records of the East and West Jersey Proprietors 31 (rev. ed. 2014), https://www.nj.gov/state/archives/pdf/proprietors.pdf. While the reason behind this singular restriction is not entirely clear, planters may have been targeted because colonial-era East New Jersey was riven with "strife and excitement" between planters and the Colony's proprietors "respecting titles to the soil." *See* W. Whitehead, East Jersey Under the Proprietary Governments 150-51 (rev. 2d ed. 1875); *see also* T. Gordon, The History of New Jersey 49 (1834).

In any event, we cannot put meaningful weight on this solitary statute. First, although the "planter" restriction may have prohibited the public carry of pistols, it did not prohibit planters from carrying long guns for self-defense — including the popular musket and carbine. *See* Peterson 41. Second, it does not appear that the statute survived for very long. By 1694, East New Jersey provided that no slave "be permitted to carry any gun or pistol . . . into the woods, or plantations" unless their owner accompanied them. Grants and Concessions 341. If slave-owning planters were prohibited from carrying pistols, it is hard to comprehend why slaves would have been able to carry them in the planter's presence. Moreover, there is no evidence that the 1686 statute survived the 1702 merger of East and West New Jersey. *See* 1 Nevill, Acts of the General Assembly of the Province of New-Jersey (1752). At most eight

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[13] Even assuming that pocket pistols were, as East Jersey in 1686 deemed them, "unusual or unlawful," it appears that they were commonly used at least by the founding. *See*, *e.g.*, G. Neumann, The History of Weapons of the American Revolution 150-51 (1967); *see also* H. Hendrick, P. Paradis, & R. Hornick, Human Factors Issues in Handgun Safety and Forensics 44 (2008).

years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment.

Respondents next direct our attention to three late-18th-century and early-19th-century statutes, but each parallels the colonial statutes already discussed. One 1786 Virginia statute provided that "no man, great nor small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country." Collection of All Such Acts of the General Assembly of Virginia ch. 21, p.33 (1794).[14] A Massachusetts statute from 1795 commanded justices of the peace to arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Acts and Laws ch. 2, p.436, in Laws of the Commonwealth of Massachusetts. And an 1801 Tennessee statute likewise required any person who would "publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person" to post a surety; otherwise, his continued violation of the law would be "punished as for a breach of the peace, or riot at common law." 1801 Tenn. Acts pp. 260-61.

A by-now-familiar thread runs through these three statutes: They prohibit bearing arms in a way that spreads "fear" or "terror" among the people. As we have already explained, Chief Justice Herbert in *Sir John Knight's Case* interpreted this *in Terrorem Populi* element to require something more than merely carrying a firearm in public. Respondents give us no reason to think that the founding generation held a different view. Thus, all told, in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry.

3

Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and "surety" statutes. None of these restrictions imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime.

Common-Law Offenses. As during the colonial and founding periods, the common-law offenses of "affray" or going armed "to the terror of the people" continued to impose some limits on firearm carry in the antebellum period. But

[14] The Virginia statute all but codified the existing common law in this regard. See G. Webb, The Office and Authority of a Justice of Peace 92 (1736) (explaining how a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People").

as with the earlier periods, there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.

For example, the Tennessee attorney general once charged a defendant with the common-law offense of affray, arguing that the man committed the crime when he "'arm[ed] himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people.'" *Simpson* v. *State*, 13 Tenn. 356, 358 (1833). More specifically, the indictment charged that Simpson "with force and arms being arrayed in a warlike manner . . . unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray." *Id.* at 361. The Tennessee Supreme Court quashed the indictment, holding that the Statute of Northampton was never part of Tennessee law. *Id.* at 359. But even assuming that Tennesseans' ancestors brought with them the common law associated with the Statute, the *Simpson* court found that if the Statute had made, as an "independent ground of affray," the mere arming of oneself with firearms, the Tennessee Constitution's Second Amendment analogue had "completely abrogated it." *Id.* at 360. At least in light of that constitutional guarantee, the court did not think that it could attribute to the mere carrying of arms "a necessarily consequent operation as terror to the people." *Ibid.*

Perhaps more telling was the North Carolina Supreme Court's decision in *State* v. *Huntly*, 25 N.C. 418 (1843) (*per curiam*). Unlike the Tennessee Supreme Court in *Simpson*, the *Huntly* court held that the common-law offense codified by the Statute of Northampton was part of the State's law. *See* 25 N.C. at 421-22. However, consistent with the Statute's long-settled interpretation, the North Carolina Supreme Court acknowledged "that the carrying of a gun" for a lawful purpose "*per se* constitutes no offence." *Id.* at 422-23. Only carrying for a "wicked purpose" with a "mischievous result . . . constitute[d a] crime." *Id.* at 423; *see also* J. Haywood, The Duty and Office of Justices of Peace 10 (1800); H. Potter, The Office and Duties of a Justice of the Peace 39 (1816).[15] Other state courts likewise recognized that the common law did not punish the carrying of deadly weapons *per se*, but only the carrying of such weapons "for

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[15] The dissent concedes that *Huntly*, 25 N.C. 418, recognized that citizens were "'at perfect liberty' to carry for 'lawful purpose[s].'" But the dissent disputes that such "lawful purpose[s]" included self-defense, because *Huntly* goes on to speak more specifically of carrying arms for "business or amusement." *Id.* at 422-23. This is an unduly stingy interpretation of *Huntly*. In particular, *Huntly* stated that "the citizen is at perfect liberty to carry his gun" "[f]or *any* lawful purpose," of which "business" and "amusement" were then mentioned. *Ibid.* (emphasis added). *Huntly* then contrasted these "lawful purpose[s]" with the "wicked purpose . . . to terrify and alarm." *Ibid.* Because there is no evidence that *Huntly* considered self-defense a "wicked purpose," we think the best reading of *Huntly* would sanction public carry for self-defense, so long as it was not "in such [a] manner as naturally will terrify and alarm." *Id.* at 423. ["Business or amusement" was a legal term of art that encompassed all lawful activities. *See* Ch. 2.F.5 n.36. —EDS.]

the purpose of an affray, and in such manner as to strike terror to the people." *O'Neill* v. *State*, 16 Ala. 65, 67 (1849). Therefore, those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so.

Statutory Prohibitions. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. As we recognized in *Heller*, "the majority of the 19th-century courts to consider the question held that [these] prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. Respondents unsurprisingly cite these statutes — and decisions upholding them — as evidence that States were historically free to ban public carry.

In fact, however, the history reveals a consensus that States could *not* ban public carry altogether. Respondents' cited opinions agreed that concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry. That was true in Alabama. *See State* v. *Reid*, 1 Ala. 612, 616, 619-621 (1840). It was also true in Louisiana. *See State* v. *Chandler*, 5 La. 489, 490 (1850). Kentucky, meanwhile, went one step further — the State Supreme Court *invalidated* a concealed-carry prohibition. *See Bliss* v. *Commonwealth*, 12 Ky. 90 (1822).[20]

The Georgia Supreme Court's decision in *Nunn* v. *State*, 1 Ga. 243 (1846), is particularly instructive. Georgia's 1837 statute broadly prohibited "wearing" or "carrying" pistols "as arms of offence or defence," without distinguishing between concealed and open carry. 1837 Ga. Acts 90, §1. To the extent the 1837 Act prohibited "carrying certain weapons *secretly*," the court explained, it was "valid." *Nunn*, 1 Ga., at 251. But to the extent the Act also prohibited "bearing arms *openly*," the court went on, it was "in conflict with the Constitutio[n] and *void*." *Ibid.*; *see also Heller*, 554 U.S. at 612. The Georgia Supreme Court's treatment of the State's general prohibition on the public carriage of handguns indicates that it was considered beyond the constitutional pale in antebellum America to altogether prohibit public carry.

Finally, we agree that Tennessee's prohibition on carrying "publicly or privately" any "belt or pocket pisto[l]," 1821 Tenn. Acts ch. 13, p.15, was, on its face, uniquely severe, *see Heller*, 554 U.S. at 629. That said, when the Tennessee Supreme Court addressed the constitutionality of a substantively

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[20] With respect to Indiana's concealed-carry prohibition, the Indiana Supreme Court's reasons for upholding it are unknown because the court issued a one-sentence *per curiam* order holding the law "not unconstitutional." *Mitchell*, 3 Blackf. at 229. Similarly, the Arkansas Supreme Court upheld Arkansas' prohibition, but without reaching a majority rationale. *See Buzzard*, 4 Ark. 18. The Arkansas Supreme Court would later adopt Tennessee's approach, which tolerated the prohibition of all public carry of handguns except for military-style revolvers. *See*, *e.g.*, *Fife v. State*, 31 Ark. 455 (1876).

identical successor provision, *see* 1870 Tenn. Acts ch. 13, §1, p.28, the court read this language to permit the public carry of larger, military-style pistols because any categorical prohibition on their carry would "violat[e] the constitutional right to keep arms." *Andrews* v. *State*, 50 Tenn. 165, 187 (1871); *see also Heller*, 554 U.S. at 629 (discussing *Andrews*).

All told, these antebellum state-court decisions evince a consensus view that States could not altogether prohibit the public carry of "arms" protected by the Second Amendment or state analogues.[22]

Surety Statutes. In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public. Although respondents seize on these laws to justify the proper-cause restriction, their reliance on them is misplaced. These laws were not *bans* on public carry, and they typically targeted only those threatening to do harm.

As discussed earlier, Massachusetts had prohibited riding or going "armed offensively, to the fear or terror of the good citizens of this Commonwealth" since 1795. In 1836, Massachusetts enacted a new law providing:

> "If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided." Mass. Rev. Stat., ch. 134, §16.

In short, the Commonwealth required any person who was reasonably likely to "breach the peace," and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm. Between 1838 and 1871, nine other jurisdictions adopted variants of the Massachusetts law.

Contrary to respondents' position, these "reasonable-cause laws" in no way represented the "direct precursor" to the proper-cause requirement. While New

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[22] The Territory of New Mexico made it a crime in 1860 to carry "any class of pistols whatever" "concealed or otherwise." 1860 Terr. of N. M. Laws §§1-2, p.94. This extreme restriction is an outlier statute enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights, and its constitutionality was never tested in court. Its value in discerning the original meaning of the Second Amendment is insubstantial. Moreover, like many other stringent carry restrictions that were localized in the Western Territories, New Mexico's prohibition ended when the Territory entered the Union as a State in 1911 and guaranteed in its State Constitution that "[t]he people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. Const., Art. II, §6 (1911).

York presumes that individuals have *no* public carry right without a showing of heightened need, the surety statutes *presumed* that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace."[24] As William Rawle explained in an influential treatise, an individual's carrying of arms was "sufficient cause to require him to give surety of the peace" only when "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them." A View of the Constitution of the United States of America 126 (2d ed. 1829). Then, even on such a showing, the surety laws did not *prohibit* public carry in locations frequented by the general community. Rather, an accused arms-bearer "could go on carrying without criminal penalty" so long as he "post[ed] money that would be forfeited if he breached the peace or injured others — a requirement from which he was exempt if *he* needed self-defense." *Wrenn*, 864 F.3d at 661.

Thus, unlike New York's regime, a showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee rather than a ban. All told, therefore, "[u]nder surety laws . . . everyone started out with robust carrying rights" and only those reasonably accused were required to show a special need in order to avoid posting a bond. *Ibid.* These antebellum special-need requirements "did not expand carrying for the responsible; it shrank burdens on carrying by the (allegedly) reckless." *Ibid.*

One Court of Appeals has nonetheless remarked that these surety laws were "a severe constraint on anyone thinking of carrying a weapon in public." *Young*, 992 F.3d at 820. That contention has little support in the historical record. Respondents cite no evidence showing the average size of surety postings. And given that surety laws were "intended merely for prevention" and were "not meant as any degree of punishment," 4 Blackstone, Commentaries, at 249, the burden these surety statutes may have had on the right to public carry was likely too insignificant to shed light on New York's proper-cause standard — a violation of which can carry a 4-year prison term or a $5,000 fine. In *Heller*, we noted that founding-era laws punishing unlawful discharge "with a small fine and forfeiture of the weapon . . ., not with significant criminal penalties," likely did not "preven[t] a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him." 554 U.S. at 633-634. Similarly, we have little reason to think that the hypothetical possibility

[24] It is true that two of the antebellum surety laws were unusually broad in that they did not expressly require a citizen complaint to trigger the posting of a surety. See 1847 Va. Acts ch. 14, §16; W. Va. Code, ch. 153, §8 (1868).

of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century.

Besides, respondents offer little evidence that authorities ever enforced surety laws. The only recorded case that we know of involved a justice of the peace *declining* to require a surety, even when the complainant alleged that the arms-bearer "'did threaten to beat, wou[n]d, mai[m], and kill'" him. Brief for Professor Robert Leider et al. as *Amici Curiae* 31 (quoting *Grover* v. *Bullock*, No. 185 (Worcester Cty., Aug. 13, 1853)); *see* E. Ruben & S. Cornell, Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context, 125 Yale L.J. Forum 121, 130, n.53 (2015). And one scholar who canvassed 19th-century newspapers — which routinely reported on local judicial matters — found only a handful of other examples in Massachusetts and the District of Columbia, all involving black defendants who may have been targeted for selective or pretextual enforcement. *See* R. Leider, Constitutional Liquidation, Surety Laws, and the Right To Bear Arms 15-17, in New Histories of Gun Rights and Regulation (J. Blocher, J. Charles, & D. Miller eds.) (forthcoming); *see also* Brief for Professor Robert Leider et al. as *Amici Curiae* 31-32. That is surely too slender a reed on which to hang a historical tradition of restricting the right to public carry.[25]

Respondents also argue that surety statutes were severe restrictions on firearms because the "reasonable cause to fear" standard was essentially *pro forma*, given that "merely carrying firearms in populous areas breached the peace" *per se*. But that is a counterintuitive reading of the language that the surety statutes actually used. If the mere carrying of handguns breached the peace, it would be odd to draft a surety statute requiring a complainant to demonstrate "reasonable cause to fear an injury, or breach of the peace," rather than a reasonable likelihood that the arms-bearer carried a covered weapon. After all, if it was the nature of the weapon rather than the manner of carry that was dispositive, then the "reasonable fear" requirement would be redundant.

Moreover, the overlapping scope of surety statutes and criminal statutes suggests that the former were not viewed as substantial restrictions on public carry. For example, when Massachusetts enacted its surety statute in 1836, it reaffirmed its 1794 criminal prohibition on "go[ing] armed offensively, to the terror of the people." Mass. Rev. Stat., ch. 85, §24. And Massachusetts continued to criminalize the carrying of various "dangerous weapons" well

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[25] The dissent speculates that the absence of recorded cases involving surety laws may simply "show that these laws were normally followed." Perhaps. But again, the burden rests with the government to establish the relevant tradition of regulation, and, given all of the other features of surety laws that make them poor analogues to New York's proper-cause standard, we consider the barren record of enforcement to be simply one additional reason to discount their relevance.

after passing the 1836 surety statute. *See*, *e.g.*, 1850 Mass. Acts ch. 194, §1, p.401; Mass. Gen. Stat., ch. 164, §10 (1860). Similarly, Virginia had criminalized the concealed carry of pistols since 1838, *see* 1838 Va. Acts ch. 101, §1, nearly a decade before it enacted its surety statute, *see* 1847 Va. Acts ch. 14, §16. It is unlikely that these surety statutes constituted a "severe" restraint on public carry, let alone a restriction tantamount to a ban, when they were supplemented by direct criminal prohibitions on specific weapons and methods of carry.

To summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry — concealed carry — so long as they left open the option to carry openly.

None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

4

Evidence from around the adoption of the Fourteenth Amendment also fails to support respondents' position. For the most part, respondents and the United States ignore the "outpouring of discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves" after the Civil War. *Heller*, 554 U.S. at 614. Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden. Nevertheless, we think a short review of the public discourse surrounding Reconstruction is useful in demonstrating how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens.

A short prologue is in order. Even before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857), Chief Justice Taney offered what he thought was a parade of horribles that would result from recognizing that free blacks were citizens of the United States. If blacks were citizens, Taney fretted, they would be entitled to the privileges and immunities of citizens, including the right "to keep and carry arms *wherever they went*." *Id.* at 417 (emphasis added). Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that

public carry was a component of the right to keep and bear arms — a right free blacks were often denied in antebellum America.

After the Civil War, of course, the exercise of this fundamental right by freed slaves was systematically thwarted. This Court has already recounted some of the Southern abuses violating blacks' right to keep and bear arms. *See McDonald*, 561 U.S. at 771 (noting the "systematic efforts" made to disarm blacks); *id.* at 845-47 (THOMAS, J., concurring in part and concurring in judgment); *see also* S. Exec. Doc. No. 43, 39th Cong., 1st Sess., 8 (1866) ("Pistols, old muskets, and shotguns were taken away from [freed slaves] as such weapons would be wrested from the hands of lunatics").

In the years before the 39th Congress proposed the Fourteenth Amendment, the Freedmen's Bureau regularly kept it abreast of the dangers to blacks and Union men in the postbellum South. The reports described how blacks used publicly carried weapons to defend themselves and their communities. For example, the Bureau reported that a teacher from a Freedmen's school in Maryland had written to say that, because of attacks on the school, "[b]oth the mayor and sheriff have warned the colored people to go armed to school, (which they do)" and that the "[t]he superintendent of schools came down and brought [the teacher] a revolver" for his protection. Cong. Globe, 39th Cong., 1st Sess., 658 (1866); *see also* H.R. Exec. Doc. No. 68, 39th Cong., 2d Sess., 91 (1867) (noting how, during the New Orleans riots, blacks under attack "defended themselves . . . with such pistols as they had").

Witnesses before the Joint Committee on Reconstruction also described the depredations visited on Southern blacks, and the efforts they made to defend themselves. One Virginia music professor related that when "[t]wo Union men were attacked . . . they drew their revolvers and held their assailants at bay." H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p.110 (1866). An assistant commissioner to the Bureau from Alabama similarly reported that men were "robbing and disarming negroes upon the highway," H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 297 (1866), indicating that blacks indeed carried arms publicly for their self-protection, even if not always with success. *See also* H.R. Exec. Doc. No. 329, 40th Cong., 2d Sess., 41 (1868) (describing a Ku Klux Klan outfit that rode "through the country . . . robbing every one they come across of money, pistols, papers, &c."); *id.* at 36 (noting how a black man in Tennessee had been murdered on his way to get book subscriptions, with the murderer taking, among other things, the man's pistol).

Blacks had "procured great numbers of old army muskets and revolvers, particularly in Texas," and "employed them to protect themselves" with "vigor and audacity." S. Exec. Doc. No. 43, 39th Cong., 1st Sess., at 8. Seeing that government was inadequately protecting them, "there [was] the strongest desire on the part of the freedmen to secure arms, revolvers particularly." H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, at 102.

On July 6, 1868, Congress extended the 1866 Freedmen's Bureau Act, *see* 15 Stat. 83, and reaffirmed that freedmen were entitled to the "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to keep and bear arms*." §14, 14 Stat. 176 (1866) (emphasis added). That same day, a Bureau official reported that freedmen in Kentucky and Tennessee were still constantly under threat: "No Union man or negro who attempts to take any active part in politics, or the improvement of his race, is safe a single day; and nearly all sleep upon their arms at night, and carry concealed weapons during the day." H.R. Exec. Doc. No. 329, 40th Cong., 2d Sess., at 40.

Of course, even during Reconstruction the right to keep and bear arms had limits. But those limits were consistent with a right of the public to peaceably carry handguns for self-defense. For instance, when General D.E. Sickles issued a decree in 1866 pre-empting South Carolina's Black Codes — which prohibited firearm possession by blacks — he stated: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons. . . . And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms." Cong. Globe, 39th Cong., 1st Sess., at 908-909; *see also McDonald*, 561 U.S. at 847-48 (opinion of THOMAS, J.). Around the same time, the editors of The Loyal Georgian, a prominent black-owned newspaper, were asked by "A Colored Citizen" whether "colored persons [have] a right to own and carry fire arms." The editors responded that blacks had "the *same* right to own and carry fire arms that *other* citizens have." The Loyal Georgian, Feb. 3, 1866, p.3, col. 4. And, borrowing language from a Freedmen's Bureau circular, the editors maintained that "[a]ny person, white or black, may be disarmed if convicted of making an improper or dangerous use of weapons," even though "no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others." *Ibid.* (quoting Circular No. 5, Freedmen's Bureau, Dec. 22, 1865); *see also McDonald*, 561 U.S. at 848-49 (opinion of THOMAS, J.).[27]

As for Reconstruction-era state regulations, there was little innovation over the kinds of public-carry restrictions that had been commonplace in the early

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[27] That said, Southern prohibitions on concealed carry were not always applied equally, even when under federal scrutiny. One lieutenant posted in Saint Augustine, Florida, remarked how local enforcement of concealed-carry laws discriminated against blacks: "To sentence a negro to several dollars' fine for carrying a revolver concealed upon his person, is in accordance with an ordinance of the town; but still the question naturally arises in my mind, 'Why is this poor fellow fined for an offence which is committed hourly by every other white man I meet in the streets?'" H.R. Exec. Doc. No. 57, 40th Cong., 2d Sess., 83 (1867); see also H.R. Rep. No. 16, 39th Cong., 2d Sess., 427 (1867).

19th century. For instance, South Carolina in 1870 authorized the arrest of "all who go armed offensively, to the terror of the people," 1870 S.C. Acts p.403, no. 288, §4, parroting earlier statutes that codified the common-law offense. That same year, after it cleaved from Virginia, West Virginia enacted a surety statute nearly identical to the one it inherited from Virginia. *See* W. Va. Code, ch. 153, §8. Also in 1870, Tennessee essentially reenacted its 1821 prohibition on the public carry of handguns but, as explained above, Tennessee courts interpreted that statute to exempt large pistols suitable for military use.

Respondents and the United States, however, direct our attention primarily to two late-19th-century cases in Texas. In 1871, Texas law forbade anyone from "carrying on or about his person . . . any pistol . . . unless he has reasonable grounds for fearing an unlawful attack on his person." 1871 Tex. Gen. Laws §1. The Texas Supreme Court upheld that restriction in *English* v. *State*, 35 Tex. 473 (1871). The Court reasoned that the Second Amendment, and the State's constitutional analogue, protected only those arms "as are useful and proper to an armed militia," including holster pistols, but not other kinds of handguns. *Id.* at 474-75. Beyond that constitutional holding, the *English* court further opined that the law was not "contrary to public policy," *id.* at 479, given that it "ma[de] all necessary exceptions" allowing deadly weapons to "be carried as means of self-defense," and therefore "fully cover[ed] all wants of society," *id.* at 477.

Four years later, in *State* v. *Duke*, 42 Tex. 455 (1875), the Texas Supreme Court modified its analysis. The court reinterpreted Texas' State Constitution to protect not only military-style weapons but rather all arms "as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense." *Id.* at 458. On that understanding, the court recognized that, in addition to "holster pistol[s]," the right to bear arms covered the carry of "such pistols at least as are not adapted to being carried concealed." *Id.* at 458-59. Nonetheless, after expanding the scope of firearms that warranted state constitutional protection, *Duke* held that requiring any pistol-bearer to have "'reasonable grounds fearing an unlawful attack on [one's] person'" was a "legitimate and highly proper" regulation of handgun carriage. *Id.* at 456, 459-60. *Duke* thus concluded that the 1871 statute "appear[ed] to have respected the right to carry a pistol openly when needed for self-defense." *Id.* at 459.

We acknowledge that the Texas cases support New York's proper-cause requirement, which one can analogize to Texas' "reasonable grounds" standard. But the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900. *See* W. Va. Code, ch. 148, §7 (1887). The West Virginia Supreme Court upheld that prohibition, reasoning that *no* handguns of any kind were protected by the Second Amendment, a rationale endorsed by no other court during this period. *See State* v. *Workman*, 14 S. E.

9, 11 (1891). The Texas decisions therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public.

In the end, while we recognize the support that postbellum Texas provides for respondents' view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not "stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense" in public. 554 U.S. at 632.

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Finally, respondents point to the slight uptick in gun regulation during the late-19th century — principally in the Western Territories. As we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. *See id.* at 614.[28] Here, moreover, respondents' reliance on late-19th-century laws has several serious flaws even beyond their temporal distance from the founding.

The vast majority of the statutes that respondents invoke come from the Western Territories. Two Territories prohibited the carry of pistols in towns, cities, and villages, but seemingly permitted the carry of rifles and other long guns everywhere. *See* 1889 Ariz. Terr. Sess. Laws no. 13, §1, p.16; 1869 N.M. Laws ch. 32, §§1-2, p.72.[29] Two others prohibited the carry of *all* firearms in towns, cities, and villages, including long guns. *See* 1875 Wyo. Terr. Sess. Laws ch. 52, §1; 1889 Idaho Terr. Gen. Laws §1, p.23. And one Territory completely prohibited public carry of pistols *everywhere*, but allowed the carry of "shot-guns or rifles" for certain purposes. See 1890 Okla. Terr. Stats., Art. 47, §§1-2, 5, p.495.

These territorial restrictions fail to justify New York's proper-cause requirement for several reasons. First, the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry. For starters, "[t]he very transitional and temporary character of the American [territorial] system" often "permitted legislative improvisations which might not have been

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[28] We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.

[29] The New Mexico restriction allowed an exception for individuals carrying for "the lawful defence of themselves, their families or their property, and the same being then and there threatened with danger." 1869 Terr. of N. M. Laws ch. 32, §1, p.72. The Arizona law similarly exempted those who have "reasonable ground for fearing an unlawful attack upon his person." 1889 Ariz. Terr. Sess. Laws no. 13, §2, p.17.

tolerated in a permanent setup." E. Pomeroy, The Territories and the United States 1861-1890, p.4 (1947). These territorial "legislative improvisations," which conflict with the Nation's earlier approach to firearm regulation, are most unlikely to reflect "the origins and continuing significance of the Second Amendment" and we do not consider them "instructive." *Heller*, 554 U.S. at 614.

The exceptional nature of these western restrictions is all the more apparent when one considers the miniscule territorial populations who would have lived under them. To put that point into perspective, one need not look further than the 1890 census. Roughly 62 million people lived in the United States at that time. Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined to account for only 420,000 of those inhabitants — about two-thirds of 1% of the population. *See* Dept. of Interior, Compendium of the Eleventh Census: 1890, Part I.-Population 2 (1892). Put simply, these western restrictions were irrelevant to more than 99% of the American population. We have already explained that we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, "that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms" in public for self-defense. *Heller*, 554 U.S. at 632. Similarly, we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also "contradic[t] the overwhelming weight" of other, more contemporaneous historical evidence. *Heller*, 554 U.S. at 632.

Second, because these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality. When States generally prohibited both open and concealed carry of handguns in the late-19th century, state courts usually upheld the restrictions when they exempted army revolvers, or read the laws to exempt at least that category of weapons. See, *e.g.*, *Haile* v. *State*, 38 Ark. 564, 567 (1882); *Wilson* v. *State*, 33 Ark. 557, 560 (1878); *Fife* v. *State*, 31 Ark. 455, 461 (1876); *State* v. *Wilburn*, 66 Tenn. 57, 60 (1872); *Andrews*, 50 Tenn., at 187.[30] Those state courts that upheld broader prohibitions without qualification generally operated under a fundamental misunderstanding of the right to bear arms, as expressed in *Heller*. For example, the Kansas Supreme Court upheld a complete ban on public carry enacted by the city of Salina in 1901 based on the rationale that

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[30] Many other state courts during this period continued the antebellum tradition of upholding concealed carry regimes that seemingly provided for open carry. *See*, *e.g.*, *State v. Speller*, 86 N.C. 697 (1882); *Chatteaux v. State*, 52 Ala. 388 (1875); *Eslava v. State*, 49 Ala. 355 (1873); *State v. Shelby*, 2 S. W. 468 (1886); *Carroll v. State*, 28 Ark. 99 (1872); *cf. Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897) (remarking in dicta that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons").

the Second Amendment protects only "the right to bear arms as a member of the state militia, or some other military organization provided for by law." *Salina* v. *Blaksley*, 72 Kan. 230, 232 (1905). That was clearly erroneous. *See Heller*, 554 U.S. at 592.

Absent any evidence explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment, we fail to see how they inform "the origins and continuing significance of the Amendment." *Id.* at 614; *see also* The Federalist No. 37, at 229 (explaining that the meaning of ambiguous constitutional provisions can be "liquidated and ascertained *by a series of particular discussions and adjudications*" (emphasis added)).

Finally, these territorial restrictions deserve little weight because they were — consistent with the transitory nature of territorial government — short lived. Some were held unconstitutional shortly after passage. *See In re Brickey*, 8 Idaho 597, (1902). Others did not survive a Territory's admission to the Union as a State. See Wyo. Rev. Stat., ch. 3, §5051 (1899) (1890 law enacted upon statehood prohibiting public carry only when combined with "intent, or avowed purpose, of injuring [one's] fellow-man"). Thus, they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation.

Beyond these Territories, respondents identify one Western State — Kansas — that instructed cities with more than 15,000 inhabitants to pass ordinances prohibiting the public carry of firearms. See 1881 Kan. Sess. Laws §§1, 23, pp. 79, 92.[31] By 1890, the only cities meeting the population threshold were Kansas City, Topeka, and Wichita. Even if each of these three cities enacted prohibitions by 1890, their combined population (93,000) accounted for only 6.5% of Kansas' total population. Although other Kansas cities may also have restricted public carry unilaterally,[32] the lone late-19th-century state law respondents identify does not prove that Kansas meaningfully restricted public carry, let alone demonstrate a broad tradition of States doing so.

At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an

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[31] In 1875, Arkansas prohibited the public carry of all pistols. *See* 1875 Ark. Acts p.156, §1. But this categorical prohibition was also short lived. About six years later, Arkansas exempted "pistols as are used in the army or navy of the United States," so long as they were carried "uncovered, and in [the] hand." 1881 Ark. Acts p.191, no. 96, §§1, 2.

[32] In 1879, Salina, Kansas, prohibited the carry of pistols but broadly exempted "cases when any person carrying [a pistol] is engaged in the pursuit of any lawful business, calling or employment" and the circumstances were "such as to justify a prudent man in carrying such weapon, for the defense of his person, property or family." Salina, Kan., Rev. Ordinance No. 268, §2.

American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*, 554 U.S. at 581. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public. *Klenosky*, 428 N.Y.S. 2d at 257.

IV

The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

I join the opinion of the Court in full but add the following comments in response to the dissent.

I

Much of the dissent seems designed to obscure the specific question that the Court has decided, and therefore it may be helpful to provide a succinct summary of what we have actually held. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the Court concluded that the Second Amendment protects the right to keep a handgun in the home for self-defense. *Heller* found that the

Amendment codified a preexisting right and that this right was regarded at the time of the Amendment's adoption as rooted in "'the natural right of resistance and self-preservation.'" *Id.* at 594. "[T]he inherent right of self-defense," *Heller* explained, is "central to the Second Amendment right." *Id.* at 628.

Although *Heller* concerned the possession of a handgun in the home, the key point that we decided was that "the people," not just members of the "militia," have the right to use a firearm to defend themselves. And because many people face a serious risk of lethal violence when they venture outside their homes, the Second Amendment was understood at the time of adoption to apply under those circumstances. The Court's exhaustive historical survey establishes that point very clearly, and today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose.

That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* v. *Chicago*, 561 U.S. 742 (2010), about restrictions that may be imposed on the possession or carrying of guns.

In light of what we have actually held, it is hard to see what legitimate purpose can possibly be served by most of the dissent's lengthy introductory section. Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years? Does the dissent think that laws like New York's prevent or deter such atrocities? Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? And how does the dissent account for the fact that one of the mass shootings near the top of its list took place in Buffalo? The New York law at issue in this case obviously did not stop that perpetrator.

What is the relevance of statistics about the use of guns to commit suicide? Does the dissent think that a lot of people who possess guns in their homes will be stopped or deterred from shooting themselves if they cannot lawfully take them outside?

The dissent cites statistics about the use of guns in domestic disputes, but it does not explain why these statistics are relevant to the question presented in this case. How many of the cases involving the use of a gun in a domestic dispute occur outside the home, and how many are prevented by laws like New York's?

The dissent cites statistics on children and adolescents killed by guns, but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home? Our decision, as noted, does not expand the categories of people who may lawfully possess a gun, and federal law generally forbids the possession of a

handgun by a person who is under the age of 18, 18 U.S.C. §§922(x)(2)-(5), and bars the sale of a handgun to anyone under the age of 21, §§922(b)(1), (c)(1).[1]

The dissent cites the large number of guns in private hands — nearly 400 million — but it does not explain what this statistic has to do with the question whether a person who already has the right to keep a gun in the home for self-defense is likely to be deterred from acquiring a gun by the knowledge that the gun cannot be carried outside the home. And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

No one apparently knows how many of the 400 million privately held guns are in the hands of criminals, but there can be little doubt that many muggers and rapists are armed and are undeterred by the Sullivan Law. Each year, the New York City Police Department (NYPD) confiscates thousands of guns, and it is fair to assume that the number of guns seized is a fraction of the total number held unlawfully. The police cannot disarm every person who acquires a gun for use in criminal activity; nor can they provide bodyguard protection for the State's nearly 20 million residents or the 8.8 million people who live in New York City. Some of these people live in high-crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities. Some are members of groups whose members feel especially vulnerable. And some of these people reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury.

Ordinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to

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[1] The dissent makes no effort to explain the relevance of most of the incidents and statistics cited in its introductory section. Instead, it points to studies (summarized later in its opinion) regarding the effects of "shall issue" licensing regimes on rates of homicide and other violent crimes. I note only that the dissent's presentation of such studies is one-sided. *See* RAND Corporation, Effects of Concealed-Carry Laws on Violent Crime (Apr. 22, 2022), https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime-html; *see also* Brief for William English et al. as *Amici Curiae* 3 ("The overwhelming weight of statistical analysis on the effects of [right-to-carry] laws on violent crime concludes that RTC laws do not result in any statistically significant increase in violent crime rates"); Brief for Arizona et al. as *Amici Curiae* 12 ("[P]opulation-level data on licensed carry is extensive, and the weight of the evidence confirms that objective, non-discriminatory licensed-carry laws have two results: (1) statistically significant reductions in some types of violent crime, or (2) no statistically significant effect on overall violent crime"); Brief for Law Enforcement Groups et al. as *Amici Curiae* 12 ("[O]ver the period 1991-2019 the inventory of firearms more than doubled; the number of concealed carry permits increased by at least sevenfold," but "murder rates fell by almost half, from 9.8 per 100,000 people in 1991 to 5.0 per 100,000 in 2019" and "[v]iolent crimes plummeted by over half").

2.5 million times per year. Brief for Law Enforcement Groups et al. as *Amici Curiae* 5. A Centers for Disease Control and Prevention report commissioned by former President Barack Obama reviewed the literature surrounding firearms use and noted that "[s]tudies that directly assessed the effect of actual defensive uses of guns . . . have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." Institute of Medicine and National Research Council, Priorities for Research To Reduce the Threat of Firearm-Related Violence 15-16 (2013) (referenced in Brief for Independent Women's Law Center as *Amicus Curiae* 19-20).

Many of the *amicus* briefs filed in this case tell the story of such people. Some recount incidents in which a potential victim escaped death or serious injury only because carrying a gun for self-defense was allowed in the jurisdiction where the incident occurred. Here are two examples. One night in 1987, Austin Fulk, a gay man from Arkansas, "was chatting with another man in a parking lot when four gay bashers charged them with baseball bats and tire irons. Fulk's companion drew his pistol from under the seat of his car, brandished it at the attackers, and fired a single shot over their heads, causing them to flee and saving the would-be victims from serious harm." Brief for DC Project Foundation et al. as *Amici Curiae* 31.

On July 7, 2020, a woman was brutally assaulted in the parking lot of a fast food restaurant in Jefferson City, Tennessee. Her assailant slammed her to the ground and began to drag her around while strangling her. She was saved when a bystander who was lawfully carrying a pistol pointed his gun at the assailant, who then stopped the assault and the assailant was arrested. *Ibid.* (citing C. Wethington, Jefferson City Police: Legally Armed Good Samaritan Stops Assault, ABC News 6, WATE.com (July 9, 2020), https://www.wate.com/news/local-news/jefferson-city-police-legally-armed-good-samaritan-stops-assault/).

In other incidents, a law-abiding person was driven to violate the Sullivan Law because of fear of victimization and as a result was arrested, prosecuted, and incarcerated. See Brief for Black Attorneys of Legal Aid et al. as *Amici Curiae* 22-25.

Some briefs were filed by members of groups whose members feel that they have special reasons to fear attacks. See Brief for Asian Pacific American Gun Owners Association as *Amicus Curiae*; Brief for DC Project Foundation et al. as *Amici Curiae*; Brief for Black Guns Matter et al. as *Amici Curiae*; Brief for Independent Women's Law Center as *Amicus Curiae*; Brief for National African American Gun Association, Inc., as *Amicus Curiae*.

I reiterate: All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional.

II

This brings me to Part II-B of the dissent, which chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit. The record before us, however, tells us everything we need on this score. At argument, New York's solicitor general was asked about an ordinary person who works at night and must walk through dark and crime-infested streets to get home. Tr. of Oral Arg. 66-67. The solicitor general was asked whether such a person would be issued a carry permit if she pleaded: "[T]here have been a lot of muggings in this area, and I am scared to death." *Id.* at 67. The solicitor general's candid answer was "in general," no. *Ibid.* To get a permit, the applicant would have to show more — for example, that she had been singled out for attack. *Id.* at 65; *see also id.* at 58. A law that dictates that answer violates the Second Amendment.

III

My final point concerns the dissent's complaint that the Court relies too heavily on history and should instead approve the sort of "means-end" analysis employed in this case by the Second Circuit. Under that approach, a court, in most cases, assesses a law's burden on the Second Amendment right and the strength of the State's interest in imposing the challenged restriction. This mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun. Two examples illustrate the point.

The first is the Second Circuit's decision in a case the Court decided two Terms ago, *New York State Rifle & Pistol Assn., Inc.* v. *City of New York*, 140 S.Ct. 1525 (2020). The law in that case affected New York City residents who had been issued permits to keep a gun in the home for self-defense. The city recommended that these permit holders practice at a range to ensure that they are able to handle their guns safely, but the law prohibited them from taking their guns to any range other than the seven that were spread around the city's five boroughs. Even if such a person unloaded the gun, locked it in the trunk of a car, and drove to the nearest range, that person would violate the law if the nearest range happened to be outside city limits. The Second Circuit held that the law was constitutional, concluding, among other things, that the restriction was substantially related to the city's interests in public safety and crime prevention. *See New York State Rifle & Pistol Assn., Inc.* v. *New York*, 883 F.3d 45, 62-64 (2018). But after we agreed to review that decision, the city repealed the law and admitted that it did not actually have any beneficial effect on public safety. *See* N.Y. Penal Law Ann. §400.00(6); Suggestion of Mootness in *New York State Rifle & Pistol Assn., Inc.* v. *City of New York*, O.T. 2019, No. 18-280, pp. 5-7.

Exhibit two is the dissent filed in *Heller* by JUSTICE BREYER, the author of today's dissent. At issue in *Heller* was an ordinance that made it impossible for any District of Columbia resident to keep a handgun in the home for self-defense. See 554 U.S. at 574-75. Even the respondent, who carried a gun on the job while protecting federal facilities, did not qualify. *Id.* at 575-76. The District of Columbia law was an extreme outlier; only a few other jurisdictions in the entire country had similar laws. Nevertheless, JUSTICE BREYER's dissent, while accepting for the sake of argument that the Second Amendment protects the right to keep a handgun in the home, concluded, based on essentially the same test that today's dissent defends, that the District's complete ban was constitutional. See *id.* at 689, 722, (under "an interest-balancing inquiry. . ." the dissent would "conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it").

Like that dissent in *Heller*, the real thrust of today's dissent is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit.[3] That argument was rejected in *Heller*, and while the dissent protests that it is not rearguing *Heller*, it proceeds to do just that.

Heller correctly recognized that the Second Amendment codifies the right of ordinary law-abiding Americans to protect themselves from lethal violence by possessing and, if necessary, using a gun. In 1791, when the Second Amendment was adopted, there were no police departments, and many families lived alone on isolated farms or on the frontiers. If these people were attacked, they were on their own. It is hard to imagine the furor that would have erupted if the Federal Government and the States had tried to take away the guns that these people needed for protection.

Today, unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves. And today, no less than in 1791, the Second Amendment guarantees their right to do so.

JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, concurring.

The Court employs and elaborates on the text, history, and tradition test that *Heller* and *McDonald* require for evaluating whether a government regulation infringes on the Second Amendment right to possess and carry guns

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[3] If we put together the dissent in this case and Justice Breyer's *Heller* dissent, States and local governments would essentially be free to ban the possession of all handguns, and it is unclear whether its approach would impose any significant restrictions on laws regulating long guns. The dissent would extend a very large measure of deference to legislation implicating Second Amendment rights, but it does not claim that such deference is appropriate when any other constitutional right is at issue.

for self-defense. See *District of Columbia* v. *Heller*, 554 U.S. 570, (2008); *McDonald* v. *Chicago*, 561 U.S. 742, (2010). Applying that test, the Court correctly holds that New York's outlier "may-issue" licensing regime for carrying handguns for self-defense violates the Second Amendment.

I join the Court's opinion, and I write separately to underscore two important points about the limits of the Court's decision.

First, the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court's decision does not affect the existing licensing regimes — known as "shall-issue" regimes — that are employed in 43 States.

The Court's decision addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York. As the Court explains, New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York's regime — the unchanneled discretion for licensing officials and the special-need requirement — in effect deny the right to carry handguns for self-defense to many "ordinary, law-abiding citizens." *see also Heller*, 554 U.S. at 635. The Court has held that "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767, (quoting *Heller*, 554 U.S. at 599). New York's law is inconsistent with the Second Amendment right to possess and carry handguns for self-defense.

By contrast, 43 States employ objective shall-issue licensing regimes. Those shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. Brief for Arizona et al. as *Amici Curiae* 7. Unlike New York's may-issue regime, those shall-issue regimes do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense. As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice. Tr. of Oral Arg. 50-51.

Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.

Second, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment "is neither a regulatory straightjacket nor a regulatory blank check." Properly interpreted, the Second Amendment allows

a "variety" of gun regulations. *Heller*, 554 U.S. at 636. As Justice Scalia wrote in his opinion for the Court in *Heller*, and JUSTICE ALITO reiterated in relevant part in the principal opinion in *McDonald*:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]
>
> "We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Heller*, 554 U.S. at 626-627 & n.26 (citations and quotation marks omitted); *see also McDonald*, 561 U.S. at 786 (plurality opinion).

With those additional comments, I join the opinion of the Court.

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution. Scholars have proposed competing and potentially conflicting frameworks for this analysis, including liquidation, tradition, and precedent. The limits on the permissible use of history may vary between these frameworks (and between different articulations of each one). To name just a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning? *Cf. McCulloch* v. *Maryland*, 17 U.S. 316 (1819) (citing practice "introduced at a very early period of our history"). What form must practice take to carry weight in constitutional analysis? *See Myers* v. *United States*, 272 U.S. 52 (1926) (citing a "legislative exposition of the Constitution . . . acquiesced in for a long term of years"). And may practice settle the meaning of individual rights as well as structural provisions? *See* Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 49-51 (2019) (canvassing arguments). The

historical inquiry presented in this case does not require us to answer such questions, which might make a difference in another case.

Second and relatedly, the Court avoids another "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Bill of Rights was ratified in 1791. Here, the lack of support for New York's law in either period makes it unnecessary to choose between them. But if 1791 is the benchmark, then New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little). *Cf. Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258-89 (2020) (a practice that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" informing our understanding of the First Amendment). So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving postenactment history more weight than it can rightly bear."

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), https://www.cdc.gov/violenceprevention/firearms/fastfact.html. Since the start of this year (2022), there have been 277 reported mass shootings — an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), https://www.gunviolencearchive.org. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. J. Goldstick, R. Cunningham, & P. Carter, Current Causes of Death in Children and Adolescents in the United States, 386 New England J. Med. 1955 (May 19, 2022) (Goldstick).

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York's law operates in practice. Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that

justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York's law, the Court fails to correctly identify and analyze the relevant historical facts. Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not "consistent with the Nation's historical tradition of firearm regulation."

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The Second Circuit has done so and has held that New York's law does not violate the Second Amendment. *See Kachalsky* v. *County of Westchester*, 701 F.3d 81, 97-99, 101 (2012). I would affirm that holding.

I

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. A. Karp, Estimating Global Civilian-Held Firearms Numbers, Small Arms Survey 4 (June 2018), https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-Firearms-Numbers.pdf. . . .

Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. *Cf.* Brief for Educational Fund To Stop Gun Violence et al. as *Amici Curiae* 17-18 (Brief for Educational Fund) (citing studies showing that, within the United States, "states that rank among the highest in gun ownership also rank among the highest in gun deaths" while "states with lower rates of gun ownership have lower rates of gun deaths"). In 2015, approximately 36,000 people were killed by firearms nationwide. M. Siegel et al., Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States, 107 Am. J. Pub. Health 1923 (2017). Of those deaths, 22,018 (or about 61%) were suicides, 13,463 (37%) were homicides, and 489 (1%) were unintentional injuries. *Ibid.* On top of that, firearms caused an average of 85,694 emergency room visits for nonfatal injuries each year between 2009 and 2017. E. Kaufman et al., Epidemiological Trends in Fatal and Nonfatal Firearm Injuries in the US, 2009-2017, 181 JAMA Internal Medicine 237 (2021) (Kaufman).

Worse yet, gun violence appears to be on the rise. By 2020, the number of firearm-related deaths had risen to 45,222, CDC, Fast Facts, or by about 25%

since 2015. That means that, in 2020, an average of about 124 people died from gun violence every day. *Ibid.* . . . And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular. *See* CDC, Age-Adjusted Rates of Firearm-Related Homicide, by Race, Hispanic Origin, and Sex — National Vital Statistics System, United States, 2019, at 1491 (Oct. 22, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7042a6-H.pdf (documenting 34.9 firearm-related homicides per 100,000 population for non-Hispanic Black men in 2019, compared to 7.7 such homicides per 100,000 population for men of all races). . .

The dangers posed by firearms can take many forms. Newspapers report mass shootings occurring at an entertainment district in Philadelphia, Pennsylvania (3 dead and 11 injured); an elementary school in Uvalde, Texas (21 dead); a supermarket in Buffalo, New York (10 dead and 3 injured); a series of spas in Atlanta, Georgia (8 dead); a busy street in an entertainment district of Dayton, Ohio (9 dead and 17 injured); a nightclub in Orlando, Florida (50 dead and 53 injured); a church in Charleston, South Carolina (9 dead); a movie theater in Aurora, Colorado (12 dead and 50 injured); an elementary school in Newtown, Connecticut (26 dead); and many, many more. . . . Since the start of this year alone (2022), there have already been 277 reported mass shootings — an average of more than one per day. Gun Violence Archive; *see also* Gun Violence Archive, General Methodology, https://www.gunviolencearchive.org/methodology (defining mass shootings to include incidents in which at least four victims are shot, not including the shooter).

And mass shootings are just one part of the problem. Easy access to firearms can also make many other aspects of American life more dangerous. Consider, for example, the effect of guns on road rage. In 2021, an average of 44 people each month were shot and either killed or wounded in road rage incidents, double the annual average between 2016 and 2019. S. Burd-Sharps & K. Bistline, Everytown for Gun Safety, Reports of Road Rage Shootings Are on the Rise (Apr. 4, 2022), https://www.everytownresearch.org/reports-of-road-rage-shootings-are-on-the-rise/. Some of those deaths might have been avoided if there had not been a loaded gun in the car. See *ibid.*; Brief for American Bar Association as *Amicus Curiae* 17-18; Brief for Educational Fund 20-23 (citing studies showing that the presence of a firearm is likely to increase aggression in both the person carrying the gun and others who see it).

The same could be said of protests: A study of 30,000 protests between January 2020 and June 2021 found that armed protests were nearly six times more likely to become violent or destructive than unarmed protests. Everytown for Gun Safety, Armed Assembly: Guns, Demonstrations, and Political Violence in America (Aug. 23, 2021), https://www.everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america/ (finding that 16% of armed protests turned violent, compared to less than 3% of unarmed protests). Or domestic disputes: Another study found that a woman

is five times more likely to be killed by an abusive partner if that partner has access to a gun. Brief for Educational Fund 8 (citing A. Zeoli, R. Malinski, & B. Turchan, Risks and Targeted Interventions: Firearms in Intimate Partner Violence, 38 Epidemiologic Revs. 125 (2016); J. Campbell et al., Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1092 (2003)). Or suicides: A study found that men who own handguns are three times as likely to commit suicide than men who do not and women who own handguns are seven times as likely to commit suicide than women who do not. D. Studdert et al., Handgun Ownership and Suicide in California, 382 New England J. Med. 2220, 2224 (June 4, 2020).

Consider, too, interactions with police officers. The presence of a gun in the hands of a civilian poses a risk to both officers and civilians. *Amici* prosecutors and police chiefs tell us that most officers who are killed in the line of duty are killed by firearms; they explain that officers in States with high rates of gun ownership are three times as likely to be killed in the line of duty as officers in States with low rates of gun ownership. Brief for Prosecutors Against Gun Violence as *Amicus Curiae* 23-24; Brief for Former Major City Police Chiefs as *Amici Curiae* 13-14, and n.21, (citing D. Swedler, M. Simmons, F. Dominici, & D. Hemenway, Firearm Prevalence and Homicides of Law Enforcement Officers in the United States, 105 Am. J. Pub. Health 2042, 2045 (2015)). They also say that States with the highest rates of gun ownership report four times as many fatal shootings of civilians by police officers compared to States with the lowest rates of gun ownership. Brief for Former Major City Police Chiefs as *Amici Curiae* 16 (citing D. Hemenway, D. Azrael, A. Connor, & M. Miller, Variation in Rates of Fatal Police Shootings Across US States: The Role of Firearm Availability, 96 J. Urb. Health 63, 67 (2018)).

These are just some examples of the dangers that firearms pose. There is, of course, another side to the story. I am not simply saying that "guns are bad." See *ante* (ALITO, J., concurring). Some Americans use guns for legitimate purposes, such as sport (*e.g.*, hunting or target shooting), certain types of employment (*e.g.*, as a private security guard), or self-defense. Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Consider, for one thing, that different types of firearms may pose different risks and serve different purposes. The Court has previously observed that handguns, the type of firearm at issue here, "are the most popular weapon chosen by Americans for self-defense in the home." *District of Columbia* v.

Heller, 554 U.S. 570, 629 (2008). But handguns are also the most popular weapon chosen by perpetrators of violent crimes. In 2018, 64.4% of firearm homicides and 91.8% of nonfatal firearm assaults were committed with a handgun. Dept. of Justice, Bureau of Justice Statistics, G. Kena & J. Truman, Trends and Patterns in Firearm Violence, 1993-2018, pp. 5-6 (Apr. 2022). Handguns are also the most commonly stolen type of firearm — 63% of burglaries resulting in gun theft between 2005 and 2010 involved the theft of at least one handgun. Dept. of Justice, Bureau of Justice Statistics, L. Langton, Firearms Stolen During Household Burglaries and Other Property Crimes, 2005-2010, p.3 (Nov. 2012).

Or consider, for another thing, that the dangers and benefits posed by firearms may differ between urban and rural areas. See generally Brief for City of Chicago et al. as *Amici Curiae* (detailing particular concerns about gun violence in large cities). Firearm-related homicides and assaults are significantly more common in urban areas than rural ones. For example, from 1999 to 2016, 89.8% of the 213,175 firearm-related homicides in the United States occurred in "metropolitan" areas. M. Siegel et al., The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States, 1991-2016, 36 J. Rural Health 255 (2020).

JUSTICE ALITO asks why I have begun my opinion by reviewing some of the dangers and challenges posed by gun violence and what relevance that has to today's case. All of the above considerations illustrate that the question of firearm regulation presents a complex problem — one that should be solved by legislatures rather than courts. What kinds of firearm regulations should a State adopt? Different States might choose to answer that question differently. They may face different challenges because of their different geographic and demographic compositions. A State like New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density. For a variety of reasons, States may also be willing to tolerate different degrees of risk and therefore choose to balance the competing benefits and dangers of firearms differently.

The question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes. The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them.

II . . .

B

As the Court recognizes, New York's licensing regime traces its origins to 1911, when New York enacted the "Sullivan Law," which prohibited public carriage of handguns without a license. See 1911 N.Y. Laws ch. 195, §1, p.443. Two years later in 1913, New York amended the law to establish substantive standards for the issuance of a license. See 1913 N.Y. Laws ch. 608, §1, pp. 1627-1629. Those standards have remained the foundation of New York's licensing regime ever since — a regime that the Court now, more than a century later, strikes down as unconstitutional.

As it did over 100 years ago, New York's law today continues to require individuals to obtain a license before carrying a concealed handgun in public. N.Y. Penal Law Ann. §400.00(2); *Kachalsky*, 701 F.3d at 85-86. Because the State does not allow the open carriage of handguns at all, a concealed-carry license is the only way to legally carry a handgun in public. This licensing requirement applies only to handguns (*i.e.*, "pistols and revolvers") and short-barreled rifles and shotguns, not to all types of firearms.

To obtain a concealed-carry license for a handgun, an applicant must satisfy certain eligibility criteria. Among other things, he must generally be at least 21 years old and of "good moral character." §400.00(1). And he cannot have been convicted of a felony, dishonorably discharged from the military, or involuntarily committed to a mental hygiene facility. *Ibid.* If these and other eligibility criteria are satisfied, New York law provides that a concealed-carry license "shall be issued" to individuals working in certain professions, such as judges, corrections officers, or messengers of a "banking institution or express company." §400.00(2). Individuals who satisfy the eligibility criteria but do not work in one of these professions may still obtain a concealed-carry license, but they must additionally show that "proper cause exists for the issuance thereof." §400.00(2)(f).

The words "proper cause" may appear on their face to be broad, but there is "a substantial body of law instructing licensing officials on the application of this standard." [*Kachalsky*] at 86. New York courts have interpreted proper cause "to include carrying a handgun for target practice, hunting, or self-defense." *Ibid.* When an applicant seeks a license for target practice or hunting, he must show "'a sincere desire to participate in target shooting and hunting.'" *Ibid.* When an applicant seeks a license for self-defense, he must show "'a special need for self-protection distinguishable from that of the general community.'" 701 F.3d at 86. . . . In most counties, the licensing officer is a local judge. *Kachalsky*, 701 F.3d at 87 n.6. . . . If the officer denies an application, the applicant can obtain judicial review under Article 78 of New York's Civil Practice Law and Rules. *Kachalsky*, 701 F.3d at 87. New York courts will then review whether the denial was arbitrary and capricious. *Ibid.*

In describing New York's law, the Court recites the above facts but adds its own gloss. It suggests that New York's licensing regime gives licensing officers too much discretion and provides too "limited" judicial review of their decisions; that the proper cause standard is too "demanding"; and that these features make New York an outlier compared to the "vast majority of States". But on what evidence does the Court base these characterizations? Recall that this case comes to us at the pleading stage. The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record. Thus, at this point, there is no record to support the Court's negative characterizations, as we know very little about how the law has actually been applied on the ground. . . .

Even accepting the Court's line between "may issue" and "shall issue" regimes and assuming that its tally (7 "may issue" and 43 "shall issue" jurisdictions) is correct, that count does not support the Court's implicit suggestion that the seven "may issue" jurisdictions are somehow outliers or anomalies. The Court's count captures only a snapshot in time. It forgets that "shall issue" licensing regimes are a relatively recent development. Until the 1980s, "may issue" regimes predominated. As of 1987, 16 States and the District of Columbia prohibited concealed carriage outright, 26 States had "may issue" licensing regimes, 7 States had "shall issue" regimes, and 1 State (Vermont) allowed concealed carriage without a permit. Congressional Research Service, Gun Control: Concealed Carry Legislation in the 115th Congress 1 (Jan. 30, 2018). Thus, it has only been in the last few decades that States have shifted toward "shall issue" licensing laws. Prior to that, most States operated "may issue" licensing regimes without legal or practical problem.

Moreover, even considering, as the Court does, only the present state of play, its tally provides an incomplete picture because it accounts for only the number of States with "may issue" regimes, not the number of people governed by those regimes. By the Court's count, the seven "may issue" jurisdictions are New York, California, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia. Together, these seven jurisdictions comprise about 84.4 million people and account for over a quarter of the country's population. Thus, "may issue" laws can hardly be described as a marginal or outdated regime.

And there are good reasons why these seven jurisdictions may have chosen not to follow other States in shifting toward "shall issue" regimes. The seven remaining "may issue" jurisdictions are among the most densely populated in the United States . . .

As I explained above, densely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas. It is thus easy to see why the seven "may issue" jurisdictions might choose to regulate firearm carriage more strictly than other States.

New York and its *amici* present substantial data justifying the State's decision to retain a "may issue" licensing regime. The data show that stricter gun regulations are associated with lower rates of firearm-related death and injury. *See, e.g.*, Brief for Citizens Crime Commission of New York City as *Amicus Curiae* 9-11; Brief for Former Major City Police Chiefs as *Amici Curiae* 9-12; Brief for Educational Fund 25-28; Brief for Social Scientists et al. as *Amici Curiae* 9-19. In particular, studies have shown that "may issue" licensing regimes, like New York's, are associated with lower homicide rates and lower violent crime rates than "shall issue" licensing regimes. For example, one study compared homicide rates across all 50 States during the 25-year period from 1991 to 2015 and found that "shall issue" laws were associated with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates. Siegel, 107 Am. J. Pub. Health, at 1924-1925, 1927. Another study longitudinally followed 33 States that had adopted "shall-issue" laws between 1981 and 2007 and found that the adoption of those laws was associated with a 13%-15% increase in rates of violent crime after 10 years. Donohue, 16 J. Empirical Legal Studies, at 200, 240. Numerous other studies show similar results. *See*, *e.g.*, Siegel, 36 J. Rural Health, at 261 (finding that "may issue" laws are associated with 17% lower firearm homicide rates in large cities); C. Crifasi et al., Association Between Firearm Laws and Homicide in Urban Counties, 95 J. Urb. Health 383, 387 (2018) (finding that "shall issue" laws are associated with a 4% increase in firearm homicide rates in urban counties); M. Doucette, C. Crifasi, & S. Frattaroli, Right-to-Carry Laws and Firearm Workplace Homicides: A Longitudinal Analysis (1992-2017), 109 Am. J. Pub. Health 1747, 1751 (Dec. 2019) (finding that States with "shall issue" laws between 1992 and 2017 experienced 29% higher rates of firearm-related workplace homicides); Brief for Social Scientists et al. as *Amici Curiae* 15-16, and nn.17-20 (citing "thirteen . . . empirical papers from just the last few years linking ["shall issue"] laws to higher violent crime").

JUSTICE ALITO points to competing empirical evidence that arrives at a different conclusion. But these types of disagreements are exactly the sort that are better addressed by legislatures than courts. The Court today restricts the ability of legislatures to fulfill that role. It does so without knowing how New York's law is administered in practice, how much discretion licensing officers in New York possess, or whether the proper cause standard differs across counties. And it does so without giving the State an opportunity to develop the evidentiary record to answer those questions. Yet it strikes down New York's licensing regime as a violation of the Second Amendment.

III

A

How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purposes it serves?

The Court does so by purporting to rely nearly exclusively on history. It requires "the government [to] affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of 'the right to keep and bear arms.'" Beyond this historical inquiry, the Court refuses to employ what it calls "means-end scrutiny." That is, it refuses to consider whether New York has a compelling interest in regulating the concealed carriage of handguns or whether New York's law is narrowly tailored to achieve that interest. Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far.

The Court concedes that no Court of Appeals has adopted its rigid history-only approach. To the contrary, every Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment. *Ibid.*; *ante*, at 10, n.4 (majority opinion) (listing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D. C. Circuits). At the first step, the Courts of Appeals use text and history to determine "whether the regulated activity falls within the scope of the Second Amendment." *Ezell* v. *Chicago*, 846 F.3d 888, 892 (7th Cir. 2017). If it does, they go on to the second step and consider "'the strength of the government's justification for restricting or regulating'" the Second Amendment right. *Ibid.* In doing so, they apply a level of "means-ends" scrutiny "that is proportionate to the severity of the burden that the law imposes on the right": strict scrutiny if the burden is severe, and intermediate scrutiny if it is not. *National Rifle Assn. of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195, 198, 205 (5th Cir. 2012).

The Court today replaces the Courts of Appeals' consensus framework with its own history-only approach. That is unusual. We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade. The Court attempts to justify its deviation from our normal practice by claiming that the Courts of Appeals' approach is inconsistent with *Heller*. In doing so, the Court implies that all 11 Courts of Appeals that have considered this question misread *Heller*.

To the contrary, it is this Court that misreads *Heller*. The opinion in *Heller* did focus primarily on "constitutional text and history,", but it did *not* "rejec[t] . . . means-end scrutiny," as the Court claims.. The *Heller* Court concluded that the Second Amendment's text and history were sufficiently clear to resolve that question: The Second Amendment, it said, does include such an individual right. There was thus no need for the Court to go further — to look beyond text and history, or to suggest what analysis would be appropriate in other cases where the text and history are not clear. . . .

The majority further made clear that its rejection of freestanding interest balancing did *not* extend to traditional forms of means-end scrutiny. It said: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." [*Id.* at 634]. To illustrate this point, it cited as an example the First Amendment right to free speech. *Id.* at 635. Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment. *See*, *e.g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, (2000) (applying strict scrutiny); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 186, 189-190, (1997) (applying intermediate scrutiny). The majority therefore cannot have intended its opinion, consistent with our First Amendment jurisprudence, to be read as rejecting all traditional forms of means-end scrutiny.

As *Heller*'s First Amendment example illustrates, the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history "accords with how we protect other constitutional rights." As the Court points out, we do look to history in the First Amendment context to determine "whether the expressive conduct falls outside of the category of protected speech." But, if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden. See, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (applying strict scrutiny to laws that burden political speech); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to time, place, and manner restrictions); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-66, (1980) (applying intermediate scrutiny to laws that burden commercial speech).

Additionally, beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions. *See*, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny under the First Amendment to laws that restrict free exercise of religion in a way that is not neutral and generally applicable); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to race-based classifications); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny under the Equal Protection Clause to sex-based classifications); *see also Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) ("When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness").

The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional

anomaly. Rather, it is the Court's rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.

B

The Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its "ends") against the methods used to achieve those objectives (its "means"). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

Consider *Heller* itself. That case, fraught with difficult historical questions, illustrates the practical problems with expecting courts to decide important constitutional questions based solely on history. The majority in *Heller* undertook 40 pages of textual and historical analysis and concluded that the Second Amendment's protection of the right to "keep and bear Arms" historically encompassed an "individual right to possess and carry weapons in case of confrontation" — that is, for self-defense. 554 U.S. at 592; *see also id.* at 579-619. Justice Stevens' dissent conducted an equally searching textual and historical inquiry and concluded, to the contrary, that the term "bear Arms" was an idiom that protected only the right "to use and possess arms in conjunction with service in a well-regulated militia." *Id.* at 651. I do not intend to relitigate *Heller* here. I accept its holding as a matter of *stare decisis*. I refer to its historical analysis only to show the difficulties inherent in answering historical questions and to suggest that judges do not have the expertise needed to answer those questions accurately.

For example, the *Heller* majority relied heavily on its interpretation of the English Bill of Rights. Citing Blackstone, the majority claimed that the English Bill of Rights protected a "'right of having and using arms for self-preservation and defence.'" *Id.* at 594 (quoting 1 Commentaries on the Laws of England 140 (1765)). The majority interpreted that language to mean a private right to bear

arms for self-defense, "having nothing whatever to do with service in a militia." 554 U.S. at 593. Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald* v. *Chicago*, 561 U.S. 742 (2010), that the *Heller* Court had gotten the history wrong: The English Bill of Rights "did not . . . protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars." Brief for English/Early American Historians as *Amici Curiae* in *McDonald* v. *Chicago*, O.T. 2009, No. 08-1521, p.2. Rather, these *amici* historians explained, the English right to "have arms" ensured that the Crown could not deny Parliament (which represented the people) the power to arm the landed gentry and raise a militia — or the right of the people to possess arms to take part in that militia — "should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation." *Id.* at 2-3. Thus, the English right did protect a right of "self-preservation and defence," as Blackstone said, but that right "was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives," *i.e.*, Parliament. *Id.* at 7-8. The Court, not an expert in history, had misread Blackstone and other sources explaining the English Bill of Rights.

And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. 554 U.S. at 586. Linguistics experts now tell us that the majority was wrong to do so. See, *e.g.*, Brief for Corpus Linguistics Professors and Experts as *Amici Curiae* (Brief for Linguistics Professors); Brief for Neal Goldfarb as *Amicus Curiae*; Brief for Americans Against Gun Violence as *Amicus Curiae* 13-15. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to "'war, soldiering, or other forms of armed action by a group rather than an individual.'" Brief for Linguistics Professors 11, 14; *see also* D. Baron, Corpus Evidence Illuminates the Meaning of Bear Arms, 46 Hastings Const. L. Q. 509, 510 (2019) ("Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent"); *id.* at 510-11 (reporting 900 instances in which "bear arms" was used to refer to military or collective use of firearms and only 7 instances that were either ambiguous or without a military connotation).

These are just two examples. Other scholars have continued to write books and articles arguing that the Court's decision in *Heller* misread the text and history of the Second Amendment. *See generally, e.g.*, M. Waldman, The Second Amendment (2014); S. Cornell, The Changing Meaning of the Right To Keep and Bear Arms: 1688-1788, in Guns in Law 20-27 (A. Sarat, L. Douglas,

& M. Umphrey eds. 2019); P. Finkelman, The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court, 37 Cardozo L. Rev. 623 (2015); D. Walker, Necessary to the Security of Free States: The Second Amendment as the Auxiliary Right of Federalism, 56 Am. J. Legal Hist. 365 (2016); W. Merkel, *Heller* as Hubris, and How *McDonald* v. *City of Chicago* May Well Change the Constitutional World as We Know It, 50 Santa Clara L. Rev. 1221 (2010).

I repeat that I do not cite these arguments in order to relitigate *Heller*. I wish only to illustrate the difficulties that may befall lawyers and judges when they attempt to rely *solely* on history to interpret the Constitution. In *Heller*, we attempted to determine the scope of the Second Amendment right to bear arms by conducting a historical analysis, and some of us arrived at very different conclusions based on the same historical sources. Many experts now tell us that the Court got it wrong in a number of ways. That is understandable given the difficulty of the inquiry that the Court attempted to undertake. The Court's past experience with historical analysis should serve as a warning against relying exclusively, or nearly exclusively, on this mode of analysis in the future.

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. The Court's historical analysis in this case is over 30 pages long and reviews numerous original sources from over 600 years of English and American history. Lower courts — especially district courts — typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court's approach requires. Tellingly, even the Courts of Appeals that have addressed the question presented here (namely, the constitutionality of public carriage restrictions like New York's) "have, in large part, avoided extensive historical analysis." *Young* v. *Hawaii*, 992 F.3d 765, 784-785 (9th Cir. 2021) (collecting cases). In contrast, lawyers and courts are well equipped to administer means-end scrutiny, which is regularly applied in a variety of constitutional contexts.

Second, the Court's opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. . . . Other than noting that its history-only analysis is "neither a . . . straightjacket nor a . . . blank check," the Court offers little explanation of how stringently its test should be applied. Ironically, the only two "relevan[t]" metrics that the Court does identify are "how and why" a gun control regulation "burden[s the] right to armed self-defense." In other words, the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why) — even as it rejects the utility of means-end scrutiny.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court believes that some historical laws and decisions cannot justify upholding modern regulations because, it says, they were outliers. It explains that just two court decisions or three colonial laws are not enough to satisfy its test. But the Court does not say how many cases or laws would suffice "to show a tradition of public-carry regulation." Other laws are irrelevant, the Court claims, because they are too dissimilar from New York's concealed-carry licensing regime. But the Court does not say what "representative historical analogue," short of a "twin" or a "dead ringer," would suffice. Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd. At worst, they create a one-way ratchet that will disqualify virtually any "representative historical analogue" and make it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security.

Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. As an initial matter, many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed. Unsurprisingly, the extent to which colonial statutes enacted over 200 years ago were actually enforced, the basis for an acquittal in a 17th-century decision, and the interpretation of English laws from the Middle Ages (to name just a few examples) are often less than clear. And even historical experts may reach conflicting conclusions based on the same sources. *Compare, e.g.*, P. Charles, The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review, 60 Clev. St. L. Rev. 1, 14 (2012), *with* J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 104 (1994). As a result, history, as much as any other interpretive method, leaves ample discretion to "loo[k] over the heads of the [crowd] for one's friends." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 377 (2012).

Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court's apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was "predominantly rural." C. McKirdy, Misreading the Past: The Faulty Historical Basis Behind the Supreme Court's Decision in District of Columbia v. Heller, 45 Capital U. L. Rev. 107, 151 (2017). In 1790, most of America's relatively small population of just four million people lived on farms or in small towns. *Ibid.* Even New York City, the largest American city then, as it is now, had a population of just 33,000 people. *Ibid.* Small founding-era towns are unlikely to have faced the same degrees and types of

risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs. *Id.* at 152 ("For the most part, a population living on farms and in very small towns did not create conditions in which firearms created a significant danger to the public welfare").

This problem is all the more acute when it comes to "modern-day circumstances that [the Framers] could not have anticipated." *Heller*, 554 U.S. at 721-722, (BREYER, J., dissenting). How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns" constructed with the aid of a three-dimensional printer? *See, e.g.*, White House Briefing Room, FACT SHEET: The Biden Administration Cracks Down on Ghost Guns, Ensures That ATF Has the Leadership It Needs To Enforce Our Gun Laws (Apr. 11, 2022), https://whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/. Or modern laws requiring all gun shops to offer smart guns, which can only be fired by authorized users? *See, e.g.*, N.J. Stat. Ann. §2C:58-2.10(a). Or laws imposing additional criminal penalties for the use of bullets capable of piercing body armor? *See, e.g.*, 18 U.S.C. §§921(a)(17)(B), 929(a).

The Court's answer is that judges will simply have to employ "analogical reasoning." But, as I explained above, the Court does not provide clear guidance on how to apply such reasoning. Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances. The Court affirms *Heller*'s recognition that States may forbid public carriage in "sensitive places." But what, in 21st-century New York City, may properly be considered a sensitive place? Presumably "legislative assemblies, polling places, and courthouses," which the Court tells us were among the "relatively few" places "where weapons were altogether prohibited" in the 18th and 19th centuries. On the other hand, the Court also tells us that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines th[at] category . . . far too broadly." So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say.

Although I hope — fervently — that future courts will be able to identify historical analogues supporting the validity of regulations that address new technologies, I fear that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified. Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern

problems. And as technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

IV

Indeed, the Court's application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York's licensing requirements do today. Thus, even applying the Court's history-only analysis, New York's law must be upheld because "historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation."

A. England.

The right codified by the Second Amendment was "'inherited from our English ancestors.'" *Heller*, 554 U.S. at 599 (quoting *Robertson* v. *Baldwin*, 165 U.S. 275, 281, (1897)). And some of England's earliest laws regulating the public carriage of weapons were precursors of similar American laws enacted roughly contemporaneously with the ratification of the Second Amendment. I therefore begin, as the Court does, with the English ancestors of New York's laws regulating public carriage of firearms.

The relevant English history begins in the late-13th and early-14th centuries, when Edward I and Edward II issued a series of orders to local sheriffs that prohibited any person from "going armed." *See* 4 Calendar of the Close Rolls, Edward I, 1296-1302, p.318 (Sept. 15, 1299) (1906); *id.* at 588 (July 16, 1302); 5 *id.* Edward I, 1302-1307, at 210 (June 10, 1304) (1908); *id.* Edward II, 1307-1313, at 52 (Feb. 9, 1308) (1892); *id.* at 257 (Apr. 9, 1310); *id.* at 553 (Oct. 12, 1312); *id.* Edward II, 1323-1327, at 560 (Apr. 28, 1326) (1898); 1 Calendar of Plea and Memoranda Rolls of the City of London, 1323-1364, p.15 (Nov. 1326) (A. Thomas ed. 1926). Violators were subject to punishment, including "forfeiture of life and limb." *See, e.g.*, 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299) (1906). Many of these royal edicts contained exemptions for persons who had obtained "the king's special licence." *See ibid.*; 5 *id.* Edward I, 1302-1307, at 210 (June 10, 1304); *id.* Edward II,

1307-1313, at 553 (Oct. 12, 1312); *id.* Edward II, 1323-1327, at 560 (Apr. 28, 1326). Like New York's law, these early edicts prohibited public carriage absent special governmental permission and enforced that prohibition on pain of punishment.

The Court seems to suggest that these early regulations are irrelevant because they were enacted during a time of "turmoil" when "malefactors . . . harried the country, committing assaults and murders." *Ante*, at 31 (internal quotation marks omitted). But it would seem to me that what the Court characterizes as a "right of armed self-defense" would be more, rather than less, necessary during a time of "turmoil." The Court also suggests that laws that were enacted before firearms arrived in England, like these early edicts and the subsequent Statute of Northampton, are irrelevant. But why should that be? Pregun regulations prohibiting "going armed" in public illustrate an entrenched tradition of restricting public carriage of weapons. That tradition seems as likely to apply to firearms as to any other lethal weapons — particularly if we follow the Court's instruction to use analogical reasoning. And indeed, as we shall shortly see, the most significant prefirearm regulation of public carriage — the Statute of Northampton — was in fact applied to guns once they appeared in England. *See Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686)

The Statute of Northampton was enacted in 1328. 2 Edw. 3, 258, c. 3. By its terms, the statute made it a criminal offense to carry arms without the King's authorization. It provided that, without such authorization, "no Man great nor small, of what Condition soever he be," could "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." *Ibid.* For more than a century following its enactment, England's sheriffs were routinely reminded to strictly enforce the Statute of Northampton against those going armed without the King's permission. *See* Calendar of the Close Rolls, Edward III, 1330-1333, at 131 (Apr. 3, 1330) (1898); 1 Calendar of the Close Rolls, Richard II, 1377-1381, at 34 (Dec. 1, 1377) (1914); 2 *id.* Richard II, 1381-1385, at 3 (Aug. 7, 1381) (1920); 3 *id.* Richard II, 1385-1389, at 128 (Feb. 6, 1386) (1921); *id.* at 399-400 (May 16, 1388); 4 *id.* Henry VI, 1441-1447, at 224 (May 12, 1444) (1937); *see also* 11 Tudor Royal Proclamations, The Later Tudors: 1553-1587, pp. 442-445 (Proclamation 641, 21 Elizabeth I, July 26, 1579) (P. Hughes & J. Larkin eds. 1969).

The Court thinks that the Statute of Northampton "has little bearing on the Second Amendment," in part because it was "enacted . . . more than 450 years before the ratification of the Constitution." The statute, however, remained in force for hundreds of years, well into the 18th century. See 4 W. Blackstone, Commentaries 148-49 (1769) ("The offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public

peace, by terrifying the good people of the land; *and is particularly prohibited by the Statute of Northampton*" (first emphasis in original, second emphasis added)). It was discussed in the writings of Blackstone, Coke, and others. *See ibid.*; W. Hawkins, 1 Pleas of the Crown 135 (1716) (Hawkins); E. Coke, The Third Part of the Institutes of the Laws of England 160 (1797). And several American Colonies and States enacted restrictions modeled on the statute. *See infra*, at 40-42. There is thus every reason to believe that the Framers of the Second Amendment would have considered the Statute of Northampton a significant chapter in the Anglo-American tradition of firearms regulation.

The Court also believes that, by the end of the 17th century, the Statute of Northampton was understood to contain an extratextual intent element: the intent to cause terror in others. The Court relies on two sources that arguably suggest that view: a 1686 decision, *Sir John Knight's Case*, and a 1716 treatise written by Serjeant William Hawkins. But other sources suggest that carrying arms in public was prohibited *because* it naturally tended to terrify the people. *See*, *e.g.*, M. Dalton, The Country Justice 282-83 (1690) ("[T]o wear Armor, or Weapons not usually worn . . . seems also be a breach, or means of breach of the Peace . . . ; *for* they strike a fear and terror in the People" (emphasis added)). According to these sources, terror was the natural consequence — not an additional element — of the crime.

I find this view more persuasive in large part because it is not entirely clear that the two sources the Court relies on actually support the existence of an intent-to-terrify requirement. Start with *Sir John Knight's Case*, which, according to the Court, considered Knight's arrest for walking "'about the streets'" and into a church "'armed with guns.'" (quoting *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep., at 76). The Court thinks that Knight's acquittal by a jury demonstrates that the Statute of Northampton only prohibited public carriage of firearms with an intent to terrify. But by now the legal significance of Knight's acquittal is impossible to reconstruct. Brief for Patrick J. Charles as *Amicus Curiae* 23, n.9. The primary source describing the case (the English Reports) was notoriously incomplete at the time *Sir John Knight's Case* was decided. *Id.* at 24-25. And the facts that historians can reconstruct do not uniformly support the Court's interpretation. The King's Bench required Knight to pay a surety to guarantee his future good behavior, so it may be more accurate to think of the case as having ended in "a conditional pardon" than acquittal. *Young*, 992 F.3d at 791; *see also Rex* v. *Sir John Knight*, 1 Comb. 40, 90 Eng. Rep. 331 (K. B. 1686). And, notably, it appears that Knight based his defense on his loyalty to the Crown, not a lack of intent to terrify. 3 The Entring Book of Roger Morrice 1677-1691: The Reign of James II, 1685-1687, pp. 307-308 (T. Harris ed. 2007).

Similarly, the passage from the Hawkins treatise on which the Court relies states that the Statute of Northampton's prohibition on the public carriage of weapons did not apply to the "wearing of Arms . . . unless it be accompanied

with such Circumstances as are apt to terrify the People." Hawkins 136. But Hawkins goes on to enumerate relatively narrow circumstances where this exception applied: when "Persons of Quality . . . wea[r] common Weapons, or hav[e] their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them," or to persons merely wearing "privy Coats of Mail." *Ibid.* It would make little sense if a narrow exception for nobility, see Oxford English Dictionary (3d ed., Dec. 2012), https://www.oed.com/view/Entry/155878 (defining "quality," A.I.5.a), and "privy coats of mail" were allowed to swallow the broad rule that Hawkins (and other commentators of his time) described elsewhere. That rule provided that "there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is . . . strictly prohibited by [the Statute of Northampton]." Hawkins 135. And it provided no exception for those who attempted to "excuse the wearing such Armour in Publick, by alleging that . . . he wears it for the Safety of his Person from . . . Assault." *Id.* at 136. In my view, that rule announces the better reading of the Statute of Northampton — as a broad prohibition on the public carriage of firearms and other weapons, without an intent-to-terrify requirement or exception for self-defense.

Although the Statute of Northampton is particularly significant because of its breadth, longevity, and impact on American law, it was far from the only English restriction on firearms or their carriage. See, *e.g.*, 6 Hen. 8 c. 13, §1 (1514) (restricting the use and ownership of handguns); 25 Hen. 8 c. 17, §1 (1533) (same); 33 Hen. 8 c. 6, §§1-2 (1541) (same); 25 Edw. 3, st. 5, c. 2 (1350) (making it a "Felony or Trespass" to "ride armed covertly or secretly with Men of Arms against any other, to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance") (brackets and footnote omitted). Whatever right to bear arms we inherited from our English forebears, it was qualified by a robust tradition of public carriage regulations.

As I have made clear, I am not a historian. But if the foregoing facts, which historians and other scholars have presented to us, are even roughly correct, it is difficult to see how the Court can believe that English history fails to support legal restrictions on the public carriage of firearms.

B. The Colonies.

The American Colonies continued the English tradition of regulating public carriage on this side of the Atlantic. In 1686, the colony of East New Jersey passed a law providing that "no person or persons . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province." An Act Against Wearing Swords, &c., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881). East New Jersey also specifically prohibited

"planter[s]" from "rid[ing] or go[ing] armed with sword, pistol, or dagger." *Ibid.* Massachusetts Bay and New Hampshire followed suit in 1692 and 1771, respectively, enacting laws that, like the Statute of Northampton, provided that those who went "armed Offensively" could be punished. An Act for the Punishing of Criminal Offenders, 1692 Mass. Acts and Laws no. 6, pp. 11-12; An Act for the Punishing of Criminal Offenders, 1771 N.H. Acts and Laws ch. 6, §5, p.17.

It is true, as the Court points out, that these laws were only enacted in three colonies. But that does not mean that they may be dismissed as outliers. They were successors to several centuries of comparable laws in England, and predecessors to numerous similar (in some cases, materially identical) laws enacted by the States after the founding. And while it may be true that these laws applied only to "dangerous and unusual weapons," that category almost certainly included guns, see Charles, 60 Clev. St. L. Rev., at 34, n.181 (listing 18th century sources defining "'offensive weapons'" to include "'Fire Arms'" and "'Guns'"); *State* v. *Huntly*, 25 N.C. 418, 422 (1843) (*per curiam*) ("A gun is an 'unusual weapon,' wherewith to be armed and clad"). Finally, the Court points out that New Jersey's ban on public carriage applied only to certain people or to the concealed carriage of certain smaller firearms. But the Court's refusal to credit the relevance of East New Jersey's law on this basis raises a serious question about what, short of a "twin" or a "dead ringer," qualifies as a relevant historical analogue.

C. The Founding Era.

The tradition of regulations restricting public carriage of firearms, inherited from England and adopted by the Colonies, continued into the founding era. Virginia, for example, enacted a law in 1786 that, like the Statute of Northampton, prohibited any person from "go[ing] nor rid[ing] armed by night nor by day, in fairs or markets, or in other places, in terror of the Country." 1786 Va. Acts, ch. 21. And, as the Court acknowledges, "public-carry restrictions proliferate[d]" after the Second Amendment's ratification five years later in 1791. Just a year after that, North Carolina enacted a law whose language was lifted from the Statute of Northampton virtually verbatim (vestigial references to the King included). Collection of Statutes, pp. 60-61, ch. 3 (F. Martin ed. 1792)[1] Other States passed similar laws in the late-18th and 19th centuries. *See, e.g.*, 1795 Mass. Acts and Laws ch. 2, p.436 ; 1801 Tenn.

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[1] The validity of this statute is subious, as indicated by the supposed reference to "the King." The State of North Carolina later officially declared that the book "was utterly unworthy of the talents and industry of the distinguished compiler, omitting many statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province, or in the State." *Preface of the Commissioners of 1838*, Revised Code of North Carolina xiii (1855).–EDS.

Acts pp. 260-261; 1821 Me. Laws p.285; *see also* Charles, 60 Clev. St. L. Rev. at 40, n.213 (collecting sources).

The Court discounts these laws primarily because they were modeled on the Statute of Northampton, which it believes prohibited only public carriage with the intent to terrify. I have previously explained why I believe that preventing public terror was one *reason* that the Statute of Northampton prohibited public carriage, but not an *element* of the crime. And, consistent with that understanding, American regulations modeled on the Statute of Northampton appear to have been understood to set forth a broad prohibition on public carriage of firearms without any intent-to-terrify requirement. See Charles, 60 Clev. St. L. Rev. at 35, 37-41; J. Haywood, A Manual of the Laws of North-Carolina, pt. 2, p.40 (3d ed.1814); J. Ewing, The Office and Duty of a Justice of the Peace 546 (1805).

The Court cites three cases considering common-law offenses, but those cases do not support the view that only public carriage in a manner likely to terrify violated American successors to the Statute of Northampton. If anything, they suggest that public carriage of firearms was not common practice. At least one of the cases the Court cites, *State* v. *Huntly*, wrote that the Statute of Northampton codified a pre-existing common-law offense, which provided that "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, *by* terrifying the good people of the land." 25 N.C. at 420-421 (quoting 4 Blackstone, Commentaries, at 149; emphasis added). *Huntly* added that "[a] gun is an 'unusual weapon'" and that "[n]o man amongst us carries it about with him, as one of his every-day accoutrements — as a part of his dress — and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment." 25 N.C. at 422. True, *Huntly* recognized that citizens were nonetheless "at perfect liberty" to carry for "lawful purpose[s]" — but it specified that those purposes were "business or amusement." *Id.* at 422-23. New York's law similarly recognizes that hunting, target shooting, and certain professional activities are proper causes justifying lawful carriage of a firearm. The other two cases the Court cites for this point similarly offer it only limited support — either because the atextual intent element the Court advocates was irrelevant to the decision's result, see *O'Neill* v. *State*, 16 Ala. 65 (1849), or because the decision adopted an outlier position not reflected in the other cases cited by the Court, see *Simpson* v. *State*, 13 Tenn. 356, 360 (1833). The founding-era regulations — like the colonial and English laws on which they were modeled — thus demonstrate a longstanding tradition of broad restrictions on public carriage of firearms.

D. The 19th Century.

Beginning in the 19th century, States began to innovate on the Statute of Northampton in at least two ways. First, many States and Territories passed

bans on concealed carriage or on any carriage, concealed or otherwise, of certain concealable weapons. For example, Georgia made it unlawful to carry, "unless in an open manner and fully exposed to view, any pistol, (except horseman's pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives, manufactured and sold for the purpose of offence and defence." Ga. Code §4413 (1861). Other States and Territories enacted similar prohibitions. See, *e.g.*, Ala. Code §3274 (1852) (banning, with limited exceptions, concealed carriage of "a pistol, or any other description of fire arms"); *see also ante*, at 44, n.16 (majority opinion) (collecting sources). And the Territory of New Mexico appears to have banned all carriage whatsoever of "any class of pistols whatever," as well as "bowie kni[ves,] . . . Arkansas toothpick[s], Spanish dagger[s], slung-shot[s], or any other deadly weapon." 1860 Terr. of N.M. Laws §§1-2, p.94. These 19th-century bans on concealed carriage were stricter than New York's law, for they prohibited concealed carriage with at most limited exceptions, while New York permits concealed carriage with a lawfully obtained license. Moreover, as *Heller* recognized, and the Court acknowledges, "the majority of the 19th-century courts to consider the question held that [these types of] prohibitions on carrying concealed weapons *were lawful* under the Second Amendment or state analogues." 554 U.S. at 626 (emphasis added).

The Court discounts this history because, it says, courts in four Southern States suggested or held that a ban on concealed carriage was only lawful if open carriage or carriage of military pistols was allowed. The Court also cites *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822), which invalidated Kentucky's concealed-carry prohibition as contrary to that State's Second Amendment analogue. *Bliss* was later overturned by constitutional amendment and was, as the Court appears to concede, an outlier. Several of these decisions, however, emphasized States' leeway to regulate firearms carriage as necessary "to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence." *State* v. *Smith*, 11 La. Ann. 633 (1856); *see also Andrews* v. *State*, 50 Tenn. 165, 179-180 (1871) (stating that "the right to *keep*" rifles, shotguns, muskets, and repeaters could not be "*infringed* or *forbidden*," but "[t]heir *use* [may] be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right"); *State* v. *Reid*, 1 Ala. 612, 616 (1840) (recognizing that the constitutional right to bear arms "necessarily . . . leave[s] with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals"). And other courts upheld concealed-carry restrictions without any reference to an exception allowing open carriage, so it is far from clear that the cases the Court cites represent a consensus view. See *State* v. *Mitchell*, 3 Blackf. 229 (Ind. 1833); *State* v. *Buzzard*, 4 Ark. 18 (1842). And, of course, the

Court does not say whether the result in this case would be different if New York allowed open carriage by law-abiding citizens as a matter of course.

The second 19th-century innovation, adopted in a number of States, was surety laws. Massachusetts' surety law, which served as a model for laws adopted by many other States, provided that any person who went "armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon," and who lacked "reasonable cause to fear an assualt [*sic*]," could be made to pay a surety upon the "complaint of any person having reasonable cause to fear an injury, or breach of the peace." Mass. Rev. Stat., ch. 134, §16 (1836). Other States and Territories enacted identical or substantially similar laws. These laws resemble New York's licensing regime in many, though admittedly not all, relevant respects. Most notably, like New York's proper cause requirement, the surety laws conditioned public carriage in at least some circumstances on a special showing of need.

The Court believes that the absence of recorded cases involving surety laws means that they were rarely enforced. Of course, this may just as well show that these laws were normally followed. In any case, scholars cited by the Court tell us that "traditional case law research is not especially probative of the application of these restrictions" because "in many cases those records did not survive the passage of time" or "are not well indexed or digitally searchable." E. Ruben & S. Cornell, Firearms Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context, 125 Yale L.J. Forum 121, 130-131, n.53 (2015). On the contrary, "the fact that restrictions on public carry were well accepted in places like Massachusetts and were included in the relevant manuals for justices of the peace" suggests "that violations were enforced at the justice of peace level, but did not result in expensive appeals that would have produced searchable case law." *Id.* at 131 n.53 (citation omitted). The surety laws and broader bans on concealed carriage enacted in the 19th century demonstrate that even relatively stringent restrictions on public carriage have long been understood to be consistent with the Second Amendment and its state equivalents.

E. Postbellum Regulation.

After the Civil War, public carriage of firearms remained subject to extensive regulation. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., 908 (1866) ("The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons"). Of course, during this period, Congress provided (and commentators recognized) that firearm regulations could not be designed or enforced in a discriminatory manner. See *ibid.*; Act of July 16, 1866, §14, 14 Stat. 176-177 (ensuring that all citizens were entitled to the "full and equal benefit of all laws . . . including the constitutional right to keep and bear arms . . . without respect to race or color, or previous

condition of slavery"); *see also* The Loyal Georgian, Feb. 3, 1866, p.3, col. 4. But that by-now uncontroversial proposition says little about the validity of nondiscriminatory restrictions on public carriage, like New York's.

. . . Most notably, many States and Western Territories enacted stringent regulations that prohibited *any* public carriage of firearms, with only limited exceptions. For example, Texas made it a misdemeanor to carry in public "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense" absent "reasonable grounds for fearing an [immediate and pressing] unlawful attack." 1871 Tex. Gen. Laws ch. 34, §1. Similarly, New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory." 1869 Terr. of N.M. Laws ch. 32, §1. New Mexico's prohibition contained only narrow exceptions for carriage on a person's own property, for self-defense in the face of immediate danger, or with official authorization. *Ibid.* Other States and Territories adopted similar laws. See, *e.g.*, 1875 Wyo. Terr. Sess. Laws ch. 52, §1; 1889 Idaho Terr. Gen. Laws §1, p.23; 1881 Kan. Sess. Laws §23, p.92; 1889 Ariz. Terr. Sess. Laws no. 13, §1, p.16.

When they were challenged, these laws were generally upheld. P. Charles, The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters, 64 Clev. St. L. Rev. 373, 414 (2016); *see also ante*, at 56-57 (majority opinion) (recognizing that postbellum Texas law and court decisions support the validity of New York's licensing regime); *Andrews*, 50 Tenn. at 182 (recognizing that "a man may well be prohibited from carrying his arms to church, or other public assemblage," and that the carriage of arms other than rifles, shot guns, muskets, and repeaters "may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances").

The Court's principal answer to these broad prohibitions on public carriage is to discount gun control laws passed in the American West. It notes that laws enacted in the Western Territories were "rarely subject to judicial scrutiny." But, of course, that may well mean that "[w]e . . . can assume it settled that these" regulations were "consistent with the Second Amendment." See *ante*, at 21 (majority opinion). The Court also reasons that laws enacted in the Western Territories applied to a relatively small portion of the population and were comparatively short lived. But even assuming that is true, it does not mean that these laws were historical aberrations. To the contrary, bans on public carriage in the American West and elsewhere constitute just one chapter of the centuries-old tradition of comparable firearms regulations described above.

F. The 20th Century.

The Court disregards "20th-century historical evidence." But it is worth noting that the law the Court strikes down today is well over 100 years old,

having been enacted in 1911 and amended to substantially its present form in 1913. That alone gives it a longer historical pedigree than at least three of the four types of firearms regulations that *Heller* identified as "presumptively lawful." 554 U.S. at 626-27 & n.26; see C. Larson, Four Exceptions in Search of a Theory: *District of Columbia* v. *Heller* and Judicial *Ipse Dixit*, 60 Hastings L.J. 1371, 1374-1379 (2009) (concluding that "'prohibitions on the possession of firearms by felons and the mentally ill [and] laws imposing conditions and qualifications on the commercial sale of arms'" have their origins in the 20th century); *Kanter* v. *Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons"). Like JUSTICE KAVANAUGH, I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding. But unlike JUSTICE KAVANAUGH, I find the disconnect between *Heller*'s treatment of laws prohibiting, for example, firearms possession by felons or the mentally ill, and the Court's treatment of New York's licensing regime, hard to square. The inconsistency suggests that the Court today takes either an unnecessarily cramped view of the relevant historical record or a needlessly rigid approach to analogical reasoning.

The historical examples of regulations similar to New York's licensing regime are legion. Closely analogous English laws were enacted beginning in the 13th century, and similar American regulations were passed during the colonial period, the founding era, the 19th century, and the 20th century. Not all of these laws were identical to New York's, but that is inevitable in an analysis that demands examination of seven centuries of history. At a minimum, the laws I have recounted *resembled* New York's law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes. That is all that the Court's test, which allows and even encourages "analogical reasoning," purports to require.

In each instance, the Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

V

We are bound by *Heller* insofar as *Heller* interpreted the Second Amendment to protect an individual right to possess a firearm for self-defense.

But *Heller* recognized that that right was not without limits and could appropriately be subject to government regulation. 554 U.S. at 626-627. *Heller* therefore does not require holding that New York's law violates the Second Amendment. In so holding, the Court goes beyond *Heller*.

. . . [T]he history, as it appears to me, seems to establish a robust tradition of regulations restricting the public carriage of concealed firearms. To the extent that any uncertainty remains between the Court's view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny. Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.

The Second Circuit has previously done just that, and it held that New York's law does not violate the Second Amendment. *See Kachalsky*, 701 F.3d at 101. It first evaluated the degree to which the law burdens the Second Amendment right to bear arms. *Id.* at 93-94. It concluded that the law "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," but does not burden the right to possess a firearm in the home, where *Heller* said "'the need for defense of self, family, and property is most acute.'" *Kachalsky*, 701 F.3d at 93-94 (quoting *Heller*, 554 U.S. at 628). The Second Circuit therefore determined that the law should be subject to heightened scrutiny, but not to strict scrutiny and its attendant presumption of unconstitutionality. 701 F.3d at 93-94. In applying such heightened scrutiny, the Second Circuit recognized that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." *Id.* at 97. I agree. As I have demonstrated above, see *supra*, at 3-9, firearms in public present a number of dangers, ranging from mass shootings to road rage killings, and are responsible for many deaths and injuries in the United States. The Second Circuit then evaluated New York's law and concluded that it is "substantially related" to New York's compelling interests. *Kachalsky*, 701 F.3d at 98-99. To support that conclusion, the Second Circuit pointed to "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Id.* at 99. We have before us additional studies confirming that conclusion. And we have been made aware of no less restrictive, but equally effective, alternative. After considering all of these factors, the Second Circuit held that New York's law does not unconstitutionally burden the right to bear arms under the Second Amendment. I would affirm that holding.

New York's Legislature considered the empirical evidence about gun violence and adopted a reasonable licensing law to regulate the concealed

carriage of handguns in order to keep the people of New York safe. The Court today strikes down that law based only on the pleadings. It gives the State no opportunity to present evidence justifying its reasons for adopting the law or showing how the law actually operates in practice, and it does not so much as acknowledge these important considerations. Because I cannot agree with the Court's decision to strike New York's law down without allowing for discovery or the development of any evidentiary record, without considering the State's compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision, I respectfully dissent.

C. THE FOUR GVRs

A week after *Bruen*, the Supreme Court granted certiorari in four cases, vacated their judgments, and remanded them — a procedure often referred to as a "GVR" — for reconsideration in light of *Bruen.*

Two involved state statutes for the confiscation of magazines holding more than 10 rounds. In the California case, the district court held the law unconstitutional, as did a 2-1 Ninth Circuit panel. But a divided en banc Ninth Circuit reversed and upheld the law. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated* 2022 WL 2347579. In the New Jersey case, the district judge upheld the challenged statute, as did a 2-1 Third Circuit panel. The petition for rehearing en banc fell short by one judge's vote. *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Attorney General N.J.*, 974 F.3d 237 (3d Cir. 2020), *vacated* 2022 WL 2347576.

The third case involved a challenge to Maryland's ban on many semiautomatic rifles. This case, like *Bruen*, was contrary to circuit precedent, *Kolbe v. Hogan* (Ch. 15.A). In *Kolbe*, the district court upheld the ban under intermediate scrutiny, but a 2-1 Fourth Circuit panel said that strict scrutiny should have been used. A divided Fourth Circuit, sitting en banc, ruled that the arms at issue were outside the scope of Second Amendment protection or, alternatively, the law was constitutional under intermediate scrutiny. The post-*Bruen* grant, vacate, and remand was in *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), *vacated* 2022 WL 2347601.

While the above cases are certain to continue, the final case with a GVR may not. *Young v. State of Hawaii* started as a *pro se* case by a fisherman who wanted to carry a handgun when angling in remote areas. *Young* went one way before a panel and the other way en banc. The en banc majority held that there is no right to "bear arms" outside one's property. *Young v. State of Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc). The Hawaii Attorney General advised sheriff's office to begin issuing concealed carry permits. All procedural rules

about permitting, such as fees, background checks, etc., still apply.[2] So presumably, Hawaii County will issue Mr. Young a permit.

D. BRUEN *RULES*

Chapter 12.A. presented some rules from *Heller* and *McDonald*. Below are some from *Bruen*:

The core rule

> The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.[3]

The core test

Second Amendment cases should be decided by "text, as informed by history." *Id.*at 2127 The "standard for applying the Second Amendment is as follows":

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[4]

As with any constitutional issue, the first question to ask is whether the conduct implicates the constitutional text. If a Fourth Amendment litigant sued because "[t]he police officer stared at me for half an hour while I ate at

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[2] Hawaii Attorney General, Op. No. 22-02 (July 7, 2022). For similar directives, *see* Massachusetts Attorney General and Executive Office of Public Safety, "Joint Advisory Regarding the Massachusetts Firearms Licensing System After the Supreme Court's Decision in *New York State Rifle & Pistol Association v. Bruen*"; Maryland Attorney General, letter to Captain Andrew Rossignol, Commander of the Maryland State Police Licensing Division; New Jersey Attorney General Enforcement Directive No. 22-07.

[3] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (quoting *McDonald*, 561 U.S. at 780).

[4] *Id.* at 2129-30 (quotation omitted).

the diner," the court would dismiss the complaint, because staring at a person in a public place is neither a "search" nor a "seizure," so there is no Fourth Amendment issue.

Similarly, with the First Amendment, a threshold question is whether a government action implicates "the freedom of speech." Under current precedent, a municipal ordinance that pool halls must close by 11 p.m. does not raise a "freedom of speech" issue, even though the ordinance limits conversation while playing pool. Conversely, students wearing black armband to public school to protest the Vietnam War does implicate "the freedom of speech." Even though no words are used, a message is expressed.[5]

In a Second Amendment context, a litigant who complains about extremely strict federal regulations for the manufacture of sarin nerve gas will have his case dismissed, with no need for consideration of the legal history of the regulation of nerve gas. *Heller* states that "dangerous and unusual weapons" are not protected by the Second Amendment.[6] Sarin is obviously dangerous and unusual.

The burden of proof is on the government

Assuming that a restricted activity does implicate the right to keep arms or the right to bear arms, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[7]

Judges do not bear the burden of researching legal history. "Courts are thus entitled to decide a case based on the historical record compiled by the parties."[8] "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden."[9]

The judiciary should not defer to the legislature

> "[W]hile … judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms"

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[5] *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).
[6] 554 U.S. at 627.
[7] *Bruen*, 142 S. Ct., at 2127.
[8] *Id.* at 2130 n.5.
[9] *Id.* at 2150.

for self-defense. It is this balance — struck by the traditions of the American people — that demands our unqualified deference."[10]

What history matters most?

"Not all history is created equal" — because "'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'"[11] Most important, according to *Bruen*, is the Founding Era, when the Second Amendment was ratified. Also important is Reconstruction — a period some historians call "The Second Founding" — when the Fourteenth Amendment was enacted in part of make the Second Amendment enforceable about state and local governments.

What if the 1791 era meaning of the right to arms was different from the Reconstruction era meaning? The majority opinion and Justice Barrett's concurrence both acknowledge, that the answer is unresolved. In *Bruen*, answering the question was unnecessary, because the evidence of a robust Second Amendment right to bear arms during Reconstruction was just as strong as it was for the original Founding Period.[12]

As for other historical periods:

- "English practices that 'prevailed up to the "period immediately before and after the framing of the Constitution"" and were "'acted upon or accepted in the colonies'" are relevant.[13]
- The colonial period is relevant to the extent that it informed the original understanding of the Second Amendment.[14]
- "'[H]ow the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century'" is "'a critical tool of constitutional interpretation'" "'to determine *the public understanding* of a legal text in the period after its enactment or ratification.'"[15]
- However, one must "guard against giving postenactment history more weight than it can rightly bear."[16] "[T]o the extent later history contradicts what the text says, the text controls."[17] "'[P]ostratification adoption or acceptance of laws that are *inconsistent* with the original

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[10] *Id.* at 2131 (quoting *Heller*, 554 U.S. at 635).

[11] *Id.* at 2136 (quoting *Heller* at 634-35) (emphasis in *Bruen*). This is the most-quoted sentence from *Heller*, since it applies to constitutional interpretation in general, not just the Second Amendment.

[12] *Id.* at 2138; *see also id.* at 2162-63 (Barret, J., concurring).

[13] *Id.* at 2136 (quoting *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting) and *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)).

[14] *Id.* at 2142-44.

[15] *Id.* at 2127-28, 2153-54 & n.28 (quoting *Heller*, 554 U.S. at 605)

[16] *Id.*

[17] *Id.* at 2137.

meaning of the constitutional text obviously cannot overcome or alter that text.'"[18]
    - Late-nineteenth-century laws, however, "cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." [19] The late 19th century is important insofar as it provides "confirmation of what . . . had already been established" by earlier history.[20]
    - "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence"[21]
- "[A] regular course of practice' can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution."[22]
- "[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them."[23]
- "In other words, we recognize that 'where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.'"[24]
- "To the extent there are multiple plausible interpretations of *Sir John Knight's Case*, we will favor the one that is more consistent with the Second Amendment's command."[25] Presumably this principle applies to other arguably ambiguous precedents.

Historical Analogies

A valid modern restriction can be "a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[26]

Bruen does not purport to "exhaustively" define how judges may consider how laws are "relevantly similar." *Bruen* does offer some guidelines:

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[18] *Id.* (quoting *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d at 1274, n.6 (Kavanaugh, J., dissenting)).
[19] *Id.* at 2153-54.
[20] *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1976 (2019)).
[21] *Id.* at 2154 n.28.
[22] *Id.* at 2136 (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)) (internal quotation marks omitted).
[23] *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring)).
[24] *Id.* at 2137 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).
[25] *Id.* at 2141 n.11.
[26] *Id.* at 2133.

- "[C]ourts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'"[27]
- Analogy "does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the 'product of an interest balancing by the people,' not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances. . . . It is not an invitation to revise that balance through means-end scrutiny."[28]
- "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[29]
- "[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."[30]
- "[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality."[31]
- "[O]ther cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[32]

A modern gun control and a possible historical analogue must be "relevantly similar." To consider relevant similarity, *Heller* and *McDonald* point to "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[33]

- "How" means: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense."[34]

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[27] *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).
[28] *Id.* at 2133 n.7.
[29] *Id* at 2131.
[30] *Id.*
[31] *Id.* at 2131.
[32] *Id.* at 2132.
[33] *Id.* at 2132-33. *Heller* and *McDonald* declared that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central* considerations when engaging in an analogical inquiry." *Id.* at 2133 (citing *McDonald*, 561 U.S. 767).
[34] *Id.*

- "Why" means: "whether that burden is comparably justified."[35]

Rules for the right to bear arms

- "*[T]he manner* of public carry" is "subject to reasonable regulation." For example, the legislature may ban concealed carry as long as open carry is lawful.[36]
- Firearms may be forbidden in certain "sensitive places." [37]
- "[C]ourts can use analogies to those [19th century and before] historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[38]
- "[E]xpanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly" and would "eviscerate the general right to publicly carry arms for self-defense."[39]
- "To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'general desire for self-defense is sufficient to obtain a [permit].' . . . Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily

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[35] *Id.* The second metric, the "why," is very important. It prevents historic, burdensome laws that were enacted for one purpose from being used as a basis to impose burdens for other purposes. As Mark Frassetto, an attorney for Everytown for Gun Safety, writes, "Militia and fire prevention laws imposed substantial burdens on founding era gun owners." In his view, courts should uphold laws that impose equally substantial burdens "regardless of the underlying motivation for regulation." Mark Frassetto, *The Duty to Bear Arms: Historical Militia Law, Fire Prevention Law, and the Modern Second Amendment*, *in* New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society (Jacob Charles, Joseph Blocher & Darrell Miller eds.) (Oxford Univ. Pr. forthcoming). *Bruen* expressly forbids this methodology.

[36] "The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation . . . States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly." *Bruen*, 142 S. Ct. at 2150.

[37] *Id.* at 2133 (citing David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 205, 229-236 (2018) and Brief for Independent Institute as *Amicus Curiae Supporting Petitioners)*. Note: the Independent Institute is a think tank in Oakland, California. David Kopel works at the Independence Institute, a think tank in Denver.

[38] *Id.* at 2133.

[39] *Id.* at 2134.

prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry."[40]

- "[S]hall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.' And they likewise appear to contain only 'narrow, objective, and definite standards' guiding licensing officials, rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion.'"[41]
- "[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry."[42]

NOTES & QUESTIONS

1. **CQ:** The now-rejected Two-Part Test (TPT) (a.k.a Two-Step Test) used by most but not all lower federal courts post-*Heller* is examined in depth in Chapter 12. Most of the excerpted cases in Chapters 13-16 used the TPT. As you read them you can form your own conclusions about how well the test was working. However, it should be noted that there is a selection bias in the cases that were selected for the textbook, for the same reason that there is case selection bias in all law school textbooks. We chose the best-written opinions on the most important issues. There were many TPT cases whose reasoning was relatively superficial or weak, and we did not deem them worthy of students' time.

For a broader overview of the TPT, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 Duke L.J. 1433 (2018) (TPT is working well); David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 Duke L.J. Online 79 (2018) (problems in the Second, Fourth, and Ninth Circuits); George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 Duke L.J. Online 41 (2018) (Professors Ruben and Blocher present evidence of judicial underenforcement, which would be more apparent if their study had focused on final case outcomes).

2. *Analogy "metrics." Bruen* offers two central self-defense "metrics" from *Heller* and *McDonald*, but does not claim these metrics are the only ones that

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[40] *Id.* at 2138 n.9 (citing *Drake v. Filko*, 724 F.3d 426, 442 (3d. Cir. 2013) (Hardiman, J., dissenting); *Heller*, 554 U.S. at 635).
[41] *Id.* (citations omitted).
[42] *Id.*

can be used. While the *Bruen* metrics focus on self-defense, the right to arms is for all "lawful purposes." *Heller*, 554 U.S. at 625; *McDonald*, 561 U.S. at 78. For example, recreational arms activities, such as hunting or target shooting, are in themselves part of the right. Additionally, they build skills for defense of self and others. Can you describe analogical metrics that account for "lawful purposes" besides self-defense?

3. The *Bruen* text, if read strictly, would seem to limit additions to the list to "*new*" types of sensitive places. This would rule out carry bans on types of places that were well-known in the eighteenth or nineteenth century, such as municipal parks. At present, there is much variance in state law on sensitive places, even in states that have generally respected the right to bear arms. If you wish, examine your state's laws about where licensed carry is prohibited. Which areas of prohibition are most sensible? Which are most constitutionally sound based on analogy to the "sensitive places" enumerated in *Bruen* and *Heller*: courthouses, polling places, legislative assemblies, schools, and government buildings? Which are "*new*" (emphasis in *Bruen*) in that they did not exist in the nineteenth century or before?

4. *Bruen* warns against "exorbitant" fees for carry permits. Georgetown law professor Randy Barnett described the $505 cost of obtaining a D.C. permit. Thereafter, the D.C. cost is $235 triennially for permit renewals. In Barnett's view, some of the mandatory training was essential information for students to know about D.C.'s rules about deadly force, sensitive places, and so on. But he considered the 18 hours of training to be excessive, and mainly for the purpose of erecting barriers to applicants. Unlike many jurisdictions, D.C. mandates that all the training must take place in person in classrooms. Many other states allow training on-line at one's own pace, plus in-person live fire training at a range. "I can afford all this, of course, though I cannot say the same for all other citizens of D.C.," Barnett concluded. Randy Barnett, *A Minor Impact on Gun Laws But a Potentially Momentous Shift in Constitutional Method*, SCOTUSBlog.com (June 27, 2022). Are the D.C. fees and costs vulnerable to constitutional challenge?

5. While joining Justice Thomas's opinion in full, Justice Kavanaugh wrote a concurring opinion, joined by Chief Justice Roberts. They stated that "a mental health records check" could be part of a shall-issue system. *Id.* at 2162. Mental health records are already checked for all retail gun purchases, and for all concealed carry permit applications, pursuant to the National Instant Check System, which has a database of all persons who have been adjudicated a "mental defective" and hence prohibited for life from firearms possession. Chs. 9.C.3.d, 13.E. Would additional mental health investigations — such as

requiring persons who are seeing a therapist to waive confidentiality — be constitutional?

6. **CQ:** Justice Barrett's concurrence asks, "Should courts rely on original understanding as of 1791, when the Second Amendment was ratified, or also 1868, when the Fourteenth Amendment made the Second Amendment enforceable against the States?" What do you think? Can you think of cases where the choice might make a difference?

7. *The rise of shall issue.* Starting around the turn of the twentieth century, states began adopting may-issue laws for concealed carry. The first shall-issue law was enacted by Washington State in 1961.[43] By 2022, forty-four states, plus the District of Columbia and Puerto Rico, allowed concealed carry either with a shall-issue permit, or with no need for a permit (25 states). Of the 25 permitless concealed carry states, all but Vermont issue optional permits under a shall-issue system. (The optional permit is useful for travel to another states, and in some states for carry in certain areas that would otherwise be not allowed.) Is *Bruen*'s approval of shall-issue systems based on originalism? On pragmatism?

8. *How many are too few?* The *Bruen* opinion notes examples of historic laws that prohibited handgun carry most of the time. *Bruen* contrasts them with the mainstream approach. They are:

- East Jersey, which for a while was separate from West Jersey. "Planters" (frontiersman) were allowed to carry long guns but not handguns. "[W]e cannot put meaningful weight on this solitary statute . . . At most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment."[44]
- Three colonial statutes against carrying arms "Offensively" to cause "Fear." The *Bruen* majority did not believe that such laws banned peaceable carry. Regardless, "we doubt that three colonial regulations could suffice to show a tradition of public-carry regulation."[45] In other words, 3/13 = 23% is not enough.
- "Tennessee, meanwhile, enacted in 1821 a broader law that prohibited carrying, among other things, "belt or pocket pistols, either public or private," except while traveling. 1821 Tenn. Acts ch. 13, §1, p.15."[46] "That said, when the Tennessee Supreme Court addressed the

[43] Wash. RCW 9.41.070.
[44] *Bruen* at 2143–44.
[45] *Id.*
[46] *Id.* at 2146 n.16.

constitutionality of a substantively identical successor provision, see 1870 Tenn. Acts ch. 13, §1, p.28, the court read this language to permit the public carry of larger, military-style pistols because any categorical prohibition on their carry would "violat[e] the constitutional right to keep arms." *Andrews* v. *State*, 50 Tenn. 165, 187 (1871)."[47] The Tennessee 1821 ban, like Georgia's 1837 ban, might count for nothing; the Georgia Supreme Court held that a ban on open carry violated the Second Amendment, and the Tennessee Court adopted a saving construction to allow open carry of large handguns.[48]

- Arkansas prohibited all public carry of pistols in 1875 but changed the law in 1881 to allow open carry of large pistols in the hand.[49]
- The Kansas legislature in 1881 told three large cities to prohibit public carry. It is not claimed that any of the cities did so, and they accounted for under 7% of the Kansas population.
- Texas in 1871 and West Virginia in 1887 banned handgun carry except while traveling or when the carrier had "reasonable grounds" to fear for his safety.[50] The West Virginia statute did not count, as it was supported by the state supreme court's theory "that *no* handguns of any kind were protected by the Second Amendment, a rationale endorsed by no other court during this period. See *State* v. *Workman*, 14 S. E. 9, 11 (1891)."[51] As for Texas (where the case law affirmed at least the right to keep nonconcealable handguns), "we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not 'stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public. 554 U. S., at 632."[52]
- Five Western Territories:
    - The Territory of New Mexico made it a crime in 1860 to carry "any class of pistols whatever" "concealed or otherwise." 1860 Terr. of N.M. Laws §§1-2, p.94. This extreme restriction is an outlier statute enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights, and its constitutionality was never tested in court. Its value in discerning the original meaning of the Second Amendment is insubstantial. Moreover, like many other stringent carry restrictions that were localized in the Western

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[47] *Id.* at 2147
[48] *Id.* (discussing *Nunn v. State*, 1 Ga. 243 (1846)).
[49] *Id.* at 2155 n.31.
[50] *Id.* at 2153.
[51] *Id.*
[52] *Id.* (quoting *Heller*, 554 U. S., at 632).

Territories, New Mexico's prohibition ended when the Territory entered the Union as a State in 1911 and guaranteed in its State Constitution that "[t]he people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N. M. Const., Art. II, §6 (1911).[53]
    - New Mexico in 1869 modified the above to ban handgun carrying in towns, while allowing long gun carry. Arizona enacted a similar statute in 1889.[54]
    - Idaho in 1889 and Wyoming in 1875 banned all gun carrying in town.
    - Oklahoma 1890 banned pistol carrying and limited long gun carry.
    - "[W]e will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence."
- "Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense."[55]

As you consider how other historic arms laws may or may not be precedents for particular types of modern laws, consider the historic laws in light of *Bruen*'s list of insufficient laws. Are the other laws more numerous, or longer-lasting, than the collection of laws in *Bruen* that were held insufficient to override the constitutional text? many of these jurisdictions amended their laws over time and upon entry to the union.[56] *See also* Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 Sup. Ct. Rev. 49 (suggesting various ways in which courts in constitutional cases can identify whether a particular law should be considered an "outlier.")

9. *New York legislature vs. Bruen*. Using a "message of necessity" to short circuit the normal New York constitutional rule that a bill must be available to legislators and the public for three days before it is passed (N.Y. Const., art. III, §14), the New York legislative leadership and Governor Kathy Hochul introduced a bill on a Friday morning in early July, and enacted it that afternoon. It takes effect on Sept. 1, 2022.

The New York State Sheriffs' Association criticized "thoughtless, reactionary action, just to make a political statement," and "the burdensome, costly, and unworkable nature of many of the new laws' provisions." "We do

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[53] *Id.* at 2147 n.22.
[54] *Id.* at 2154.
[55] *Id.* at 2147 n.22, 2153-55.
[56] *See* Ch. 7.H.

not support punitive licensing requirements that aim only to restrain and punish law-abiding citizens who wish to exercise their Second Amendment rights."[57] The New York Association of [County] Clerks wrote to the governor, "[i]n haste to pass the new regulations as a reaction to the recent United States Supreme Court ruling, the process as it stands now will be riddled with complex, confusing and redundant barriers of compliance."[58]

Where will concealed carry permit holders be allowed to carry? "Probably some streets," she explained.[59]

The new law designates an enormous variety of places as "sensitive locations." Not only does the law prohibit concealed carry licensees from bringing their guns into these locations, the law makes felons of proprietors, owners, and employees who simply possess arms in the location.[60] Thus, a doctor who runs his or her own practice cannot have a handgun in a lock box in his or her office. A church cannot have volunteer security guards, such as the former police officer who thwarted a mass shooter at the New Life Church in Colorado Springs in 2007.[61] The same goes for every school of any level, government or independent, regardless of what school wants.

Under the new law, licensed carry is also banned in all forms of public transportation, including in one's own car on a ferry. All these restrictions defy *Bruen*'s rule that "*new*" (emphasis in original) types of "sensitive places" may be authorized by analogy to sensitive places from the nineteenth century and before. Ferries, churches, doctors' offices, entertainment facilities, and restaurants with a liquor license that serve meals to customers who don't order drinks are not "new." Firearms possession is also forbidden at "any gathering of individuals to collectively express their constitutional rights to protest or assemble."[62] In other words, if two dozen members of the county branch of New York's Conservative Party gather anywhere (even in a private home) for a meeting, they may not protect themselves.

Beyond the enumerated list of sensitive locations, bringing a gun into *any* building is a felony, unless the owner has posted a permission sign or granted

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[57] New York State Sheriffs' Association, *Statement Concerning New York's new Firearms Licensing Laws*, July 6, 2022.

[58] Wendy Wright, *NY county clerks question feasibility of enacting gun permit changes*, SpectrumLocalNews.com (Rochester) (July 18, 2022).

[59] Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats to Pass New Gun Laws in Response to Supreme Court Ruling*, N.Y. Times (June 30, 2022).

[60] N.Y. Penal Law §265.01-e.

[61] *Security Guard Who Stopped Shooter Credits God*, CNN.com (Dec. 10, 2007); Judy Keen & Andrea Stone, *This Month's Mass Killings a Reminder of Vulnerability*, USA Today (Dec. 21, 2007); Jeanne Assam, God, The Gunman & Me (2010). New Life Church is a megachurch; there were thousands of worshippers present in the sanctuary when the killer entered.

[62] N.Y. Penal Law §265.01-e(s).

express permission.[63] Permit applicants must submit "a list of former and current social media accounts of the applicant from the past three years."[64]

10. *California's "good moral character" statute.* California's handgun carry licensing statute includes a requirement that the applicant be of "good moral character." After *Bruen* was announced, California Attorney General Rob Bonta proposed to use the policy of the Riverside County Sheriff's Department: "Legal judgments of good moral character can include . . . *absence of hatred and racism*, fiscal stability[.]"[65] He added that "social media accounts" were fair game for inquiry. Denials could be based on "[a]ny arrest in the last five years, regardless of the disposition," or any conviction in the last seven.[66]

UCLA law professor Eugene Volokh suggests that it is unconstitutional to deny the exercise of constitutional rights because of an arrest without a conviction. Likewise, under the First Amendment, "[t]he government can't restrict ordinary citizens' actions — much less their constitutionally protected actions — based on the viewpoints that they express." Volokh is also skeptical about the denial of rights for "[l]ack of 'fiscal stability' — which may simply mean being very poor or insolvent." Eugene Volokh, *State Attorney General Suggests Considering Applicants' Ideological Viewpoints in Denying Carry Licenses*, Reason, Volokh Conspiracy (June 26, 2022).

Are California's policies good ideas? Does *Bruen* suggest anything about whether they are constitutional?

11. For Professor Kopel's analysis of some amicus briefs supporting Respondents in *Bruen*, see *Surprising Support for the Right to Bear Arms: Reading the Cited Sources from Everytown's Amicus Brief*, Reason, Volokh Conspiracy (Nov. 3, 2021); *Social science on the right to bear arms: Doomsday warnings don't hold up*, Reason.com (Nov. 2, 2021); *Corpus Linguistics and the Second Amendment: Support for the Right to Bear Arms for All Purposes*, Reason.com, (Oct. 29, 2021); *Amnesty International Brief Against Right to Bear Arms*, Reason.com (Oct. 13, 2021).

12. *Criticism of the historical test.* There was little or no criticism of the first, history-and-tradition-based, prong of the Two-Part Test (Ch. 12.B) before *Bruen* was decided. Indeed, many scholars supported the test as a whole, *see, e.g.*, Ruben & Blocher, *supra* Note 1, and the courts applying it did not

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[63] *Id.* at §265.01–d.
[64] *Id.* at §400 1.
[65] California Department of Justice, Office of the Attorney General, *U.S. Supreme Court's Decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843*, OAG-2022-02, June 24, 2022.
[66] *Id.*

typically, if at all, complain about the test. That changed after *Bruen* was handed down.

Professor Jacob D. Charles criticizes *Bruen* and offers prospective advice to legislators enacting gun control laws in *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. (forthcoming). Based on analysis of approximately 200 post-*Bruen* lower court cases, he argues that *Bruen*'s text and history test is unworkable. He is particularly critical of *Bruen*'s rule that historical legislative choice *not* to enact gun control based on well-known social problems should be construed to imply that gun control is not a constitutionally permissible solution to that problem.

Professor Charles suggests that courts should appoint "neutral historical experts" to help them decide gun control cases — a suggestion at odds with *Bruen*'s express rule that that parties have the burden of introducing historical evidence, as they do with other evidence.

Finally, he urges legislators enacting new gun control laws "to be explicit about four types of evidence for the law's constitutionality that track *Brue*n's new demands: the purpose for the law, the expected burden on armed self-defense, the precise nature of the problem to which the law is directed, and the historical tradition from which the law springs."

Professor Charles's suggestion would undoubtedly be helpful to government lawyers tasked with defending gun control laws. However, the suggestion has not been followed. For example, when the New Jersey legislature enacted severe restrictions on where licensed concealed carry is allowed, Senate President John Sweeney stated that the bill had been researched and was certainly constitutional. But when the law was challenged in federal district court, the Judge ended up having to do her own historical research and criticized the New Jersey Attorney General for being unwilling or unable to provide historical information that could be used as analogies in support of the new statute. *Koons v. Platkin*, 2023 WL 3478604 (D.N.J. May 16, 2023).

Professors Joseph Blocher and Eric Ruben also criticize *Bruen*'s requirement that modern courts must reason by historical analogy to decide cases about issues such as "3D-printed guns, large-capacity magazines, obliterated serial numbers, and the possession of guns on subways or by people subject to domestic violence restraining orders. *Originalism-by-Analogy and Second Amendment Adjudication*, Yale L.J. (forthcoming). They urge courts to 1. "discern workable principles of relevant similarity — the sine qua non of analogical reasoning — to compare historical and modern laws." 2. "account for the fundamental differences between past and present, for example by adjusting the level of generality at which the historical inquiry is conducted." And 3. "recognize that — precisely because it requires comparison of past and present — *Bruen* preserves an important role for empirics and legislative deference."

Judges, both in opinions and elsewhere, have also complained about *Bruen* and engaged in what some call "uncivil obedience." *See* George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607, 619-20 (2023) (citing examples). Uncivil obedience by lower court judges "take[s] the Supreme Court's opinions at face value and pursue[s] the logic of the opinions to their ends" to arrive at absurd or unreasonable outcomes for the purpose of criticizing the opinion and making it more difficult for the Supreme Court to "hold[] the line laid down in *Bruen*." Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 Wm. & Mary L. Rev. (forthcoming 2023) (manuscript at 30) (quoting Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 Wm. & Mary L. Rev. 1, 14 (2018)). *But see* Denning & Reynolds, 65 Wm. & Mary L. Rev. (forthcoming 2023) (manuscript at 4) (stating that a "surprising number of [post-*Bruen* opinions] seem to recognize *Bruen* for the sea-change it portends and are attempting to implement it in good faith").Professors Denning and Reynolds have previously studied lower court resistance to *Heller* (Ch. 11.A) and *Lopez v. United States* (Ch. 9.B.3.a).

Before *Bruen* the first, history-based, step in the Two-Part Test served to filter out cases from Second Amendment protection. That is, if the plaintiff's claim failed at step one, the inquiry was over and the plaintiff lost. If the plaintiff's claim passed step one, the plaintiff could (and usually did) still lose at step two under the very government-favoring version applied at step two. Might this explain why judges and scholars, who admittedly favor narrower gun rights are now speaking out against the *Bruen* test? If the test is truly unworkable, should it not also be unworkable as part of the Two-Part Test? If it were as unworkable as many now claim, would you expect at least some of those now complaining about the test to have made similar complaints — that it's impossible to perform, that it leads to unreliable results, etc. — before it was divorced from step two? The closest pre-*Bruen* expression to complaint was multiple courts "assuming without deciding" (and similar language) that the conduct at issue was protected by the Second Amendment, and ruling that the regulation passed step two.

What does the text of *Bruen* say about empirics and legislative deference?

13. *Is means-ends scrutiny inescapable?* Professors Denning and Reynolds describe *Heller* as a "minimalist" opinion and *Bruen* as a "maximalist" one. They argue that, to justify *Bruen*'s rejection of tiered scrutiny, "Justice Thomas had to 'retcon' Heller — reading back into the latter decision the analytical framework adopted in *Bruen*. Denning & Reynolds, 65 Wm. & Mary L. Rev. (forthcoming 2023) (manuscript at 3). Do you agree? Consider *Heller II* (Ch. 12.D), in which two judges of the D.C. Circuit read *Heller* as allowing them to adopt tiers of scrutiny, whereas dissenting then-Judge Kavanaugh argued that *Heller*'s methodology was text and history, not tiered scrutiny.

They also address what they call "the *Heller* safe harbor" of "presumptively lawful" gun controls, which Justice Kavanaugh's *Bruen* concurrence quotes in full: "Critics at the time questioned whether these could be squared with the self-conscious originalism of the rest of the [*Heller*] opinion. This tension is only heighted by *Bruen*'s text-history-tradition only approach."

Stephen Halbrook and Professor Nelson Lund argue back and forth about *Bruen* in three articles. Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 Federalist Soc'y Rev. 279 (2022); Stephen Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund's Critique of Bruen*, 24 Federalist Soc'y Rev. 54 (2023); Nelson Lund, *Stephen P. Halbrook's Confused Defense of Bruen's Novel Interpretive Rule*, Geo. Mason L. Stud. Rsch. Paper No. LS 23-03. The two authors agree that *Heller* and *Bruen* were correctly decided on text and history. They also agree that many post-*Heller* lower courts misused tiers of scrutiny, and that *Bruen*'s repudiation of the Two-Step Test was proper. Halbrook, fully supportive of *Bruen*, argues that text, history, and analogies are the only proper bases for courts to decide Second Amendment cases.

According to Lund, the Court has repeatedly issued *ipse dixits* in support of certain gun controls that cannot be plausibly upheld by text-history-analogy: namely the "presumptively lawful" list in *Heller*, and the blessing of fairly-administered shall-issue carry licensing (Ch. 10.D.6.b) in *Bruen*. He disagrees with Halbrook's dismissal of these as dicta, and with Halbrook's efforts to justify shall issue based on history. In Lund's view, the *ipse dixits* show that "means-end" analysis still has a role post-*Bruen*, if that analysis does not upset the balance struck by the Founding generation. While part of the Lund-Halbrook debate is about *Heller* said, perhaps the key disagreement is between what *Bruen* explicitly says (Halbrook) versus what *Bruen* does (Lund).

Bruen has been criticized for not allowing courts to engage in means-end balancing, and therefore to contradict decades of precedent. *See*, *e.g.*, Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen*, 32 Wm. & Mary Bill of Rights J. (2023). Professor Bruce Ledewitz disagrees. *No Balancing for Anti-Constitutional Government Conduct*, 2023 U. Ill. L. Rev. Online 80 (2023). Looking at First Amendment and other constitutional precedents, he distinguishes "unconstitutional" laws from "anti-constitutional" laws. For "unconstitutional" laws, the legislature recognized that constitutional rights were important, but struck a defective balance. For example, a law that banned all cigar advertising within a thousand feet of school recognized the First Amendment right of commercial speech but went too far in creating no-advertising zones that encompassed almost the entirety of most cities. The law was held unconstitutional based on the Supreme Court's four-part *Central Hudson* intermediate scrutiny test for commercial speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In contrast, an "anti-

constitutional" law forbade "graphic sexually explicit subordination of women through pictures and/or words." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). Because the law did not apply to "obscenity," but was far broader, it was held unconstitutional without resort to a balancing test. In Ledewitz's words, "the ordinance, by its terms, rejected the First Amendment's commitment that the government may not censure ideas regardless of how damaging those ideas are."

The law in question in *Bruen* was plainly anti-constitutional because it rejected the idea that ordinary people have a right to bear arms. However, writes Ledewitz, non-prohibitory regulations of carrying — such as requiring 18 hours of training for a carry permit — are not anti-unconstitutional; they are, at most potentially unconstitutional, to the extent that the government does not meet its burden of showing that the regulation is not excessive. Ledewitz predicts that, notwithstanding what *Bruen* says about balancing, the Court will uphold some regulations based on balancing — as long as the legislature is not acting from "anti-constitutional" hostility to the right itself.

14. Professor Lawrence Rosenthal offers what he describes as a "relatively conventional" criticism of the Court for "ignoring the Second Amendment's preamble altogether," and thus failing to recognize the "ambiguity" of bear arms. But the majority of his article describes "serious litigating errors by the attorneys defending the laws at issue" in *Heller* and *Bruen.* "These flawed litigating strategies reflect . . . an incomplete grasp of the conceptual underpinnings of originalism as a method of constitutional interpretation. Lawyers defending statutes or other legal regimes without clear framing-era antecedents must develop a more sophisticated understanding of originalist constitutional interpretation." *Nonoriginalist Laws in an Originalist World: Litigating Original Meaning from Heller to Bruen*, 73 Amer. U.L. Rev. (forthcoming 2023).

15. Jacob D. Charles, On Sordid Sources in Second Amendment Litigation, 76 Stanford L. Rev. Online (forthcoming). Historic justifications for modern gun controls often rely on laws that are rightly considered repellant today, such as laws against enslaved persons, free persons of color, or religious minorities. The author suggests that such laws should not be considered off-limits as precedents for modern gun control. "Without a full picture of past laws — the prosaic and prejudiced alike — courts risk impermissibly narrowing the range of legislative options the ratifiers understood to be consistent with the right to keep and bear arms. And constricting that authority too tightly would be to usurp the people's power to rule themselves." Does Professor Charles's suggestion fit with Bruen's "Why" — "whether that burden is comparably justified"? Should racist and similarly repellent laws be a legitimate basis for justifying modern regulations?

CHAPTER 1

FIREARM FACTS, DATA, AND SOCIAL SCIENCE

A. CHALLENGES OF EMPIRICAL ASSESSMENTS OF FIREARMS POLICY

The Rand Study was updated again in 2023. *See* Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States (3d ed. 2023). The 427-page third edition updates its previous findings and conclusions with social science research published through October 2020. Supportive evidence was found that (1) child-access prevention (CAP) laws, or safe storage laws, reduce self-inflicted fatal or nonfatal firearms injuries among children and youth; (2) stand-your-ground laws are associated with increases in firearm homicides; and (3) shall-issue laws increase both total and firearm homicides. The effects of "assault weapon" bans on mass shootings and other fatalities remained inconclusive, but the third update found limited evidence that high-capacity magazine bans may reduce mass shootings and associated fatalities. The third edition continued to emphasize the need for both more rigorous research and significantly-increased methodological quality in current research.

Consistent with the Urbatsch study and Yamane article cited in Chapter 1.A of the printed book, Rutgers University researchers report that many Americans — especially women and minorities new to gun ownership — continue to decline to reveal their gun ownership when questioned by strangers. Allison E. Bond, et al., *Predicting Potential Underreporting of Firearm Ownership in a Nationally Representative Sample, Social Psychiatry and Psychiatric Epidemiology* (June 23, 2023); *see* J.D. Tuccille, *The Ranks of Gunowners Grow, and So Does Their Resistance to Scrutiny*, Reason (July 5, 2023) (summarizing the Bond study). They worry that these survey respondents are not being reached with messaging about firearm safety and secure firearm storage, but their deeper concern is that such evasion frustrates the accuracy of academic research into the prevalence of gun ownership.

> The implications of false denials of firearms ownership are substantial. First, such practices would result in an underestimation of firearms ownership rates and diminish our capacity to test the association between firearm access and

> various firearm violence-related outcomes. Furthermore, such practices would skew our understanding of the demographics of firearm ownership, such that we would overemphasize the characteristics of those more apt to disclose. Third, the mere existence of a large group of individuals who falsely deny firearm ownership highlights that intervention aimed at promoting firearm safety (e.g., secure firearm storage) may fail to reach communities in need.

Tuccille points out that the study's authors didn't actually identify anybody who denied gun ownership as a gun owner, but rather built statistical profiles of confirmed gun owners and applied those profiles to estimate the probability that a secretive respondent was lying about not owning guns.

The researchers also speculated about why respondents withhold such information, as Tuccille explains:

> "It may be that a percentage of firearm owners are concerned that their information will be leaked and the government will take their firearms or that researchers who are from universities that are typically seen as liberal and anti-firearm access will paint firearm owners in a bad light," the authors allowed. They also speculated that many respondents falsely denying owning guns may come from communities that are traditionally unfriendly to gun ownership. That's an interesting possibility considering that nearly half of all those designated as potential gun owners are unmarried urban women of color. In fact, as the study points out, *many* new gun owners are women and minorities. . . .
>
> "Our results highlight the potential that several groups, particularly women and individuals living in urban environments, may be prone to falsely denying firearm ownership," adds the Rutgers report.

Tuccille concludes that "[a]cademic researchers and policymakers who draw from their work clearly regret such opacity. But they should cast the blame not on gun owners, but on the activists and politicians who vilified the exercise of self-defense rights and who drove growing numbers of Americans to evade scrutiny."

B. AMERICAN GUN OWNERSHOP

1. Gun Ownership by Number

Gun sales have surged since 2020, spurred by rioting, increasing urban crime, political turmoil, and COVID. From March 2020 to March 2022, 18 percent of U.S. households purchased a firearm, according to survey data from NORC at the University of Chicago. Press Release, *One in Five American Households Purchased a Gun During the Pandemic,* NORC (Mar. 24, 2022). Over this period, one in 20 American adults (5 percent) purchased a gun for the first time and the percentage of U.S. adults living in a household with a gun increased to 46 percent. "Increasing gun sales during the pandemic were driven in nearly

equal parts by people purchasing a gun for the first time and existing gun owners purchasing additional firearms," said NORC's John Roman. "New gun owners during the pandemic were much more likely to be younger and People of Color compared to pre-pandemic gun owners in America."

According to a separate study published in the *Annals of Internal Medicine,* "[a]n estimated 2.9% of U.S. adults (7.5 million) became new gun owners from 1 January 2019 to 26 April 2021. Most (5.4 million) had lived in homes without guns." Matthew Miller, et al., *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey,* 175 Ann. Intern. Med. 219 (Feb. 2022).

In May 2022, William D. English, Ph.D., a political economist and assistant professor at Georgetown University, published the *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022), Georgetown McDonough School of Business Research Paper No. 4109494. From the abstract:

> This report summarizes the findings of a national survey of firearms ownership and use conducted between February 17th and March 23rd, 2021 by the professional survey firm Centiment. This survey, which is part of a larger book project, aims to provide the most comprehensive assessment of firearms ownership and use patterns in America to date. This online survey was administered to a representative sample of approximately fifty-four thousand U.S. residents aged 18 and over, and it identified 16,708 gun owners who were, in turn, asked in depth questions about their ownership and their use of firearms, including defensive uses of firearms.
>
> Consistent with other recent survey research, the survey finds an overall rate of adult firearm ownership of 31.9%, suggesting that in excess of 81.4 million Americans aged 18 and over own firearms.

Additional findings from this survey are reported in the sections below.

Two studies considered violence with firearms that occurred during the COVID pandemic, when gun sales were surging. One found that U.S. and state-specific risks of gun violence were 30% higher during the COVID-19 pandemic (March 2020 to March 2021) compared to the same period pre-pandemic. Paddy Ssentongo et al., *Gun Violence Incidence During the COVID-19 Pandemic is Higher Than Before the Pandemic in the United States*, 11 Sci. Rep. 20654 (2021). The other concluded that

> Nationwide, firearm purchasing and firearm violence increased substantially during the first months of the coronavirus pandemic. At the state level, the magnitude of the increase in purchasing was not associated with the magnitude of the increase in firearm violence. Increases in purchasing may have contributed to additional firearm injuries from domestic violence in April and May. Results suggest much of the rise in firearm violence during our study period was attributable to other factors. . .

Julia P. Schleimer, et al., *Firearm Purchasing and Firearm Violence During the Coronavirus Pandemic in the United States: A Cross-Sectional Study,* 8 Injury Epidemiology 43 (2021).

3. Gun Ownership by Type

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Sept. 28, 2022):

> The average gun owner owns about 5 firearms, and handguns are the most common type of firearm owned. 48.0% of gun owners – about 39 million individuals — have owned magazines that hold over 10 rounds (up to 542 million such magazines in total), and 30.2% of gun owners – about 24.6 million individuals — have owned an AR-15 or similarly styled rifle (up to 44 million such rifles in total). . . . In total, Americans own over 415 million firearms, consisting of approximately 171 million handguns, 146 million rifles, and 98 million shotguns.

4. Gun Ownership by Demographics

In the aforementioned study published in the *Annals of Internal Medicine,* researchers noted that "[a]pproximately half of all new gun owners were female (50% in 2019 and 47% in 2020 to 2021), 20% were Black (21% in 2019 and in 2020–2021), and 20% were Hispanic (20% in 2019 and 19% in 2020–2021)." Matthew Miller, et al., *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey,* 175 Ann. Intern. Med. 219 (Feb. 2022).

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Georgetown McDonough Sch. of Bus. Research Paper No. 4109494, 2022): "Demographically, gun owners are diverse. 42.2% are female and 57.8% are male. Approximately 25.4% of Blacks own firearms, 28.3% of Hispanics own firearms, 19.4% of Asians own firearms, and 34.3% of Whites own firearms."

C. DEFENSIVE GUN USE: FREQUENCY AND RESULTS

2. The Frequency of Defensive Gun Use

c. Other Surveys

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Georgetown McDonough Sch. of Bus. Research Paper No. 4109494, 2022):

> The survey further finds that approximately a third of gun owners (31.1%) have used a firearm to defend themselves or their property, often on more than one occasion, and it estimates that guns are used defensively by firearms owners in approximately 1.67 million incidents per year. Handguns are the most common firearm employed for self-defense (used in 65.9% of defensive incidents), and in most defensive incidents (81.9%) no shot was fired. Approximately a quarter (25.2%) of defensive incidents occurred within the gun owner's home, and approximately half (53.9%) occurred outside their home, but on their property. About one out of ten (9.1%) defensive gun uses occurred in public, and about one out of thirty (3.2%) occurred at work.
>
> A majority of gun owners (56.2%) indicate that they carry a handgun for self-defense in at least some circumstances, and about 35% of gun owners report carrying a handgun with some frequency. We estimate that approximately 20.7 million gun owners (26.3%) carry a handgun in public under a "concealed carry" regime; and 34.9% of gun owners report that there have been instances in which they had wanted to carry a handgun for self-defense, but local rules did not allow them to carry.

F. FIREARM VIOLENT CRIME

1 Homicides

The Pew Research Center reports that data from the Centers for Disease Control and Prevention (CDC) show that more Americans died of gun-related injuries in 2021 than in any other year on record, with record numbers of both murders and suicides committed with firearms. John Gramlich, *What the Data Says About Gun Deaths in the U.S.,* Pew Research Center (Apr. 26, 2023). A record total of 48,830 people died, with 26,328 suicides (54%), 20,958 murders (43%), 549 from accidents, 537 involved law enforcement, and 458 had undetermined circumstances. The record 48,830 firearm-related deaths in 2021 reflected a 23% since 2019, before the onset of the coronavirus pandemic.

Provisional data from the CDC show that 48,117 people died from gun-related deaths in 2022, representing a 1.9% decline from 2021. There were 6.8% (1,366) fewer homicides with firearms in 2022. *See* Johns Hopkins Bloomberg Sch. of Pub. Health, CDC Provisional Data: Gun Suicides Reach All-time High in 2022, Gun Homicides Down Slightly from 2021 (July 27, 2023).

Philip J. Cook & Audrey Vila, *Gun Violence in Durham, NC, 2017-2021: Investigation and Court Processing of Fatal and Nonfatal Shootings*, Duke Univ. (Feb. 2023):

> In 2020, there were 66% more shooting victims in Durham than in the previous year, an unprecedented increase. While high rates of gun violence are a chronic problem in Durham, this surge in 2020 made the search for solutions more urgent than ever. Effective law enforcement is a key to gun violence prevention. The Durham Police Department (DPD) is on the front line of the city's response to gun violence, and in particular is responsible for

investigating criminal shootings, arresting suspected perpetrators, and providing the Durham District Attorney's Office with evidence required for a successful prosecution of the defendants. Its success in accomplishing these tasks has a direct influence on gun violence rates. . . .

One specific purpose of this report has been to document the disparities between fatal and nonfatal shooting incidents with respect to how they are investigated by the police and processed in court. Nonfatal shootings are sometimes called "almoscides" to highlight the fact that whether the victim lives or dies in a criminal shooting is largely a matter of chance. The mixes of circumstances, motives, and characteristics of victims and shooters are similar. For that reason, it is reasonable to claim that solving nonfatal shooting cases is as important for prevention purposes as solving fatal shooting cases. The goal is to prevent shootings, period. Yet despite this logic, Durham, like other jurisdictions, is much more likely to solve fatal than nonfatal shootings, and that is true despite the fact that nonfatal shootings generally have a key witness (the victim) who is lacking from fatal cases. Much of the explanation for this disparity appears to be with respect to the greater priority and resources devoted to the investigation of fatal shootings. This report may be helpful in making the case for increasing the priority for investigations and prosecutions of nonfatal shootings.

G. HOW CRIMINALS OBTAIN GUNS

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published the *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis—Volume Two* in January 2023. It focuses on data, information, and analysis relating to crime guns recovered by law enforcement during domestic and international investigations between 2017 and 2021. The report's conclusion on domestic tracing states:

> The results presented in this section are consistent with the findings of prior ATF reports and academic research on the illicit acquisition of firearms by prohibited persons. Traced crime guns typically originate from the legal supply chain of manufacture (or import), distribution, and retail sale. Crime guns may change hands a number of times after that first retail sale, and some of those transactions may be a theft or violate one or more regulations on firearm commerce. Individuals who are prohibited due to their criminal records or other conditions are unlikely to purchase directly from a licensed federal firearms dealer. Instead, prohibited persons determined to get crime guns acquire them through underground crime gun markets that involve unregulated transactions with acquaintances and illicit "street" sources. Many ATF crime gun trafficking investigations involve close-to-retail diversions of crime guns from legal firearms commerce including straw purchasing from FFLs, trafficking by FFLs, and illegal transfers by unlicensed sellers. A variety of illegally transferred crime guns sources sustain underground crime gun markets that supply prohibited persons and other dangerous individuals. (footnotes omitted).

H. RACE, GUN CRIME, AND VICTIMIZATION

Sharone Mitchell Jr., a former Chicago public defender, urged that the Supreme Court should strike down New York's restrictive gun laws in *Bruen* "because of their disproportionate and devastating impact on Black and brown communities." He explains that "[w]hile I support policies that actually stem the flow of guns, prevent violence, and heal those who have been harmed, I also support ending the way we criminalize gun possession. I do this because there is no Second Amendment on the South Side of Chicago." Mitchell also advocates for alternative gun violence prevention programs, such as the "Interrupters Model," which "pays and trains trusted insiders of a community to anticipate where violence will occur and intervene before it erupts." Sharone Mitchell Jr., *There's No Second Amendment on the South Side of Chicago: Why Public Defenders are Standing with the New York State Rifle and Pistol Association in the Supreme Court,* The Nation (Nov. 12, 2021).

I. YOUTH CRIME

Natalie Chwalisz, *Beating the Gun—One Conversation at a Time? Evaluating the Impact of DC's "Cure the Streets" Public Health Intervention Against Gun Violence*, Crime & Delinq. (Apr. 3, 2023). From the abstract:

> Violence interrupters (VI) operate as mediators after gang-involved shootings to stop retributory shootings. While some cities, like Chicago, have seen initial success, other cities, such as Boston, Newark, and Phoenix have seen little or mixed effects. This is the first evaluation of the Washington DC intervention. . . . My findings indicate that the program was not effective in reducing gun violence.

Kaleb Malone, et al., *Project Inspire Pilot Study: A Hospital-Led, Comprehensive Intervention Reduces Gun Violence Among Juveniles Delinquent Of Gun Crimes*, 95 J. Trauma & Acute Care 137 (2023). From the abstract:

> **Background:** . . . . While there is no nationally accepted juvenile rate of recidivism, previous literature reveals rearrest rates from 50% to 80% in high-risk youth, and some reports show that up to 40% of delinquent juveniles are incarcerated in adult prisons before the age of 25 years. We hypothesize that Project Inspire, a hospital-led comprehensive intervention, reduces recidivism among high-risk teens.
>
> **Methods**: Led by a level 1 trauma center, key community stakeholders including the juvenile court, city, and city police department joined forces to create a community-wide program aimed at curbing gun violence in high-risk individuals. Participants, aged 13 to 18 years, are selected by the juvenile gun

court. They underwent a rigorous 3-week program with a curriculum incorporating the following: trauma-informed training and confidence building, educational/professional development, financial literacy, entrepreneurship, and career-specific job shadowing and mentorship. Rates of recidivism were measured annually.

Results: Project Inspire has hosted two classes in 2018 and 2019, graduating nine participants aged 14 to 17 years. Sixty-seven percent were Black. All were males. At 1 year, none of the graduates reoffended. At 2 years, one participant reoffended. At 3 years, no additional participants reoffended. No graduate reoffended as a juvenile. Thus, the overall rate of recidivism for Project Inspire is 11% to date. Eighty-nine percent of graduates received a diploma, general educational development, or obtained employment.

Conclusion: Project Inspire is a hospital-led initiative that effectively reduces recidivism among juveniles delinquent of gun crimes. This sets the framework for trauma centers nationwide to lead in establishing impactful, comprehensive, gun-violence intervention strategies.

Level of evidence: Prognostic and Epidemiological; Level V.

Eustina G. Kwon, et al., *Association of Community Vulnerability and State Gun Laws With Firearm Deaths in Children and Adolescents Aged 10 to 19 Years*, JAMA Network Open (May 24, 2023). From the abstract:

Objective To assess the rate of death due to assault-related firearm injury stratified by community-level social vulnerability and state-level gun laws in a national cohort of youths aged 10 to 19 years.

Design, Setting, and Participants This national cross-sectional study used the Gun Violence Archive to identify all assault-related firearm deaths among youths aged 10 to 19 years occurring in the US between January 1, 2020, and June 30, 2022.

Exposure Census tract–level social vulnerability (measured by the Centers for Disease Control and Prevention social vulnerability index [SVI]; categorized in quartiles as low [<25th percentile], moderate [25th-50th percentile], high [51st-75th percentile], or very high [>75th percentile]) and state-level gun laws (measured by the Giffords Law Center gun law scorecard rating; categorized as restrictive, moderate, or permissive).

Results Among 5813 youths aged 10 to 19 years who died of an assault-related firearm injury over the 2.5-year study period, the mean (SD) age was 17.1 (1.9) years, and 4979 (85.7%) were male. The death rate per 100 000 person-years in the low SVI cohort was 1.2 compared with 2.5 in the moderate SVI cohort, 5.2 in the high SVI cohort, and 13.3 in the very high SVI cohort. The mortality rate ratio of the very high SVI cohort compared with the low SVI cohort was 11.43 (95% CI, 10.17-12.88). When further stratifying deaths by the Giffords Law Center state-level gun law scorecard rating, the stepwise increase in death rate (per 100 000 person-years) with increasing SVI persisted, regardless of whether the Census tract was in a state with restrictive gun laws (0.83 in

the low SVI cohort vs 10.11 in the very high SVI cohort), moderate gun laws (0.81 in the low SVI cohort vs 13.18 in the very high SVI cohort), or permissive gun laws (1.68 in the low SVI cohort vs 16.03 in the very high SVI cohort). The death rate per 100 000 person-years was higher for each SVI category in states with permissive compared with restrictive gun laws (eg, moderate SVI: 3.37 vs 1.71; high SVI: 6.33 vs 3.78).

Conclusions and Relevance In this study, socially vulnerable communities in the US experienced a disproportionate number of assault-related firearm deaths among youths. Although stricter gun laws were associated with lower death rates in all communities, these gun laws did not equalize the consequences on a relative scale, and disadvantaged communities remained disproportionately impacted. While legislation is necessary, it may not be sufficient to solve the problem of assault-related firearm deaths among children and adolescents.

K. DOES GUN OWNERSHIP REDUCE CRIME?

5. Lawful Defensive Carry of Firearms

b. Do Concealed-Carry Laws Affect the Crime Rate?

Social science studies have not shown a predictive relationship between less restrictive concealed carry laws and increased violent crime. The most comprehensive assessment of social science studies on this issue is the RAND Corporation's 2020 metastudy, which found that the evidence is "inconclusive" that state shall-issue laws have any effects on total homicides, firearm homicides, robberies, assaults, and rapes. Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States 282-302 (RAND Corp. 2d ed. 2020).

Several recent studies show that less restrictive concealed-carry laws have little or no effect on homicide or other violent crime rates. In one state-level study, researchers found no evidence that right-to-carry laws have increased crime. Carlisle E. Moody & Thomas B. Marvell, *The Right-to-Carry Laws: A Critique of the 2014 Version of Aneja, Donohue, and Zhang,"* 15 Econ. J. Watch 51 (2018). Another state-level study found that right-to-carry laws have no significant effects on the overall violent or property crime rates, and actually led to medium-term decreases in murder rates. Wei Shi & Lung-fei Lee, *The Effects of Gun Control on Crimes: A Spatial Interactive Fixed Effects Approach*, 55 Empirical Econ. 233 (2018). A sophisticated study by Dr. William English, a Georgetown economics professor, shows that when one tracks actual concealed carry permit issuance over time, rather than the cruder "binary" methodology that merely looks at crime rates before and after a restrictive law is lifted, more permissive carry has no significant effect on violent crime or homicide rates. William English, *The Right to Carry Has Not Increased Crime:*

Improving an Old Debate Through Better Data on Permit Growth Over Time 34 (Georgetown McDonough Sch. of Bus. Research Paper No. 3887151, 2021).

Other studies suggesting that restrictive carry laws reduce crime, as opposed to "shall-issue" regimes have methodological flaws:

- John Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical L. Stud. 198 (2019). This study estimated increases in violent crime generally with more lenient shall-issue laws. The RAND metastudy questions the reliability of Donohue's synthetic control model, explaining that "when controls are made up of just a few states, as they were in this case, their usefulness for identifying causal effects may be compromised." RAND 2d ed. at 291-92. Professor English subjected this study to a detailed critique. English at 5-36.
- Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923 (2017), and Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. Urban Health 383 (2018). Siegel and colleagues estimated that shall-issue laws are associated with significantly higher rates of total, firearm-related, and handgun-related homicides. Crifasi and colleagues estimated that right-to-carry laws were associated with a 7% (corrected) increase in firearm homicide in large, urban counties. The RAND metastudy classified both studies as having "serious methodological problems." RAND 2d. ed. at 298-99.

K. Alexander Adams & Youngsung Kim, *The Impact of Liberalized Concealed Carry Laws on Homicide: An Assessment* (Feb. 23, 2023). From the abstract:

> This paper uses panel data from 1980 to 2018 in all 50 U.S. states and the District of Columbia to examine the relationship between liberalized concealed carry laws, homicide, and firearm homicide. Multivariate regression analysis was conducted with state and time fixed effects. A general-to-specific procedure was also used to reduce the arbitrariness of choosing control variables in the crime equation. Various robustness checks were also employed, including the use of a generalized synthetic control model. The relationship between shall-issue and constitutional carry laws and homicide were statistically insignificant at the 1%, 5%, and even 10% level. The results were robust to multiple alternative model specifications. We find no evidence that looser concealed carry laws pose a significant public health or criminological risk.

M. MASS SHOOTINGS

1. Defining "Mass Shooting"

Tristan Bridges, et al., *Database Discrepancies In Understanding the Burden of Mass Shootings In the United States, 2013–2020*, 22 Lancet Reg'l Health — Americas (June 2023). From the summary:

> **Background**
> The United States experiences more mass shootings than any other nation in the world. Various entities have sought to collect data on this phenomenon, but there is no scholarly consensus regarding how best to define mass shootings. As a result, existing datasets include different incidents, limiting our understanding of the impact of mass gun violence in the U.S.
>
> **Methods**
> We compared five datasets of mass shootings for each year included in five databases (2013–2020) and identified overlaps between each database's incidents. These overlaps and divergences between datasets persisted after applying the strictest fatality threshold (four or more) in mass shootings scholarship and policy.
>
> **Findings**
> The datasets collectively include 3155 incidents, but the number of incidents included in each individual dataset varies from 57 to 2955 incidents. Only 25 incidents (0.008% of all incidents) are included in all five datasets. This finding persists even when applying the strictest criteria for mass shootings (four or more fatalities).
>
> **Interpretation**
> Data discrepancies prevent us from understanding the public health impact of mass gun violence. These discrepancies result from a lack of scholarly consensus on how to define mass shootings, likely the downstream consequence of the politicization of gun violence research. We argue for a broad definition of a mass shooting and a government-supported data collection program to remedy these discrepancies. Such steps can improve the quality of research and support policy-making and journalism on the subject.

Further reading: Marisa Booty, et al., *Describing a "Mass Shooting": The Role of Databases in Understanding Burden*, 6 Inj. Epidemiology 47 (2019).

4. Mass Shootings and "Assault Weapons"

Recent studies show that "assault weapon" bans do not deter mass public shootings. *See* Daniel Webster et al., *Evidence Concerning the Regulation of Firearms Design, Sale, and Carrying on Fatal Mass Shootings in the United States*, 19 Criminology & Pub. Pol'y 171, 188 (2020) ("[B]ans on assault

weapons had no clear effects on either the incidence of mass shootings or on the incidence of victim fatalities from mass shootings."); Rosanna Smart, et al., *The Science Of Gun Policy: A Critical Synthesis of Research Evidence on The Effects of Gun Policies in The United States* 233-35, 236-40 (Rand Corp., 3d ed., 2023) (available evidence is inconclusive that "assault weapon" bans have any effect on mass shootings or firearm homicides).

The flawed DiMaggio study discussed in the printed book still is being used to show that the federal "assault weapon" ban in effect from 1994-2004 significantly reduced mass-shooting fatalities. *See* Michael J. Klein, M.D., *Yes, the 1994 federal assault weapons ban saved lives,* Chicago Sun-Times (Dec. 24, 2022). Dr. Klein was a co-author of the DiMaggio study and argues in this article that the risk of dying in a mass shooting was 70% lower during the period the federal ban was in effect. His claims were disputed, however, by Professors E. Gregory Wallace and George A. Mocsary. *See* E. Gregory Wallace & George A. Mocsary, *Fact-Check: Mass Shootings Actually Increased During the Federal 'Assault Weapons' Ban,* The Federalist (Jan. 31, 2023).

CHAPTER 3
THE COLONIES

B. SPORADIC DISARMAMENT OF DISSIDENTS

2. Early Firearms Regulation and Prohibition

c. Sporadic Disarmament of Dissidents

On page 197, please note the following correction to the text discussing Maryland's "Papist" statute:

The text cites a Maryland bill that provided for forfeiture of arms owned by "Papists" during the French & Indian War. 52 of the Archives of Maryland 450. The cited source, however, includes bills that were introduced into the Maryland legislature but not enacted. While the bill appears to have passed the lower house, it was rejected by the upper house. Upper House Journal at 296-97, 474-75 (Governor's speech noting rejection of militia bill), 640-41 (bill rejected again in the October 1756 legislative session).

CHAPTER 5
THE NEW CONSTITUTION

F. POST-RATIFICATION LEGISLATION AND COMMENTARY

1. The Militia Acts

NOTES & QUESTIONS

13. [New Note] *Military subordination to the civil power.* With variations in language, 48 state constitutions declare: "in all cases the military should be under strict subordination to, and governed by, the civil power." One scholar traces the Military Subordination Clauses to "roots in English anxieties over the memory of an independent standing army" during the British Civil Wars (Ch. 22.H.2), "the colonists' protests against British soldiers, and the unsuccessful push to include the clause in the Federal Constitution." The author suggests that the "Founding Era meaning and the Founding Generation's reaction to historical analogs to today's private militias confirms strong historical support" for states being allowed to forbid private militias. Alden A. Fletcher, *Strict Subordination: The Origins of Civil Control of Private Military Power in State Constitutions*, 14 Harv. Nat'l. Sec. J. 254 (2023).

CHAPTER 6

THE RIGHT TO ARMS, MILITIAS, AND SLAVERY IN THE EARLY REPUBLIC AND ANTEBELLUM PERIODS

B. ANTEBELLUM CASE LAW ON THE RIGHT TO ARMS UNDER STATE AND FEDERAL CONSTITUTIONS

6. [New Section] *Nonfirearm Arms*

Bruen's emphasis on legal history and analogies has sent litigants scurrying to learn about historic laws regarding non-firearms arms, which might serve as analogies to support various modern laws.

The full history of every American state or colonial statute restricting a particular type of nonfirearm weapon is described in David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. (forthcoming 2024). This Section is based on that article, and citations may be found therein.

The most common target of regulation was the Bowie knife, starting in 1837. By the end of the century, most states outside the northeast had specific statutes regulating them. A "Bowie knife" was not a new type of knife, but was a marketing term applied to a wide variety of knives useful for offense or defense. Many Bowie knife laws also applied to "dirks" (another broad term for fighting knives) and daggers (a two-edged knife with a thin blade).

The majority approach involved one or more of the following regulations: prohibiting concealed carry while not restricting open carry, forbidding sales to minors, or imposing extra punishment for use in a violent crime, such a duel.

A few jurisdictions went further, as in the Tennessee Bowie knife law that was upheld in *Aymette v. State* (Ch. 6.B.2). Several southern states imposed annual personal property taxes on Bowie knives, at a level that, within a few years, would cumulatively exceed the knife's purchase price. The Georgia Supreme Court in *Nunn v. State* (Ch. 6.B.1) held unconstitutional a statute against Bowie knives, most handguns, and a variety of other weapons. While

the prohibition of concealed carry was upheld, the laws against open carry, sales, and possession were held to violate the Second Amendment.

Some laws enacted before 1900 covered other specific weapons, such as sword canes (a sword concealed in a walking stick). Metallic knuckles were also regulated.

Flexible impact weapons were another target of regulation. All these weapons can be said to fit in the general category of "sap" — a small, concealable, flexible, weighted bludgeon. A typical sap is a flexible leather case with a weight at one end. It is extremely easy to make such a weapon at home. For example, take a sock and put some pocket change or a few tablespoons of sand or dirt in the toe. Grasp the sock by the other end. You now have a flexible impact weapon. You can swing it and strike whoever is attacking you.

While a sap blow to the head can be lethal, saps are usually nonlethal, albeit capable to inflicting serious injury, like a broken bone. They are easy to conceal. Unlike firearms, saps are nearly silent, and unlike firearms or knives, saps rarely create sanguinary wounds.

The most commonly regulated type of sap was the slungshot (sometimes called a "colt"). Originally invented by sailors for casting mooring lines, the slungshot was fairly long compared to other saps, and thus allowed strikes from a longer distance.

The "blackjack" is shorter, and had become a law enforcement favorite by the end of the nineteenth century. Also on the shorter side was the "sand club," whose name indicates the material used for its weighted load.

As with Bowie knives, there were various laws for the above items against concealed carry, sales to minors, or use in a violent crime.

Cannons were subject to little regulation, other than laws restricting discharge in cities or towns.

Today, litigants argue about whether laws such as concealed carry bans for Bowie knives are proper analogies for laws banning the possession of common firearms. *Compare*, *e.g.*, *Barnett v. Raoul*, 2023 WL 3160285 (S.D. Ill., Apr. 28, 2023) (concealed carry restrictions and the like are not precedents for possession bans) *with Bevis v. City of Naperville*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023) (they are). Both cases have been heard in a consolidated oral argument by the Seventh Circuit.

Before 1900, general bans on the possession of particular types of arms by persons who were recognized as having civil rights were rare. The closest analogies for modern possession bans might be general bans on sales, and also perhaps punitive taxes on sales or possession.

Following is a summary of all state or territorial sales ban for particular types of nonfirearm arms, enacted before 1900:

- *Bowie knife.* Sales bans in Georgia, Tennessee, and later in Arkansas. Georgia ban held to violate the Second Amendment in *Nunn*. Prohibitive

transfer or occupational vendor taxes in Alabama and Florida, which were repealed. Personal property taxes at levels high enough to discourage possession by poor people in Mississippi, Alabama, and North Carolina.

- *Dirk.* Georgia (1837) (held to violate Second Amendment in *Nunn*); Arkansas (1881).
- *Sword cane.* Georgia (1837) (held to violate the Second Amendment in *Nunn*), Arkansas (1881).
- *Slungshot or "colt."* Sales bans in nine states or territories. The Kentucky ban was later repealed. Illinois also banned possession.
- *Metallic knuckles.* Sales bans in six states, later repealed in Kentucky. Illinois also banned possession.
- *Sand club or blackjack.* New York (1881).

Kopel and Greenlee argue that the sales or high-tax laws for Bowie and other knives were too rare to create an established tradition under *Bruen*. The sales bans for slungshots (9 states or territories) and metallic knuckles (6 states) may come closer. Although the sociology of nineteenth-century possession of slungshots and metallic knuckles is not well-developed, it seems unlikely that these arms were so rare as to be considered "dangerous and unusual" under *Heller*.

However, *Heller* states that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. It is at least possible that slungshots and metallic knuckles were mainly used by criminals rather than by law-abiding citizens.

CHAPTER 7
THE WAR, RECONSTRUCTION, AND BEYOND

J. SELF-DEFENSE

5. Stand Your Ground

NOTES & QUESTIONS

5. [Add to end of Note] Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. Cal. L. Rev. 509 (2023) (the pretrial immunity phase for self-defense cases should be abolished; self-defense should be only an affirmative defense at trial, like duress or insanity).

CHAPTER 8

A NEW AND DANGEROUS CENTURY

B. CHANGES IN THE MILITIA AND OTHER FEDERAL AND STATE MILITARY FORCES

An outstanding new article provides much insight on the similarities and differences between the original organization of U.S. military forces and their present organization. Robert Leider, *Deciphering the "Armed Forces of the United States"*, 57 Wake Forest L. Rev. (forthcoming). Here is the abstract:

> The Constitution provides for two kinds of military land forces — armies and militia. Commentators and judges generally differentiate armies from the militia based upon federalism. They consider the constitutional "armies" to be the federal land forces, and the constitutional "militia" to be state land forces — essentially state armies. And the general consensus is that the militia has largely disappeared as an institution because of twentieth-century reforms that brought state National Guards under the control of the federal Armed Forces.
>
> This Article argues that the state armies view of the militia is erroneous. At the Framing, the core distinction between armies and militia was professionalism, not federalism. Armies comprised soldiers for whom military service was their principal occupation, while the militia comprised individuals who were subject to military service on a part-time or emergency basis. The armies were the regular forces, while the militia was the citizen army.
>
> From these definitions, this article then provides a better translation of the Framing-era military system to the structure of the modern Armed Forces. Today, the constitutional "armies" consist of the regular non-naval forces (including the regular army and the regular air force). The modern "militia" includes all other persons who perform, or could be called to perform, military service on a part-time or emergency basis. These include military reservists and National Guardsmen, all of whom form the modern volunteer militia, and the registrants of the Selective Service System, who form the modern general militia.

E. NATIONAL FIREARMS ACT REGULATION TODAY

The regulations relating to the National Firearms Act, 26 U.S.C. §§ 5801-72, can be found in 27 CFR Parts 478-79.

2. NFA Arms

b. Combinations of Machine Gun Parts and Conversion Kits

Forced-Reset Triggers

A forced-reset trigger (FRT) is "drop-in" replacement trigger mechanism for standard semi-automatic AR platform and some semi-automatic handguns. It is designed to increase firearm's rate of fire to almost fully automatic, thereby producing a nearly "machine gun" like experience. A standard trigger requires the shooter to pull and then release the trigger so that it resets by spring action before the user can pull the trigger again to fire a second shot. The FRT forces the trigger to move forward and reset itself. The FRT thus will reset and fire continuously so long as the shooter maintains constant pressure on the trigger. Some FRTs have adjustments that can bypass the rapid-fire mechanism and fire only single shots.

A binary trigger (Ch. 15.D.3) also is designed to increase the rate of fire for certain semi-automatic rifles (such as those built on the AR platform) and handguns. It allows the shooter to fire one round by pulling the trigger and then to fire a second round when the shooter releases the trigger to return forward to reset. As with a standard trigger, the binary trigger thus requires the shooter to pull and *release* the trigger. In other words:

- *Standard trigger.* One shot when the trigger is pressed. The user then releases the trigger, and the trigger is pulled forward by a spring, and resets. To fire a second shot, the user then presses the trigger again.
- *Binary trigger.* One shot when the trigger is pressed backwards (towards the user), and another shot when the trigger is released and moves forward.
- *Forced-reset trigger.* The user never needs to release the trigger. As long as the user keeps backwards pressure on the trigger, the gun will continue to fire.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued a cease-and-desist notice in July 2021 to Rare Breed Triggers, a manufacturer of FRTs, ordering the company to stop selling its popular FRT-15 trigger. ATF asserting that the FRT-15 meets the statutory definition of "machinegun": it is

a part that, when installed, converts a firearm into a machinegun. Rare Breed refused to comply and filed a federal lawsuit against ATF. The federal district court denied Rare Breed's motion for a preliminary injunction to prevent the ATF from taking the enforcement steps outlined in its letter. *Rare Breed Triggers, LLC v. Garland,* 2021 WL 4750081 (M.D. Fla. Oct. 12, 2021). The case was dismissed without prejudice on October 28, 2021.

Separately, Rare Breed obtained a preliminary injunction for patent infringement against Wide Open Enterprises, manufacturer of the "Wide Open" trigger, and Big Daddy Enterprises, distributor of Wide Open's trigger. *Rare Breed Triggers, LLC v. Big Daddy Enterprises, Inc.,* 2021 WL 6197091 (N.D. Fla. Dec. 30, 2021). The ATF went to Big Daddy in January 2022 and confiscated its inventory of Wide Open triggers, but it did not visit Rare Breed.

Based on internal emails purportedly leaked from the ATF, Gun Owners of America (GOA) and the Firearms Policy Coalition warned in late January/early February 2022 that the ATF was about to track down and confiscate Rare Breed and Wide Open FRTs from businesses that manufacture, distribute, or sell such items.

On March 22, 2022, ATF issued an open letter to all federal firearms licensees announcing that some FRTs are "firearms" and "machineguns" as defined in the National Firearms Act (NFA) and "machineguns" as defined in the Gun Control Act (GCA). The letter differentiates some FRTs from standard and binary triggers because "FRT devices allow a firearm to automatically expel more than one shot with a single, continuous pull of the trigger." Because of this operation, the letter explains, the ATF has classified FRTs as a "machinegun" as defined by the NFA and GCA (the definition includes any parts designed to convert a firearm to a machinegun). They thus are subject to the registration, transfer, taxation, and possession restrictions of the NFA (26 USC §§ 5841 and 5861) and the possession, transport, and transport of machinegun provisions of the GCA (18 USC §§ 922(o) and 922(a)(4)).

In May 2022, Rare Breed filed a new lawsuit against the DOJ and ATF in federal district court in North Dakota. It is unclear how the ATF will enforce its position on FRTs against individuals after issuance of its March 22, 2022, open letter. For one view from Washington Gun Law, a gun-rights organization, see the video here.

In January 2023, district court entered a temporary restraining order against Rare Breed Triggers. *United States v. Rare Breed Triggers*, 2023 WL 504992 (E.D.N.Y. Jan. 25, 2023). According to the court, Rare Breed's FRT-15 trigger kit was a machine gun conversion kit. The predecessor version had been so determined by ATF. Rare Breed did not seek a different ATF classification for the FRT-15. Rare Breed falsely told customers that the FRT-15 was not and could not be regulated by ATF. The TRO covers "FRT-15, the Wide Open Trigger, forced reset triggers, and other machinegun conversion devices."

There is no similar ATF action against binary triggers (Ch. 15.D.3).

Glock Switches

The "Glock Switch" is a "relatively simple, albeit illegal, device that allows a conventional semi-automatic Glock pistol to function as a fully automatic firearm. The switch is classified as a machine gun under federal law." Bureau of Alcohol, Tobacco, Firearms and Explosives, *Internet Arms Trafficking*. Glock switches have surged in popularity among criminals the last few years.

c. Bump Stocks

In 2021, a Fifth Circuit panel upheld ATF's regulation to redefine "machinegun" to include bump stocks. *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021). In June 2022, the full Fifth Circuit voted to hear the case en banc and vacated the panel decision.

On the merits en banc, the Fifth Circuit ruled 13-3 against ATF's classification of bump stocks as machine gun conversion kits. *Cargill v. Garlandv*, 57 F.4th 447 (5th Cir. 2023) (en banc). In the view of the majority, the NFA defines "machinegun" as "any weapon which shoots . . ., automatically more than one shot, without manual reloading, by a single function of the trigger." With a bump stock, a single function of the trigger causes only a single shot. "But even if that conclusion were incorrect, the rule of lenity would still require us to interpret the statute against imposing criminal liability."

The Sixth Circuit came to similar conclusion in *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 65 F.4th 895 (6th Cir. 2023). Although the court found the NFA's definition of "machinegun" to be ambiguous, it declined to apply *Chevron* deference because the subject matter was one "in which the courts are well-equipped to operate." The court declined to "abdicate [its] interpretive responsibility in such instances." It then held that the rule of lenity required it to rule in Hardin's favor.

i. Stabilizing Braces

On January 13, 2023, the Attorney General signed ATF final rule 2021R-08F, "Factoring Criteria for Firearms with Attached 'Stabilizing Braces,'" which clarifies those factors the ATF will consider when determining whether firearms equipped with a purported "stabilizing brace" (sometimes referred to as a "pistol brace") will be considered a "rifle" or "short-barreled rifle" under the Gun Control Act of 1968, or a "rifle" or "firearm" subject to regulation under the National Firearms Act.

The final rule was published in the Federal Register on January 31, 2023. If the firearm with the "stabilizing brace" is a short-barreled rifle, the rule gave the affected person an "amnesty period" for 120 days from the date of

publication to register the firearm tax-free, which expired on May 31, 2023. Potential penalties for noncompliance are a fine of up to $10,000 and a maximum 10 years in prison.

The rule reverses the ATF's long-held position that a stabilizing or pistol brace did not convert the firearm into a rifle or short-barrel rifle, the latter which would require registration under the NFA.

The ATF explains that "[t]he rule's amended definition of 'rifle' clarifies that the term 'designed, redesigned, made or remade, and intended to be fired from the shoulder' includes a weapon that is equipped with an accessory, component, or other rearward attachment (e.g., a 'stabilizing brace') that provides surface area that allows the weapon to be fired from the shoulder, provided other factors, as listed in the definition, indicate the weapon is designed and intended to be fired from the shoulder." The ATF also says that "[t]his rule does not affect 'stabilizing braces' that are objectively designed and intended as a 'stabilizing brace' for use by individuals with disabilities, and not for shouldering the weapon as a rifle. Such stabilizing braces are designed to conform to the arm and not as a buttstock."

Several lawsuits have been filed challenging the rule, including one by 25 states. A federal district court in *Mock v. Garland,* 2023 WL 2711630 (N.D. Tex. Mar. 30, 2023), denied injunctive relief. A Fifth Circuit panel enjoined the rule pending appeal in May 2023, but the injunction was limited to the litigants — the Firearms Policy Coalition and its members, Maxim Defense Industries and its customers, and two individual plaintiffs and their families. The Fifth Circuit heard oral arguments in the case on June 29, 2023.

A federal district court issued a preliminary injunction against the rule on May 31, 2023. *See Texas v. U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives,* 2023 WL 3763895 (S.D. Tex. May 31, 2023). This injunction applies to individuals employed directly by the State of Texas or its agencies, as well as all members of the private litigants in the case (Gun Owners of America, Gun Owners Foundation, Brady Brown). The injunction will remain in place pending disposition of *Mock v. Garland.*

4. Recent Growth in NFA Ownership

NOTES & QUESTIONS

2. [New Note] Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 Dickinson L. Rev. 273 (2022):

> As the NFA registry grows year after year, the federal government enjoys ever-increasing tax revenues. Consequently, registry expansion offers a lucrative and effective means of implementing gun control measures. ATF reclassification of existing non-NFA firearms and accessories as falling under

the NFA can compel registrations or preclude ownership of controversial items altogether.

. . . After *Heller*, the only constitutional NFA registry is a small one, reserved for the truly dangerous and unusual. By focusing on modern developments in three NFA categories — short-barreled rifles, silencers, and machine guns — this Comment contends that some NFA prohibitions are already constitutionally unsound and absent judicial intervention, Congress should remove them from the NFA altogether.

CHAPTER 9

THE SECOND AMENDMENT AND CONTEMPORARY GUN REGULATION

B. THE SECOND AMENDMENT IN THE LATER TWENTIETH CENTURY

3. Gun Control and the Limits of Federal Power

c. Modern Applications of the Twentieth Century Precedents: Firearms Freedoms Acts and Second Amendment Sanctuaries

Second Amendment Sanctuary (SAS) legislation and policies differ from Firearms Freedom Act (FFA) legislation in important ways. State FFA legislation declared aspects of federal law invalid. Those types of declarations have been uniformly struck down.

SAS legislation and policies simply declare an intention not to enforce federal law with state or local resources. The SAS movement began in 2018, in Illinois, as a reaction by rural counties to gun legislation that urban legislators were introducing following the Parkland, FL, shooting. Movement founders candidly admit that it is based on the model of immigration sanctuaries. Sheila Simon, *On Target? Assessing Gun Sanctuary Ordinances That Conflict with State Law*, 122 W. Va. L. Rev. 817, 817-21 (2020).

Second Amendment Sanctuaries now appear at both the state and local level. State SAS policies are designed to defy federal gun laws. Local SAS polices often purport to defy either federal gun laws, state gun laws, or both.

State and local SAS policies designed to defy federal gun laws exhibit strong *de jure* validity. They rest solidly on the constitutional principle that state and local governments cannot be forced to implement federal law. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot use the states as instruments of federal governance by compelling state or local government officials to enforce federal laws); *New York v. United*

States, 505 U.S. 144 (1992) (holding that the federal government may not force states to establish regulations in furtherance of federal policy).

Enforcement by federal officials is still possible. But the federal government cannot compel state and local officials to enforce federal rules. State refusal to enforce federal law has a long pedigree. *See, e.g.*, *Prigg v. Pennsylvania*v, 41 U.S. 529 (1842) (affirming that Pennsylvania had no obligation to assist in enforcement of the Fugitive Slave Act); *see also* Horace K Houston, *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 New Eng. Q. 252 (2004).

Local SAS policies that purport to defy state law present a different situation. The broad subordination of local governments to state power means that local policies designed to defy state law have weak claims to *de jure* validity. For a good summary of the issues and doctrine surrounding state powers over local governments, see Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 Col. Human Rights L. Rev. 1, 84-88 (2018). Some observers moved quickly to the conclusion that state and local sanctuary policies that purport to defy state law are merely symbolic and inconsequential. *See* Ric Su, The Rise of Second Amendment Sanctuaries, American Constitution Society, Issue Brief, (March 2021) (Second Amendment Sanctuaries lack the power to nullify state laws and face various other legal and practical obstacles). Some commentators offer novel theories of de jure validity. *See* Shawn Fields, *Second Amendment Sanctuaries*, 115 Nw. L. Rev. 437 (2020) (challenging the view of de jure invalidity with a three-part theoretical construct grounded on home rule provisions, sub-federal anti-commandeering, and substantive constitutional resistance on matters unsettled by the judiciary); Shelia Simon, *On Target? Assessing Gun Sanctuary Ordinances that Conflict with State Law*, 122 W. V. L. Rev. 817 (2020) (presenting a normative case rooted in agency for the validity of local sanctuary policies); Steven Halbrook, *Virginia's Second Amendment Sanctuaries: Do They Have Legal Effect?* (Nov. 22, 2020) (arguing that absent judicial resolution, local constitutional officers have an obligation not to enforce firearms laws of questionable constitutionality). Another rendition of the sort of argument presented by Halbrook appears in the Tazewell County Board of Supervisors' claim of authority "to order the militia to the localities" per the Virginia Constitution was a justification to defy state gun control measures. Similarly, the Sheriff of Culpepper County pledged to evade state gun bans by deputizing "thousands of our law-abiding citizens." *A Virginia sheriff has vowed to deputize county residents if the new Democratic majority in the state legislature passes gun control measures*, AP News (December 9, 2019, 1:53 PM).

Professor Johnson argues that while local SAS policies that defy state law might lack formal validity, they might still achieve broad practical effect

through the same sort of *discretionary non-enforcement* that has been deployed by state and local officials in opposition to marijuana restrictions, immigration laws and quality-of-life regulations that fuel mass incarceration. *See* Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion and Race*, 50 Pepperdine L. Rev. 1 (2023).

Some state legislation might exhibit both SAS and FFA characteristics. In that case, the state effort to nullify federal law is highly likely to be struck down. However, the formal or informal refusal of state or local officials to aid in the enforcement of federal law would remain valid.

NOTES & QUESTIONS

3. [Add to end of Note] Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion, and Race*, 50 Pepperdine L. Rev. 1 (2023) ("[E]ven where Second Amendment Sanctuaries have weak claims to formal validity, defiant public officials still have broad opportunities to implement Second Amendment Sanctuary policies through the exercise of enforcement discretion. The conclusion that enforcement discretion can effectuate sanctuary policies is tempered by the caution that using enforcement discretion in this way also invites the sort of racially biased implementation that has been common in the administration of firearms laws.").

4. [Moved to New Note from 2022 Supplement] In 2022 the New Hampshire General Court (the state legislature) enacted HB 1178, to prohibit state or local officials from enforcing any federal statute, regulator, or executive order

> inconsistent with any law of this state regarding the regulation of firearms, ammunition, magazines or the ammunition feeding devices, firearm components, firearms supplies, or knives. Silence in the New Hampshire Revised Statutes Annotated pertaining to a matter regulated by federal law shall be construed as an inconsistency for the purposes of this chapter."

A notable word in the statute is "knives." The New Hampshire law is the first of the State's Rights arms bills to apply to nonfirearm arms.

The bill also addresses concerns raised about similar bills previously adopted in other states. First, the bill expressly allows N.H. law enforcement to assist federal arms law enforcement when the gun control law enforcement is in conjunction with another crime. For example, ATF is investigating someone for armed robberies.

Additionally, state and local officials can freely comply with records requests from the federal government.

5. [New Note] *Missouri's Second Amendment Preservation Act* (SAPA). Under a statute enacted in 2021, "Any registration or tracking of firearms, firearm accessories, or ammunition" within Missouri violates the Second Amendment. "Any act forbidding the possession, ownership, use, or transfer of a firearm, firearm accessory, or ammunition by law-abiding citizens" violates the Second Amendment. So does "Any act ordering the confiscation of firearms, firearm accessories, or ammunition from law-abiding citizens." A "law-abiding citizen" is "a person who is not otherwise precluded under state law from possessing a firearm." All federal laws to the contrary are void in Missouri. Mo. Rev. Stat. §§ 1.410 – 1.485.

The Biden administration brought suit against SAPA and won in U.S. District Court. *United States v. Missouri*, 2023 WL 2390677 (W.D. Mo. Mar. 7, 2023). The court held that SAPA violates the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI cl. 2. The National Firearms Act and the Gun Control Act create extensive systems for registering and tracking firearms. SAPA's "logical implication is that Missouri citizens need not comply with federal licensing and registration requirements." All sorts of federal laws or regulations order confiscation of firearms or accessories from law-abiding citizens. (*E.g.*, when the ATF's reclassified bump stocks and pistol braces regulation as NFA items. (Ch. 8.E.2.c; 2023 Supp. Chs. 8.E.2.c, 8.E.2.i).

"Section 1.440 imposes a duty on Missouri courts and law enforcement agencies to protect against infringements as defined under § 1.420. In creating an affirmative duty to protect against infringements, § 1.440 effectively imposes an affirmative duty to effectuate an obstacle to federal firearms enforcement within the state. . . . § 1.440 violates intergovernmental immunity." Additionally, "Section 1.470 imposes a monetary penalty through civil enforcement action against any political subdivision or law enforcement agency that employs an officer who formerly enforced the infringements identified in § 1.420 — that is, certain federal firearms regulations . . . [T]hese enforcement schemes are likely to discourage federal law enforcement recruitment efforts."

The case is presently on appeal of the Eighth Circuit.

In a separate state court suit on the same issue, the City of St. Louis, the County of St. Louis, and Jackson County sued and asked for a declaratory judgment and an injunction. Plaintiffs alleged that SAPA violates the U.S. Constitution Supremacy Clause, and well as several provisions of the Missouri Constitution, such as the home rule powers of charter cities.

The state trial court ruled that plaintiffs did not need the requested equitable relief because they had an adequate remedy at law: if anyone brought a civil SAPA enforcement case against them, they could as defendants raise their constitutional arguments.

By 6-1, the Missouri Supreme Court disagreed. *City of St. Louis v. State*, 643 S.W.3d 295 (Mo. 2022). An intended purpose of the Declaratory Judgment

Act is to settle constitutional questions. Moreover, the possibility of raising a constitutional defense in possible future civil actions was inadequate: "a party need not face a multiplicity of lawsuits or wait for an enforcement action to be initiated before seeking a declaration of rights." "Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act." The case was remanded to the trial court for adjudication of the constitutional issues.

6. [New Note] An Oregon county's Second Amendment Sanctuary ordinance said that all gun control laws originating from outside the county are void, and county officials shall not participate in their enforcement. The county ordinance was held to violate the state firearms preemption law, O.R.S. § 166.170. The county ordinance would make the treatment of firearms different from the rest of the state. This would create the "patchwork" that preemption is intended to prevent. *Board of County Comm. of Columbia Cty. v. Rosenblum*, 324 Or App 221 (2023).

C. MODERN FEDERAL REGULATION OF FIREARMS: THE GUN CONTROL ACT

On June 25, 2022, President Joseph Biden signed into law S. 2938, the Bipartisan Safer Communities Act, which makes many significant changes to the Gun Control Act. The bill was privately negotiated by a bipartisan group of Senators, and immediately brought to the floors of the Senate and House, bypassing the standard process of committee hearings. Experience shows that legislation enacted with shortcuts to normal procedure and public input often contains major drafting errors and unintended consequences. The problems are particularly problematic when a bill changes the criminal law to make it more severe. Professor Leider provides an analysis of the Act.

Robert Leider*
The Bipartisan Safer Communities Act: Doctrinal and Policy Problems
49 J. Legis. 234 (2023)

Introduction

The Bipartisan Safer Communities Act injects substantial uncertainty throughout the Gun Control Act. This was the unfortunate byproduct of a

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rushed and aborted legislative process. This Essay examines the changes imposed by the Act, focusing on three sets of issues. First, it examines the changes to the prohibited person rules. Second, it looks at Congress's effort to further control commerce in firearms. Third, it examines how the bill supports red-flag laws without adopting any particular federal law. It presumes that the reader already has a high degree of familiarity with federal gun control laws.

The Framers designed our system of federal legislating to be slow and methodical. To become law, a bill must pass two houses of Congress.[1] Those houses represent different constituencies. Even then, the bill will not become law unless the President, whose constituency is national, signs the bill or two-thirds of Congress overrides his veto.[2]

Congressional rules and conventions generally make this procedure slower and more cumbersome. Before a bill becomes a law, Congress first assigns it to a committee. The committee holds hearings and offers amendments. The bill then goes to the floor. Members debate its provisions and offer amendments. If it passes, the bill then goes to the other house, where the process is often repeated. Then, if the two houses did not agree on the final text (and often they do not), they must reconcile their differences. Congress may appoint a conference committee.[3] The committee can agree on a final text, which then must be approved by both houses.[4] Alternatively, the first house may accede to the changes made by the second house and pass that version of the bill.[5] Only then does it go to the President.

For a many reasons, most bills never make it this far. Perhaps they do not enjoy the support of a majority of members. Or maybe the broad outlines of the bill enjoy the support of a majority, but the majority cannot agree on the specific text. But even bills that enjoy the support of a majority of members often do not become law. Legislative time is limited and the bill may not be a priority. The bill may face a hostile committee or a hostile committee chairman. The bill may be filibustered in the Senate, requiring 60 votes to overcome it. In a close vote, individual members may try to hold the bill hostage until members agree to pass something of importance to that member. And so on.[6]

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[1] U.S. Const. art. I, § 7, cl. 2.

[2] U.S. Const. art. I, § 7, cl. 3.

[3] Elizabeth Rybicki, Cong. Rsch. Serv., 96-708, Conference Committee and Related Procedures: An Introduction 3 (2021); House Rules Committee, 117th Cong., Rules of the House of Representatives, Rule XXII 37-39 (2021); U.S. Senate Committee on Rules and Administration, 116th Cong., Standing Rules of the Senate, Rule XXVIII (2019).

[4] Elizabeth Rybicki, Cong. Rsch. Serv., R96-708, Conference Committee and Related Procedures: An Introduction 1 (2021).

[5] *Id.*

[6] On the various reasons legislation fails to pass ("vetogates"), see William N. Eskridge, Jr., James J. Brudney & Josh Chafetz, Legislation and Statutory Interpretation 100-07 (3d ed. 2022).

Gun control bills are among the hardest bills to pass through Congress. Gun control is divisive politically and socially.[7] Many people who favor gun rights are single issue voters, and in close elections, it does not pay candidates to alienate them.[8] Congress is also malapportioned toward smaller states, and these jurisdictions often do not support stricter gun laws.[9] And if nothing else, getting sixty votes in the Senate to overcome a filibuster on this issue is extraordinarily difficult.

Despite these challenges, political moments occur when many Members of Congress desire to pass gun control. Some members strongly believe that federal gun laws should be stronger and look for strategic moments get stricter laws passed. Others, including those who oppose gun control generally, feel extraordinary pressure to pass something, often in the wake of a mass shooting, an assassination, or another tragedy that receives national attention.

This is what happened with the Bipartisan Safer Communities Act, which was passed in the wake of two horrible mass shootings. The first occurred at a supermarket in Buffalo, New York, where a white supremacist killed ten African-Americans in May 2022.[10] Ten days later, a gunman killed nineteen children and two teachers at Robb Elementary School in Uvalde, Texas.[11] Members of Congress both faced enormous pressure to do something legislative to stem these mass shootings, but had no obvious way to overcome congressional deadlock — particularly the de facto sixty-vote threshold in the Senate.[12]

To overcome the gridlock, Senators tried a different way of legislating. A small, bipartisan groups of Senators — including Republicans necessary to overcome the filibuster — met in secret and agreed on language among themselves.[13] Once the agreement was reached, the bill was jammed through Congress as quickly as possible. The usual hearings were not held.[14] No

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[7] Pew Rsch. Ctr., Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive 10 (2021).

[8] R.J. Reinhart, *Gun Control Remains an Important Factor for U.S. Voters*, Gallup (Oct. 23, 2017).

[9] Pew Rsch. Ctr., *supra* note 7, at 10; Heather McCracken, et al., *Gun Ownership in America*, RAND (using data collected between 2007 and 2016).

[10] Jimmy Vielkind & Ginger Adams Otis, *The Buffalo Shooting: What We Know So Far, From Twitch to Replacement Theory*, Wall St. J. (May 19, 2022).

[11] *The Names: 19 Children, 2 Teachers Killed in Uvalde School*, AP News (June 3, 2022).

[12] Farnoush Amiri, *Families of Uvalde, Buffalo victims to testify in Congress*, AP News, (June 3, 2022).

[13] Annie Karni & Emily Cochrane, *Leaving Wish Lists at the Door, Senators Found Consensus on Guns*, N.Y. Times (June 24, 2022).

[14] *Actions Overview S.2938 — 117th Congress (2021-2022), S.2938 - Bipartisan Safer Communities Act*, Congress.gov, (last accessed Aug. 16, 2022).

committee marked up the bill.[15] Amendments on the floor were beaten back, lest they scuttle the deal.[16]

The predictable and unfortunate result of this stunted legislative process was a law loaded with unclear policy goals, garbled language, and technical deficiencies. Ultimately, it will fall to the courts and to the administrative agencies to explain what this law actually does.

I. Changes to the Prohibited Persons Rules

From the criminal law perspective, the federal prohibitions on buying and receiving firearms are the most significant. The vast majority of criminal prosecutions under the Gun Control Act of 1968 are for the possession of a firearm by a prohibited person (usually a felon) and its aggravated sibling, unlawful possession by a person subject to the Armed Career Criminal Act.

To give a comparative perspective, consider these numbers on the quantity of federal criminal prosecutions compiled by the Transactional Records Clearinghouse, broken down by the lead charge. Between fiscal years 2008 and 2017, there were approximately 73,000 cases for which the primary crime was a violation of the Gun Control Act of 1968 or the National Firearms Act.[17] Of these, about 54,000 were federal criminal prosecutions in which unlawful possession of a firearm by a felon was the lead charge and nearly 60,000 prosecutions for possession by any prohibited person.[18]

Compare that with some unlawful trafficking offenses. During the same time period, there were about 1,500 cases brought primarily for manufacturing or selling firearms without a license.[19] Another approximately 1,300 cases were brought for making a false statement in connection with the sale of a gun or ammunition—the primary provision implicated by "straw purchase" sales.[20] And there were 77 cases brought for unlawfully selling firearms across state lines.[21]

As these numbers demonstrate, federal prosecutors lean heavily toward bringing prohibited person cases. It is not difficult to understand why. These cases are cheap and easy to bring.[22] Sufficient evidence (possession of the gun) is usually found on the defendant's person or in his vehicle or home. In many

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[15] *Id.*
[16] *See id.*; Karni & Cochrane, *supra* note 13.
[17] TRAC, Federal Weapons Prosecutions Rise for Third Consecutive Year (2017).
[18] *Id.* at tbl.2.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 516 & n.50, 537-38, 551 (2001) (explaining how possession offenses are easier for prosecutors to prove compared with traditional crimes).

cases, the most significant legal issues will be whether the search was lawfully conducted and if not, whether the evidence has to be suppressed. By contrast, interstate trafficking prosecutions require much more investigation. There can also be serious burden-of-proof questions. These may include whether the seller acted with the requisite mens rea[23] and whether the seller was liquidating part of his private collection—which is generally lawful under federal law—or engaging in sales to make a profit—which is unlawful, unless the person is licensed as a dealer.[24]

The Bipartisan Safer Communities Act makes several changes to the prohibited person rules. At this time, their true legal effect is unknown and will require clarification by subsequent legislation, administrative rulemaking, or judicial decisions.

A. Modifying the Rules for Juveniles

The Gun Control Act contains two comprehensive, largely overlapping lists of prohibited persons. The first list is contained in subsection (d). That subsection makes it "unlawful for any person to sell or otherwise dispose of any firearm or ammunition knowing or having reasonable cause to believe that such person" falls into one of the prohibited categories.[25] The second list is in subsection (g), which makes it unlawful for any person who fits within one of the categories to *possess* a firearm that has ever moved in or affected interstate commerce.[26] The list of prohibited persons in each list is nearly identical, including, for example, felons, those addicted to drugs, and those unlawfully present in the United States. There are minor differences in the lists, and they make sense. For example, a person may not transfer a firearm to a person under indictment for a felony (but not yet convicted).[27] But a person merely under indictment may continue to possess owned firearms until he is convicted.[28]

Strangely, the Bipartisan Safer Communities Act made changes to subsection (d) (sale or transfer) without making the corresponding changes to subsection (g) (possession). Among these changes, it is now unlawful under subsection (d) to make a sale knowing the recipient falls into a prohibiting

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[23] *See* 18 U.S.C. § 924(a)(1)(D) (setting a default mens rea of "willfully" for violations of the Gun Control Act).
[24] *See* 18 U.S.C. § 921(21)(C), § 922(a)(1).
[25] 18 U.S.C. § 922(d).
[26] 18 U.S.C. § 922(g); *see Scarborough v. United States*, 431 U.S. 563, 575 (1977) (interpreting the Act to apply to any former transportation of the firearm in interstate commerce).
[27] 18 U.S.C. § 922(d)(1); *see also* 18 U.S.C. § 922(n) (prohibiting shipment, transportation, and receipt of a firearm in interstate or foreign commerce by a person under felony indictment).
[28] *See* 18 U.S.C. § 922(g)(1).

category for conduct that was done "including as a juvenile."[29] Subsection (g), however, does not include this "including as a juvenile" language.[30]

1. The effect this omission will have is unclear. On a strict textual reading (and courts are moving in a textualist direction[31]), it may now be possible that some individuals are prohibited from receiving firearms for conduct as a juvenile, but they are not prohibited from possessing firearms or manufacturing their own firearms. (Maybe this will fuel demand in "ghost guns" among such persons.[32]) On the other hand, maybe the courts will deem this a drafting mistake and read into subsection (g) the "including as a juvenile" language placed in subsection (d).[33] But this approach is fraught with peril because it will result in the judiciary substantively expanding the scope of a felony.[34]

2. The confusion is compounded because Congress made the opposite error for involuntary mental health commitments. Congress added to (d)(4) that a person is prohibited if he "has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older."[35] The memo circulated with the bill claimed that this provision "[i]mproves current law so that mental health adjudication records for persons under 16 years old do not disqualify them from purchasing a firearm."[36] But Congress never

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[29] Bipartisan Safer Communities Act, Pub. L. 117-159, § 12001(a)(1)(A)(1), 136 Stat. 1314, 1322 (2022).

[30] *See* 18 U.S.C. § 922(g)(1).

[31] *See* Diarmuid F. O'Scannlain, "*We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 St. John's L. Rev. 303, 304 (2017).

[32] "Ghost guns" are partially finished firearm components. By completing much of the manufacturing process, sellers of these products make it easy for consumers to finish manufacturing the firearm. But because they are not complete firearms yet, they have largely fallen outside the federal regulatory framework. The Department of Justice has finalized new rules designed to make more unfinished frames and receivers qualify as "firearms" under the Gun Control Act, under the theory that they can be readily restored to firing condition. *See* 18 U.S.C. § 921(a)(3); Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 27,652 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447-449).

[33] *Cf. King v. Burwell*, 576 U.S. 473, 492-95 (2015) (construing "an Exchange established by the State" to include federal exchanges to make the statute operate in the way Congress intended).

[34] *See United States v. Bass*, 404 US. 336, 348 (1971); *see also* Dep't of Justice, Memorandum Opinion for the Chief Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives: Nonimmigrant Aliens and Firearms Disabilities under the Gun Control Act (2011) (refusing to interpret the firearms prohibition applying to aliens admitted to the United States on a nonimmigrant visa to apply to nonimmigrant aliens who are present pursuant to the visa waiver program).

[35] Bipartisan Safer Communities Act § 12001(a)(1)(A)(ii), 136 Stat. 1322.

[36] Bipartisan Safer Communities Act: Section-By-Section at 2 (also on file with author).

amended subsection (g), which continues to read that it is unlawful for a person to possess a firearm if he "has been adjudicated as a mental defective or who has been committed to a mental institution."[37] This provision applies to adjudications under age 16.[38] So under a literal reading of the Gun Control Act, a person may now transfer a firearm to a person for whom it is unlawful to possess. Again, there is the question of whether courts will claim that Congress's amendment to (d)(4) was also meant to apply to (g)(4). This time, however, courts would be acting to narrow the scope of a federal criminal provision, which does not raise the same judicial power concerns that would come with *expanding* the juvenile provision to subsection (g).[39]

3. Substantively, it is unclear what this language ("including as a juvenile") is supposed to do. A memo circulated with the bill states that this provision "[c]larifies current law that a person is prohibited from purchasing a firearm if their juvenile record meets the existing criteria for a prohibited firearms purchaser under 18 U.S.[C.] 922(d)."[40] But that is already the law; it is not in need of clarification. Individuals, for example, who are convicted of felonies or involuntarily committed to a mental institution cannot plead that the conviction happened before age 18 as a defense.[41] So maybe the provision does nothing. But courts are loathe to construe a statute so that a statutory amendment has no substantive effect.

One area where there is no uniform federal standard is whether juvenile *adjudications* count as "convictions." Some states treat adjudications in juvenile court as civil matters, while others treat them as criminal ones.[42] For what qualifies as a felony, the Gun Control Act provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[43] Federal courts have understood this to mean that a juvenile adjudication counts as a felony conviction only when state law treats it as criminal conviction.[44] Perhaps the

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[37] 18 U.S.C. § 922(g)(4).

[38] *See, e.g.*, *United States v. Lender*, 985 F.2d 151, 156 (4th Cir. 1993) (discussing definition of "crime punishable by imprisonment for a term exceeding one year" in the context of the Armed Career Criminal Act); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 714-15 (M.D. Pa. 2016) (juvenile involuntary commitments).

[39] *See Bass*, 404 U.S. at 347-49 (discussing the rule of lenity).

[40] Bipartisan Safer Communities Act: Section-By-Section, *supra* note 36, at 2.

[41] *See Keyes*, 195 F. Supp. 3d at 714–15

[42] *Compare United States v. Walters*, 359 F.3d 340, 344-46 (4th Cir. 2004) (holding that juvenile adjudications are not criminal "convictions" under Virginia law), *with United States v. Mendez*, 765 F.3d 950, 953 (9th Cir. 2014) (holding that juvenile adjudications are "convictions" under Washington state law).

[43] 18 U.S.C. § 921(20).

[44] *See supra* note 42.

"including as a juvenile" language overturns this state-by-state approach and mandates a new federal standard in which all juvenile adjudications count as "convictions" notwithstanding state law. But the "including as a juvenile" amendment to subsection (d) did not change the provision that what counts as a "conviction" depends on state law.

B. Expanding the Domestic Violence Gun Ban

In 1996, the "Lautenberg Amendment" prohibited the possession of firearms by those convicted of a misdemeanor crime of domestic violence.[45] Congress defined the provision only to apply misdemeanor violent crimes "committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."[46] The theory behind the provision was that many serious cases of domestic violence were essentially felony cases that state law treated as misdemeanors or were pleaded down to misdemeanors by prosecutors.[47] Moreover, individuals are more likely to murder a spouse if they have a prior history of domestic violence.[48] But the limitation only to spouses and those similarly situated to spouses led to concerns about a "boyfriend loophole" for individuals who committed dating violence.[49]

The Bipartisan Safer Communities Act expands the prohibition to cover some people convicted of domestic violence against dating partners. The amendment applies the domestic violence gun ban to an individual "who has a current or recent former dating relationship with the victim."[50] The term "dating relationship" is then defined as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature."[51] The Act does not define a serious dating relationship, but provides three factors to evaluate whether a relationship qualifies: "(i) the length of the relationship; (ii) the nature of the relationship; and (iii) the

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[45] 1997 Consolidated Omnibus Appropriations Act, Pub. L. 104-208 § 658, 110 Stat. 3009, 3009-172 (1999).
[46] 18 U.S.C. § 921(a)(33)(ii) (2012).
[47] *See* Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws*, 29 Fordham Urb. L.J. 427, 453-54 (2001); Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. Rev. 365, 390 n.96 (1999) (collecting legislative history sources).
[48] *United States v. Skoien*, 614 F.3d 638, 642-44 (7th Cir. 2010) (en banc) (discussing studies).
[49] *See* Boyfriend Loophole, Wikipedia.
[50] Bipartisan Safer Communities Act § 12005(a)(1)(B), 136 Stat. 1332.
[51] *Id.* § 12005(a)(2)(A).

frequency and type of interaction between the individuals involved in the relationship."[52] The Act also disclaims that a "causal acquaintanceship or ordinary fraternalization in a business or social context" qualifies.[53]

The misdemeanor gun ban applies differently to dating partners than it does to family members. First, unlike for family members, the ban is not retroactive for crimes committed before its effective date.[54] The Lautenberg Amendment was retroactive and did not exempt government employees acting within the scope of their duties.[55] Before 1996, many police officers had pleaded guilty to misdemeanor crimes of domestic violence so they could avoid felony convictions and keep their jobs. These officers found themselves dismissed after the Lautenberg Amendment, which applied to convictions that predated its effective date.[56] The dating partner ban avoids this problem.

Second, the ban is only permanent for recidivists. A person with a single conviction may regain his right to bear arms after five years have elapsed unless the person commits another crime of domestic violence, a crime of violence (whether domestic violence or otherwise), or another offense that disqualifies the person from possessing a firearm under § 922(g).[57]

Despite this mitigation, the ban, as written, still has serious problems. Although all laws have a zone of ambiguity, the definition of "dating relationship" is a vague standard. The Act contains no effective guidance about where the line is between a serious relationship and a not serious relationship. A week of dating? A month? A year? Nor does it explain the relationship between physical intimacy and length of time. Does a week qualify if it includes intercourse? How about a year if there is little or no physical intimacy?

The lack of a proper definition will cause serious problems. First, there is a good chance that the provision is unconstitutionally vague because of its indeterminacy, which makes it difficult for many to know whether they fall within the prohibition or not.[58] Second, even if it is not vague, courts may limit the provision under the rule of lenity only to those relationships that undoubtedly fall within its scope.[59]

The lack of a proper definition will also make it difficult to prosecute possession and attempted purchases. Under the current understanding of §

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[52] *Id.* § 12005(a)(2)(B).
[53] *Id.* § 12005(a)(1)(C).
[54] *Id.* § 12005(b).
[55] *See Fraternal Order of Police v. United States*, 173 F.3d 898, 901 (D.C. Cir. 1999).
[56] *See* Roberto Suro & Philip P. Pan, *Law's Omission Disarms Some Police*, Wash. Post (Dec. 27, 1996).
[57] Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).
[58] *Johnson v. United States*, 576 U.S. 591, 597 (2015).
[59] *See Johnson*, 576 U.S. at 615-16 (Thomas, J., concurring) (arguing that courts should just apply vague statutes in core cases that plainly fall within their text).

922(g), a person must know his status as a prohibited person.[60] A person may read this definition and believe in good faith that he or she is not prohibited. Such a belief could also scuttle a prosecution for making a false statement in connection with purchasing a firearm (i.e., lying on the ATF Form 4473 when asked about disqualifying conditions).[61]

The law is also vague about recidivists. The law provides that firearm rights are restored "in the case of a person who has not more than 1 conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship" after "5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted" of another crime of violence.[62] At that point, the National Instant Check System "shall be updated to reflect the status of the person."[63] But what happens if the person commits a misdemeanor crime of violence after six years? For example, the person has a bar fight against another (unknown) patron and is convicted of simple assault. Is he now barred for life from possessing a firearm? Or did the restoration of his firearm rights after five years return him to the status quo ante position where an offense for misdemeanor (non-domestic) violence will not disqualify him? The language is capable of either interpretation.

C. Increasing Statutory Maximum Penalties for Prohibited Possessors

One of the potentially most serious facets of the current bill is that it increases the maximum penalty for violations of § 922(d) and (g) from 10 years to 15 years.[64] This is surprising. In recent years, progressives have railed against regulatory gun offenses because the crimes are not violent and minorities face disproportionate punishment. A recent report from the Sentencing Commission showed that a majority of all federal firearm convictions were against Black defendants.[65] Yet, Democrats in Congress increased the maximum penalties with no real dissent.

At this time, the impact of increasing the statutory maximum is difficult to determine. In June 2022, the Sentencing Commission issued a report looking at sentencing for all firearm offenses (not just possession by prohibited

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[60] *Rehaif v. United States*, 139 S. Ct. 2191 (2019).
[61] *See* 18 U.S.C. § 922(a)(6) (prohibiting knowing false statements in connection with the purchase of firearms and ammunition); *id.* § 924(a)(1)(A) (prohibiting knowing false statements of information that federal firearm licensees must collect and keep records).
[62] Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).
[63] *Id.*
[64] Bipartisan Safer Communities Act § 12004(c), 136 Stat. 1329 (codified at 18 U.S.C. § 924(a)).
[65] Matthew J. Iaconetti et. al, U.S. Sent'g Comm'n, What Do Federal Firearms Offenses Really Look Like? 10 (2022).

persons). Nevertheless, the report is instructive because of the ubiquity of prohibited person offenses compared with other federal gun offenses. The Sentencing Commission found that approximately half of convicted defendants received a sentence within the range of the U.S. Sentencing Guidelines.[66] On average, gun defendants were sentenced to 42 months in prison.[67] Another 23.5% received sentences of 5 to 10 years.[68] Only 3.4% received sentences greater than 10 years.[69] The Sentencing Commission found that, for gun defendants, the guidelines "ha[ve] a strong anchoring effect."[70]

Given this, the Sentencing Commission, more than Congress or individual judges, will determine the likely impact of increasing the statutory maximum for prohibited person offenses. At this time, it is not known how the Sentencing Commission will respond. Will the Commission take the cue from Congress and raise the presumptive Guideline range for all gun offenses? If it does, raising the statutory maximum will likely translate into an increase in actual sentences. But if the Commission maintains the current range, then the increase in the statutory maximum will likely have little effect, except in a narrow range of aggravated cases warranting sentences above 10 years.

D. Prohibited Transfers

The act also adds two new prohibited transfer categories under § 922(d). It is now prohibited to transfer a firearm to a person who "Intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense" or who "intends to sell or otherwise dispose of the firearm or ammunition" to a prohibited person.[71]

These changes may facilitate the prosecution of accomplices to crime. Accomplice liability has a high mens rea, including either specific intent to facilitate commission of the offense or (more arguably) knowledge that a person is assisting the offense.[72] This new provision will allow prosecution where the transferor has knowledge or reasonable cause to believe a crime is intended with the weapon, a much lower mens rea.[73]

It is unclear whether a person who makes a false declaration that he does not intend to commit a crime in connection with a firearms may be punished.

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[66] *Id.* at 15.
[67] *Id.* at 14.
[68] *Id.* at 15.
[69] *Id.*
[70] *Id.* at 17.
[71] 18 U.S.C. § 922(d)(10), (11).
[72] Joshua Dressler, Understanding Criminal Law § 30.05[B][2], at 449-50 (8th ed. 2018) (explaining that the precise mens rea for accomplice liability is doctrinally uncertain).
[73] *See* Stuntz, *supra* note 22, at 537-38 (explaining how legislatures draft criminal laws to benefit prosecutors).

There may be Fifth Amendment problems with forcing someone to disclose his future criminal intent.[74] Or the courts may decide that there is no problem because no one is compelled to purchase a firearm.

II. Changes to the Prohibited Persons Rules

The Bipartisan Safer Communities Act makes several changes to the legal regime surrounding purchasing and trafficking in firearms. The substantive changes described in Part I will have profound effect on the operation of the National Instant Check System. The new Act also makes other changes to the federal legal regime, some of which may be quite significant, while others appear cosmetic.

A. Modifying the Rules for Juveniles . . . Again.

The most significant rule change for firearm sales involves sales to those between 18 and 21. To implement the new provision regarding juvenile convictions, the Act creates special provisions for young adults who purchase firearms.

Ordinarily, one who purchases a firearm from a licensed dealer is subject to a background check through the National Instant Check System.[75] The transaction may proceed once the system gives its approval or, if no approval is forthcoming, three business days have elapsed.[76]

For young-adult transactions in which there is "a possibly disqualifying juvenile record," the research period will now expand to 10 business days.[77] So young adults may find themselves with a two-week waiting period to purchase firearms.

Additionally, for young-adult transactions, the National Instant Check System must contact "the criminal history repository or juvenile justice information system . . . of the State in which the person resides," "the appropriate State custodian of mental health adjudication records," and "a local law enforcement agency of the jurisdiction in which the person resides."[78] It is not clear how this will work in practice. This might be done quickly through a computer check. Or young adults may find that they encounter delays at point of sale as a matter of course. It is also not clear what will happen

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[74] *Cf. Haynes v. United States*, 390 U.S. 85, 97-100 (1968).
[75] 18 U.S.C. § 922(t)(1), (3).
[76] *Id.* § 922(t)(1)(B)(ii).
[77] *Id.* § 922(t)(1)(C)(iii).
[78] 34 U.S.C. § 40901(l)(1).

if state authorities refuse to cooperate with the system. Finally, the mental health provision is set to sunset in 10 years.[79]

B. How Will the National Instant Check System Handle the Expanded Misdemeanor Crimes of Domestic Violence Category?

There may also be considerable administrability problems with expanding misdemeanor crimes of domestic violence to dating partners. Suppose the National Instant Check System discovers that a potential applicant has been convicted of assault or battery. What is the examiner supposed to do? A court proceeding—especially a brief plea bargain—may not have the details about whether the victim was in a relationship with the defendant. Even if it does, it may not describe that relationship in detail. How is the examiner supposed to determine whether the person is qualified to purchase the firearm or not? The result may be that anyone convicted of assault or battery may face delays in purchasing firearms.

There will also be problems even when examiners have access to all the information. The definition of serious dating relationship is vague; yet, the examiner will still have to make a legal determination whether this relationship falls within the ban. It is not clear how examiners will apply the factors and whether they will do so consistently.

Ultimately, this ambiguity will need to be resolved. Congress is unlikely to do it. Maybe the courts will as they decide cases. Or maybe these factors will receive more attention from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in rulemaking.

C. New Crimes for Straw Purchases and Trafficking in Firearms

The law adds two new sections to the Gun Control Act. Section 932 prohibits straw purchasing of firearms, while § 933 contains a new crime of trafficking in firearms.

Section 932 makes it a crime for "any person to knowingly purchase, or conspire to purchase, any firearm in or otherwise affecting interstate of foreign commerce for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe such other person" is prohibited from possessing a firearm, intends to commit a felony, drug trafficking offense, or a federal crime of terrorism with the firearm.[80] The maximum penalty is 15 years for ordinary offenses and 25 years if the crime involves drug trafficking

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[79] Bipartisan Safer Communities Act § 12001(a), 136 Stat. 1324 (setting sunset date of Sept. 30, 2032).

[80] 18 U.S.C. § 932(b).

or terrorism.[81] This provision will give prosecutors more tools to pursue those who illegally engage in the business of firearm sales.

It is unclear how § 932 will affect the straw purchasing rules. Currently, straw purchasers are prosecuted under the Gun Control Act for making a material false statement in connection with the sale of a firearm.[82] Usually, the false statement is answering "yes" to the question on the Form 4473 asking whether the person is the actual buyer of the firearm.[83] In *Abramski v. United States*, the Supreme Court held that, to sustain a conviction under the false statement provision, the government did not need to prove that the intended recipient of the firearm was prohibited from possessing firearms.[84]

Under one version of this offense, this new section explicitly requires that the intended recipient be prohibited from possessing firearms. Again, it is unclear how the courts will understand this section. Perhaps courts will find § 932 to be an aggravated form of straw purchasing and the false-statement provision to be essentially a lesser included offense. Under this theory, prosecutors now have two crimes they could bring for essentially the same offense. Alternatively, courts might interpret § 932 to be Congress's statement on the criminalization of straw purchases. Given that Congress explicitly required that the recipient be prohibited from receiving firearms, maybe courts will view this as an intent to narrow the offense, and thus, abrogate *Abramski*. Likely the first interpretation—that prosecutors can bring either charge—will prevail in the courts. But this is nevertheless an open question.

Section 933 now makes it a 15-year felony to ship, receive, or transport a firearm in or affecting interstate or foreign commerce if the person knows that the recipient is a felon or that receipt of the firearm would constitute a felony.[85] The provision punishes both the shipper and the receiver.[86]

There may be some confusion regarding the use of the word "felony" in both provisions. Felony is defined as "any offense under Federal or State law punishable by imprisonment for a term exceeding 1 year."[87] Again, the provision was inartfully drafted. Presumably, under § 921(20), a crime punishable by more than one year does not include state misdemeanor offenses punishable by more than two years.[88] But the definition in § 932(a)(3) does not explicitly cross-reference §921 and the language ("any offense under Federal or State law") is slightly different from § 921's "*crime* punishable by more than

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[81] *Id.* § 932(c).
[82] *See supra* note 61.
[83] *Abramski v. United States*, 573 U.S. 169, 173-74 (2014).
[84] *Id.* at 189.
[85] 18 U.S.C. § 933.
[86] *Id.* § 933(a)(1), (2).
[87] 18 U.S.C. § 932(a)(3); *id.* § 933 (a)(1) (incorporating the definition from § 932).
[88] 18 U.S.C. § 921(20).

one year." So it is possible that courts will understand these provisions to include state misdemeanor crimes.

D. Redefining Engaged in the Business

The previous version of the Gun Control Act stated that a person was a dealer in firearms if he "devoted time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase of firearms."[89] The new bill changed "with the principal objective of livelihood and profit" and inserts in its place "to predominantly earn a profit."[90]

On the surface, this seems like Congress is playing word games. A person acts with the "principal objective" of earning a profit if he seeks "to predominantly earn a profit." The two appear synonymous.

A more charitable understanding of what Congress is trying to accomplish here is confirming that a person can unlawfully deal in firearms with mixed motives. Individuals may legitimately engage in occasional private sales for nonpecuniary reasons, such as to alter or liquidate a firearm collection.[91] Because of political pressure and because occasional sales are not inherently unlawful, ATF has been timid in prosecuting unlawful sales by those who occasionally sell firearms for profit.[92] This section may be understood to confirm what has previously been the law: individuals who resell firearms for profit are required to obtain Federal Firearms Licenses, even if their sales are occasional. Congress may be signaling to ATF that it needs to take a stronger hand in enforcing this provision against those engaged in occasional, but still unlawful, sales.

III. Red-Flag Laws

Finally, this section will discuss the new federal provisions for so-called "red-flag laws," also called "extreme risk protection orders." These are essentially restraining orders that authorize police to seize a person's firearms

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[89] 18 U.S.C. § 921(a)(21)(C).

[90] Bipartisan Safer Communities Act § 12002, 136 Stat. 1324 (codified at 18 U.S.C. § 921(21)(C)).

[91] 18 U.S.C. § 921(C).

[92] Ali Watkins, *When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment*, N.Y. Times, (June 3, 2018); Scott Glover, *Unlicensed Dealers Provide a Flow of Weapons to Those Who Shouldn't Have Them, CNN Investigation Finds*, CNN (Mar. 25, 2019, 8:39 AM).

and prohibit him from acquiring new firearms.[93] The status is usually temporary; most orders eventually expired unless renewed.[94] But the goal is to prevent someone in crisis, who may become suicidal or homicidal, from possessing a firearm while the crisis lasts.[95]

In principle, red-flag laws have much to commend. Unlike most gun control prohibiting factors, the status is temporary and risk-related. A person involuntarily committed to a mental institution loses his firearm rights for life, unless the rights are restored. This can be quite harsh. The mental health episodes leading to involuntary commitment may be transitory. They may not even involve a proclivity for violence. Yet, the resulting firearm ban is indefinite. Red-flag laws, in contrast, are a limited prohibition, targeted against those likely to become violent or suicidal. They last only for the emergency, at which point a person's rights are restored. So it is much better tailored than most common gun prohibiting factors.

But practice and theory do not align, and red-flag laws have serious implementation problems. The most serious problem is that no one—not even mental health professionals—can accurately predict who will become violent.[96] Those who are mentally ill are more likely to be victims of crime than to perpetrate it.[97] So judges are put in the impossible position of predicting future violent behavior, which is something that even mental-health professionals who study violence cannot accurately do. Faced with this, judges are probably more likely to err on the side of disarmament. The costs to a judge of erroneously allowing a person to retain his firearms which he then uses criminally is likely to be much higher than the cost of erroneously depriving someone of his firearm rights.

Another problem is the fear that disgruntled partners will weaponize these orders.[98] They might do this to seek revenge against a current or former spouse or to gain leverage over divorce or custody proceedings. For this reason, gun groups routinely oppose these laws and push for amendments that criminalize false statements made in connection with applying for these orders.

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[93] *See, e.g.*, Caitlin M. Johnson, Note, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. Ill. L. Rev. 1515, 1526-28 (2021); Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 Hastings Const. L.Q. 683, 688 (2019); Extreme Risk Laws, Everytown for Gun Safety.

[94] Johnson, *supra* note 93, at 1528. A few states allow final orders to last indefinitely. *Id.*

[95] *Id.* at 1521.

[96] Jeffrey S. Janofsky et. al, *Psychiatrists' Accuracy in Predicting Violent Behavior on an Inpatient Unit*, 39 Hosp. & Cmty. Psychiatry 1090, 1091-93 (1988).

[97] Sarah L. Desmarais, et al., *Community Violence Perpetration and Victimization Among Adults with Mental Illness*, 104 Am. J. Pub. Health 2342, 2346-47 (2014).

[98] Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, Stateline, Pew Rsch. Ctr. (Sept. 4, 2019).

Red-flag laws have been adopted in several states.[99] Many members of Congress wished to include a new federal red-flag law.[100] But as explained, gun groups remain opposed, and there were not sufficient votes to pass a federal law.[101]

Unable to reach agreement, Congress instead provided grants to states that have red-flag laws.[102] The law imposes many conditions to obtain the grants, including that there be adequate pre-deprivation and post-deprivation due process.[103] The provision requires that there be "at the appropriate phase" certain guarantees including "notice, the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses."[104] The law requires "pre-deprivation and post-deprivation heightened evidentiary standards and proof which mean not less than the protections afforded to a similarly situated litigant in Federal court or promulgated by the State's evidentiary body."[105] Defendants must also have a right to a lawyer.[106]

These provisions reflect the division in Congress. The law lacks provisions that gun owners probably wanted. The law does not require states to furnish counsel at no cost if the defendant cannot afford counsel. The law does not set a specific heightened standard for the plaintiff's burden of persuasion. And the law does not ban temporary *ex parte* orders to seize firearms. On the other hand, the law has some provisions that are concessions to those who favor expanded gun rights. The law does not require states to have red-flag laws to get these grants. And the law explicitly requires some due process protections—which may be aimed at states which have (or which are considering) particularly broad red-flag laws.

Conclusion

Since 1994, the federal gun control debate has been largely in a stalemate. The Bipartisan Safer Communities Act reflects that lack of consensus. Its provisions are modest. For the Gun Control Act more broadly, the law raises more questions than it answers.

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[99] *Id.*
[100] *Id.*; Johnson, *supra* note 93, at 1525-26 (discussing proposed legislation).
[101] Patrick Svitek, *Texas Is Unlikely to Adopt Key Provision of Bipartisan Gun Bill — A Red Flag Law to Take Guns Away from People Deemed Dangerous*, Texas Tribune (June 23, 2022).
[102] Bipartisan Safer Communities Act § 12003, 136 Stat. 1325.
[103] *Id.* § 12003(a) (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(I)).
[104] *Id.*
[105] *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(III)).
[106] *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(II)).

The Bipartisan Safer Communities Act has some significant provisions. It gives powerful new enforcement tools to prosecutors, including increasing the potential maximum sentence for felons in possession and new gun trafficking crimes. It remains to be seen whether federal prosecutors utilize these provisions and whether new theoretical maximum sentences will translate to more punishment for gun violators in the average case. Parts of the Act, especially those related to young adults and the expanded misdemeanor crimes of domestic violence, may prove difficult to implement.

Finally, several provisions of the Act contain critical ambiguities. Those ambiguities will require careful attention to subsequent legislation, administrative rulemaking, and case law.

NOTES & QUESTIONS

3. [New Note] The Bipartisan Safer Communities Act of 2022 also amends the Elementary and Secondary Education of Act of 1965 (20 U.S.C. § 7906). (*See* BSCA *at,* Title III, Sub-title D, Sec. 13401)

Title 20 of the U.S. Code establishes and regulates the Office of Education, along with the various grant programs that disburse federal monies to local school districts for such things as building improvements, technology assistance, and (now under BSCA) funding for safety programs. In prior years the Department of Education, through its Office of Elementary & Secondary Education, has awarded billions of dollars of federal money through various grant programs to local and regional school districts. *See* Dep't. Of Educ., Off. of Elementary and Secondary Educ., Funding Status & Awards.

Section 7906 of ESEA is a list of activities that would jeopardize funding to local school districts. The list includes the use of any funds that violate federal law, the distribution of obscene material, the distribution of sex-related material unless age-appropriate, etc. The BSCA of 2022 added a new prohibited activity at sub-section (7), so that no funds may be used "for the provision to any person of a dangerous weapon, as defined in section 930(g)(2) of title 18, or training in the use of a dangerous weapon."

As this supplement goes to print, a controversy has arisen over whether schools with hunter safety classes and archery programs will lose funding under this amendment to the ESEA. Texas Senator Cornyn and North Caroline Senator Tillis (co-sponsors of BSCA) have written letters to Education Secretary Miguel Cardona requesting clarification of the agency's interpretation of this provision.

1. Overview of the Gun Control Act

a. Some Basic Rules

(i) Purchasing a Gun from a Commercial Dealer

NOTES & QUESTIONS

1. [New Note] *Background check delays.* Pennsylvania law requires background checks to be conducted instantaneously. 18 Pa. C.S. § 6111.1(b) ("the Pennsylvania State Police shall immediately during the licensee's call or by return call forthwith"); § 6111.1(c) ("The Pennsylvania State Police shall employ and train such personnel as are necessary to administer expeditiously the provisions of this section."); 37 Pa. Code § 33.102 ("The Pennsylvania instantaneous records check system").

In *Firearms Owners Against Crime v. Evanchick*, No. 218 M.D. 2022 (Commonwealth Ct. Pa. Sept. 2, 2022). Plaintiffs alleged that Pennsylvania State Police purposely understaffs its Pennsylvania Instant Check System (PICS) Operation Section. The court found that while responses for 65% of checks are completed within minutes, there have been delays of up to 34 hours, and delays of 9-10 hours are routine during peak times. Thus, the Pennsylvania Commonwealth Court judge granted a PI to "enjoin PSP from further noncompliance with section 6111.1 of the Firearms Act."

But a 3-judge appellate panel ruled that sovereign immunity forbids an affirmative injunction that defendants do something. There could be no mandamus relief for operational matters, which are discretionary, and involve budgeting. Nor could there be declaratory relief, because the court cannot add mandates to the statute. *Firearms Owners Against Crime v. Evanchick*, 291 A.3d 50 (Commonwealth Ct. Pa. Mar. 6, 2023).

Pennsylvania has two intermediate appellate courts. The Superior Court handles most types of appeals. Relevant in the above case is the Commonwealth Court, which is the intermediate appellate court for matters involving state and local governments and their agencies, and is also the trial court for lawsuits against the Commonwealth. Cases in the Commonwealth Court are usually heard by three-judge panels, sometimes by a single judge, and sometimes en banc by all seven judges.

2. [New Note] *False denials.* If the background check results in a false denial — for example, the purchaser has the same name as a convicted felon — federal law provides for an appeal process. Unfortunately, many false denials are impossible to undo, due to many states' failure to correct records that have been proven to incorrect. Even when the FBI does recognize that a state record is false, and allows a sale to proceed, the FBI does not correct it own database; as a result, the next time the individual tries to buy a firearm, he or she will

again be denied. *See* Stephen Halbrook, Written testimony, 7-11, United States Senate, Judiciary Committee, Hearing on *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS)* (Dec. 13, 2017).

A post-*Bruen* case involving a false denial by a state agency arose in California. There, as in some other states, private sales are outlawed. A friend may sell a gun to a friend only by routing the transaction through a FFL. The FFL must process the transfer as if the FFL were selling a firearm from its own inventory.

In California, if the initial check by the California Dept. of Justice (CalDOG) reveals an arrest or a criminal charge, the DOJ has 30 days to research the final disposition. If the DOJ fails to find a final disposition within 30 days, the DOJ must advise the FFL that the sale can proceed. Cal. Penal Code § 28220(f)(4).

Regina had been arrested in 1967 for burglary. Los Angeles County Superior Court records showed that the charge had been reduced to a misdemeanor and then dismissed. There being no conviction at all, let alone a felony, Regina was eligible to purchase a firearm.

Nevertheless, CalDOJ sent a FFL a letter falsely claiming that CalDOJ had been unable to verify Regina's eligibility. The FFL chose not to consummate the sale. *Regina v. California*, 89 Cal. App. 5th 386 (Cal. App. 2d Dist. Mar. 17, 2023).

The California Court of Appeal held that the California statute was constitutional and was not preempted by the federal background check statute. The DOJ's "error" in its false statement to the FFL was "not of constitutional dimension." Whatever statutory remedy California law provides for the false statement by DOJ was not before the Court of Appeals

b. The Gun Control Act Statute

The federal Law Enforcement Officer Safety Act (LEOSA) forbids states to forbid out-of-state visiting law enforcement officers, or retired officers, from carrying handguns. To be qualified for LEOSA, officers or retirees must meet certain standards. 18 U.S.C. §§ 926B & 926C. A U.S. District Court in New Jersey held that LEOSA preempts New Jersey law in two ways:

1. New Jersey may not require that visiting officers obtain a New Jersey carry permit.
2. New Jersey may not forbid such officers from carrying hollow point ammunition.

Federal Law Enforcement Officers Association v. Grewal, 2022 WL 2236351 (D.N.J. June 21, 2022).

The decision does not affect general New Jersey law restricting hollow point ammunition. Hollow point ammunition is generally considered to be superior for self-defense in most situations. *See* online Ch. 20.B.1. In New Jersey, individuals may not possess hollow-point ammunition, except on their own property, when hunting, target shooting, or traveling to and from a target range, or when the hollow cavity has a polymer filling. N.J. Stat. Ann. §§ 2C:39-3f(1), :39-3g(2), :39-6f.

2. Due Process and the GCA

b. *Mens Rea* and *Rehaif*

An empirical study of 922(g) prosecutions in the first eight months after *Rehaif* estimated that prosecutorial charging reductions had prevented "2,000 convictions for 922(g) and eliminated more than 8,000 years of prison." Matthew Mizel, Michael Serota, Jonathan Cantor & Joshua Russell-Fritch, *Does Mens Rea Matter?* 2022 Wisc. L. Rev. (forthcoming).

In another decision issued a few days after *Bruen,* though not a gun case, the U.S. Supreme Court further clarified how the mens rea terms "knowing or intentionally" are to be applied to the "except as authorized" clause in any federal statute. Although addressing controlled substances issued as prescriptions by treating physicians, the Court clarified that once a defendant has met his or her burden to show that his or her conduct is authorized under the relevant statute, the burden shifts to the government to prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Xiulu Ruan v. United States,* 142 S. Ct. 2370 (2022). This new rule may have some future application to federally licensed firearms dealers in prosecutions that allege unauthorized sale of firearms.

3. Prohibited Persons

l. [New Section] Parole and Probation

Conditions of parole or probation often include the requirement that the individual not possess a firearm. The first post-*Bruen* federal circuit cases on the issue affirmed the constitutionality of the prohibitions, and promised, "An opinion explaining this disposition will follow." The opinion has not yet been presented. *United States v. Perez-Garcia* & *United States v. Fencl,* 2023 WL 2596689 (9th Cir. Jan. 26, 2023). *Perez-Garcia* was pretrial release, and *Fencl* was parole.

Trial court affirmations include *United States v. Wendt*, 2023 WL 166461 (S.D. Iowa Jan. 11, 2023); *United States v. Slye*, 2022 WL 9728732, (W.D. Pa.

Oct. 6, 2022); *Ex parte Isedore*, 2023 WL 142514 (Tex. App.—Houston [14th Dist.] Jan. 10, 2023).

4. Regulation of Retails Sales of Ordinary Firearms

b. Regulation of Buyers

NOTES & QUESTIONS

6. [New Note] Knowingly making false statements or using false identification to deceive an FFL with respect to any fact material to the lawfulness of the sale is a federal felony. 18 U.S.C. § 922(a)(6). This was upheld as not involving conduct protected by the plain text of the Second Amendment. *United States v. Soto*, 2023 WL 1087886 (W.D. Tex. Jan. 27, 2023). Similarly, 18 U.S.C. § 924(a)(1)(A) forbids knowingly making false statements or representations regarding firearms records. It was upheld under similar reasoning. *United States v. Porter*, 2023 WL 113739 (S.D.W. Va. Jan. 5, 2023).

7. GCA Penalties

a. Statutory Penalties in § 924

In another case decided within days of *Bruen,* the U.S. Supreme Court addressed mandatory sentencing enhancements for federal crimes in which a firearm was used. In *United States v. Taylor,* 142 S. Ct. 2015 (2022), the Court held that a conviction under the Hobbs Act for attempted robbery, in which the defendant already faced up to 20 years in prison, could not be extended an additional 10 years under 18 U.S.C.S. § 924(c), because § 924(c)(3)(A) required completion of the crime. Because no element of the attempted Hobbs Act robbery required proof that the defendant used, attempted to use, or threatened to use force, the enhancement could not be applied to the circumstances of Taylor's conviction.

The controversy did not involve fundamental rights, but turned on statutory interpretation. The 7-2 decision was written by Justice Neil M. Gorsuch, with Justices Clarence Thomas and Samuel A. Alito dissenting.

Courts have held that section 924(c) creates an independent substantive offense. A defendant can be charged with a 924(c) violation even if no other offense is charged. *See*, *e.g.*, *United States v. Sudduth*, 457 F.2d 1198, 1202 (10th Cir. 1972).

Section 924(c) requires mandatory consecutive, not concurrent, sentences. Section 924(j) specifies penalties for killing someone in the course of a 924(j) crime. Must the 924(j) sentences be consecutive, or can they be concurrent? Resolving a circuit split, a unanimous Supreme Court opinion by Justice

Jackson held that 924(j) sentences may be concurrent. *Lora v. United States*, 143 S. Ct. 1713 (2023).

An excellent new article provides the first in-depth survey of federal sentencing under 924(c) and related statutes. Brandon E. Beck, *The Federal War in Guns: A Story in Four-And-A-Half Acts*, 26 U. Penn. J. Constl. L (forthcoming). As the author explains, the federal mandatory sentences sometimes lead to enormous terms of imprisonment, far beyond what might be imposed under state laws. From the start, and especially in the Gun Control Act of 1968 and the Firearms Owners' Protection Act of 1986, various prohibitions and sentences were enacted by Congress with little attention and no serious debate. Although the extremely harsh federal sentences were originally touted for being valuable as threats to force defendants to plead to state law offenses, since the early 1990s the U.S. Department of Justice has massively increased prosecutions. Although prosecution rates vary from one administration to another, the overall upward trend has never been reversed. The federal sentences in sections 922 and 924 are a major cause of mass incarceration in federal prisons.

Post-*Bruen* cases upholding the drug trafficking sentence enhancement in 924(c)(1)(A) include *United States v. Burgess*, 2023 WL 179886 (6th Cir. Jan. 13, 2023); *United State v. Issac*, 2023 WL 1415597 (N.D. Ala. Jan. 31, 2023); *United States v. Garrett*, 2023 WL 157961 (N.D. Ill. Jan. 11, 2023); *United States v. Trammell*, 2023 WL 22981 (W.D. Ky. Jan. 3, 2023); *United States v. Snead*, 2022 WL 16534278 (W.D. Va. Oct. 28, 2022); *United States v. Ingram*, 2022 WL 3691350 (D.S.C. Aug. 25, 2022); *U.S.A. v. Nevens*, 2022 WL 17492196 (C.D. Cal. Aug. 15, 2022).

b. The Sentencing Guidelines

Sentencing Guidelines § 2D1.1(b)(1) imposes an enhanced sentence if the defendant possessed a dangerous weapon at the time of a felony drug offense. A cocaine dealer possessed one firearm in his automobile when selling, and several rifles at home while selling. The Ninth Circuit upheld the constitutionality of the particular sentencing enhancement because there is a history and tradition of restricting firearms possession during the commission of felonies that involve a risk of violence. *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023).

c. [New Section] Forfeitures

In both the federal and state systems, forfeitures of crime guns have long been standard. In America, the practice is at least as old as forfeitures of arms from persons convicted of using firearms to terrify the public. *See* Ch. 2.F.5. On the

other hand, British confiscations of firearms from Americans did much to precipitate the American Revolution. *See* Ch.4.B.1-2.

The leading post-*Bruen* case on forfeitures involved a federal court challenge to arms confiscation by the Pennsylvania State Police. The son of Mr. and Mrs. Frein perpetrated crimes. As part of the investigation, the Pennsylvania State Police seized the parents' guns. The parents' guns were never used as evidence, and the parents had no involvement in the crime.

After the son's criminal case ended with a long prison sentence, the Pennsylvania State Police refused to return the parents' firearms.

The Third Circuit ordered the guns returned. "The ratifiers of both the Second Amendment and the Fourteenth Amendment (which secures the right in the states) understood that arbitrary seizures prevent citizens from keeping arms for their self-defense." *Frein v. Pennsylvania State Police*, 47 F.4th 247 (3d Cir. 2022).

The State Police had argued that the Second Amendment guarantees a right to arms, but not a particular individual firearm. So Mr. and Mrs. Frein could just buy new guns. The Third Circuit answered: "We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere. Just as those seizures and retentions can violate the First Amendment, seizing and holding on to guns can violate the Second." *Id.* at 256.

D. LAYERS OF REGULATION: AGENCY RULES AND AGENCY GUIDANCE

The regulations relating to the Gun Control Act, 18 U.S.C. §§ 921-31, can be found in 27 CFR Part 478. Additional regulations related to 18 U.S.C. §§ 921 and 922 can be found in 27 CFR Part 72 and 32 CFR Part 635.

1. [New Section] *ATF's "Frame or Receiver" Rule*

Becoming effective August 24, 2022, is a 364-page ATF regulation: *Definition of "Frame or Receiver" and Identification of Firearms*, ATF Final Rule 2021R-05F, 87 Fed. Reg. 24652 (Apr. 26, 2022). Even very experienced firearms regulation attorneys are finding some of it difficult to understand.

This new rule will significantly change ATF's regulations implementing the Gun Control Act of 1968 ("GCA"), the National Firearms Act ("NFA"), and the import provisions of the Arms Export Control Act ("AECA"), and it is the first major change to the definitions of "firearm" and "frame or receiver" since ATF first promulgated regulations implementing Title I of the GCA in 1968.

Below are excerpts from two legal compliance alerts by the Washington, D.C., law firm Reeves & Dola. The Reeves & Dola *Alerts* are available on the

firm's website. The first reviews the new definition of "frame or receiver." The second reviews the new definition of "Privately Made Firearm" and the related controls.

Reeves & Dola, LLP
ATF's New "Frame or Receiver" Rule What You Should Know -- Part I
(Aug. 11, 2022)

…I. An Overview of the New Definition "Frame or Receiver"

A. Structure

The Final Rule creates a new § 478.12 to house the definition of "frame or receiver". The structure of the definition is different from what ATF originally proposed in the Notice of Proposed Rulemaking (NPRM) because of the high number of comments expressing concern over the convoluted structure originally presented. The regulations implementing the National Firearms Act and the Arms Export Control Act, 27 C.F.R. Parts 479 and 447 respectively, will also be revised to cross-reference the new definition of "frame or receiver" in 27 C.F.R. § 478.12.

The definition includes several examples to illustrate the following: (1) grandfathered prior classifications; (2) which part of common firearm models is the frame or receiver; and (3) partially complete, disassembled, or nonfunctional frame or receiver that would be considered a frame or receiver because it can be readily completed, assembled, restored, or otherwise converted to a functional state.

A new term that will play an important role in firearm and frame or receiver classifications is "readily," which is added to §§ 478.11 and 479.11. "Readily" is part of the statutory definition of "firearm," which includes a weapon that will, is designed to, or may ***readily*** be converted to expel a projectile, and also the "frame" or "receiver" of any such weapon. 18 U.S.C. 921(a)(3)(A), (B). However, ATF has never defined the term until now. ATF first introduced "readily" in the NPRM and received many comments in opposition to the definition. Nevertheless, only minor changes have been made to the term in the Final Rule. "Readily" will play a very important role in determining whether a frame or receiver has been destroyed, and in classifications of partially complete, disassembled, or nonfunctional frames or receivers.

B. Single Housing or Structural Component

One of the key changes made to the definition of "frame or receiver" was to center the definition around only **one** housing or structural component for a given type of weapon. ATF made this change in response to comments, and it

is a marked improvement over the NPRM, which referenced "any housing for any fire control component."

The Final Rule also creates three distinct sub-definitions. One is for "frame," which applies to handguns and handgun variants. "Receiver" applies to rifles, shotguns, or projectile weapons other than handguns. The third sub-definition is for frame or receiver applicable to firearm mufflers and silencers.

C. Prior Classifications

To ensure that industry members and others can rely on ATF's prior classifications, the Final Rule grandfathers most prior ATF classifications, and variants thereof, into the new definition of "frame or receiver." The Final Rule also provides examples and diagrams of some of those weapons, such as the AR-15 rifle and Ruger Mark IV pistol.

CAUTION! ATF classifications of partially complete, disassembled, or nonfunctional frames or receivers as not falling within the definition of firearm "frame or receiver" prior to this rule *ARE NOT GRANDFATHERED*! Any such classifications, including parts kits, would need to be resubmitted for evaluation. The resubmission should include any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit. ATF will take this into consideration when making the classification determination.

If persons remain unclear which specific portion of a weapon or device falls within the definitions of "frame" or "receiver," then they may voluntarily submit a request to ATF Firearms Technology Industry Services Branch for a classification determination.

II. Working with the New Definition of "Frame or Receiver"

Despite the changes to the structure of "frame or receiver" in the Final Rule, the definition is dense and includes several paragraphs and subparagraphs. This style of regulatory structure can be challenging to work through, so we provide an order of review to help guide you through the new definition.

Rather than trying to swallow this definition whole (danger, choking hazard), we offer the following yes/no questions to determine which portion of the "frame or receiver" definition applies to your firearm or part. As you review these questions, we recommend having the complete new § 478.12 handy for cross-referencing purposes, especially because our approach does not follow the strict order of the definition in the hopes of creating a more digestible flow.

Question 1: Is your frame or receiver melted, crushed, shredded, or cut according to ATF-approved methods?

☐ **NO** - proceed to Question 2.

☐ **YES** - your item is "destroyed" and is *not* a controlled "frame" or "receiver" pursuant to **§ 478.12(e)**.

Notes:

- The term "destroyed" means the frame or receiver has been permanently altered such that it may not "readily" (*see* new definition in §§ 478.11 and 479.11) be completed, assembled, restored, or otherwise converted to function as a frame or receiver (defined in § 478.12(a)).
- Destruction can be accomplished by completely melting, crushing, or shredding the frame or receiver, or torch cutting according to ATF specifications.

Question 2: Is your piece a blank or a disassembled, partially complete, or nonfunctional frame or receiver?

☐ **NO** - proceed to Question 3.

☐ **YES** - refer to **§ 478.12(c)** to determine whether it is a controlled frame or receiver. If it is designed to or may "readily" be completed, assembled, restored, or otherwise converted to function as a frame or receiver, it is controlled as a frame or receiver (defined in § 478.12(a)).

Notes:

- "Readily" is a new defined term in § 478.11.
- What is *not* considered a frame or receiver: forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon, for example an unformed block of metal, liquid polymer, or other raw material.
- § 478.12(c) contains examples to show what could be considered a controlled frame or receiver compared to what may not rise to the level of control.
- ***Prior ATF classification letters concerning partially complete, disassembled, or nonfunctional frames or receivers, including parts kits:*** If you have an ATF classification letter issued prior to April 26, 2022,

ruling the partially complete, disassembled, or nonfunctional frame or receiver, including a parts kit, was not, or did not include, a firearm frame or receiver (either under the old § 478.11 or old § 479.11), this letter is ***no longer valid***. If your business involves such items, whether it is importing, selling/transferring, or acquiring for use in further manufacturing and assembly operations, you should consider obtaining a new classification determination from ATF under the new rules. When issuing a classification, ATF may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit. *See* **§ 478.12(f)(2)**.

Question 3: Did ATF issue a classification determination ruling on which part of the firearm is the controlled frame or receiver *before* April 22, 2022?

☐ **NO** - proceed to Question 4.

☐ **YES** - refer to **§ 478.12(f)(1)**. Such determination is grandfathered in and *remains valid* under the new definitions. These firearms are exempt from the new definitions and the marking requirements under the Final Rule.

Notes:

- This question is *not* for partially complete, disassembled or nonfunctional frames or receivers. For these items, refer to Question 2.
- Any such part marked with an "importer's or manufacturer's serial number" (new definition added to § 478.11) is presumed to be the controlled frame or receiver of the weapon unless there is an official ATF determination or other reliable evidence showing that such part is not the frame or receiver.
- Some examples of such prior determinations include: (i) AR-15/M-16 variant firearms; (ii) Ruger Mark IV pistol; (iii) Benelli 121 M1 shotgun; and (iv) Vickers/Maxim, Browning 1919, M2 and box-type machineguns and semiautomatic "variants" (defined in § 478.12(a)(3)).

Question 4: Is it a firearm muffler or silencer? Refer to § 478.11 for the definition of "firearm muffler or silencer."

☐ **NO** - proceed to Question 5.

☐ **YES** - refer to **§ 478.12(b)**. For firearm mufflers and silencers, the frame and receiver is the part that provides housing or a structure for the primary

internal component designed to reduce the sound of a projectile. The frame or receiver *does not* include a removable end cap of an outer tube or modular piece.

Notes:

- The Final Rule adds a new definition to § 478.11 for "complete muffler or silencer device" which is important for determining when and what to mark with the required identifying information. We will address this in more detail in Part 3 to our Alert.
- ATF references baffles, baffling material, expansion chamber, or equivalent as the primary internal component designed to reduce the sound of a projectile.
- For the part that provides housing or structure, ATF cites to an outer tube or modular piece.
- If the firearm muffler or silencer is modular, the frame or receiver means the principal housing attached to the weapon that expels a projectile, even if an adapter or other attachments are required to connect the part to the weapon.

Question 5: Is it a "frame" (for handguns) or a "receiver" (for rifles, shotguns, and other weapons that expel a projectile other than handguns) not captured by Questions 1-4 above? Refer to **§ 478.12(a)** for the definitions of "frame" and "receiver".

☐ **"Frame"** as defined in **§ 478.12(a)(1)**.

☐ **"Receiver"** as defined in **§ 478.12(a)(2)**.

☐ Item is a **"multi-piece frame or receiver"** not captured under 478.12(a). Refer to **478.12(d)**.

- A "multi-piece frame or receiver" is defined as "a frame or receiver that may be disassembled into multiple modular subparts, *i.e.*, standardized units that may be replaced or exchanged." It does not include an internal frame of a pistol that is a complete removable chassis that provides housing for the energized component, unless the chassis itself may be disassembled.

☐ **None of the above.** Item is not a "frame or receiver" under the new definition. If after performing this analysis doubt remains as to the proper classification, or which specific portion of a weapon or device falls within the definitions of "frame" or "receiver," you may voluntarily submit a request to the ATF

Firearms Technology Industry Services Branch for a classification determination.

Notes:

- "Variants" and "variants thereof" are defined in § 478.12(a)(3)).
- § 478.12(a)(4) lists several examples of common firearm models and "variants thereof" with illustrations showing which part is the frame or receiver under the new definition. The examples listed are: **(i)** hinged or single framed revolvers; **(ii)** hammer-fired semiautomatic pistols; **(iii)** Glock variant striker-fired semiautomatic pistols; **(iv)** Sig Sauer P250/P320 variant semiautomatic pistols (internal removable chassis; distinguished from a multi-piece frame unless the chassis can be disassembled); **(v)** bolt action rifles; **(vi)** break action, lever action, or pump action rifles and shotguns; **(vii)** AK variant firearms; **(viii)** Steyr AUG variant firearms; **(ix)** Thompson machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP40, and SIG 550 firearms, and HK machineguns and semiautomatic variants; and **(x)** Sten, Sterling, and Kel-Tec SUB-2000 firearms…

Reeves & Dola, LLP
ATF's New "Frame or Receiver" Rule What You Should Know -- Part 2
(Aug. 16, 2022)

…In this second part we will review the Final Rule's impact on firearms made by unlicensed persons, what is now termed "Privately Made Firearms" or "PMFs". This aspect of the Final Rule has received a lot of attention and is the most controversial. Multiple lawsuits have been filed in different jurisdictions against the Department of Justice and the ATF to prevent the Final Rule from going into effect. In one case brought by Gun Owners of America, seventeen states have joined as Plaintiffs.

The regulatory citations in this Alert are all in Title 27 of the Code of Federal Regulations.

I. What is a Privately Made Firearm?

A. New Defined Term

The Final Rule creates a new term, "Privately Made Firearm" to be added to § 478.11 as follows:

"***Privately made firearm (PMF).*** A firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed

manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm manufactured or made before October 22, 1968 (unless remanufactured after that date)."

The Final Rule also amends the definitions in Part 447 (governing permanent imports of firearms and other defense articles) to cross reference this term.

B. Why ATF Created a New Term

Citing "technological advances," ATF explains in the Final Rule that it is now easier for companies to sell firearm parts kits, standalone frame or receiver parts, and easy-to complete frames or receivers to unlicensed persons without maintaining any records or conducting a background check, even though such products enable individuals to "quickly and easily" make firearms. "Such privately made firearms ("PMFs"), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver, making it difficult for law enforcement to determine where, by whom, or when they were manufactured, and to whom they were sold or otherwise transferred. Because of the difficulty with tracing illegally sold or distributed PMFs, those firearms are also commonly referred to as "ghost guns."

However, the Final Rule does not prohibit individuals from making their own PMFs. Indeed, ATF acknowledges repeatedly that firearms privately made by non-prohibited persons solely for personal use generally do not come under the purview of the GCA.

> "This rule does not restrict law abiding citizens' ability to make their own firearms from parts for self-defense or other lawful purposes. Under this rule, non-prohibited persons may continue to lawfully complete, assemble, and transfer unmarked firearms without a license as long as they are not engaged in the business of manufacturing, importing, dealing in, or transacting curio or relic firearms in a manner requiring a license. Neither the GCA nor this implementing rule requires unlicensed individuals to mark (non-NFA) firearms they make for their personal use, or to transfer them to an FFL for marking. Such individuals who wish to produce, acquire, or transfer PMFs should, however, determine whether there are any applicable restrictions under State or local law." Final Rule at 24686-24687 (internal citations omitted).

The way the Final Rule imposes control over PMFs is through Federal Firearms Licensees ("FFLs" or "licensees") who accept a PMF into inventory. These licensees will be responsible for marking the PMF and entering it into

their Acquisition and Disposition ("A&D") records according to the requirements set forth in the Final Rule, which we explain below.

II. PMF Marking Requirements

A. What Triggers the Marking Requirement?

Under the Final Rule, unlicensed individuals are not required to mark their own PMFs for personal use or when they occasionally acquire them for a personal collection or sell or transfer them from a personal collection to unlicensed in-state residents consistent with federal, state, and local law. Only once a PMF is transferred to a licensee for any reason, including repair, and the licensee voluntarily accepts the PMF into its inventory, is that licensee required to mark the PMF in accordance with the requirements set forth in § 478.92. Citing to the GCA, 18 U.S.C. 923(g)(1)(A), (g)(2), ATF explains, "[t]he GCA provides that all firearms received and transferred by FFLs must be traceable through licensee records maintained for the period and in such form as prescribed by regulations. There is no exception for PMFs." Final Rule at 24687.

The Final Rule does not obligate any licensee to receive a PMF into its inventory, so a licensee can choose to refuse the PMF. In addition, licensed dealer-gunsmiths, manufacturers, and importers who do same-day adjustments or repairs to a firearm do not have to mark the firearm or enter it into their A&D records if the firearm is returned to the same person from whom it was received, and it is not kept overnight. This distinction tracks ATF's long-held policy for licensed gunsmiths performing on-the-spot repairs of commercially produced firearms (*see* ATF Rul. 77-1) and clarifies that this policy applies to licensed manufacturers and licensed importers, not just licensed dealers or gunsmiths.

National Firearms Act firearms identified and registered on the National Firearms Registration and Transfer Record pursuant to an ATF Form 1 (5320.1) Application to Make and Register a Firearm are not subject to the PMF marking requirements. Neither are firearms manufactured or made prior to October 22, 1968 (the effective date of the GCA) unless the firearm is remanufactured after that date.

B. What is the Required Format for a PMF Serial Number?

The Final Rule requires the serial numbers for PMFs be unique (not duplicate any other serial number placed by the licensee on any other firearm) and begin with the licensee's abbreviated Federal firearms license number as a prefix to a unique identification number, followed by a hyphen. The abbreviated license number is the first three and last five digits, so an example would be:

There is no requirement for the private maker to be identified in the firearm markings or in the licensee's records. As the serial number will contain the licensee's abbreviated license number, the PMF would be traced to the licensee, not the private maker.

If a PMF is already marked with a unique identification number by the unlicensed private maker, the licensee may adopt the existing number if that identifying number meets the marking requirements of § 478.92 (for example, the number cannot be readily obliterated, altered, or removed, meets the size and depth requirements, and does not duplicate any of the licensee's other firearms). However, the licensee must place their abbreviated license number as a prefix followed by a hyphen to the existing serial number, thus enabling the firearm to be traced to the licensee. This part of the rule will be codified in § 478.92(a)(4)(iii)(D).

For polymer frames or receivers, the PMF serial number can be placed on a metal plate permanently embedded into the polymer, or by another method approved in advance by ATF.

C. Who Can Mark the Firearms?

According to ATF, the intent of the Final Rule is not to require FFLs to obtain equipment to serialize PMFs. If a licensee is not capable of marking a PMF it will accept into inventory, the licensee can take the PMF to another FFL or to a non-licensed engraver for marking services. In the latter instance, the engraver would apply the markings under the licensee's direct supervision and must not accept the PMF into inventory (*i.e.,* the PMF must not be transferred to the non-licensed engraver).

The FFL may also require the unlicensed individual to serialize the PMF prior to accepting the PMF into the FFL's inventory. Unlicensed individuals can accomplish this by utilizing the marking services of licensed gunsmiths-dealers. To provide greater access to professional marking services, ATF revises the definition of "engaged in the business" as it pertains to gunsmiths to clarify that persons who engage in the business of identifying firearms for non-licensees may become licensed as dealer-gunsmiths solely to provide professional PMF marking services. They do not have to be licensed as manufacturers. As ATF explains, "allowing persons to be licensed as dealer-gunsmiths will make professional marking services more available to unlicensed individuals, and make it possible for other licensees to receive and transfer PMFs should they choose to accept them into inventory in the course of their licensed activities." Final Rule at 24689.

D. How Soon Must an FFL Mark A PMF?

For PMFs acquired by licensees before August 24, 2022 (the effective date of the Final Rule), licensees must either mark the PMFs or cause them to be marked by another licensee either within 60 days from the effective date of a final rule (October 23, 2022), or before the date of final disposition (including to a personal collection), whichever is sooner. In these instances, the licensee may outsource the marking services to a licensed manufacturer or gunsmith. This will be codified at § 478.92(a)(4)(vi).

If a PMF is acquired on or after the effective date (August 24, 2022), § 478.92(a)(2) will require markings to be applied within seven (7) days following the date of receipt, including from a personal collection, or before disposition, including to a personal collection, whichever is sooner. In these instances, licensees may must either apply the markings themselves or cause the markings to be applied under their direct supervision, as described above.

III. PMF Recordkeeping Requirements

The Final Rule amends § 478.125(i) to require licensees to record the acquisition and disposition of a PMF. These requirements apply to licensed manufacturers, licensed importers, licensed dealers, and for personal firearms collections.

If the firearm is privately made in the United States and no manufacturer name has been identified on a PMF, the licensee who accepts the PMF into inventory must record the words "privately made firearm" or the abbreviation "PMF" as the name of the manufacturer. The name of the actual private maker is *not* required to be entered into the licensee's records.

A licensee must record acquisition of a PMF into its records by close of the next business day following receipt of the PMF. However, the PMF serial number need not be immediately recorded if the firearm is being identified by the licensee or marked under the licensee's direct supervision in accordance with § 478.92(a)(2). Remember, the licensee has 7 days to mark the PMF (or prior to disposition, whichever is sooner). Consequently, if the PMF is not marked at the time of receipt, the licensee should leave the serial number portion in the acquisition record blank until the PMF is properly marked. Once marked, the licensee must update the acquisition entry to show the new serial number.

If repairs are conducted within the same day (not overnight) and returned to the same person from whom received, the FFL does not have to record the PMF into its records.

If a PMF will be transferred to another non-licensee, "privately made firearm" or "PMF" must be recorded on the Form 4473 as the name of the manufacturer. §478.124(c)(4)….

2. [New Section] *Commerce Department Regulation*

The export of firearms and ammunition is a complex subfield, involving reports to and licenses from the U.S. State Department, the U.S. Department of Commerce, or both. On July 18, 2022, the U.S. Department of Commerce Bureau of Industry and Security (BIS) published a final rule Adoption of Congressional Notification Requirement for Certain Semiautomatic Firearms Exports Under the Export Administration Regulations (EAR), 15 C.F.R. § 743.6. The new rule requires notification to Congress for export of four million dollars or more of certain semiautomatic firearms.

E. SUING THE GUN INDUSTRY AND THE LEGISLATIVE RESPONSE: THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

NOTES & QUESTIONS

8. [Add to Note] In September 2020, all of the assets of the Remington Outdoor Company (ROC) were sold at auction. The *Soto* lawsuit continued against ROC's estate, namely its insurance policies in effect at the time. In February 2022, the insurance companies settled the *Soto* case by paying the plaintiffs the full amount of the insurance coverage, $73 million in total.

9. [New Note] In a 9-judge proceeding before the Pennsylvania Superior Court, the fractured opinions produced a surprising result. The judges agreed, 5-4, that the PLCAA is constitutional; it is a valid exercise of Congress's interstate commerce power and does not infringe Pennsylvania's Tenth Amendment powers over tort law. By 7-2, the judges agreed that the plaintiff's claim was within the scope of lawsuits forbidden by PLCAA. Nevertheless, the Superior Court reversed the trial court's dismissal of the case. There were five judges who thought reversal was appropriate either on statutory grounds (PLCAA does not apply) or on constitutional grounds (PLCAA is unconstitutional). *Gustafson v. Springfield, Inc.*, 2022 PA Super. 140 (Aug. 12, 2022). The Pennsylvania Supreme Court granted a petition for allowance of appeal. No. 240 WAL 2022 (Apr. 18, 2023).

10. [New Note] *New York and California PLCAA Predicate Legislation.* California and New York have both enacted legislation to authorize lawsuits against firearms businesses based on PLCAA's predicate exception. The California law is the Firearm Industry Responsibility Act, AB1594. The New York, enacted in June 2022, is S. 7196. It adds a new § 898-a to Article 39-DDDD. The New York statute is as follows, in relevant part:

§ 898-a. 2. "Reasonable controls and procedures" shall mean policies that 13 include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter.

§ 898-b. Prohibited activities.

1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.

2. 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.

§ 898-c. Public nuisance. 1. A violation of subdivision one or two of section eight hundred ninety-eight-b of this article that results in harm to the public shall hereby be declared to be a public nuisance.

2. The existence of a public nuisance shall not depend on whether the gun industry member acted for the purpose of causing harm to the public.

§ 898-d. Enforcement. Whenever there shall be a violation of this article, the attorney general, in the name of the people of the state of New York, or a city corporation counsel on behalf of the locality, may bring an action in the supreme court or federal district court to enjoin and restrain such violations and to obtain restitution and damages.

§ 898-e. Private right of action. Any person, firm, corporation or association that has been damaged as a result of a gun industry member's acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court [in N.Y, the trial court of general jurisdiction] or federal district court.

Neither the California nor the New York bill creates specific rules regarding firearms commerce. Rather, the open-ended language allows for suits under a nearly infinite variety of claims that firearms commerce in compliance with all definite laws about firearms commerce can be unlawful, and hence the subject of a tort suit notwithstanding PLCAA.

Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 Fla. L. Rev. (forthcoming), makes the academic case for statutory exceptions

A U.S. district court in New York held that the statute was not preempted by PLCAA. *National Shooting Sports Foundation, Inc. v. James*, 604 F.Supp.3d 48 (N.D.N.Y. 2022). A U.S. district court in New Jersey held that a similar statute was preempted by PLCAA. *Nat'l Shooting Sports Found. v. Platkin*, 2023 WL 2344635 (D.N.J. Mar. 3, 2023). Both cases are on appeal. Professor Kopel's amicus brief in the Third Circuit New Jersey case is available here.

11. [New Note, Renumbered from 2022 Supplement] Armlist.com is an online broker of firearms sales. The website arranges for a purchased firearm to be delivered to a FFL near the buyer. To receive the firearm, the buyer must go to the FFL's premises and complete the same paperwork and checks as other retail customers. A lawsuit claimed that Armslist was negligently designed to encourage buyers and sellers to evade federal and state laws. In defense, Armslist argued that Section 230 of the Communications Decency Act prohibits negligence claims for websites for alleged inadequate control of users. The Seventh Circuit found answering the statutory question because plaintiffs had not adequately pleaded a negligence claim. *Webber v. Armlist*, 70 F.4th 945 (7th Cir. 2023) (also holding that public policy precluded plaintiffs' claims, Armslist did not aid and abet tortious conduct, and Armslist's mere operation was not a civil conspiracy).

12. [New Note, Renumbered from 2022 Supplement] Tennessee enacted a state statute similar to PLCAA. Tenn. Senate Bill 0822.

13. [New Note, Renumbered from 2022 Supplement] Events in the Mexican government's lawsuits against U.S. firearms manufacturers are covered in Section 19.C.4 of this Supplement.

CHAPTER 10
THE RIGHT TO ARMS IN THE STATES

B. RECENT CHANGES TO STATE CONSTITUTIONAL RIGHT TO ARMS GUARANTEES

4. Iowa

In the November 2022 general election, the Iowa amendment passed with 65% and all but two counties voting in favor. Under the amendment, judicial review of the Iowa constitutional right to keep and bear arms is not to be based on the U.S. Second Amendment standard from Heller and Bruen. As detailed in Chapter 12.B, strict scrutiny is a methodology used in some Equal Protection and First Amendment cases. The government must prove that it has a "compelling state interest." And the government must prove that the restriction is "narrowly tailored." For example, the government must use the "least restrictive means" to accomplish the objective.

NOTES & QUESTIONS

5. Can you think of cases in which the strict scrutiny standard might yield different results from the *Heller*/*Bruen* historical test?

C. STATE FIREARMS PREEMPTION LAWS

Philadelphia's mayor issued an executive order banning licensed carry at all city-owned recreation spaces, including parks, basketball courts and pools. Office of the Mayor, Executive Order 4-22 (Sept. 7, 2022). *Gun Owners of Am. v. Philadelphia*, No. 2647 (Phil. Cty. Ct. of Common Pleas, 1st Dist. Oct. 3, 2022), held that the ban is preempted by the state's Uniform Firearms Act.

In contrast, Philadelphia's ban on home manufacture of guns by non-FFLs was held not to violate the state's Uniform Firearms Act. The court reasoned that the UFA regulates only ownership, possession, transfer, and transportation. It does not clearly express comprehensive preemptive intent.

Gun Owners of America v. Philadelphia, No. 0884 (Phil. Cty. Ct. of Common Pleas, 1st Jud. Dist. Sept. 12, 2022).

A Florida statute allows civil actions and penalties against local officials who willfully violate the state firearms preemption law. Fla. Stats. § 790.33. Several elected officials argued that the statute violates common law legislative immunity and governmental function immunity. By 5-1, the Florida Supreme Court disagreed. "[T]o engage in conduct that is prohibited by statute is not a discretionary function." *Fried v. State* & *City of Weston v. State*, 355 So.3d 899 (Fla. 2023).

Lebanon, OH, allows licensed carry in its municipal building, such as during city council meetings, but not while court is in session. The ordinance was held not to violate Ohio's preemption law. *Donovan v. City of Lebanon*, No. 21-CV-094117 (Ohio Ct. Common Pleas, Warren Cty., Apr. 4, 2023).

Ongoing preemption litigation over gun control laws enacted by the city of Columbus, OH, has been complicated by the city's location in three different counties. In a case brought by City of Columbus, a Franklin County Common Pleas Judge issued a preliminary injunction holding that the state preemption statute violates the "home rule" guarantee of the Ohio Constitution. Per Ohio Supreme Court precedent, the State was entitled to a stay as a matter of right. The county judge did grant a stay while the case is appealed to the intermediate Court of Appeals. *City of Columbus v. State of Ohio*, No. 19 CV 002281 (Franklin Cty. Ct. of Common Pleas Nov 4, 2022). In the short interim between the preemption decision and the stay, Columbus enacted more gun control. The Columbus laws are presently on appeal, with the Ohio Attorney General participating in the case against Columbus.

NOTES & QUESTIONS

6. [New Note] *Preemption and Public Carry – Public Universities.* In *Bd. of Regents of Higher Educ. of Mont. v. State of Montana*, 512 P.3d 748 (June 29, 2022) [68] the Montana Supreme Court struck down Mont. Code Ann. § 45-3-111. This law was passed by the state legislature to eliminate the authority of the Montana University Board of Regents to regulate the public carry of firearms on the Montana University System (MUS) campuses. The new law merely required compliance with Montana state law in order to carry firearms on MUS campuses. The Board of Regent's Policy 1006 had effectively banned both the open and concealed carry of firearms on all MUS campuses. The decision does

[68] Published one week after the U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Assn., Inc. v. Bruen,* 142 S. Ct. 2111 (2022).

not specifically discuss Montana's preemption doctrine, codified at Mont. Code Ann. § 45-8-351 which reads:

> Restriction on local government regulation of firearms. (1) Except as provided in subsection (2), a county, city, town, consolidated local government, or other local government unit may not prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.
>
> (2)(a) For public safety purposes, a city or town may regulate the discharge of rifles, shotguns, and handguns. A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of unpermitted concealed weapons or the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction.
>
> (b) Nothing contained in this section allows any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others or to prohibit the legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise.

The Montana high court side-stepped the firearm preemption issue by finding that Montana Board of Regents was not a "local government" subject to the legislative control of the Montana Legislature:

> Under the 1889 Montana Constitution, the Legislature possessed absolute authority over the Board, which was vested with "general control and supervision of the State University . . . [with] powers and duties [as] prescribed by law." Mont. Const. of 1889, art. XI, § 11. The 1972 Constitution removed the language subjecting the Board's powers and duties to legislative control and instead vested the Board with the "full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS] and . . . supervise and coordinate other public educational institutions assigned by law." Mont. Const. art. X, § 9(2)(a). By the plain language of Mont. Const. art. X, § 9, the Board retains full independence over the MUS.

Bd. of Regents of Higher Educ. of Mont., 512 P.3d at 751.

Note that the Montana Supreme Court found that "Montana is not immune from the catastrophic loss that follows the use of firearms on school campuses. . . . The Board, not the Legislature, is constitutionally vested with full authority to determine the [firearm regulation] priorities of the MUS." The Court's finding was not that MUS was not immune from liability, but that the State of Montana was not immune.

The Court then concluded that the "Board is constitutionally vested with full responsibility to supervise, coordinate, manage, and control the MUS and its properties. The regulation of firearms on MUS campuses falls squarely within this authority. As applied to the Board, Sections 3 through 8 of HB 102

[Mont. Code Ann. § 45-3-111] unconstitutionally infringe[d] upon the Board's constitutionally derived authority."

The Court's rationale explicitly links exposure to liability to authority to regulate firearms. The Court's opinion then appears to concede that the State of Montana's treasury remains at risk for injuries when crimes involving firearms happen on campus. Yet the Board of Regents can turn MUS campuses into "gun-free zones" and thus override the Legislature's policy designed to mitigate that liability by allowing the law-abiding public to carry of firearms for self-defense on MUS campuses in the same manner that they do in the rest of the state.

7. [New Note] *Preemption and Public Carry – Public Land Leased to Private Entities.* In *Herndon v. City of Sandpoint,* 2023 WL 4111076 (Idaho June 22, 2023), the Idaho Supreme Court found no state constitutional or statutory barrier to a municipality leasing a public park to a private music festival, who in turn banned the public from carrying firearms on park grounds during the period of time the park was leased to the festival operators.

Idaho's preemption doctrine is codified at Idaho Code § 18-3302J:

> (1) The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen's right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature's intent to wholly occupy the field of firearms regulation within this state.
>
> (2) Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition. . . .

An exception to Idaho's constitutional carry policy (Ch. 10.D.6) is found at Idaho Code § 18-3302(25): "Nothing in [Idaho's constitutional carry statute] shall be construed to limit the existing rights of a private property owner, private tenant, private employer or private business entity."

The plaintiffs had argued that the government of the City of Sandpoint was fully preempted from regulating firearms in the public park — and as the city was not "a private property owner" — that it could not convey the right to regulate firearms in the public park to the music festival through the artifice of a lease.

The Idaho Supreme Court disagreed, and upheld the lease provision as a short-term conveyance of public property, that transmuted the public park to private property for the duration of the lease. This allowed the festival to take

full advantage of I.C. § 18-3302(25) as if they were private property owners of the public park.

8. [New Note] Both *Board of Regents* and *Herndon* side-stepped the head-on conflict between state governments regulating the public carrying of firearms and what are arguably subordinate political entities promulgating their own, in some cases, contradictory policies.

Is this conflict or confusion exactly what a preemption doctrine is supposed to address? What other policy objectives do firearm preemption laws achieve?

a. Could a state legislature conclude that mitigation of mass shooting casualties is best achieved by allowing all law-abiding citizens to provide for their own self-defense, and that in exercising for their own self-defense the armed private citizen becomes the first line of defense against these horrific events?

b. In *DeShaney v. Winnebago County,* 489 U.S. 189 (1989) the U.S. Supreme Court found no constitutional violation when governments fail to protect someone from criminal conduct. There are exceptions to this general rule: (1) when the state takes a person into custody, thus confining the person against his or her will; (2) the "state-created danger" doctrine where the state actor creates the danger or renders a person more vulnerable to an existing danger, *Id.,* 489 U.S. at 198-201; and (3) conduct by a government actor that is arbitrary or shocks the conscience in a constitutional sense. *See Collins v. City of Harker Heights,* 503 U.S. 115 (1992); *Waddell v. Hendry County Sheriff's Office,* 329 F.3d 1300, 1305 (11th Cir. 2003).

The properties at issue in *Board of Regents* and *Herndon* are still public property (state university campus and city park). Are the government actors (school administrators and city managers) placing anyone who would normally carry a firearm for self-defense in greater danger by forbidding him or her from exercising the right to carry on these public properties?

The case of *Peschke v. Carroll College*, 929 P.2d 874 (1996), cited in the Montana case, was brought by the estate of an employee of the MUC who had been murdered on campus. The case went to the jury on a negligence cause of action on the proposition that the college had failed to provide a safe and secure place to work. The Montana Supreme Court upheld the jury verdict in favor of the college; the jury found that the college had not breached its duty of care on a negligence claim. But what if Emma Peschke normally carried a gun for self-defense? A right since *Bruen,* recognized by the Supreme Court, even in public.

What if Emma Peschke was trained and proficient in the use a handgun and likely could have neutralized the threat against her? Would the MUC's

policy of disarming everyone on campus constitute a "state-created danger"? Would this be an exception to *Deshaney*? Would the estate of Emma Peschke have had more than just a negligence work place claim to bring if the same events occurred today, post-*Bruen*? Assuming she could prove causation (normally a question for the jury) that "but for" the campus's gun-free zone policy, she would have carried a gun and neutralized the threat, should she (or her estate) be able to bring a claim against state-actors for infringing the right of self-defense?

D. MODERN STATE GUN CONTROL LAWS

7. Property Rights and Arms Rights

b. Shooting Ranges

NOTES & QUESTIONS

2. [New Note] For a thorough resource on the topic of zoning and shooting ranges, see American Law of Zoning, § 18.16.50.

CHAPTER 11

THE SUPREME COURT AFFIRMS AN INDIVIDUAL RIGHT TO ARMS

A. THE SUPREME COURT AFFIRMS AN INDIVIDUAL RIGHT TO ARMS AGAINST FEDERAL INFRINGEMENT

Comment: Corpus Linguistics and the Meaning of Bear Arms

Some of the corpus linguistics scholars discussed above filed amicus briefs in *New York State Rifle & Pistol Association v. Bruen*. Professors David B. Kopel and E. Gregory Wallace argued that many of the historical quotes in the briefs were deceptively chopped, and the full quotes plainly treated bearing arms as a personal self-defense activity. Their article made clear that it was not questioning corpus linguistics per se, but instead was only criticizing deliberate misclassification of quotes. David Kopel & E. Gregory Wallace, *Corpus Linguistics and the Second Amendment: Support for the Right to Bear Arms for All Purposes*, Reason.com (Oct. 31, 2021 12:26 AM).

In contrast, a recent article does argue that corpus linguistics is inherently improper in constitutional adjudication. Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation*, 70 Drake L. Rev. 387 (2022). The article argues that corpus linguistic suffers several inherent defects:

> In determining the original understanding of a constitutional provision, the voice of the "common man" will, contrary to proponents of corpus linguistics, often not be heard, but rather the voices of elites. The corpora are often incomplete and do not include key texts that scholars have long relied upon to determine constitutional meaning. Corpora will often be biased in favor of newsworthy events, such as wars, and will not record important traditions. Bias may also result from historical and temporal circumstances, which may disproportionately reflect "what people are talking about at the time" rather than ordinary meaning.
>
> More fundamentally, the "frequency hypothesis," on which the entire legal corpus linguistics endeavor relies, is unsound. Just because one meaning of "bear arms" more frequently appears in an assortment of documents does not mean that that is the meaning in a particular instance, such as the use of "bear

> arms" in the Constitution. Culling a large number of irrelevant results and categorizing the remaining results according to their assumed meaning is often purely subjective, irreproducible, and far from scientific.

The authors suggest that "if the tool is to be relied upon at all, expert testimony after appropriate discovery should be required to meet the standards of admissibility under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals* and its state analogues."

CHAPTER 12
STANDARDS OF REVIEW

B. THE TWO-PART TEST

On page 978, insert the following after the paragraph that begins "Some restrictions on constitutional rights are categorically void.":

Even in areas where the Supreme Court has articulated a fairly relaxed test for judging governmental actions, strong categorical rules may exist. For example, in 1990 the Supreme Court held that the First Amendment's Free Exercise Clause does not limit laws of general applicability that were enacted for neutral (not anti-religious) purposes that happen to interfere with someone's religious activities. *Employment Div. v. Smith*, 494 U.S. 872 (1990) (peyote use). However, decisions before and after *Smith* state various rights of conscience in categorical terms, seemingly placing them off-limits from governmental action. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2017) (right of clergy to choose not to officiate at a same-sex wedding); *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015) (right to teach on unpopular ideas); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (right of religious organizations to choose who will serve in ministerial roles); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("freedom to profess whatever religious doctrine one desires"); *id.* at 877-78 (right to bow in worship); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (right to hold beliefs that a court might consider not "acceptable, logical, consistent, or comprehensible"); *id.* at 715-16 (right to identify as part of denomination even while having difference with the denomination's orthodox beliefs and practices); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976) (right of ecclesiastical authorities to adjudicate intra-church disputes); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (government may not "force or influence a person to go to or remain away from church against his will"); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) ("freedom to believe . . . is absolute"); *id.* ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."); Watson v. Jones, 80 U.S. 679, 733 (1871) (churches' right to decide "church discipline" or "the conformity of the members of the church to the standard of morals required of them").

CHAPTER 13

WHO? BANS ON PERSONS AND CLASSES

A. [New Section Title] *DOMESTIC VIOLENCE MISDEMEANANTS AND PERSONS SUBJECT TO RESTRAINING ORDERS*

The federal lifetime ban on firearms possession by anyone convicted of a misdemeanor involving domestic violence has been upheld in all post-*Bruen* cases so far. 18 U.S.C. § 922(g)(9). *See United States v. Bernard*, 2022 WL 17416681 (N.D. Iowa Dec. 5, 2022); *United States v. Anderson*, 2022 WL 10208253 (W.D. Va. Oct. 17, 2022); *United States v. Jackson*, 2022 WL 3582504 (W.D. Okla. Aug. 19, 2022); *United States v. Nutter*, 2022 WL 3718518 (S.D.W. Va. Aug. 29, 2022).

In contrast, the ban on possession by persons under civil domestic restraining orders has faced more skepticism. The ban was upheld in *United States v. Kays*, 2022 WL 3718519 (W.D. Okla. Aug. 29, 2022) (surety laws are a good enough analogue). But it was held unconstitutional in *United States v. Combs*, 2023 WL 1466614 (E.D. Ky. Feb. 2, 2023) and *United States v. Perez-Gallan*, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022) ("This Court's opinion says nothing about whether a state court could remove someone's guns through conditions of release or a restraining order.").

Most famously, the ban was held unconstitutional by the Fifth Circuit in *United States v. Rahimi*. The U.S. Supreme Court granted certiorari on June 30, 2023. The Court did not change the question presented by the Solicitor General: "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face."

United States v. Rahimi

61 F.4th 443 (5th Cir. 2023)

Cory T. Wilson, Circuit Judge: . . .

The question presented in this case is *not* whether prohibiting the possession of firearms by someone subject to a domestic violence restraining

order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional under the Second Amendment of the United States Constitution. In the light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen* 142 S. Ct. 2111 (2022), it is not.

Zackey Rahimi levies a facial challenge to § 922(g)(8).

I.

Between December 2020 and January 2021, Rahimi was involved in five shootings in and around Arlington, Texas. On December 1, after selling narcotics to an individual, he fired multiple shots into that individual's residence. The following day, Rahimi was involved in a car accident. He exited his vehicle, shot at the other driver, and fled the scene. He returned to the scene in a different vehicle and shot at the other driver's car. On December 22, Rahimi shot at a constable's vehicle. On January 7, Rahimi fired multiple shots in the air after his friend's credit card was declined at a Whataburger restaurant.

Officers in the Arlington Police Department identified Rahimi as a suspect in the shootings and obtained a warrant to search his home. Officers executed the warrant and found a rifle and a pistol. Rahimi admitted that he possessed the firearms. He also admitted that he was subject to an agreed civil protective order entered February 5, 2020, by a Tarrant County state district court after Rahimi's alleged assault of his ex-girlfriend. The order also expressly prohibited Rahimi from possessing a firearm.

A federal grand jury indicted Rahimi for possessing a firearm while under a domestic violence restraining order in violation of 18 U.S.C. § 922(g)(8). . . Rahimi now contends that *Bruen* overrules our precedent and that under *Bruen*, § 922(g)(8) is unconstitutional. We agree on both points.

II. . . .

In *Emerson*, we held that the Second Amendment guarantees an individual right to keep and bear arms—the first circuit expressly to do so. 270 F.3d at 260. But we also concluded that § 922(g)(8) was constitutional as applied to the defendant there. *Id.* at 263. "*Emerson* first considered the scope of the Second Amendment right 'as historically understood,' and then determined—presumably by applying some form of means-end scrutiny *sub silentio*—that § 922(g)(8) [was] 'narrowly tailored' to the goal of minimizing 'the threat of lawless violence.'" *McGinnis*, 956 F.3d at 755 (quoting *Emerson*, 270 F.3d at 264).

After *D.C. v. Heller*, 554 U.S. 570 (2008), courts coalesced around a similar "two-step inquiry for analyzing laws that might impact the Second Amendment." *McGinnis*, 956 F.3d at 753. . . .

Enter *Bruen.* Expounding on *Heller*, the Supreme Court held that "[w]hen the Second Amendment's plain text covers an individual's conduct, the

Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129-30. In that context, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Put another way, "the [G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. In the course of its explication, the Court expressly repudiated the circuit courts' means-end scrutiny—the second step embodied in *Emerson* and applied in *McGinnis*. *Id.* at 2128-30. To the extent that the Court did not overtly overrule *Emerson* and *McGinnis*—it did not cite those cases but discussed other circuits' similar precedent—*Bruen* clearly "fundamentally change[d]" our analysis of laws that implicate the Second Amendment *Bonvillian Marine*, 19 F.4th at 792, rendering our prior precedent obsolete.

III.

Our review of Rahimi's facial challenge to § 922(g)(8) is de novo. *See United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997). First, the court addresses the Government's argument that Rahimi is not among those citizens entitled to the Second Amendment's protections. Concluding he is, we then turn to whether § 922(g)(8) passes muster under *Bruen*'s standard.

A.

According to the Government, *Heller* and *Bruen* add a gloss on the Second Amendment that restricts its applicability to only "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, and "ordinary, law-abiding citizens," *Bruen*, 142 S. Ct. at 2122. Because Rahimi is neither responsible nor law-abiding, as evidenced by his conduct and by the domestic violence restraining order issued against him, he falls outside the ambit of the Second Amendment. Therefore, argues the Government, § 922(g)(8) is constitutional as applied to Rahimi.

The Second Amendment provides, simply enough:

> 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.

U.S. Const. amend. II. *Heller* explained that the words "the people" in the Second Amendment have been interpreted throughout the Constitution to "unambiguously refer[ ] to all members of the political community, not an unspecified subset." 554 U.S. at 580. Further, "the people" "refer[ ] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). For those reasons, the *Heller* Court began its analysis with the "strong

presumption that the Second Amendment right is exercised individually and belongs to all Americans," *id.* at 581, and then confirmed that presumption, *id.* at 595. *Heller*'s exposition of "the people" strongly indicates that Rahimi is included in "the people" and thus within the Second Amendment's scope.

To be sure, as the Government argues, *Heller* and *Bruen* also refer to "law-abiding, responsible citizens" in discussing the amendment's scope (*Bruen* adds "ordinary, law-abiding citizens"). And there is some debate over the extent to which the Court's "law-abiding" qualifier constricts the Second Amendment's reach. *Compare Kanter v. Barr*, 919 F.3d 437, 451-53 (7th Cir. 2019) (Barrett, J. dissenting), *abrogated by Bruen*, 142 S. Ct. 2111, *with Binderup v. Att'y Gen.*, 836 F.3d 336, 357 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments). As summarized by now-Justice Barrett, "one [approach] uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away." *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting). The Government's argument that Rahimi falls outside the community covered by the Second Amendment rests on the first approach. But it runs headlong into *Heller* and *Bruen*, which we read to espouse the second one.

That reading, in turn, leads us to conclude that, in context, *Heller* simply uses "law-abiding, responsible citizens" as shorthand in explaining that its holding (that the amendment codifies an individual right to keep and bear arms) should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. . . ." 554 U.S. at 626-27; *accord Range v. Attorney Gen.*, 53 F.4th 262, 266 (3d Cir. 2022) (upholding 18 U.S.C. § 922(g)(1), which prohibits firearm possession by convicted felons, because "the people" categorically "excludes those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses"), *reh'g en banc granted, opinion vacated*, 56 F.4th 992 (3d Cir. 2023). In other words, *Heller* 's reference to "law-abiding, responsible" citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders "presumptively" tolerated or would have tolerated. *See* 554 U.S. at 627, n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."). *Bruen*'s reference to "ordinary, law-abiding" citizens is no different. *See* 142 S. Ct. at 2134.

From the record before us, Rahimi did not fall into any such group at the time he was charged with violating § 922(g)(8), so the "strong presumption" that he remained among "the people" protected by the amendment holds. When he was charged, Rahimi was subject to an agreed domestic violence restraining order that was entered in a civil proceeding. That alone does not suffice to

remove him from the political community within the amendment's scope. And, while he was *suspected* of other criminal conduct at the time, Rahimi was not a convicted felon or otherwise subject to another "longstanding prohibition[ ] on the possession of firearms" that would have excluded him. *Heller*, 554 U.S. at 626-27; *see Range*, 53 F.4th at 273 (concluding that *Heller*, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, and *Bruen* support that criminals, as a group, "fall[ ] outside 'the people' . . . and that § 922(g)(1) is well-rooted in the nation's history and tradition of firearm regulation").

Indeed, the upshot of the Government's argument is that the Second Amendment right can be readily divested, such that "a person could be in one day and out the next: . . . his rights would be stripped as a self-executing consequence of his new status." *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting). But this turns the typical way of conceptualizing constitutional rights on its head. And the Government's argument reads the Supreme Court's "law-abiding" gloss so expansively that it risks swallowing the text of the amendment. *Cf. Bruen*, 142 S. Ct. at 2156 ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting *McDonald*, 561 U.S. at 780)).

Further, the Government's proffered interpretation of "law-abiding" admits to no true limiting principle. Under the Government's reading, Congress could remove "unordinary" or "irresponsible" or "non-law-abiding" people—however expediently defined—from the scope of the Second Amendment. Could speeders be stripped of their right to keep and bear arms? Political nonconformists? People who do not recycle or drive an electric vehicle? One easily gets the point: Neither *Heller* nor *Bruen* countenances such a malleable scope of the Second Amendment's protections; to the contrary, the Supreme Court has made clear that "the Second Amendment right is exercised individually and belongs to all Americans," *Heller*, 554 U.S. at 581. Rahimi, while hardly a model citizen, is nonetheless among "the people" entitled to the Second Amendment's guarantees, all other things equal.

B.

Which brings us to the question of whether Rahimi's right to keep and bear arms may be constitutionally restricted by operation of § 922(g)(8). The parties dispute Rahimi's burden necessary to sustain his facial challenge to the statute. The Government contends that Rahimi "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Rahimi contests that assertion, asserting during oral argument that the Government's interpretation of *Salerno* has fallen out of favor, though he contends that in any event, he has satisfied *Salerno*'s standard.

Bruen instructs how to proceed. The plaintiffs there levied a facial challenge to New York's public carry licensing regime. 142 S. Ct. at 2122. To evaluate the challenged law, the Supreme Court employed a historical analysis, aimed at "assess[ing] whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131. Construing *Heller*, the Court flatly rejected any means-end scrutiny as part of this analysis, *id.* at 2129, such that if a statute is inconsistent with the Second Amendment's text and historical understanding, then it falls under any circumstances. *Cf. Salerno*, 481 U.S. at 745; *Freedom Path, Inc. v. Internal Revenue Serv.*, 913 F.3d 503, 508 (5th Cir. 2019) ("A facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." (cleaned up)).

Bruen articulated two analytical steps: First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct[.]" 142 S. Ct. at 2129-30. If so, then the "Constitution presumptively protects that conduct," and the Government "must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.*.

To carry its burden, the Government must point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Id.* at 2131-32. "[W]e are not obliged to sift the historical materials for evidence to sustain [§ 922(g)(8)]. That is [the Government's] burden." *Id.* at 2150.

The Government need not identify a "historical *twin*"; rather, a "well-established and representative historical *analogue*" suffices. *Id.* at 2133. The Supreme Court distilled two metrics for courts to compare the Government's proffered analogues against the challenged law: *how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right. *Id.* (citing *McDonald*, 561 U.S. at 767, and *Heller*, 554 U.S. at 599). "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." *Id.*

As to the degree of similarity required, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Id.* "[C]ourts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted." *Id.)*. On the other hand, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* The core question is whether the challenged law and proffered analogue are "relevantly similar." *Id.* at 2132.

When the challenged regulation addresses a "general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 2131. Moreover, "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.*

C.

Rahimi's possession of a pistol and a rifle easily falls within the purview of the Second Amendment. The amendment grants him the right "to keep" firearms, and "possession" is included within the meaning of "keep." *See id.* at 2134-35. And it is undisputed that the types of firearms that Rahimi possessed are "in common use," such that they fall within the scope of the amendment. *See id.* at 2143 ("[T]he Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'") (quoting *Heller*, 554 U.S. at 627). Thus, *Bruen*'s first step is met, and the Second Amendment presumptively protects Rahimi's right to keep the weapons officers discovered in his home. *See id.* at 2126.

But Rahimi, like any other citizen, may have forfeited his Second Amendment rights if his conduct ran afoul of a "lawful regulatory measure[ ]" "prohibiting . . . the possession of firearms," *Heller*, 554 U.S. at 626-27 & 627 n.26, that is consistent with "the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 142 S. Ct. at 2127. The question turns on whether § 922(g)(8) falls within that historical tradition, or outside of it.

… Distilled to its essence, the provision operates to deprive an individual of his right to possess (i.e., "to keep") firearms once a court enters an order, after notice and a hearing, that restrains the individual "from harassing, stalking, or threatening an intimate partner" or the partner's child. The order can rest on a specific finding that the restrained individual poses a "credible threat" to an intimate partner or her child. Or it may simply include a general prohibition on the use, attempted use, or threatened use of physical force reasonably expected to cause bodily injury. The covered individual forfeits his Second Amendment right for the duration of the court's order. This is so even when the individual has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature.

These characteristics crystallize "how" and "why" § 922(g)(8) "burden[s] a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133. In particular, we focus on these key features of the statute: (1) forfeiture of the

right to possess weapons (2) after a civil proceeding[7] (3) in which a court enters a protective order based on a finding of a "credible threat" to another specific person, or that includes a blanket prohibition on the use, of threatened use, of physical force, (4) in order to protect that person from "domestic gun abuse." The first three aspects go to *how* the statute accomplishes its goal; the fourth is the statute's goal, the *why.*

To sustain § 922(g)(8)'s burden on Rahimi's Second Amendment right, the Government bears the burden of proffering "relevantly similar" historical regulations that imposed "a comparable burden on the right of armed self-defense" that were also "comparably justified." *Id.* at 2132-33. And "when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 2136. We thus afford greater weight to historical analogues more contemporaneous to the Second Amendment's ratification.

The Government offers potential historical analogues to § 922(g)(8) that fall generally into three categories: (1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of "dangerous" people, (2) English and American "going armed" laws, and (3) colonial and early state surety laws. We discuss in turn why each of these historical regulations falters as "relevantly similar" precursors to § 922(g)(8).

1.

The Government relies on laws of varying antiquity as evidence of its "dangerousness" analogues. We sketch these chronologically, mindful that greater weight attaches to laws nearer in time to the Second Amendment's ratification.

Under the English Militia Act of 1662, officers of the Crown could "seize all arms in the custody or possession of any person" whom they "judge[d] dangerous to the Peace of the Kingdom." 13 &14 Car. 2, c.3, § 13 (1662). Citing scholarship, the Government thus posits that "by the time of American independence, England had established a well-practiced tradition of disarming dangerous persons—violent persons and disaffected persons perceived as threatening to the crown." Joseph G.S. Greenlee, *The Historical Justification*

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[7] The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections. *See* U.S. Const. amend. IV; U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend. VIII. It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.

for Prohibiting Dangerous Persons from Possessing Firearms, 20 Wyo. L. Rev. 249, 261 (2020).

But the Militia Act's provenance demonstrates that it is not a forerunner of our Nation's historical tradition of firearm regulation. Under Charles I (who reigned 1625-1649), the Crown and Parliament contested for control of the militia. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 8 (1996). After the resulting civil war and Oliver Cromwell's interregnum, the monarchy was restored in 1660 when Charles II took the throne. Charles II began using the militia to disarm his political opponents. *Id.* (citing J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994) 35-38 (1994)). The Militia Act of 1662 facilitated this disarmament, which escalated under the Catholic James II once he took the throne in 1685. *Id.*; *see Heller*, 554 U.S. at 593 (noting that the disarmaments "caused Englishmen . . . to be jealous of their arms"). After the Glorious Revolution, which enthroned Protestants William and Mary, the Declaration of Rights, codified as the 1689 English Bill of Rights, qualified the Militia Act by guaranteeing "[t]hat the subjects which are Protestants may have arms for their defence suitable to their Conditions and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. "This right," which *restricted* the Militia Act's reach in order to prevent the kind of politically motivated disarmaments pursued by Charles II and James II, "has long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. This understanding, and the history behind it, defeats any utility of the Militia Act of 1662 as a historical analogue for § 922(g)(8).

The Government next points to laws in several colonies and states that disarmed classes of people considered to be dangerous, specifically including those unwilling to take an oath of allegiance, slaves, and Native Americans. *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 157-60 (2007). These laws disarmed people thought to pose a threat to the security of the state due to their perceived lack of loyalty or societal status. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200-01 (5th Cir. 2012) (discussing relevant scholarship), *abrogated by Bruen*, 142 S. Ct. at 2126-30. "While public safety was a concern, most disarmament efforts were meant to prevent armed rebellions. The early Americans adopted much of that tradition in the colonies." Greenlee, *supra*, at 261.

But we question at a threshold level whether colonial and state laws disarming categories of "disloyal" or "unacceptable" people present tenable analogues to § 922(g)(8). Laws that disarmed slaves, Native Americans, and disloyal people may well have been targeted at groups excluded from the political community—i.e., written out of "the people" altogether—as much as they were about curtailing violence or ensuring the security of the state. Their

utility as historical analogues is therefore dubious, at best. In any event, these laws fail on substance as analogues to § 922(g)(8), because out of the gate, *why* they disarmed people was different. The purpose of laws disarming "disloyal" or "unacceptable" groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of "domestic gun abuse," *McGinnis*, 956 F.3d at 758, posed by another individual. Thus, laws disarming "dangerous" classes of people are not "relevantly similar" to § 922(g)(8) such that they can serve as historical analogues.

Finally, the Government offers two proposals that emerged in state ratification conventions considering the proposed Constitution. A minority of Pennsylvania's convention authored a report in which they contended that citizens have a right to bear arms "unless for crimes committed, *or real danger of public injury*." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 662, 665 (1971) (emphasis added). And at the Massachusetts convention, Samuel Adams proposed a qualifier to the Second Amendment that limited the scope of the right to "peaceable citizens." *Id.* at 681.

But these proposed amendments are not reflective of the Nation's early understanding of the scope of the Second Amendment right. While they were influential proposals, *see Heller*, 554 U.S. at 604, neither became part of the Second Amendment as ratified. Thus, the proposals might somewhat illuminate the scope of firearm rights at the time of ratification, but they cannot counter the Second Amendment's text, or serve as an analogue for § 922(g)(8) because, *inter alia*, they were not enacted. *Cf. Bruen*, 142 S. Ct. at 2137 ("[T]o the extent later history contradicts what the text [of the Second Amendment] says, the text controls.").

2.

The Government also relies on the ancient criminal offense of "going armed to terrify the King's subjects." *Bruen*, 142 S. Ct. at 2141. This common law offense persisted in America and was in some cases codified. *Id.* at 2144. The Government offers four exemplars codified in the Massachusetts Bay Colony, the state of Virginia, and the colonies of New Hampshire and North Carolina.

The Massachusetts law provided "[t]hat every justice of the peace . . . may cause to be staid and arrested all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride, or go armed offensively . . . and upon view of such justice or justices, confession of the party or other legal conviction of any such offence, shall commit the offender to prison . . . and seize and take away his armor or weapons. . . ." 1 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, 52-53 (1869) (1692 statute) (cleaned up). Similarly, the New Hampshire statute authorized justices of the peace "upon view of such justice, confession of the party, or legal proof of any such offense . . . [to] cause the [offender's] arms or weapons to be taken away. . . ." Acts and Laws of His Majesty's Province of New-Hampshire: In New-England; with

Sundry Acts of Parliament, 17 (1771) (1701 statute); *see Bruen*, 142 S. Ct. at 2142-43 (noting that Massachusetts and New Hampshire laws "were substantively identical"). Virginia's law differed slightly: "[N]o man . . . [shall] go [ ]or ride armed by night or by day, in fairs or markets, or in other places, in terror of the country, upon pain of being arrested and committed to prison by any justice on his view, or proof of others, there to a time for so long a time as a jury, to be sworn for that purpose by the said justice, shall direct, and in like manner to forfeit his armour to the Commonwealth. . . ." Revised Code of the State of Virginia: Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force, 554 (1819) (1786 statute). North Carolina's colonial law was contained within its constable's oath, which required constables to "arrest all such persons as, in your sight, shall ride or go armed offensively, or shall commit or make any riot, affray, or other breach of his Majesty's peace. . . ." Collection of All of the Public Acts of Assembly of the Province of North-Carolina: Now in Force and Use, 131 (1751) (1741 statute) (cleaned up). While similarly aimed at curbing "going armed offensively," the North Carolina law did not provide for forfeiture.

These proffered analogues fall short for several reasons. An overarching one is that it is doubtful these "going armed" laws are reflective of our Nation's historical tradition of firearm regulation, at least as to forfeiture of firearms. *See Bruen*, 142 S. Ct. at 2142 ("[W]e doubt that *three* colonial regulations could suffice to show a tradition of public carry regulation."). North Carolina's law did not provide for forfeiture, so it quickly falls out of the mix. And fairly early on, Massachusetts and Virginia dropped forfeiture as a penalty, going the way of North Carolina and thereby undercutting the Government's reliance on those laws. Indeed, Massachusetts amended its law to remove the forfeiture provision in 1795, just four years after the ratification of the Second Amendment. 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, 653 (1807) (statute enacted Jan. 29, 1795). Virginia had done so by 1847, shortly before the Commonwealth re-codified its laws in 1849. *See* Code of Virginia: With the Declaration of Independence and Constitution of the United States and the Declaration of Rights and Constitution of Virginia, 756 (1849). It is unclear how long New Hampshire's "going armed" law preserved its forfeiture provision, but assuming *arguendo* it persisted longer than the others, one outlier is not enough "to show a tradition of public carry regulation." *Bruen*, 142 S. Ct. at 2142.

And on substance, the early "going armed" laws that led to weapons forfeiture are not relevantly similar to § 922(g)(8). First, those laws only disarmed an offender after criminal proceedings and conviction. By contrast, § 922(g)(8) disarms people who have merely been civilly adjudicated to be a threat to another person—or, who are simply governed by a civil order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force," § 922(g)(8)(C)(ii), whether or not there is a "credible threat to

the physical safety" of anyone else, § 922(g)(8)(C)(i). Rahimi's domestic violence restraining order satisfied both conditions; but it bears emphasis that the order at issue here was entered by agreement, in a civil proceeding, after Rahimi apparently waived hearing (the order states no formal hearing was held, and no record was created), and without counsel or other safeguards that would be afforded him in the criminal context. These distinctions alone defeat the "going armed" laws as useful analogues for § 922(g)(8).

Moreover, the "going armed" laws, like the "dangerousness" laws discussed above, appear to have been aimed at curbing terroristic or riotous behavior, i.e., disarming those who had been adjudicated to be a threat to society generally, rather than to identified individuals. And § 922(g)(8) works to disarm not only individuals who are threats to other individuals but also every party to a domestic proceeding (think: divorce court) who, with no history of violence whatever, becomes subject to a domestic restraining order that contains boilerplate language that tracks § 922(g)(8)(C)(ii). In other words, where "going armed" laws were tied to violent or riotous conduct and threats to society, § 922(g)(8) implicates a much wider swath of conduct, not inherently dependent on any actual violence or threat. Thus, these "going armed" laws are not viable historical analogues for § 922(g)(8).

3.

Lastly, the Government points to historical surety laws. At common law, an individual who could show that he had "just cause to fear" that another would injure him or destroy his property could "demand surety of the peace against such person." 4 William Blackstone, Commentaries on the Laws of England 252 (1769). The surety "was intended merely for prevention, without any crime actually committed by the party; but arising only from probable suspicion, that some crime [wa]s intended or likely to happen." *Id.* at 249. If the party of whom surety was demanded refused to post surety, he would be forbidden from carrying a weapon in public absent special need. *See Bruen*, 142 S. Ct. at 2148-49 (discussing operation of historical surety laws). Many jurisdictions codified this tradition, either before ratification of the Bill of Rights or in early decades thereafter.

The surety laws come closer to being "relevantly similar" to § 922(g)(8) than the "dangerousness" and "going armed" laws discussed *supra.* First, they are more clearly a part of our tradition of firearm regulation. And they were "comparably justified," *id.* at 2133, in that they were meant to protect an identified person (who sought surety) from the risk of harm posed by another identified individual (who had to post surety to carry arms). Put simply, the

why behind historical surety laws analogously aligns with that underlying § 922(g)(8).[10]

Aspects of *how* the surety laws worked resemble certain of the mechanics of § 922(g)(8) as well. The surety laws required only a civil proceeding, not a criminal conviction. The "credible threat" finding required to trigger § 922(g)(8)(C)(i)'s prohibition on possession of weapons echoes the showing that was required to justify posting of surety to avoid forfeiture. But that is where the analogy breaks down: As the Government acknowledges, historical surety laws did not prohibit public carry, much less possession of weapons, so long as the offender posted surety. *See also id.* at 2149 (noting that there is "little evidence that authorities ever enforced surety laws"). Where the surety laws imposed a conditional, partial restriction on the Second Amendment right, § 922(g)(8) works an absolute deprivation of the right, not only publicly to carry, but to *possess* any firearm, upon entry of a sufficient protective order. And, as discussed *supra*, § 922(g)(8)(C)(ii) works that deprivation based on an order that "prohibits the use, attempted use, or threatened use of physical force," whether there is a "just cause to fear" any harm, or not. At bottom, the historical surety laws did not impose "a comparable burden on the right of armed self-defense," *id.* at 2133, as § 922(g)(8).

* * *

The Government fails to demonstrate that § 922(g)(8) 's restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation. The Government's proffered analogues falter under one or both of the metrics the Supreme Court articulated in *Bruen* as the baseline for measuring "relevantly similar" analogues: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* As a result, § 922(g)(8) falls outside the class of firearm regulations countenanced by the Second Amendment.

IV.

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[10] The parties spar somewhat over the required granularity of the underlying problem in comparing § 922(g)(8) to proffered analogues. Rahimi contends more generally that domestic violence was, and remains, a persistent social ill that society has taken numerous actions against — though not disarmament. The Government counters that "crime statistics from the founding era are hard to come by," but that "there is reason to doubt that domestic *homicide* was as prevalent at the founding as it is in the modern era." To be sure, historical surety laws were not targeted to domestic violence or even more specifically to domestic homicide. But somewhat abstracting the laws' justifications, as we do above the line, strikes us as consistent with *Bruen*'s instruction that "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." 142 S. Ct. at 2133.

Doubtless, 18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society. Weighing those policy goals' merits through the sort of means-end scrutiny our prior precedent indulged, we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right. Through that lens, we conclude that § 922(g)(8) 's ban on possession of firearms is an "outlier[ ] that our ancestors would never have accepted." *Id.* Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated.

REVERSED; CONVICTION VACATED.

James C. Ho, Circuit Judge, concurring:

The right to keep and bear arms has long been recognized as a fundamental civil right. Blackstone saw it as an essential component of "'the natural right'" to "'self-preservation and defence.'" *District of Columbia v. Heller*, 554 U.S. 570 (2008) (quoting 1 William Blackstone, Commentaries on the Laws of England 139-40 (1765)). And the Supreme Court has repeatedly analogized the Second Amendment to other constitutional rights guaranteed to every American. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First, Second, Fourth, Fifth, and Sixth Amendments as the "civil-rights Amendments"); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-50 n.10 (1961) (comparing "the commands of the First Amendment" to "the equally unqualified command of the Second Amendment"); *N.Y. State Rifle & Pistol Ass'n v. Bruen* 142 S. Ct. 2111, 2126, 2130 (2022) (quoting *Konigsberg*).

But lower courts have routinely ignored these principles, treating the Second Amendment as "a second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion). So the Supreme Court has now commanded lower courts to be more forceful guardians of the right to keep and bear arms, by establishing a new framework for lower courts to apply under the Second Amendment.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129-30. "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. "[T]his historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly

similar.'" *Id.* at 2132. This framework "is neither a regulatory straightjacket nor a regulatory blank check." *Id.* at 2133. It requires the government to "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.*

Our court's decision today dutifully applies *Bruen*, and I join it in full. I write separately to explain how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from violent criminals. Our Founders firmly believed in both the fundamental right to keep and bear arms and the fundamental role of government in combating violent crime.

I.

"[T]he right to keep and bear arms . . . has controversial public safety implications." *Bruen*, 142 S. Ct. at 2126 n.3. But it's hardly "the *only* constitutional right" that does. *Id.* To the contrary, "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783 (plurality opinion).

So any legal framework that involves any of these constitutional provisions can have significant and controversial public safety consequences. A framework that under-protects a right unduly deprives citizens of liberty. But a framework that over-protects a right unduly deprives citizens of competing interests like public safety.

Take, for example, the exclusionary rule. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Since its inception, the rule has been sharply criticized for over-protecting the accused and releasing dangerous criminals into our neighborhoods. It's often said that nothing in the Constitution requires the criminal to "go free because the constable has blundered." *Herring v. United States*, 555 U.S. 135, 148 (2009) (quoting *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926)). "The exclusionary rule generates substantial social costs" by "setting the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (cleaned up).

The same can be said about *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court has "repeatedly referred to the *Miranda* warnings as 'prophylactic' and 'not themselves rights protected by the Constitution.'" *Dickerson v. United States*, 530 U.S. 428, 437-38 (2000). What's more, "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." *Miranda*, 384 U.S. at 542 (White, J., dissenting).

So it's easy to see why decisions like *Mapp* and *Miranda* have been criticized for over-protecting constitutional rights and harming public safety.

But there's a big difference between the first criticism and the second, at least as far as the judiciary is concerned. It's our duty as judges to interpret the Constitution based on the text and original understanding of the relevant provision — not on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches. *See, e.g., McDonald*, 561 U.S. at 783 (plurality opinion) (finding "no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications"); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022) ("[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."); *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) ("Constitutional rights must not give way to hoplophobia.").

And that's precisely the problem here: Members of the Supreme Court have repeatedly criticized lower courts for disfavoring the Second Amendment.[1] The Supreme Court has now responded by setting forth a new legal framework in *Bruen.* It is incumbent on lower courts to implement *Bruen* in good faith and to the best of our ability.

Bruen calls on us to examine our Nation's history and traditions to determine the meaning and scope of the Second Amendment. It's hardly the first time that the Supreme Court has looked to history and tradition to interpret constitutional provisions.[2] And it surely won't be the last.

II.

Those who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained, prosecuted, convicted, and incarcerated. And that's exactly why we have a criminal justice system—to punish criminals and disable them from engaging in further crimes.

The Constitution presumes the existence of a criminal justice system. *See, e.g.*, U.S. Const. amends. V, VI (setting forth various rights of the accused in criminal proceedings); U.S. Const. amend. VIII (prohibiting cruel and unusual punishments). That system allows the government to deny convicted criminals a wide range of liberties that it could not deny to innocent, law-abiding citizens. For example, the government cannot deprive innocent citizens of their liberty of movement. *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900); *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). But it can certainly arrest and incarcerate violent criminals.

Arrest and incarceration naturally entail the loss of a wide range of liberties — including the loss of access to weapons. *See, e.g., Chimel v. California*, 395 U.S. 752, 762-63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."); *State v. Buzzard*, 4 Ark. 18, 21 (1842) (Ringo, C.J.) ("Persons accused of crime,

upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned.").

The Supreme Court has also made clear that our Nation's history and traditions include "longstanding prohibitions on the possession of firearms by felons"—and that such measures are "presumptively lawful." *Heller*, 554 U.S. at 626 & n.26. *See also McDonald*, 561 U.S. at 786 (plurality opinion) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons,' " and "[w]e repeat those assurances here. . . . [I]ncorporation does not imperil every law regulating firearms."). So the government can presumably disarm dangerous convicted felons, whether they're incarcerated or not, without violating the Second Amendment.

The Second Amendment is not "a second-class right." *Bruen*, 142 S. Ct. at 2156. It is not "subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* That principle guides us here: The government can impose various restrictions on the rights of dangerous convicted felons, consistent with our Nation's history and traditions — and that includes the right to keep and bear arms.

III.

The power to incarcerate violent criminals is not just constitutionally permissible — it's imperative to protecting victims. After all, anyone who's willing to break the law when it comes to domestic violence is presumably willing to break the law when it comes to guns as well. The only way to protect the victim may be to detain as well as disarm the violent criminal.

For example, the government can detain and disarm, not just after conviction, but also before trial. Pre-trial detention is presumed by the Excessive Bail Clause and the Speedy Trial Clause. And it plays a significant role in protecting citizens from violence, including domestic violence. *See, e.g., United States v. Salerno*, 481 U.S. 739, 755 (1987) (permitting "the detention prior to trial of arrestees charged with serious felonies who . . . pose a threat to the safety of individuals or to the community").

In addition, the government can detain and disarm, based not just on acts of violence, but criminal threats of violence as well. *See, e.g., United States v. Ackell*, 907 F.3d 67 (1st Cir. 2018) (upholding criminal stalking law); *United States v. Gonzalez*, 905 F.3d 165 (3rd Cir. 2018) (same); *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (same); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (same); *see also People v. Counterman*, 497 P.3d 1039 (Colo. App. 2021) (same), *cert. granted sub nom. Counterman v. Colorado*, 143 S. Ct. 644 (2023). After all, to the victim, such actions are not only life-threatening—they're life-altering, even if they don't eventually result in violence.

IV.

18 U.S.C. § 922(g)(8) disarms individuals based on civil protective orders—not criminal proceedings. As the court today explains, there is no analogous historical tradition sufficient to support § 922(g)(8) under *Bruen.*

Moreover, there are additional reasons why disarmament based on civil protective orders should give us pause. Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings — and issued without any actual threat of danger. That makes it difficult to justify § 922(g)(8) as a measure to disarm dangerous individuals.

A.

"Many divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings . . . as a tactical leverage device." Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 62 n.257 (2006). *See also, e.g.*, Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. Rev. 441, 448 (1997) (civil protective orders are deployed as "an affirmative element of divorce strategy").

That's because civil protective orders can help a party in a divorce proceeding to "secure [favorable] rulings on critical issues such as [marital and child] support, exclusion from marital residence and property disposition." *Murray v. Murray*, 631 A.2d 984, 986 (1993). Protective orders can also be "a powerful strategic tool in custody disputes." Suk, *supra*, at 62.

That makes civil protective orders a tempting target for abuse. Judges have expressed "concern[ ] . . . with the serious policy implications of permitting allegations of . . . domestic violence" to be used in divorce proceedings. *Murray*, 631 A.2d at 986. *See also City of Seattle v. May*, 171 Wash.2d 847, 256 P.3d 1161, 1166 n.1 (2011) (Sanders, J., dissenting) (noting "the growing trend to use protection orders as tactical weapons in divorce cases"). And for good reason. "[N]ot all parties to divorce are above using [protective orders] not for their intended purpose but solely to gain advantage in a dissolution." Scott A. Lerner, *Sword or Shield? Combating Orders-of-Protection Abuse in Divorce*, 95 Ill. Bar J. 590, 591 (2007). Anyone who is "willing to commit perjury can spend months or even years . . . planning to file a domestic violence complaint at an opportune moment in order to gain the upper hand in a divorce proceeding." David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 Rutgers L. Rev. 1009, 1014 (2005). So "[a] plaintiff willing to exaggerate past incidents or even commit perjury can have access to a responsive support group, a sympathetic court, and a litany of immediate relief." Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 Seton Hall L. Rev. 639, 662-63 (2010).

Moreover, these concerns are exacerbated by the fact that judges are too often ill-equipped to prevent abuse. Family court judges may face enormous pressure to grant civil protective orders—and no incentive to deny them. For example, family court judges may receive mandatory training in which they're warned about "the unfavorable publicity" that could result if they deny requests for civil protective orders. *Id.* at 668. As one judge has noted, "[a] newspaper headline can be death to a municipal court judge's career." *Id.* at 667 n.213. So "the prospect of an unfavorable newspaper headline is a frightening one." *Id.* To quote another judge: "Your job is not to become concerned about all the constitutional rights of the [defendant] you're violating as you grant a restraining order. Throw him out on the street, give him the clothes on his back and tell him, 'see ya' around.'" *Id.* at 668. Yet another judge said: "If there is any doubt in your mind about what to do, you should issue the restraining order." *Id.*

As a result, "[r]estraining orders . . . are granted to virtually all who apply." *May*, 256 P.3d at 1166 n.1 (Sanders, J., dissenting). So there's a "tremendous" risk that courts will enter protective orders automatically—despite the absence of any real threat of danger. Heleniak, *supra*, at 1014. *See generally* Slocum, *supra.* In one case, for example, a family court judge granted a restraining order on the ground that the husband told his wife that he did not love her and was no longer attracted to her. *See Murray*, 631 A.2d at 984. "There was no prior history of domestic violence," yet the judge issued the order anyway. *Id.* Another judge issued a restraining order against David Letterman on the ground that his presence on television harassed the plaintiff. *See* Todd Peterson, *David Letterman Fights Restraining Order*, People (Dec. 21, 2005).

B.

Moreover, the consequences of disarming citizens under § 922(g)(8) may be especially perverse considering the common practice of "mutual" protective orders.

In any domestic violence dispute, a judge may see no downside in forbidding *both* parties from harming one another. A judge "may think that mutual restraining orders are not substantially different from regular restraining orders—after all, the goal is to keep the parties away from one another so that the violence will not continue." Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 Cal. L. Rev. 1047, 1054 (2020). "Judges may also feel that issuing a mutual restraining order saves time because they do not have to hear testimony and make a finding regarding which party is a primary aggressor or even that one party has committed domestic violence." *Id.*

But "[t]hese judicial assessments have often led to the issuance of *unmerited* mutual restraining orders, namely in situations where one party is the abuser and the other party is a victim." *Id.* (emphasis added). As a result,

"both parties are restrained *even if only one is an abuser*." *Id.* at 1055 (emphasis added).

The net result of all this is profoundly perverse, because it means that § 922(g)(8) effectively disarms *victims* of domestic violence. What's worse, victims of domestic violence may even be put in greater danger than before. Abusers may know or assume that their victims are law-abiding citizens who will comply with their legal obligation not to arm themselves in self-defense due to § 922(g)(8). Abusers might even remind their victims of the existence of § 922(g)(8) and the entry of a mutual protective order to taunt and subdue their victims. Meanwhile, the abusers are criminals who have already demonstrated that they have zero propensity to obey the dictates of criminal statutes. As a result, § 922(g)(8) effectively empowers and enables abusers by guaranteeing that their victims will be unable to fight back.

* * *

We must protect citizens against domestic violence. And we can do so without offending the Second Amendment framework set forth in *Bruen.*

Those who commit or criminally threaten domestic violence have already demonstrated an utter lack of respect for the rights of others and the rule of law. So merely enacting laws that tell them to disarm is a woefully inadequate solution. Abusers must be detained, prosecuted, and incarcerated. And that's what the criminal justice system is for. I concur.

NOTES & QUESTIONS

8. [New Note] A judge in the Southern District of New York upheld the New York Police Department's refusal to issue a long gun permit to a Bronx man who had been arrested for domestic violence in 2011, but not convicted. The complainant in the 2011 case had also obtained a restraining order, which later expired, against the man. The district court upheld the NYPD decision under intermediate scrutiny. The Second Circuit vacated and remanded for reconsideration in light of *Bruen. Tavares v. New York City*, No. 21-398 (2d Cir. July 12, 2022) (summary order, nonprecedential).

9. [New Note] For new scholarship on the issue, see Bonnie Carlson, *Domestic Violence, Firearms, and a Federal Registry: Equipping Victims to Enforce Lifesaving Legislation*, 24 Georgetown J. Gender & L. 73 (2022) (proposing a national gun registry to facilitate domestic violence order enforcement); and Samantha L. Fawcett, *Upholding the Domestic Violence Firearm Prohibitors Under Bruen's Second Amendment*, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 405 (2023) (the bans can be upheld either because the individuals are not "law-abiding" or because there are sufficient historical precedents for disarming dangerous persons).

B. [New Section Title] *PERSONS CONVICTED OF A CRIME PUNISHABLE BY A FELONY SENTENCE OF OVER ONE YEAR OR A MISDEMEANOR SENTENCE OF OVER TWO AND PERSONS UNDER INDICTMENT FOR CRIMES PUNISHABLE BY A SENTENCE OF OVER ONE YEAR*

Post-*Bruen*, 18 U.S.C. § 922(g)(1) has been upheld in over a hundred decisions. The notable exception is *Range v. United States*, in which the en banc Third Circuit ruled 11-4 against a lifetime ban on firearms possession by a person who perpetrated $2,458 of food stamp fraud in 1995.

Range v. Attorney General United States

69 F.4th 96 (3d Cir. 2023) (en banc)

HARDIMAN, Circuit Judge, with whom CHAGARES, Chief Judge, and JORDAN, GREENAWAY, JR., BIBAS, PORTER, MATEY, PHIPPS, and FREEMAN, Circuit Judges, join.

Bryan Range appeals the District Court's summary judgment rejecting his claim that the federal "felon-in-possession" law — 18 U.S.C. § 922(g)(1) — violates his Second Amendment right to keep and bear arms. We agree with Range that, despite his false statement conviction, he remains among "the people" protected by the Second Amendment. And because the Government did not carry its burden of showing that our Nation's history and tradition of firearm regulation support disarming Range, we will reverse and remand.

I

A

. . . In 1995, Range pleaded guilty . . . to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. In those days, Range was earning between $9.00 and $9.50 an hour as he and his wife struggled to raise three young children on $300 per week. Range's wife prepared an application for food stamps that understated Range's income, which she and Range signed. Though he did not recall reviewing the application, Range accepted full responsibility for the misrepresentation.

Range was sentenced to three years' probation, which he completed without incident. He also paid $2,458 in restitution, $288.29 in costs, and a $100 fine. Other than his 1995 conviction, Range's criminal history is limited to minor traffic and parking infractions and a summary offense for fishing without a license.

When Range pleaded guilty in 1995, his conviction was classified as a Pennsylvania misdemeanor punishable by up to five years' imprisonment. That conviction precludes Range from possessing a firearm because federal law generally makes it "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Although state misdemeanors are excluded from that prohibition if they are "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), that safe harbor provided no refuge for Range because he faced up to five years' imprisonment.

In 1998, Range tried to buy a firearm but was rejected by Pennsylvania's instant background check system. Range's wife, thinking the rejection a mistake, gifted him a deer-hunting rifle. Years later, Range tried to buy a firearm and was rejected again. After researching the reason for the denial, Range learned he was barred from buying a firearm because of his 1995 conviction. Range then sold his deer-hunting rifle to a firearms dealer.

B

Range sued in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that § 922(g)(1) violates the Second Amendment as applied to him. He also requested an injunction prohibiting the law's enforcement against him. . . .

The District Court granted the Government's motion [for summary judgment]. Faithfully applying our then-controlling [Two-Part Test], the Court held that Range's crime was "serious" enough to deprive him of his Second Amendment rights. . . .

While Range's appeal was pending, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The parties then submitted supplemental briefing on *Bruen*'s impact. A panel of this Court affirmed the District Court's summary judgment, holding that the Government had met its burden to show that § 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction "places him outside the class of people traditionally entitled to Second Amendment rights." *Range v. Att'y Gen.*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam).

Range petitioned for rehearing en banc. We granted the petition and vacated the panel opinion. *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2023).

III . . .

Bruen rejected the two-step approach as "one step too many." 142 S. Ct. at 2127. The Supreme Court declared: "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id.* Instead, those cases teach "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."

Id. at 2126. And "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

Applying that standard, *Bruen* held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. But the "where" question decided in *Bruen* is not at issue here. Range's appeal instead requires us to examine *who* is among [the people] protected by the Second Amendment. *see Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm. . . ."). Range claims he is one of "the people" entitled to keep and bear arms and that our Nation has no historical tradition of disarming people like him. The Government responds that Range has not been one of "the people" since 1995, when he pleaded guilty in Pennsylvania state court to making a false statement on his food stamp application, and that his disarmament is historically supported.

IV . . .

After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. If it does, the government now bears the burden of proof: it "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127 .

A

We begin with the threshold question: whether Range is one of "the people" who have Second Amendment rights. The Government contends that the Second Amendment does not apply to Range at all because "[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens." So Range's 1995 conviction, the Government insists, removed him from "the people" protected by the Second Amendment.

The Supreme Court referred to "law-abiding citizens" in *Heller.* In response to Justice Stevens's dissent, which relied on *United States v. Miller*, 307 U.S. 174 (1939), the Court reasoned that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. In isolation, this language seems to support the Government's argument. But *Heller* said more; it explained that "the people" as used throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. So the Second Amendment right, *Heller* said, presumptively "belongs to all Americans." *Id.* at 581. Range cites these statements to argue that "law-abiding citizens" should not be read "as rejecting *Heller*'s interpretation of 'the people.'" We agree with Range for four reasons.

First, the criminal histories of the plaintiffs in *Heller, McDonald*, and *Bruen* were not at issue in those cases. So their references to "law-abiding, responsible citizens" were dicta. And while we heed that phrase, we are careful not to overread it as we and other circuits did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of heightened scrutiny. Second, other Constitutional provisions reference "the people." It mentions "the people" twice with respect to voting for Congress, and "the people" are recognized as having rights to assemble peaceably, to petition the government for redress, and to be protected against unreasonable searches and seizures. Unless the meaning of the phrase "the people" varies from provision to provision—and the Supreme Court in *Heller* suggested it does not—to conclude that Range is not among "the people" for Second Amendment purposes would exclude him from those rights as well. *See* 554 U.S. at 580. And we see no reason to adopt an inconsistent reading of "the people."

Third, as the plurality stated in *Binderup*: "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical." 836 F.3d at 344 (Ambro, J.). That statement tracks then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, in which she persuasively explained that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right." 919 F.3d 437, 452 (7th Cir. 2019). We agree with that statement in *Binderup* and then-Judge Barrett's reasoning.

Fourth, the phrase "law-abiding, responsible citizens" is as expansive as it is vague. Who are "law-abiding" citizens in this context? Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who gets a traffic ticket is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-equivalents? At English common law, felonies were so serious they were punishable by estate forfeiture and even death. 4 William Blackstone, Commentaries on the Laws of England 54 (1769). But today, felonies include a wide swath of crimes, some of which seem minor.[5] And some misdemeanors seem serious.[6] As the Supreme Court noted recently: "a felon is not always more dangerous than a misdemeanant." *Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (cleaned up).

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[5] *See, e.g.*, 18 U.S.C. § 1464 (uttering "any obscene, indecent, or profane language by means of radio communication"); Mich. Comp. Laws Ann. § 445.574a(2)(d) (returning out-of-state bottles or cans); 18 Pa. Cons. Stat. Ann. § 3929.1 (third offense of library theft of more than $150); id. § 7613 (reading another's email without permission).

[6] *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 2504 (involuntary manslaughter); id. § 2707 (propulsion of missiles into an occupied vehicle or onto a roadway); 11 Del. Code § 881 (bribery).

As for the modifier "responsible," it serves only to undermine the Government's argument because it renders the category hopelessly vague. In our Republic of over 330 million people, Americans have widely divergent ideas about what is required for one to be considered a "responsible" citizen.

At root, the Government's claim that only "law-abiding, responsible citizens" are protected by the Second Amendment devolves authority to legislators to decide whom to exclude from "the people." We reject that approach because such "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting). And that deference would contravene *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S. at 636; *see also Bruen*, 142 S. Ct. at 2131 (warning against "judicial deference to legislative interest balancing").

In sum, we reject the Government's contention that only "law-abiding, responsible citizens" are counted among "the people" protected by the Second Amendment. *Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.

Having determined that Range is one of "the people," we turn to the easy question: whether § 922(g)(1) regulates Second Amendment conduct. It does. Range's request—to possess a rifle to hunt and a shotgun to defend himself at home—tracks the constitutional right as defined by *Heller.* 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."). So "the Second Amendment's plain text covers [Range's] conduct," and "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126.

B

Because Range and his proposed conduct are protected by the Second Amendment, we now ask whether the Government can strip him of his right to keep and bear arms. To answer that question, we must determine whether the Government has justified applying § 922(g)(1) to Range "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. We hold that the Government has not carried its burden.

To preclude Range from possessing firearms, the Government must show that § 922(g)(1), as applied to him, "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Historical tradition can be established by analogical reasoning, which "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin.*" *Id.* at 2133. To be compatible with the Second Amendment, regulations targeting longstanding

problems must be "distinctly similar" to a historical analogue. *Id.* at 2131. But "modern regulations that were unimaginable at the founding" need only be "relevantly similar" to one. *Id.* at 2132. *Bruen* offers two metrics that make historical and modern firearms regulations similar enough: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133.

In attempting to carry its burden, the Government relies on the Supreme Court's statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626. . . . Section 922(g)(1) is a straightforward "prohibition[ ] on the possession of firearms by felons." *Heller*, 554 U.S. at 626. And since 1961 "federal law has generally prohibited individuals convicted of crimes punishable by more than one year of imprisonment from possessing firearms." *see* An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). But the earliest version of that statute, the Federal Firearms Act of 1938, applied only to *violent* criminals. As the First Circuit explained: "the current federal felony firearm ban differs considerably from the [original] version. . . . [T]he law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011).

Even if the 1938 Act were "longstanding" enough to warrant *Heller*'s assurance — a dubious proposition given the *Bruen* Court's emphasis on Founding-and Reconstruction-era sources, 142 S. Ct. at 2136, 2150 — Range would not have been a prohibited person under that law. Whatever timeframe the Supreme Court might establish in a future case, we are confident that a law passed in 1961 — some 170 years after the Second Amendment's ratification and nearly a century after the Fourteenth Amendment's ratification — falls well short of "longstanding" for purposes of demarcating the scope of a constitutional right. So the 1961 iteration of § 922(g)(1) does not satisfy the Government's burden.

The Government's attempt to identify older historical analogues also fails. The Government argues that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range and his individual circumstances. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be "far too broad[ ]." *See Bruen*, 142 S. Ct. at 2134 (noting that historical restrictions on firearms in "sensitive places" do not empower legislatures to designate any place "sensitive" and then ban firearms there).

The Government also points out that "founding-era felons were exposed to far more severe consequences than disarmament." It is true that "founding-era practice" was to punish some "felony offenses with death." *Id.* at 9. For example, the First Congress made forging or counterfeiting a public security punishable by death. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 115 (1790). States in the early Republic likewise treated nonviolent crimes "such as forgery and horse theft" as capital offenses. *See Folajtar*, 980 F.3d at 904 (citations omitted). Such severe treatment reflects the founding generation's judgment about the gravity of those offenses and the need to expose offenders to the harshest of punishments.

Yet the Government's attempts to analogize those early laws to Range's situation fall short. That Founding-era governments punished some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue — lifetime disarmament — is rooted in our Nation's history and tradition. The greater does not necessarily include the lesser: founding-era governments' execution of some individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed. As one of our dissenting colleagues notes, a felon could "repurchase arms" after successfully completing his sentence and reintegrating into society. Krause Dissent at 127-28. That aptly describes Range's situation. So the Government's attempt to disarm Range is not "relevantly similar" to earlier statutes allowing for execution and forfeiture. *See Bruen*, 142 S. Ct. at 2132.

Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343-44 ("An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns"). Range's crime, however—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime. Nor has the Government cited forfeiture cases in which the convict was prevented from regaining his possessions, including firearms (except where forfeiture preceded execution). That's true whether the object forfeited to the government was a firearm used to hunt out of season, a car used to transport cocaine, or a mobile home used as a methamphetamine lab. And of those three, only firearms are mentioned in the Bill of Rights.

Finally, the Government makes an argument from authority. It points to a decision from a sister circuit court that "look[ed] to tradition and history" in deciding that "those convicted of felonies are not among those entitled to

possess arms." The Government also cites appellate decisions that "have categorically upheld felon-possession prohibitions without relying on means-end scrutiny." And it cites the more than 80 district court decisions that have addressed § 922(g)(1) and have ruled in favor of the Government.

As impressive as these authorities may seem at first blush, they fail to persuade. First, the circuit court opinions were all decided before *Bruen.* Second, the district courts are bound to follow their circuits' precedent. Third, the Government's contention that "*Bruen* does not meaningfully affect this Court's precedent" is mistaken for the reasons we explained in Section III, *supra.*

For the reasons stated, we hold that the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm. *See Bruen*, 142 S. Ct. at 2126.

* * *

Our decision today is a narrow one. Bryan Range challenged the constitutionality of 18 U.S.C. § 922(g)(1) only as applied to him given his violation of 62 Pa. Stat. Ann. § 481(a). Range remains one of "the people" protected by the Second Amendment, and his eligibility to lawfully purchase a rifle and a shotgun is protected by his right to keep and bear arms. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights. We will reverse the judgment of the District Court and remand so the Court can enter a declaratory judgment in favor of Range, enjoin enforcement of § 922(g)(1) against him, and conduct any further proceedings consistent with this opinion.

PORTER, Circuit Judge, concurring.

[Judge Porter first argued that "[u]ntil well into the twentieth century, it was settled that Congress lacked the power to abridge anyone's right to keep and bear arms" not only because of the Second Amendment, but also "the combination of enumerated powers and the Ninth and Tenth Amendments, combined with a more restrictive view of the Commerce Clause. Although he found it appropriate to look to founding-era state laws for "contemporaneous clues about the people's right to keep and bear arms," he cautioned that states retained sweeping police powers and weren't initially restrained by the Bill of Rights. Some states cited on by Judge Krause's dissent, he noted, did not enumerate a Second Amendment analogue until the twentieth century, if at all. Finally, he argued that using states laws to determine the scope of the Second Amendment "seeks effectively to reverse incorporate state law into

federal constitutional law," which he believes is inapplicable outside of the equal-protection context.]

AMBRO, Circuit Judge, concurring, joined by GREENAWAY, JR. and MONTGOMERY-REEVES, Circuit Judges.

[Judge Ambro clarified that, in his view, the decision is limited to its factual circumstances and "does not spell doom for § 922(g)(1)." He contended that § 922(g)(1) remains presumptively lawful based on historical analogues in both the founding and Reconstruction eras of disarming those who threatened the orderly functioning of society, but that Range successfully rebutted that presumption as the law was applied to him. He closed by noting that the Supreme Court will be forced to square the THT test with its concurrent view that felon gun restrictions are presumptively lawful, given that scholars have been unsuccessful in determining the historical support for that presumption.]

SHWARTZ, Circuit Judge, dissenting, joined by RESTREPO, Circuit Judge.

[Judge Schwartz argued that the majority downplayed the Supreme Court's admonishment that felon bans are longstanding and presumptively lawful. She also emphasized that *Bruen* used the phrase "law-abiding citizens" fourteen times and approved of certain gun regulations that include criminal background checks. Next, she criticizes the majority for looking for a historical twin, rather than a historical analogue, and rejecting the historical evidence that at the founding, the fraud-based crime of the type Range committed could be punished by death. She argued that the felon designation serves as a proxy for disloyalty and disrespect for the sovereign, which is same reason why governments disarmed groups like Native Americans, Blacks, Catholics, Quakers, and loyalists at the founding. Specifically, she notes that "Range's felony involved stealing from the government, a crime that directly undermines the sovereign." She closes by arguing that the majority opinion rejects all historical support for disarming any felon and its analytical framework will result in virtually no felony that will bar an individual from possessing a firearm.]

KRAUSE, Circuit Judge, dissenting.

[Judge Krause engaged in a lengthy historical inquiry of the validity of § 922(g)(1) by considering English history dating from the late 1600s, American colonial views up to the founding, post-ratification practices from the late

eighteenth and early nineteenth centuries, and, to a lesser extent, the later nineteenth century. She argued that in during each era, governments possessed the power to disarm those who they believed could not be trusted to obey the law. Further, she noted that penalties at the founding for those who committed grave felonies — both violent and nonviolent — was death, suggesting that the founding generation would have had no objection to imposing permanent disarmament on felons.

Next, she alleges that the majority turns the Second Amendment into a regulatory straightjacket, counter to *Bruen*, by applying a "methodology by which courts must examine each historical practice in isolation and reject it if it deviates in any respect from the contemporary regulation," which she likens to the methodology applied in *Rahimi*. *See supra* Ch. 13.A. She also took issue with the majority's rationale for what specifically exempts Range and those like him from § 922(g)(1)'s enforcement, e.g., whether it be his individual circumstances, non-violent nature, or his law-abiding life since his conviction. She claims that the majority gives no answer, which she further argues renders § 922(g)(1) so vague as to be facially unconstitutional.

She also raises what she argues are practical problems with the majority opinion, including that it makes the statute's *mens rea* impossible to establish, as the government must now prove that the defendant accused of violating § 922(g)(1) knew he was not "like Range" when he possessed firearms, as opposed to proving that he knew he was a felon. Moreover, she contends that the "majority's indeterminant and post-hoc test for which felons fall outside § 922(g)(1)" will cripple the National Instant Criminal Background Check System (NICS), to which prospective firearm purchasers must submit. For the same reason, she claims that it is no longer sufficient probable cause to stop an individual openly carrying a firearm simply be confirming a prior felony conviction in NICS. Next, she argues that it will be impossible for federal firearms licensees to know which potential customers, despite a felony conviction, are actually prohibited from possessing a firearm under § 922(g)(1). Furthermore, she argues that the decision renders the prohibition on possessing a firearm as a standard condition of bail, supervised release, probation, and parole unconstitutional as to many defendants.

Finally, Judge Krause argues that the majority could have issued a prospective declaratory judgment restoring Range's Second Amendment rights going forward. She contends that this approach is consistent with the historical tradition of requiring those disarmed to take a loyalty oath to have their right to own firearms restored and would eliminate her due process concerns discussed above. Finally, she argues that prospective relief would respect the separation of powers and federalism and avoid the debilitating effect of the majority's opinion of law enforcement, federal prosecutors, and the NICS background check system.]

ROTH, Circuit Judge, dissenting.

[Judge Roth agreed with the majority that Range is among "the people" protected by the Second Amendment but concluded that he "failed to set forth the necessary interstate commerce connections to allow federal jurisdiction of his complaint." She emphasized that a conviction under § 922(g)(1) only be sustained after the government proves beyond a reasonable doubt that the firearm at issue moved through interstate commerce. Because Range did not identify the specific firearm that he has been prohibited from possessing, she argued that there was a want of federal jurisdiction.]

NOTES & QUESTIONS

5. [Add to Note] How to convict or defend someone charged with constructive possession of a firearm is described in *What Constitutes "Constructive Possession" of Unregistered or Otherwise Prohibited Weapon Under State Law*, 88 A.L.R.5th 121 (originally published 2001).

7. [New Note] Lesane was convicted in 2003 of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) and served several years in prison. Later, in a different case, the Fourth Circuit ruled that the North Carolina statute under which Lesane had been convicted, and which formed the predicate for his 922(g)(1) conviction, did not qualify as a disqualifying crime under §922(g)(1). Hence, Lesane's conviction under 922(g)(1) was invalid. Lesane petitioned for a writ of *coram nobis* to vacate his 2003 federal conviction, and the U.S. attorney conceded that Lesane was actually innocent of the offense. Reversing the district court, the Fourth Circuit ordered the district court to issue a writ of *coram nobis*. *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022). A writ of *coram nobis* (Latin for "before us") vacates an erroneous criminal or civil judgement because of an error of fact in the original proceeding.

8. [New Note] As post-*Bruen* courts grapple with history, one of the most influential scholars on disarmament has been Joseph G.S. Greenlee. His most recent article on the topic is *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. (forthcoming 2023):

> Part III explores 17th-century England. Insurrections and rebellions were constant, so disarmament was, too. The authorities issuing disarmament orders and those carrying them out repeatedly stated that the purpose was to prevent danger. Even when people were disarmed based on their religion, it was because those religious groups were perceived as subversives seeking to overthrow the government. There was no codified English arms right until

1689, so disarmament laws were vulnerable to abuse. But even the despotic rulers justified their disarmament efforts by focusing on danger.

Part IV addresses disarmament efforts in colonial America. Nearly every disarmament law discriminated based on race, status, or religion. And the Supreme Court has made clear that discriminatory laws cannot establish a tradition of firearm regulation. So these restrictions are irrelevant. In any event, the discriminatory laws were motivated by concerns over danger. African Americans were disarmed because slaves frequently revolted—roughly 250 times—and such revolts would have been extremely deadly had the slaves been armed. Laws preventing firearm transfers to American Indians were intended to prevent attacks against the colonists. And laws disarming Catholics during the French and Indian War—viewed throughout the colonies as a war between Catholics and Protestants—were enacted to prevent Catholics from joining Catholic France.

Part V surveys disarmament orders issued during the Revolutionary War. Several counties and states disarmed people who remained or were suspected of remaining loyal to the British. Because some of these orders were broad, they inevitably disarmed some people who would not have fought for or even aided the British. But the justification for such laws was danger nevertheless—the Continental Congress, New York, Massachusetts, Delaware, New Jersey, Pennsylvania, and General George Washington all expressly stated that the loyalists were disarmed because they were dangerous. And as wartime measures, enacted when defeat seemed imminent, they have never been presented as respecting anyone's rights. Moreover, the Americans faced a perilous arms shortage throughout the war, so to the extent these laws swept too broadly, they served the purpose of arming soldiers who did not possess weapons.

Part VI discusses the relevant proposals from the Constitution ratifying conventions. Only New Hampshire's amendment received approval from the majority of the convention. Included in its Form of Ratification, the proposed amendment provided that "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion." At Massachusetts's convention, Samuel Adams proposed an amendment ensuring that "the said constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Adams's amendments were not adopted at the convention, but many members who voted for ratification did so with the understanding that such amendments would later be adopted. And after the Bill of Rights was proposed, Adams's allies celebrated his amendments having been adopted. Another proposed amendment was presented by some of the members of Pennsylvania's convention who voted against ratification. This proposal provided that "no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." Although the "crimes committed" could be read as allowing disarmament based on nonviolent activity, the reaction to the proposal both within and without the colony suggests that was not the case.

This article concludes by emphasizing that danger was always the excuse for disarmament acts in 17th-century England as well as 17th- and 18th-century America. And because authorities expressly stated why they were disarming people—i.e., danger—there is no need to imagine some mysterious motivation, such as "disrespect for the law." Indeed, "disrespect for the law" was never offered as a justification, and it contradicts the overwhelming

majority of disarmament acts, which did not require or even involve a violation of the law.

9. [New Note] The 18 U.S.C. § 922(g) prohibitions on firearm possession by certain persons are paralleled by 922(d) bans on anyone transferring a firearm to a prohibited person. The 922(d) for transfers to convicted felons was upheld on the basis that transfers are not conduct covered by the plain text of the Second Amendment. Even if they were, there are plenty of historical analogues, including laws that generally regulated firearms sales. *United States v. Porter*, 2023 WL 113739 (S.D. W. Va. Jan. 5, 2023).

10. [New Note] The majority in Range claims that the decision "is a narrow one." Judge Shwartz, however, writes "the Majority opinion is far from narrow." What do you think? Does Range open the floodgates to successful as-applied challenges to 18 U.S.C. § 922(g)(1) from an array of felons whose crimes run the gamut? Or is the decision more limited in its impact to non-violent felons who, like Range himself, committed relatively minor offenses? Consider the following offenders and whether you think the Range majority would hold the felon-in-possession ban unconstitutional as applied to them:

a. The creator of a Ponzi scheme which led to paper losses totaling $64.8 billion and drove several impacted investors to suicide. *See* Diana B. Henriques, *Bernie Madoff, Architect of Largest Ponzi Scheme in History, Is Dead at 82*, N.Y. TIMES (Apr. 14, 2021).

b. A young woman who, through text messages, encouraged her boyfriend to kill himself by carbon monoxide poisoning. He ultimately committed suicide. *See* Kate Taylor, *What We Know About the Michelle Carter Suicide Texting Case*, N.Y. TIMES (July 9, 2019).

11. [New Note] Does the history of status-based prohibitions on firearm ownership support Range's disarmament? The majority and dissents take opposite views on this matter. Judge Krause argues that "legislatures have historically possessed the authority to disarm entire groups, like felons, whose conduct evinces disrespect for the rule of law." Judge Shwartz makes a similar argument. The majority says that these comparisons to Range's conviction are too broad, likening them to *Bruen*'s warning "that historical restrictions on firearms in 'sensitive places' do not empower legislatures to designate any place 'sensitive' and then ban firearms there."

12. [New Note] In a similar vein, consider whether there are any limits to the dissenting judges' views on who may be disarmed without offending the Second Amendment. Could a state legislature, for instance, felonize jaywalking, citing jaywalkers' disregard for the rule of law and legal norms, and rely on 18 U.S.C.

§ 922(g)(1) to ensure that anyone convicted of that offense is permanently disarmed? At oral argument, the U.S. Attorney expressly declined invitations from judges to agree that there is any limit to Congress's power to felonize any activity and make the felony into a lifetime prohibitor.

13. [New Note] Is 18 U.S.C. § 922(g)(1) overbroad? Recall from the majority opinion in *Range* that felonies include a wide swath of offenses, many of which seem relatively minor. *See, e.g.*, MICH. COMP. LAWS ANN. § 445.574a(2)(d) (issuing recycling refunds for 10,000 or more out-of-state bottles or cans punishable by up to five years imprisonment). Setting aside the constitutional concerns, is this solution defensible from a policy perspective? *Compare* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1639 (2022) (attempting to make distinctions between violent felons, who could be disarmed for life, with nonviolent felons, who could not be, "would prove completely unworkable"), *with* Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J., 1429, 1472 (2021) (the felon-in-possession ban "is a blunt and punitive remedy" that "indiscriminately targets nonviolent offenders as well as conduct wholly unrelated to criminal activity"). *Cf.* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. PUB. POL'Y 695, 696 (2009) ("Is the public safer now that Martha Stewart is completely and permanently disarmed" for lying to the FBI about a securities transaction that was lawful?)

14. [New Note] The majority rejects the government's argument that "the People" protected by the Second Amendment includes only "law-abiding, responsible citizens." Following *Bruen*, lower courts have grappled with this issue, particularly with respect to felons. *Compare United States v. Tribble*, No. 22-CR-085, 2023 WL 2455978 (N.D. Ind. Mar. 10, 2023) (concluding that Second Amendment rights only extend to ordinary, law-abiding citizens and refusing to evaluate 18 U.S.C. § 922(g)(1) under *Bruen*'s text, history and tradition standard), *with United States v. Carrero*, No. 22-cr-00030, 2022 WL 9348792 (D. Utah Oct. 14, 2022) (concluding that felons fall within "the People" protected by the Second Amendment but finding 18 U.S.C. § 922(g)(1) consistent with the Nation's historical tradition of firearm regulation).

15. [New Note] *Range* was the first successful as-applied challenge to 18 U.S.C. § 922(g)(1) following *Bruen*. Only one other court has held the statute unconstitutional as applied to an individual previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, No. 18-CR-165, 2023 WL 4232309 (S.D. Miss. June 28, 2023). Judge Carlton Reeves excoriated the Supreme Court's Second Amendment jurisprudence as ahistorical and difficult for lower courts to apply. Nevertheless, he concluded that under *Bruen*'s

framework the government had not met its burden in proving a historical tradition of disarming individuals similarly situated to Mr. Bullock.

16. [New Note] As noted by Judge Krause, *Range* creates a circuit split over whether as-applied challenges to § 922(g)(1) can ever be successful. In *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), the Eighth Circuit expressly rejected "felony-by-felony litigation" and upheld the statute as applied to an individual twice convicted of sale of a controlled substance. The Eighth Circuit reaffirmed its reasoning in *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023), but a short dissent in that case from Judge David Stras implied that an en banc review of *Jackson* may be forthcoming. *See id.* at 507 ("I dissent. More to come. *See United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023).").

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18 U.S.C § 922(n) prohibits anyone under felony indictment from taking possession of any firearms, although it does not prohibit one from retaining firearms previously possessed. Unlike its cousin, § 922(g)(1), *see supra* Ch. 13(A), post-*Bruen* courts seem more skeptical of the law's constitutionality. Compare the following two cases, one upholding § 922(n) against a facial challenge and the other striking it down against the same.

United States v. Quiroz

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

DAVID COUNTS, UNITED STATES DISTRICT JUDGE

This Court faces a predicament similar to Plato's allegory of the cave. There are the known knowns: a defendant was convicted of buying a gun while under indictment; after the Supreme Court's recent ruling in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, that defendant asks this Court to reconsider the constitutionality of his statute of conviction. The known unknowns: whether a statute preventing a person under indictment from receiving a firearm aligns with this Nation's historical tradition of firearm regulation. And the unknown unknowns: the constitutionality of firearm regulations in a post-*Bruen* world.

There are no illusions about this case's real-world consequences — certainly valid public policy and safety concerns exist. Yet *Bruen* framed those concerns solely as a historical analysis. This Court follows that framework.

BACKGROUND

On June 9, 2020, Jose Gomez Quiroz ("Defendant") was indicted in a Texas state court for burglary, a second-degree felony. Defendant subsequently failed to appear for a hearing on the burglary charge and was indicted almost a year

later for jumping bail/failing to appear, a third-degree felony. In late 2021, while both charges were pending, Defendant attempted to buy an M1911, Semi Auto .22 caliber firearm from a local firearms dealer. To obtain the weapon, Defendant denied he was under indictment for a felony when filling out the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") Firearms Transaction Record form (Form 4473). Because the National Instant Criminal Background Check System ("NICS") returned a delayed response, Defendant waited seven days and then picked up the firearm on December 30, 2021. But less than a week later, the NICS informed ATF of Defendant's illegal firearm purchase.

Defendant was federally charged in March 2022 with two counts: (Count 1) making a false statement during the purchase of a firearm under 18 U.S.C. § 922(a)(6), and (Count 2) the illegal receipt of a firearm by a person under indictment under 18 U.S.C. § 922(n). A jury convicted him of both counts. One week after his conviction, Defendant moved to set aside the verdict pursuant to Rule 29 of the Federal Rules of Criminal Procedure and for this Court to reconsider his previous motion to dismiss because of the United States Supreme Court's recent ruling in *Bruen.*

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. . . .

DISCUSSION. . .

I. The Supreme Court in *Bruen* laid out a new standard for courts to use when analyzing firearm regulations. . . .

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

So the threshold question is whether the Second Amendment's plain text covers Defendant's conduct.

II. *Bruen*'s First Step: "receiving" a firearm under the Second Amendment's plain text.

The right to "keep and bear arms" shall not be infringed. Defendant's pivotal conviction was under 18 U.S.C. § 922(n), which makes it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Yet from the jump, the Government seems to misread *Bruen.* The Government first frames Defendant's conduct as "buying a gun *while under*

felony indictment." *Bruen*'s first step, however, requires only that "the Second Amendment's plain text cover the *conduct.*" And the prohibited conduct under § 922(n) is "receipt" of a firearm — nothing more. By adding "while under felony indictment" to the conduct, the Government conflates *Bruen*'s first step with its second.

To illustrate, take 18 U.S.C. § 922(g)'s proscription against felons possessing firearms. The conduct is possession — which the Government admits falls under "keep." Therefore, whether the Government can restrict that specific conduct for a specific group would fall under *Bruen*'s second step: the historical justification for that regulation. So too under § 922(n); the Second Amendment's plain text must cover "receipt" of a firearm. *Bruen*'s second step would analyze "persons under indictment." So the issue becomes whether "keep and bear arms" encompasses "receipt."

The Government next argues for a rigid, sterile reading of "keep and bear arms." Quoting *Heller*, the Government notes that to "keep arms" means to "have weapons" or "possess" and to "bear arms" means to "carry." So anything not "having," "possessing," or "carrying" weapons is excluded and thus, the Government argues, receiving a firearm falls outside the Second Amendment right to "keep and bear arms."

Yet the 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.

And logically, excluding "receive" makes little sense. To receive something means "to take into . . . one's *possession.*" How can one possess (or carry) something without first receiving it? Receipt is the condition precedent to possession — the latter is impossible without the former. Taking the Government's argument at face value would also lead to an absurd result. Indeed, if 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. The Government is asking in effect to banish gun rights to Hotel California's purgatory: "You can check out any time you like, but you can never leave."

In that same vein, the Government doesn't dispute that there is no evidence that Defendant had a gun before buying the firearm in question. So even if § 922(n) doesn't prevent "possession," by preventing receipt it effectively prevents Defendant's constitutional possession.

Bruen's first step asks a strictly textual question: does the Second Amendment's plain text cover the conduct? Without a doubt the answer here is yes. The Second Amendment's plain text does cover "receipt" and the Constitution presumptively protects such conduct. Thus, § 922(n)'s constitutionality turns on whether prohibiting persons under indictment from

receiving a firearm is consistent with the Nation's historical tradition of firearm regulation.

III. *Bruen*'s second step: the historical analysis.

Next, the Government must justify its regulation through a historical analysis. To do so, the Government's historical inquiry must show that § 922(n) is consistent with the historical understanding of the Second Amendment. If a challenged regulation addresses a "general societal problem that has persisted since the 18th century," this historical inquiry is "straightforward." But other regulations may require a "more nuanced" approach. In those cases, courts can reason by analogy. which involves finding a historical analogue that is "relatively similar" to the modern regulation. As dictated by *Bruen* the Court will initially lay out § 922(n)'s history.

A. Under indictment: the Federal Firearms Act of 1938 to present.

Section 922(n)'s history begins in 1938, when Congress passed the Federal Firearms Act ("FFA"). The FFA prohibited "individuals under indictment for, or convicted of, a crime of violence from shipping or transporting any firearms or ammunition in interstate commerce." The Act only covered those under indictment in federal court and "crimes of violence" was commonly understood to include only those offenses "ordinarily committed with the aid of firearms."

According to legislative history, Congress implemented the FFA to combat roaming criminals crossing state lines. Without federal laws, ex-convicts would simply cross state lines to circumvent conditions of probation or parole. The FFA's main goal then was to "eliminate the guns from the crooks' hands, while interfering as little as possible with the law-a-biding citizen." In Congress's eyes, those under indictment for, or convicted of, a crime of violence had already "demonstrated their unfitness to be entrusted with such dangerous instrumentalities."

Almost 25 years later, in 1961, Congress amended the FFA to cover "all individuals under indictment, regardless of the crime they were accused of." Congress also removed the "crimes of violence" language, replacing it with "crime punishable by imprisonment for a term exceeding one year."

Congress expanded gun regulations yet again with the Gun Control Act of 1968 ("GCA"). Key amendments included defining "indictment" to mean "an indictment . . . in *any* court," thus adding persons indicted under state law. In full, the GCA criminalized receipt of a firearm or ammunition "by any person . . . who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." In 1986, Congress combined all prohibitions against persons under indictment into what is now § 922(n)'s current form.

B. Analogizing felons-in-possession.

The Government analogizes regulations prohibiting felons from possessing firearms with those prohibiting receipt of a firearm by persons under indictment. According to the Government, § 922(g)(1)'s prohibitions on the possession of firearms by felons "has exactly the same historical pedigree as § 922(n)'s restriction on felony indictees." Yet the Government fails to explain why regulations enacted less than a century years ago count as "longstanding."

With nothing further, the Government's argument can be boiled down to the following syllogism:

(1) felon-in-possession laws have the same history as § 922(n);
(2) *Heller* endorsed felon-in-possession laws as constitutional;
(3) Therefore, § 922(n) is constitutional.

The first problem with this argument is it's a logical fallacy. Sharing a history with felon-in-possession laws makes § 922(n) constitutional in the same way a dog is a cat because both have four legs.

The second problem is that *Heller*'s endorsement of felon-in-possession laws was in dicta. Anything not the "court's determination of a matter of law pivotal to its decision" is dicta. Dicta is therefore "entitled to little deference because they are essentially ultra vires pronouncements about the law." Or, as Francis Bacon put it, dicta is only the "vapours and fumes of law."

The last, and most significant problem with the Government's argument is that it lacks historical analysis from the Second Amendment's ratification, much less anything pre-1938. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*" Consequently, the Government omitted the "critical tool of constitutional interpretation."

i. The state's power to disarm in the early colonies.

The Court therefore will conduct its own historical inquiry in the Government's absence, starting with the law preceding the Second Amendment's adoption in 1791. But this Court "must be careful when assessing evidence concerning English common-law rights" because "[t]he common law, of course, developed over time." And with this cautious inquiry, the Court finds one contextual clue: not what laws the colonies retained from their English roots, but what they excluded.

English law had a long history of disarming citizens for any reason or no reason at all. For example, Parliament granted officers of the Crown the power to disarm any person they judged "dangerous to the peace of the Kingdom." Or in 1688, Parliament disarmed Catholics because of their faith.

Yet even while still under English rule, the colonies' attitude toward disarming individuals diverged from its English roots. Indeed, when Virginia disarmed all citizens who refused to take an allegiance test, it did so only partially, allowing citizens to keep "such necessary weapons as shall be allowed

him by order of the justices of the peace at their court, for the defense of his house and person." So even "traitors" unwilling to swear allegiance to the Crown retained their weapons in colonial America.

Leading up to the Second Amendment's adoption, the colonies "consistently refrained from exercising such a power over citizens." As one historian wrote, after he searched all existing printed session laws of the first fourteen states year by year from 1607 to 1815, he couldn't find "a single instance in which these jurisdictions exercised a police power to prohibit gun ownership by members of the body politic."

ii. State Conventions when ratifying the Constitution.

More evidence can be gleaned from the state conventions ratifying the Constitution. In February 1788, the Massachusetts Convention was the first to recommend amendments with its ratification. John Hancock and Samuel Adams proposed several amendments that eventually appeared in the First, Second, and Fourth Amendments. One such amendment proposed that the Constitution "be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."

Massachusetts wasn't the only state, as New Hampshire copied nine of Massachusetts' proposals almost verbatim, while adding three of its own. One of the three involved the right to keep and bear arms: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."

iii. The state's power to disarm leading up to 1938.

Until federalized by the FFA, prohibiting possession of a firearm, even by those convicted of violent crimes, was a rare occurrence. For instance, it wasn't until 1886 that a state court ruled on a firearm regulation that regulated "the condition of a person — rather than directly regulating his manner of carrying." There, in *Missouri v. Shelby*, the Supreme Court of Missouri upheld a ban on carrying a deadly weapon while intoxicated.

And even though other state courts eventually ruled on laws regulating the condition of a person, very few states prohibited felons — or any other type of person for that matter — from possessing a firearm. Indeed, by the mid-1920s, only six states had laws banning concealed carry by someone convicted of a crime involving a concealed weapon. And zero states banned possession of long guns based on a prior conviction.

Whether this Nation has a history of disarming felons is arguably unclear — it certainly isn't clearly "longstanding." And what's even more unclear — and still unproven — is a historical justification for disarming those indicted, but not yet convicted, of any crime.

C. Analogizing Massachusetts' surety laws to § 922(n).

In another analogy closer to § 922(n), the Government argues that Massachusetts' mid-19th century surety laws outlined in *Bruen* are a historical example of restricting gun rights for those accused but not convicted of wrongdoing. The 1795 surety laws required a person "reasonably likely to 'breach the peace,' and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm." The Government also claims that those surety statutes burdened Second Amendment rights "more directly" than § 922(n)'s prohibitions. Yet this argument ignores the rest of Justice Thomas's analysis.

Justice Thomas dismisses the contention that surety laws were a severe restraint as having "little support in the historical record." Surety laws were "not meant as any degree of punishment." And there's little evidence that such laws were regularly enforced. Indeed, the handful of cases highlighted by Justice Thomas from Massachusetts and the District of Columbia all involved "black defendants who may have been targeted for selective or pretextual enforcement."

The Government also argues that the surety laws provide an imperfect but similar analogue to § 922(n). But not only do Massachusetts' mid-19th century surety laws fail to support the Government, they actively cut against the Government's assertions. In *Bruen*, Justice Thomas highlighted the "straightforward" historical method employed in *Heller*: "If earlier generations addressed [a general societal problem that has persisted since the 18th century], but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."

Much like § 922(n), Massachusetts' surety laws addressed the societal fear that those accused — like those under indictment — would "make an unlawful use of [their firearm]." Yet surety laws addressed that fear through means "materially different" than § 922(n). Rather than completely restrict the accused's constitutional right, surety laws permitted the accused to prove a special self-defense need. And if they couldn't, the accused needed only to post a money bond for no more than six months to keep their firearms.

In contrast, § 922(n) restricts a person's right to receive a firearm indefinitely after indictment by a grand jury — which is not an adversarial proceeding. And as the Government admits, an "indictee cannot overcome § 922(n)'s restriction by posting a bond." Thus, the existence of Massachusetts' surety laws — addressing a general societal problem through materially different means — serves only as more evidence that § 922(n) departs from this Nation's historical tradition of firearm regulation.

IV. Other historical analogies.

The Court points to an important distinction here — § 922(n) varies from the challenged regulations in *Heller* and *Bruen.* Both *Bruen* and *Heller* dealt

with regulations restricting "where" someone can keep and bear arms. In contrast, § 922(n) restricts "who" may keep and bear arms. Yet *Bruen* "decides nothing about *who* may lawfully possess a firearm." Indeed, *Bruen*'s first step mentions only "conduct." So as this Court reasoned above, "who" may keep and bear arms is relegated to step two.

And if relegated to step two, the Government must prove that restricting rights for a specific group (e.g., those under indictment or felons) adheres to this Nation's historical tradition. There lie Plato's unknown unknowns.

If the Government must prove a historical tradition for every regulation restricting a specific subgroup, *Bruen*'s framework creates an almost insurmountable hurdle. For one thing, one could easily imagine why historical analogies from the 18th century would be difficult to find. For example, if one lived more than a day's journey from civilization, a firearm was not only vital for self-defense — it put food on the table. Indeed, whether fending off wild animals or hunting, a firearm was a necessary survival tool. That is why disarming someone was likely unthinkable at the time — no firearm in the wilderness meant almost certain death.

So finding similar historical analogies is an uphill battle because of how much this Nation has changed. Society, population density, and modern technologies are all examples of change that would make something unthinkable in 1791 a valid societal concern in 2022. But the only framework courts now have is *Bruen*'s two-step analysis.

That said, this Court believes there are other historical analogies that neither the Government nor Defense explore. As stated, *Bruen* and *Heller* dealt with regulations restricting where someone may keep and bear arms and unlike the challenged regulations in *Bruen* and *Heller*, § 922(n) restricts "who" may keep and bear arms. Under the Second Amendment, the "who" imbued with the right to keep and bear arms is "the people" — a term of art. Thus, the historical inquiry should be whether there is a historical tradition of excluding those under indictment from "the people."

Both *Heller* and *Bruen* note that the Second Amendment is not the only constitutional provision that reserves rights or powers to the people. For example, the First Amendment's Assembly-and-Petition Clause prevents Congress from making laws abridging "the right of the people peaceably to assemble." The Fourth Amendment protects the right of "the people ... to be free from unreasonable searches and seizures." Or § 2 of Article I, which provides that "the people" will choose members of the House.

And just like the Second Amendment, the above provisions' reservation of rights or powers for "the people" are not absolute. Indeed, there is a long history of the Government regulating those rights — including restriction on who can exercise that right. Thus, the history of excluding specific groups from rights and powers of "the people" in other constitutional contexts can provide useful analogies.

A. Restrictions on the power of "the people" to vote in Section 2, Article I.

Section 2, Article I of Constitution states, "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Put simply, it's the right of the people to vote. This enumerated power of "the people," however, doesn't provide an analogy to § 922(n); those under indictment can still vote. But states have excluded specific groups from "the people," for instance, those convicted of a crime.

State laws restricting voting rights for those convicted of certain crimes are not a recent vintage, states have done so since the founding. In fact, Kentucky's 1792 Constitution stated, "[l]aws shall be made to exclude from . . . suffrage those who thereafter be convicted of bribery, perjury, forgery, or other high crimes and misdemeanors." Vermont's Constitution followed one year later, authorizing the removal of voting rights from those engaged in bribery or corruption during elections. As of 2022, only two states and the District of Columbia do not restrict felons' voting rights.

B. Regulating the rights of "the people" to assemble under the First Amendment.

The First Amendment's Assembly-and-Petition Clause also furnishes a helpful analogy. The First Amendment states, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably." But this right is not absolute — the Supreme Court has excluded groups from the people's right of assembly.

In *De Jonge v. Oregon*, the Supreme Court declared the right to peaceful assembly "equally fundamentally" with other First Amendment clauses. There, De Jonge was charged under a state criminal syndicalism statute after speaking at a Communist party meeting. Although the objectives of the Communist Party are heinous, the Supreme Court held that De Jonge "still enjoyed his personal right . . . to take part in a peaceable assembly having a lawful purpose."

Yet the Supreme Court also highlighted the right of assembly "without incitement to violence or crime." Indeed, much like the right to keep and bear arms, the First Amendment's right to assembly can be abused to incite violence or crime. Thus, legislation protecting against such abuses would be constitutional if "made only against the abuse." The rights themselves may not be curtailed.

The Supreme Court has also held that the Government may restrict the right to assembly when there's a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." Prior restraints against such dangers, however, incur a heavier burden.

In the Second Amendment context, however, restrictions against those already convicted of a crime, for example, would not be a prior restraint—they have already been found guilty in a constitutionally sufficient proceeding. Likewise, the right of the people doesn't protect violent actors or criminals. But that is not the case for those merely under indictment. Indeed, excluding those under indictment from the right of the people to keep and bear arms would operate much like prior restraints in the First Amendment concept. "[A] free society prefers to punish the few who abuse rights of [the people] after they break the law than to throttle them and all others beforehand."

In sum, this Court does not rehash all constitutional interpretations since 1791, and although not a perfect fit, the "rights of the people" in other contexts can supply useful comparisons. And as seen above, this Nation does have a historical tradition of excluding specific groups from the rights and powers reserved to "the people" in those contexts. But unlike the historical tradition of excluding felons or violent actors from the rights of "the people," little evidence supports excluding those under indictment in any context.

V. Courts should be skeptical of § 922(n) for other reasons.

This Court is skeptical that the Government here, or in any other court, could defend § 922(n)'s constitutionality. Not only does the historical record lack the clear evidence needed to justify this regulation, § 922(n) evokes constitutional scrutiny in other ways.

A. Grand Jury Proceedings.

The nature of grand jury proceedings is one such area that casts a shadow of constitutional doubt on § 922(n). Some feel that a grand jury could indict a [burrito] if asked to do so. The freewheeling nature of such proceedings stems from the Supreme Court holding that (1) the rules of evidence don't apply, (2) evidence barred by the Fourth Amendment's exclusionary rule may be heard, and (3) the grand jury may rely on evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. Simply put, "[a] grand jury investigation is not an adversarial process."

The Fifth Amendment guarantees the right to a grand jury indictment for federal felonies. But the right to a grand jury indictment is not always applicable to state court proceedings. So because an indictment under § 922(n) means either a state or federal indictment, a defendant indicted for a state felony could lose the right to buy a firearm without the case ever reaching a grand jury.

The Government argues here that it has always been able "to impose substantial liberty restrictions on indicted defendants." To support that claim, the Government lists detentions or conditions of pretrial release as examples. Why the Government believes those examples support its argument is unclear; detention hearings have substantial procedural safeguards. For one thing, at

a detention hearing, the defendant may request the presence of counsel; testify and present witnesses; proffer evidence; and cross-examine other witnesses appearing at the hearing. Grand jury proceedings have none of these safeguards. Detention hearings also occur at a different stage in the proceeding — often after indictment. And even if restricting a defendant's right to possess a firearm as a condition of pretrial release is constitutional — an issue which this Court does not consider here — that doesn't also make § 922(n)'s restrictions in the indictment stage constitutional.

In line with procedural concerns, the Court notes in passing that the expansion of gun rights by the Supreme Court in *Bruen* might also implicate procedural due process under the Fifth Amendment. Courts that have analyzed due process and § 922(n) did so pre-*Bruen.* If the right to keep and bear arms inside and outside the home is so clear, removing that right would likely require the same constitutional procedural safeguards that the Supreme Court has bestowed on other rights. But this Court need not analyze those issues here.

B. The historical disarmament of specific groups.

Another reason that § 922(n) warrants skepticism is the historical misappropriation of law to pretextually and unlawfully disarm unfavored groups. The Supreme Court noted such historical uses against blacks in both *Bruen* and *McDonald v. City of Chicago.* After the Civil War, "systematic efforts" were made to disarm blacks from obtaining, possessing, or carrying a firearm. For example, an 1833 Florida statute authorized "white citizen patrols to seize arms found in the homes of slaves and free blacks, and provided that blacks without a proper explanation for the presence of the firearms be summarily punished, *without benefit of a judicial tribunal.*" Another example would be the aftermath of the Cincinnati race riots in 1841. The day after the riot was quelled, all blacks were disarmed. And the day after that, white rioters ransacked the now-defenseless black residential district. That pretextual disarmament wrenched away black residents' "individual right to self-defense"—"the central component" of their Second Amendment right.

The Government cites the Seventh Circuit's reasoning in *United States v. Yancy* to argue legislatures have long had the right to disarm "unvirtuous citizens." *Yancy*'s reasoning on "unvirtuous citizens" quotes an influential 1868 constitutional treatise, which stated constitutional rights did not apply to "the idiot, the lunatic, and the felon." But what's omitted is how blacks were treated the same: "Pistols old muskets, and shotguns were taken away from [freed slaves] as such weapons would be wrested from the hands of *lunatics.*"

C. Past courts interpreted § 922(n)'s constitutionality under the collective-right view the Supreme Court rejected in *Heller.*

One last issue that gives this Court pause is that the question whether the right to keep and bear arms was a collective right or an individual right wasn't answered until the Supreme Court in *Heller* held that the Second Amendment bestowed an individual right. So courts interpreting the constitutionality of what is now § 922(n) would erroneously invoke the collective-right view that *Heller* resoundingly rejected. For example, just four years after the FFA's enactment, the First Circuit in *Cases v. United States* upheld the FFA's regulation of those under indictment, or convicted of, "crimes of violence" using the collective-right view. The First Circuit, invoking neither history nor precedent, held that a person has no right under the Second Amendment unless he is "a member of a[ ]military organization" or uses his weapon "in preparation for a military career," thus "contributing to the efficiency of the well regulated militia."

Another example that same year was the Third Circuit's decision in *United States v. Tot.* There, the court also upheld the FFA's "crimes of violence" disability, noting that the Second Amendment "was not adopted with individual rights in mind," and the FFA "[did] not infringe upon the preservation of the well regulated militia protected by the Second Amendment."

Thus, the FFA's regulations were found constitutional under the collective-right view later dismantled by *Heller.* And § 922(n)'s historical prohibitions were limited to the much-narrower "crimes of violence" disability. So if comparing the FFA's "crimes of violence" limitation to § 922(n)'s far broader coverage — which includes non-violent felonies and state indictments—it's doubtful § 922(n) would be constitutional under the individual-rights view *Heller* enumerated.

The Court notes the above concerns not to bolster its conclusion, but to highlight how *Bruen* changed the legal landscape. The *Bruen* Court made the constitutional standard "more explicit" to eliminate "asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions.'" *Bruen* did not, however, erase societal and public safety concerns—they still exist—even if *Bruen*'s new framework prevents courts from making that analysis. As stated above, the new standard creates unknown unknowns, raising many questions. This Court does not know the answers; it must only try to faithfully follow *Bruen*'s framework.

CONCLUSION

The Second Amendment is not a "second class right." No longer can courts balance away a constitutional right. After *Bruen*, the Government must prove that laws regulating conduct covered by the Second Amendment's plain text

align with this Nation's historical tradition. The Government does not meet that burden.

Although not exhaustive, the Court's historical survey finds little evidence that § 922(n) — which prohibits those under felony indictment from obtaining a firearm — aligns with this Nation's historical tradition. As a result, this Court holds that § 922(n) is unconstitutional.

United States v. Rowson

2023 WL 431037 (S.D.N.Y. Jan. 26, 2023)

PAUL A. ENGELMAYER, District Judge:

This decision resolves two motions by defendant Iszayah Rowson. Rowson moves to suppress a firearm seized from him during a traffic stop on the grounds that the livery car in which he was a passenger was stopped, and he was thereafter frisked, in violation of the Fourth Amendment. Rowson also moves to dismiss the one-count Indictment, which charges him with receipt of a firearm in violation of 18 U.S.C. § 922(n), which makes it a crime for a person while under indictment for a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive a firearm that has travelled in interstate or foreign commerce. Drawing on *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), Rowson argues that § 922(n) is facially unconstitutional under the Second Amendment.

For the reasons that follow, the Court denies both motions.

I. Overview and Procedural History

On June 2, 2022, the Grand Jury returned the Indictment, charging Rowson with a single count of violating § 922(n), on or about March 5, 2022. The charges arose from a stop shortly after 9:45 p.m. that evening by two New York City Police Department ("NYPD") officers of an Uber livery car in the Bronx, on the ground that the backseat passenger, Rowson, was not wearing a seatbelt, as required by law. After an exchange with Rowson, and after he was asked to and did exit the vehicle, an officer patted down Rowson and found a firearm in the waistband of his pants. The gun had been stolen on February 8, 2022 in Virginia. At the time, Rowson was under indictment in New York State for criminal possession of a weapon in the second degree . . . and criminal possession of a firearm, in violation of NYSPL § 265.01-(b)(1). Both are felony offenses.

II. . .

[After an extended review of the facts, Judge Engelmayer established that the police officers had reasonable suspicion to stop Rowson's vehicle and to

frisk him. He thus denied Rowson's motion to suppress the firearm seized following the traffic stop.]

III. Rowson's Motion to Dismiss

Rowson separately moves for dismissal of the Indictment on the ground that 18 U.S.C. § 922(n), evaluated under the framework for Second Amendment analysis used by the Supreme Court in *Bruen*, is unconstitutional. . . .

B. Discussion. . .

1. Are Felony Indictees Within the Scope of "The People" Protected by the Second Amendment?

The initial *Bruen* inquiry is whether the Second Amendment's "plain text covers an individual's conduct." 142 S. Ct. at 2126. The Amendment states: "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."

Rowson argues that, as a pretrial indictee who is an American citizen, he falls within the scope of "the people" covered by the Amendment. The Government seizes on an adjective in *Bruen* to argue the contrary. There, the Court, recapping its decisions in *Heller* and *McDonald*, stated that the Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and an "individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122. Drawing on the reference to "law-abiding citizen[s]," the Government argues that a felony indictee falls outside "the people" whom the Amendment protects, because, by definition, a showing of probable cause has been made that such a person violated a felony statute. Hence, it argues, such persons should not be viewed as "ordinary, law-abiding citizens" with rights under the Second Amendment.

The Government's argument on this aspect of the *Bruen* framework is unpersuasive. None of the post-*Bruen* decisions addressing § 922(n) — including the four finding § 922(n) unconstitutional — have so held. Several have explicitly held that a person indicted for a felony remains among "the people" whom the Second Amendment covers. Those include decisions upholding § 922(n) . . ., and decisions invaliding it . . .

Nor, apart from the adjective "law-abiding," does any other aspect of the analysis in *Bruen* support the Government's argument at this step. On the contrary, the Court's focus on the "conduct" of the person challenging the law supports Rowson's argument. No doubt because the class of persons implicated by the mandatory New York gun licensing statute included all who sought to carry firearms outside the home, the Court's focus in *Bruen* was not on potentially disqualifying status characteristics of the challengers to the statute. It was instead on whether the Amendment's text covered the "conduct"

the statute proscribed. The Court recognized in *Bruen* that the conduct at issue there, possessing a firearm, was presumptively protected by the Amendment, so as to require that the challenged law be justified based on "the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. The same is so of the conduct to which § 922(n) is addressed — shipping, receiving, or transporting a firearm — as the courts to consider that question have uniformly held. *See, e.g.*, *United States v. Holden*, 2022 WL 17103509, at *3 ("Receiving a firearm is . . . presumptively protected by the Second Amendment."); *United States v. Quiroz*, 2022 WL 4352482, at *4 ("[D]oes the Second Amendment's plain text cover the conduct [of receiving a firearm]? Without a doubt the answer here is yes.").

To be sure, *Bruen* did not have occasion to address whether, as the Government posits, the threshold textual inquiry into the scope of the Second Amendment's coverage may also consider whether certain persons, by category, fall outside "the people" whom the Amendment covers. It is reasonable to assume that *Bruen* leaves room for that inquiry in an appropriate case. But even if so, the Government does not offer a convincing basis to treat the broad and eclectic category of persons under any type of pending felony indictment as, *ex officio*, lacking all Second Amendment rights. Pre-*Bruen* decisions, in fact, had so inquired as to the Second Amendment rights of various persons by category. With limited exceptions, most declined to hold that the groups at issue were categorically without Second Amendment rights . . . Insofar as the scope of "the people" the Amendment covered presented an unresolved question before *Bruen*, the decision there did not address, let alone settle, that question. . . .

The case law as to convicted felons is also instructive on this point. The post-*Bruen* decisions addressing the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), although uniformly upholding that statute, have divided on the analytic basis for doing so. Although some courts have treated convicted felons as lacking Second Amendment rights, others have held otherwise, and have instead sustained § 922(g)(1) at the second step of *Bruen* analysis, based on the statute's historical antecedents . . . To the extent that convicted felons have been held to be within the scope of "the people" whom the Second Amendment covers, it follows *a priori* that felony indictees are, too.

Most fundamentally, the Government's argument disqualifying felony indictees from any Second Amendment rights is in conflict with the Supreme Court's explanation in *Heller* of the meaning of the term "the people" — reasoning foundational to its landmark holding that the Second Amendment protects individual rights. In his decision for the *Heller* majority, Justice Scalia equated that term as used in the Second Amendment to its use in other Amendments, including the First Amendment's assembly-and-petition clause and the Fourth Amendment's search-and-seizure clause. . . .

It is black letter law that even convicted felons retain rights under, *inter alia*, the First and Fourth Amendments. That the rights of such persons may be burdened based on their criminal records does not expunge these rights *in toto.* And unlike convicted felons, felony indictees do not stand to lose their political rights (for example, the right to vote) on account of a pending but as-yet-unadjudicated felony charge. The holding urged by the Government, under which felony indictees would be excluded altogether from "the people" as used in the Second Amendment, would therefore be inconsistent with both the breadth of the term, and its symmetrical use across amendments, noted in *Heller.*

The Court, joining all others to consider the question squarely post-*Bruen*, accordingly holds that felony indictees are within the scope of "the people" who have Second Amendment rights, and that the conduct regulated by § 922(n) of shipping, receiving, or transporting firearms is also covered by the plain text of the Second Amendment. Under *Bruen*, the burden is therefore on the Government to show that § 922(n) is consistent with the Nation's historical tradition of firearm regulation.

2. Is § 922(n) Consistent with the Historical Tradition of Firearms Regulation?

Had *Bruen*'s inquiry into historical antecedents required locating an 18th-century replica of § 922(n), the statute would fail the Second Amendment. The Government has not identified any federal law, before 1938, that specifically targeted felony indictees . . . Nor has the Government or the Court located a colonial era state-law replica of § 922(n).

The Supreme Court in *Bruen*, however, disclaimed the need to find an exact historical match. The proper inquiry, the Court stated, is whether the regulation "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. Where the challenged law "addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence" but it is not dispositive, *id.* at 2131. And the search for analogues is not intended to impose a "regulatory straightjacket." *Id.* at 2133. Rather, the historical inquiry "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin.*" *Id.* (emphasis in original). In conducting this inquiry, the Court inquires whether the antecedent laws and the law at issue "are 'relevantly similar'" — that is, "how and why the regulations burden" a citizen. *Id.* at 2132-33. The Court is also to focus on laws that reflect "the scope [that constitutional rights] were understood to have *when the people adopted them*" — that is, laws temporally proximate to 1791, when the Second Amendment was adopted, and, as potentially confirmative evidence, to 1868, when the Fourteenth Amendment was adopted. *See id.* at 2136 (emphasis in original); *see also id.* at 2138 (noting

scholarly debate as to whether 1791 or 1868 is the more apt date for analysis). "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous to pass constitutional muster." *Id.* at 2133.
. . .

Here, utilizing the *Bruen* methodology, the Court finds two lines of historical regulation of firearms to supply analogues sufficiently apposite to sustain § 922(n). The first entails the Nation's long line of laws of disarming persons perceived as dangerous. The second consists of historical surety laws. The Court develops these lines below.

a. Laws Disarming Dangerous Categories of Persons Perceived as Dangerous

A long line of statutes predating — and/or present at — the founding disarmed persons deemed inherently dangerous. These included many statutes that disarmed persons on bases other than a felony (or other) conviction.

For example, in 1662, the British Parliament authorized Lieutenants to "seize all arms in the custody or possession of any person" deemed "dangerous to the Peace of the Kingdom." Opp. at 30 (citing Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13 (1662)); *see also* Militia Act of 1662 ("[A]rms so seized may be restored to the owners again if the said Lieutenants or . . . their deputies or any two or more of them shall so think fit."). During the ratification period, a "highly influential," *Heller*, 554 U.S. at 604, proposal that circulated among delegates recognized that "people have a right to bear arms . . . *unless for crimes committed, or real danger of public injury*," *id.* at 658 (Stevens, J., dissenting) (emphasis added) (discussing "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents").

There is also ample evidence of colonial and revolutionary-era laws that disarmed groups of people perceived as *per se* dangerous, on the basis of their religious, racial, and political identities. *See, e.g.*, Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 115-16 & accompanying notes (2013) (citing laws barring gun sales to Native Americans, due to fears of violence; free and enslaved Black or mixed-race persons, even where completely law-abiding, out of fear of revolution against white masters; and Catholics or Loyalists). Both parties have collected examples of and/or authorities collecting such laws.

It goes without saying that, in our modern era, a law that would disarm a group based on race, nationality, or political point of view — or on the assumption that these characteristics bespoke heightened dangerousness — would be anathema, and clearly unconstitutional. But the Second Amendment's inquiry into historical analogues is not a normative one. Viewing these laws in combination, the above historical laws bespeak a "public understanding of the [Second Amendment] right" in the period leading up to

1791 as permitting the denial of access to firearms to categories of persons based on their perceived dangerousness. *Bruen* and *Heller* recognized one such longstanding classification — on gun possession by felons. *See Bruen*, 142 S. Ct. at 2137; *Heller*, 554 U.S. at 627. And courts have recognized, based on historical evidence, the common law tradition of disarming classes of individuals based on judgments about whether they were "peaceable" or "law-abiding."

In this historical context, a law such as § 922(n) fits within the tradition of firearms regulation at the time of the nation's founding. Section 922(n) imposes a partial limit on the firearms rights of a group of persons defined by an objective characteristic that is a fair proxy for dangerousness: an indictment for a felony punishable by a year or more in prison. And the burden § 922(n) imposes is limited in scope (barring the indictee from shipping, transporting, or receiving firearms, but not from possessing them) and time (expiring upon the disposition of the indictment). This aspect of historical firearms regulations is sufficient to sustain § 922(n) against Rowson's challenge.

b. Surety Statutes

Surety laws supply another relevant set of analogues. These laws required persons deemed likely to breach the peace or otherwise transgressive to post a bond before publicly carrying a firearm. The majority of courts to have considered § 922(n) following *Bruen* have treated such statutes as the most germane historical comparators for § 922(n). . . .

Colonial and American surety laws derived from a longstanding English tradition of authorizing government agents to seize arms from persons who had acted unlawfully or in a manner that threatened the public. *See, e.g.*, Robert Gardiner, The Compleat Constable 18 (3d ed. 1708) (directing justices of the peace to "arrest such persons as ride or go offensively Arm'ed" and "seize and take away their Armour and Weapons, and have them apprized as forfeited to her majesty"). Consistent with this tradition, various colonial regulations confiscated weapons from people who were deemed dangerous or apt to disturb the peace. [Judge Engelmayer cited a 1692 Massachusetts law and a 1759 New Hampshire law as support.] These statutes authorized imprisonment "until [the perpetrator] find[s] sureties for the peace and good behavior"; they did not address the return of the confiscated weapons upon the payment of such surety. Most salient, although each statute provided that a confession or "legal proof of any such offense" could justify such confiscation, neither required a conviction as a predicate. Rather, as noted, the "view of such justice" was sufficient.

As *Bruen* recounted, other laws enacted in the years immediately before and after the Second Amendment's adoption also aimed to neutralize people who were armed in ways that could cause alarm. A 1786 Virginia statute, for example, provided that "no man . . . [shall] go nor ride armed by night nor by

day, . . . in terror of the Country," Collection of All Such Acts of the General Assembly of Virginia ch. 21, p. 33 (1794) . . . Taken together, as *Bruen* synopsized, these statutes reflected the "by-now-familiar thread" of laws prohibiting "bearing firearms in a way that spreads 'fear' or 'terror' among the people." *Bruen*, 142 S. Ct. at 2145. Like their predecessors, these laws empowered justices of the peace to apprehend those who were publicly armed and presented offensively.

The Supreme Court considered these surety laws in *Bruen* but found them inapposite to the New York "proper cause" statute at issue, which conditioned the right to a license to carry a handgun in public on a showing of a "special need" for self-protection different from that of the general community. As the Court explained:

> Contrary to respondents' position, these [and other surety laws] in no way represented the "direct precursors" to New York's proper-cause requirement. While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry [unless they did so in a way that inspired fear or terror.] ... Thus, unlike New York's regime, a showing of special need was required only after an individual [had or] was reasonably accused of intending to injure another or breach the peace.

Bruen, 142 S. Ct. at 2148-49 (internal citation omitted) (emphasis in original).

In the different context presented here, however, the surety laws, considered collectively, are "relevantly similar" to § 922(n). *Id.* at 2132. That inquiry turns on "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133 (emphasis in original) (quoting *McDonald*, 561 U.S. at 767). As to the first question, the surety laws — like § 922(n), but unlike the New York "proper cause" law at issue in *Bruen* — presume that individuals have the right to bear arms. These laws imprisoned or otherwise restricted only those persons who had disturbed the peace or whose public possession of a firearm, as determined by a justice of the peace or other legal process, was otherwise likely to spread fear among the public. Section 922(n) similarly applies only to a subset of persons — felony indictees — as to whom probable cause has been found, by a grand jury or its prosecutorial equivalent in the context of a consented-to felony information, to have committed a serious crime. And they impose a burden with respect to the firearms that is comparable or, arguably, less. Unlike the surety laws, which deprived citizens of the right to possess firearms, § 922(n) does not disturb the indictee's right to continued possession of a firearm; instead, it limits the ability of the indictee to ship, receive, or transfer firearms during the pendency of the indictment. As to the second question, there is comparable justification: the period in which an indictment pends is "a volatile period during which the stakes and stresses

of pending criminal charges often motivate defendants to do violence to themselves or to others," thereby reasonably giving rise to fear of threats or violence among the community. *United States v. Kays*, 2022 WL 3718519, at *4 (quoting *United States v. Khatib*, No. 12 Cr. 190, 2012 WL 6086862, at *4 (E.D. Wis. Dec. 6, 2012), *report and recommendation adopted*, 2012 WL 6707199 (E.D. Wis. Dec. 26, 2012)).

The analogy to surety statutes has particular utility because the public safety threat posed by pretrial indictees was not, in the main, "a general societal problem" at the founding, *Bruen*, 142 S. Ct. at 2131. Such invites, as the Government rightly argues, a broader search for historical analogies. That is because, at the time the Second Amendment was ratified, bail was not available for many crimes that were then treated as capital offenses but which today would be treated as felonies within § 922(n)'s scope. Under English law through the time of ratification, bail generally was either unavailable for persons "clearly guilty or indicted" of certain violent crimes such as murder, or was discretionary for "thieves openly defamed and known; persons charged with other felonies . . . [or] accessories to felony under the same want of reputation." *See* Meyer, *Constitutionality of Pretrial Detention*, at 1157 (citing 4 Blackstone 298–99) . . . The circumstances — the relative scarcity of non-detained felony indictees — likely explain the absence of a colonial-era statute like § 922(n) addressed specifically to pretrial indictees. They reinforce this Court's conclusion that the surety statutes — as colonial and early American examples of statutes disarming (and imprisoning) persons charged with serious offenses, whereby their conduct threatened the public safety — are worthy comparators.

Courts invalidating § 922(n) have discounted the surety laws, reasoning that, because some such laws had exceptions for the payment of a bond or self-defense, these imposed a "qualitatively different burden[ ]" on the accused's Second Amendment right. *United States v. Stambaugh*, 2022 WL 16936043, at *5. In this Court's assessment, however, the surety laws, though an imperfect match, are informative and viable analogues. That some surety laws permitted the accused to reclaim their firearm on the posting of a bond or a showing of self-defense does not destroy the analogy to § 922(n). On the contrary, § 922(n) embeds its own mechanism for relief: resolution of the pending indictment (whether by dismissal, plea, acquittal, or conviction).

Further, to the extent that *Quiroz*, *Stambaugh*, *Holden*, and *Hicks* rely on the "self-defense exception" in some surety statutes, this exception developed materially after the founding. The first appears to have been enacted by Massachusetts in 1836. It provided that:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach

> of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

Mass Rev. Stat., ch. 134, § 16. Between 1836 and 1871, another 10 states adopted similar laws. *See Bruen*, 142 S. Ct. at 2148 & n.23. But as *Bruen* teaches, the more apt comparators are those in place at the time of the Second Amendment's ratification. The surety laws then in place did not provide for the retention of weapons upon a showing of self-defense, but instead applied upon the determination by a justice of the peace or other legal proceeding that a person's conduct made their possession of the weapon a heightened danger. Such makes them fair analogues to § 922(n).

Accordingly, the Government has satisfied its burden to justify § 922(n) with reference to historical antecedents. Section 922(n), the Court holds, is consistent with the Nation's history of firearms regulation. . . .

NOTES & QUESTIONS

1. [New Note] Every court to consider the constitutionality of § 922(n) following *Bruen* has held that felony indictees remain within "the people" protected by the Second Amendment. But one was doubtful. In *United States v. Now*, 2023 WL 2717517 (E.D. Wis. Mar. 15, 2023), Magistrate Judge William E. Duffin questioned whether the defendant, who was under felony indictment, "sustained his burden to show that he is an 'ordinary law-abiding' citizen so as to come within 'the people' subject to the protection of the Second Amendment. In support, he cites other deprivations of constitutional rights that may result from an indictment, such as incarceration, fingerprinting, and travel restrictions. Judge Duffin nevertheless recommended that § 922(n) be upheld as consistent with the nation's historical tradition of firearm regulation. A district court judge adopted his report and recommendation. *See United States v. Now*, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023).

2. [New Note] Unlike most of its sister § 922(g) status-based firearm prohibitors, § 922(n) only prohibits *receipt* of a firearm while under felony indictment. In other words, felony indictees may keep already possessed firearms. *Cf. United States v. Adams*, 2011 WL 1475978, at *2 (S.D. Ala. Apr. 11, 2011) ("[A]n indictment that alleges only possession of a firearm by a person under indictment is insufficient to charge a violation of 18 U.S.C. § 922(n)."). A separate federal law, however, conditions pretrial release of persons charged with federal crimes on their disarmament. *See* 18 U.S.C. § 3142(c)(1)(B)(viii).

3. [New Note] For an exhaustive comparison of post-*Bruen* cases to address Second Amendment challenges to § 922(n), compare *United States v. Alston*, 2023 WL 4758734 (E.D.N.C. July 18, 2023) (upholding § 922(n)), *United States v. Everson*, 2023 WL 3947828 (D. Mont. June 12, 2023) (same), *United States*

v. Adger, 2023 WL 3229933 (S.D. Ga. May 3, 2023) (same), *United States v. Posada*, 2023 WL 3027877 (W.D. Tex. Apr. 20,2023) (same), *United States v. Jackson*, 2023 WL 2499856 (D. Md. Mar. 13,2023) (same), *United States v. Stennerson*, 2023 WL 2214351 (D. Mont. Feb.24, 2023) (same), *United States v. Bartucci*, 2023 WL 2189530 (E.D. Cal. Feb. 23, 2023) (same), *United States v. Simien*, 2023 WL 1980487 (W.D. Tex. Feb.10, 2023) (same), *United States v. Rowson*, 2023 WL 431037 (S.D.N.Y. Jan. 26, 2023); *United States v. Kelly*, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022) (same), with *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022) (holding the statute unconstitutional in light of *Bruen*), *United States v. Hicks*, 2023 WL 164170 (W.D. Tex. Jan. 9, 2023) (same), *United States v. Stambaugh*, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022) (same), and *United States v. Holden*, 2022 WL 17103509 (N.D. Ind. Oct. 31, 2022), *rev'd on other grounds*, 2023 WL 4039607 (7th Cir. June 16, 2023) (same).

D. PERSONS UNDER 21

Jones v. Bonta

34 F.4th 704 (9th Cir. 2022)

Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Sidney H. Stein, District Judge. Opinion by Judge R. Nelson; Concurrence by Judge Lee; Dissent by Judge Stein.

R. NELSON, Circuit Judge:

America would not exist without the heroism of the young adults who fought and died in our revolutionary army. Today we reaffirm that our Constitution still protects the right that enabled their sacrifice: the right of young adults to keep and bear arms.

California has restricted the sale of most firearms to anyone under 21. Plaintiffs challenged the bans on long guns and semiautomatic centerfire rifles under the Second Amendment. The district court declined to issue a preliminary injunction.

We hold that the district court did not abuse its discretion in declining to enjoin the requirement that young adults obtain a hunting license to purchase a long gun. But the district court erred in not enjoining an almost total ban on semiautomatic centerfire rifles. First, the Second Amendment protects the right of young adults to keep and bear arms, which includes the right to purchase them. The district court reasoned otherwise and held that the laws did not burden Second Amendment rights at all: that was legal error. Second, the district court properly applied intermediate scrutiny to the long gun

hunting license regulation and did not abuse its discretion in finding it likely to survive. But third, the district court erred by applying intermediate scrutiny, rather than strict scrutiny, to the semiautomatic centerfire rifle ban. And even under intermediate scrutiny, this ban likely violates the Second Amendment because it fails the "reasonable fit" test. Finally, the district court also abused its discretion in finding that Plaintiffs would not likely be irreparably harmed. We thus affirm the district court's denial of an injunction as to the long gun regulation, reverse its denial of an injunction as to the semiautomatic centerfire rifle ban, and remand for further proceedings consistent with this opinion.

I

A

California regulates the acquisition, possession, and ownership of firearms with a multifaceted scheme. *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc). To start, some general requirements apply to everyone, not just young adults.[1] . . .

California also regulates young adults' commerce in firearms. Specifically, after first banning only the sale of handguns, California then prohibited the sale to young adults of almost any kind of firearm. The only exception was for sales of long guns to young adults who (1) have a state hunting license, (2) are peace officers, active federal officers, or active federal law enforcement agents and are allowed to carry firearms for their work, or (3) are active or honorably discharged members of the military. 2017 California Senate Bill No. 1100, California 2017-2018 Regular Session.

. . .California again amended the law, banning sales of semiautomatic centerfire rifles to young adults, and excepting only law enforcement officers and active-duty military, but not hunting license holders. . .

B

The district court declined to preliminarily enjoin the laws, holding that Plaintiffs had not shown that they were likely to succeed on the merits, both because the laws did not burden Second Amendment rights and would likely survive intermediate scrutiny. The district court also held that Plaintiffs had not shown irreparable harm and that the balance of interests did not favor enjoining the laws.

First, the district court observed that other courts had held that similar laws do not burden Second Amendment rights at all. *Jones v. Becerra*, 498 F. Supp. 3d 1317, 1326-27 (S.D. Cal. 2020). The district court noted that these

[1] We use "young adults" to refer to people who are 18 years old or older but not yet 21 years old.

courts found that similar laws were "longstanding, do not burden the Second Amendment, and are therefore presumptively constitutional." *Id.* at 1327. The district court then reasoned that "[i]ndividuals under the age of 21 were considered minors or 'infants' for most of our country's history without the rights afforded adults" and therefore they are among those "believed unfit of responsible firearm possession and use." *Id.* at 1327. It did address the tradition of militia members who were under 21 years old, but reasoned this tradition actually supported the constitutionality of the laws. *Id.* In the district court's view, "[m]ilitia members were required to possess their own firearms if they complied with accountability and maintenance regulations" and thus the "strict rules surrounding militia duty" show that the "right to firearm possession came with obligations to ensure public safety." *Id.*

Because of other courts' holdings, the longstanding history of similar regulations, and its militia analysis, the district court reasoned that California's laws "do[] not burden the Second Amendment." *Id.* The district court thus held that Plaintiffs were not likely to succeed on the merits. . .

At the preliminary injunction stage, our "review of the district court's findings" is "restricted to the limited record available to the district court when it granted or denied the motion." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982). Ultimately, because denying a preliminary injunction lies within a district court's discretion, we may reverse only when it abused its discretion by relying on an erroneous legal premise or clearly erroneous finding of fact. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1231 (9th Cir. 2020)…

III

"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." U.S. Const. amend. II. The Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). This right is "applicable to the States" through the Due Process Clause of the Fourteenth Amendment. *Id.* at 750.

The "Second Amendment right is exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The "people" protected by the Second Amendment "refers to a class of persons who are part of a national community." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

On the merits, for challenges to firearm laws under the Second and Fourteenth Amendments, we apply a "two-step framework." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). First, we ask "whether the challenged law burdens conduct protected by the Second Amendment." *Fyock*, 779 F.3d at 996 (internal quotations omitted). In this step, we "explore the

amendment's reach based on a historical understanding of the scope of the Second Amendment right." *Mai v. United States*, 952 F.3d 1106, 1114 (9th Cir. 2020) (quoting *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)). As we conduct this historical analysis, we must remain "well aware that we are jurists and not historians." *Young*, 992 F.3d at 785. Still, if the challenged law regulates conduct historically outside the scope of the Second Amendment, then it does not burden Second Amendment rights. *Mai*, 952 F.3d at 1114. But if the challenged law "falls within the historical scope of the Second Amendment, we must then proceed to the second step of the Second Amendment inquiry to determine the appropriate level of scrutiny." *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

In our historical analysis, the Framers' understanding of the Second Amendment at and around the time of ratification has special significance. Laws from that time are particularly important because they are "contemporaneous legislative exposition[s] of the Constitution" that took place "when the founders of our government and framers of our Constitution were actively participating in public affairs." *Myers v. United States*, 272 U.S. 52, 175 (1926). If they were also "acquiesced in for a long term of years," these legislative expositions "fix[] the construction" that we must give to the Constitution's parameters. *Id.* Because the militias originated in the states, *see Heller*, 554 U.S. at 596, we also consider colonial and state laws. Since the Second Amendment was incorporated against the states through the Fourteenth Amendment, our historical analysis also must consider how the right to keep and bear arms was understood in 1868, when that amendment was ratified. *See McDonald*, 561 U.S. 742, 770-78 (analyzing Reconstruction-era history).

After the historical analysis, if we conclude that the law at issue burdens Second Amendment rights, then we proceed to the second step. In this step, we determine which level of scrutiny to apply and must decide both "how close [each] law comes to the core of the Second Amendment right" and "the severity of [each] law's burden on that right." *Mai*, 952 F.3d at 1115. "Strict scrutiny applies only to laws that both implicate a core Second Amendment right and place a substantial burden on that right." *Id.* (citing *Torres*, 911 F.3d at 1262). And "[i]n weighing the severity of the burden, we are guided by a longstanding distinction between laws that regulate the manner in which individuals may exercise their Second Amendment right, and laws that amount to a total prohibition of the right." *Pena*, 898 F.3d at 977 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). Laws that regulate how individuals can exercise the right are less severe; laws that amount to a total prohibition of the right are more severe. . .

We analyze the laws against this legal backdrop. First, because the Second Amendment historically protected the right of young adults to possess firearms, the district court abused its discretion in finding no burden on Second

Amendment rights. As to the long gun regulation, the district court properly applied intermediate scrutiny, and did not abuse its discretion in finding the law likely to survive. But semiautomatic rifles are nearly totally banned. Thus, the district court erred in applying intermediate scrutiny, rather than strict scrutiny. And even under intermediate scrutiny, the district court erred in finding the law likely to survive. Finally, the district court also abused its discretion in finding that there was no irreparable harm and that the public interest favored declining to issue an injunction.

IV

A

Before engaging with the historical record, we first establish the parameters of our analysis. California regulates young adults' commerce in firearms, not their possession. And we have avoided defining "the contours of the commercial sales category because [we have] assumed the Second Amendment applied and upheld the restriction under the appropriate level of constitutional scrutiny." *Pena*, 898 F.3d at 976 (collecting cases). Still, even though this is a commercial regulation, the district court's historical analysis focused not on the history of commercial regulations specifically but on the history of young adults' right to keep and bear arms generally. *See Jones*, 498 F. Supp. 3d at 1325-29. The district court was asking the right question.

"Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense." *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). We have assumed without deciding that the "right to possess a firearm includes the right to purchase one." *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017). And we have already applied a similar concept to other facets of the Second Amendment. For example, "[t]he Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition." *Jackson*, 746 F.3d at 967. Still, because "without bullets, the right to bear arms would be meaningless," we held that "the right to possess firearms for protection implies a corresponding right" to obtain the bullets necessary to use them. *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).

Similarly, without the right to obtain arms, the right to keep and bear arms would be meaningless. *Cf. Jackson*, 746 F.3d at 967 (right to obtain bullets). "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Luis v. United States*, 578 U.S. 5 (Thomas, J., concurring in the judgment) (quoting *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting)). For this reason, the right to keep and bear arms includes the right to purchase them. And thus laws that burden the ability to purchase arms burden Second Amendment rights.

B

Finally, before we dive into the history, we pause to clear up two last points. First, because the long gun regulation and the semiautomatic rifle ban regulate different categories of guns and have different exceptions, we analyze them separately. And second, the Second Amendment does not protect the right to carry "dangerous and unusual weapons." *Heller*, 554 U.S. at 627. But that doesn't mean that weapons can be banned just because they're dangerous. Rather, "dangerous and unusual weapons" is a kind of historical term of art: *Heller* contrasted those arms with weapons "in common use at the time." *Id.* Thus "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring). Here, the district court held that "[b]oth long-guns and semi-automatic centerfire rifles are commonly used by law abiding citizens for lawful purposes such as hunting, target practice, and self-defense," and thus that they are not "dangerous and unusual weapons" under *Heller*, 554 U.S. at 627. *Jones*, 498 F. Supp. 3d at 1325. Similarly, semiautomatic weapons "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). We agree: long guns and semiautomatic rifles are not dangerous and unusual weapons.

Having cleared these last preliminary hurdles, the question now is, "based on a historical understanding of the scope of the Second Amendment right," whether the right of young adults to bear arms is "conduct [that is] protected by the Second Amendment." *Mai*, 952 F.3d at 1114 (internal citation omitted).

C

Our analysis of the historical record reveals several points which inform our exploration of the amendment's reach. First, the tradition of young adults keeping and bearing arms is deep-rooted in English law and custom. Going back many centuries, able-bodied English men at least fifteen years old were compelled to possess personal arms and had to take part in both the militia and other institutions that required them to keep and bear personal arms. Second, the American colonists brought that tradition across the Atlantic: the colonial militias almost always included all men 18 and older, and other institutions involving keeping and bearing arms made it to our shores, too. Third, at the time of the founding, all states required young adults to serve in the militia, and all states required young adults to acquire and possess their own firearms. Just after the founding, Congress established a federal militia, which included young adults, and required them to acquire and possess their own weapons. Fourth, both at the founding and later, different states had different ages of majority, and the age of majority also varied depending on the conduct at issue. And finally, turning to the Reconstruction era, some states passed laws that regulated minors' access to firearms, but most of them only

regulated handguns, and only a few banned all sales of firearms to minors. We explore each of these points in turn.

1

The tradition of young adults keeping and bearing arms is deep-rooted in English law and custom. As far back as medieval times, able-bodied men aged fifteen and older were compelled to possess personal arms and had a duty, when asked, to use those personal arms to maintain the king's peace and protect their communities and property.[8] "[T]he militia from its obscure origin in Saxon times has been composed of all subjects and citizens capable of bearing arms, regardless of age or parental authority."[9]

And the militia was not the only institution imposing an obligation to acquire and possess arms: "[u]nder English law originating long before the Norman Conquest of 1066, all able-bodied men were obliged to join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals."[10] More generally, sheriffs, coroners, and magistrates could "summon all able-bodied males to assist in keeping the peace,"[11] and the traditional minimum age for these law-enforcement duties was typically 15 or 16 years old. For example, at common law, the sheriff could command citizens — already armed — to help suppress riots, arrest criminals, and otherwise enforce civil processes.

2

This deep-rooted tradition was brought across the Atlantic by the American colonists. *Heller* confirmed that the "militia" in colonial America consisted of "a subset of 'the people' — those who were male, able bodied, and within a certain age range." 554 U.S. at 580. Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at 16. *See* Appendix 1. Every colony passed, at some point, laws identifying 18-year-olds as persons required to possess arms. *Id.* Throughout the colonial period, the minimum age fluctuated both below and above 18, and some colonies passed laws temporarily increasing the minimum age requirements for militia service to not include 18-to 20-year-olds. *Id.*

Militia members had to show up for militia duty with their own arms. When militia members were "called for service th[ey] . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *United States v. Miller*, 307 U.S. 174, 179, (1939). Colonial governments

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[8] See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 761, 788 (2014).
[9] S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 Yale L.J. 471, 473 (1917).
[10] Kopel, *supra* n.8, at 771-72.
[11] *See* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L. J. 495, 535 (2019).

even supplied arms to citizens too poor to purchase them, requiring them, for example, to pay back the government or work off their debt.

Militia membership also included some of what we might now call regulation: "members of the militia were required to meet regularly for weapons inspection and registration." *Jones*, 498 F. Supp. 3d at 1327 (citing Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early America Origins of Gun Control*, 73 Fordham L. Rev. 487, 509-11 (2004)).

Along with the militia, the colonists also brought over the practice of posse comitatus, which again required citizens to have their own arms.[16] "Prior to the advent of centralized police forces," posse comitatus allowed "sheriffs and others [to] compel[] citizens to serve in the name of the state to execute arrests, level public nuisances, and keep the peace, upon pain of fine and imprisonment."[17] And in fact, the colonists didn't just continue the practice: posse comitatus was "a pillar of local self-governance" and "central to the broader project of protecting the public good."[18] Colonial governments even punished citizens who would not join the posse.

3

The Second Amendment was ratified just a few months before Congress passed the Militia Act of 1792. The Militia Act required that young adults serve in the militia and acquire and possess their own weapons. The Act "purported to establish 'an Uniform Militia throughout the United States.'" *Perpich v. Dep't of Def.*, 496 U.S. 334, 341 (1990). The Act stated: "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. The Act also required each militia member to "provide himself with a good musket or firelock . . . or with a good rifle." *Id.* The Militia Act thus "command[ed] that every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the militia] and equip himself with appropriate weaponry." *Perpich*, 496 U.S. at 341.

Thus, "[a]t the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in every state became eighteen." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 340-44 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) ("*NRA II*"). Several states adopted the exact language from the Federal Militia Act — obligating male persons 18 years old

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[16] *See* Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 Law & Hist. Rev. 1, 10 (2008) (internal citation omitted).

[17] *See id.* at 2.

[18] *See id.* at 10.

or older to acquire and provide their own firearms. *See* Appendix 2. Either at the same time as or right after the Act's passage, every state's militia law obliged young adults to acquire and possess firearms. *Id.* "[A]ny argument that 18-to 20-year olds were not considered, at the time of the founding, to have full rights regarding firearms" is "inconceivable." *NRA II*, 714 F.3d at 342 (Jones, J., dissenting from denial of rehearing en banc).

4

Turning now to the age of majority, the common law age of majority at the time of the founding was 21 years old. "[I]t was not until the 1970s that States enacted legislation to lower the age of majority to 18." *NRA I*, 700 F.3d at 201. But the relevant age of majority also depended on the capacity or activity. William Blackstone, *Commentaries* 463-64, 465 (1765). In other words, "the age of majority — even at the Founding — lacks meaning without reference to a particular right," because, "[f]or example, a man could take an oath at age 12, be capitally punished in a criminal case at age 14, and serve as an executor at age 17." *Id.* at 463.

5

Finally, we turn to the Reconstruction era. "By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights — the fear that the National Government would disarm the universal militia — had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense." *McDonald*, 561 U.S. at 770. And even once the Fourteenth Amendment was ratified in 1868, it would of course still be many years before the Supreme Court incorporated the Second Amendment against the states. *McDonald*, 561 U.S. at 791. So, like in the colonial and founding eras, state laws were made against the backdrop of "Second Amendment analogues in their respective [state] constitutions." *NRA I*, 700 F.3d at 202 n.16.

Within a few decades of Reconstruction, some states had enacted laws regulating access to firearms by minors. *Id.* at 202. We identify twenty-eight such state laws passed between 1856 and 1897. . . . Of these laws, nineteen banned sales of only pistols to minors, and several had exceptions for hunting or parental consent. Of the non-pistol bans, three only applied to minors under fifteen years old, only required parental consent, or both. Eight states banned the sale of all firearms or deadly or dangerous weapons to minors. Four of these statutes were passed between 1881 and 1885.

There were also other Reconstruction-era restrictions on the right to acquire and bear arms. In particular, some statutes were designed to disarm formerly enslaved people and members of Native American tribes. *See Drummond v. Robinson Twp.*, 9 F.4th 217, 228 (3d Cir. 2021). Kentucky, for

example, restricted firearm access by African Americans. 1860 Ky. Acts 245 § 23.

For the most part, cases from this time did not address the constitutionality of laws that regulated firearm ownership by young adults. Two cases touch on related issues, but neither addresses our question. One of them, *Coleman v. State*, 32 Ala. 581 (1858), summarily affirmed a lower court's application of a state statute that prohibited selling or lending a pistol to a minor. But the court did not address the constitutionality of the law or say how old the minor was. In the second case, *State v. Callicutt*, 69 Tenn. 714 (1878), on top of not saying how old the minor was, that court also addressed concealed carry of dangerous weapons, not the right to keep and bear arms more generally.

Professor Cooley's famous treatise from 1868, relied on by the Fifth Circuit panel in *NRA I*, also does not address the question: its sole reference to the issue, citing *Callicutt*, comes in a discussion of the states' police powers, not of the right to keep and bear arms. *NRA I*, 700 F.3d at 202-03 (citing Thomas M. Cooley, Treatise on Constitutional Limitations 740 n.4 (5th ed. 1883)).

D

We must decide what these historical facts tell us about the reach of the Second Amendment. *Fyock*, 779 F.3d at 996. According to Plaintiffs, these facts show that the Second Amendment protects young adults' right to bear arms, because young adults were expected to bear arms at the time of the founding.

Defendants have two main responses, both of which the district court adopted. First, it argues that the protected historical right is not a full right to bear arms, but rather only a right to bear arms that comes with some obligations of militia service, at the very least the inspection requirement. *Jones*, 498 F. Supp. 3d at 1327. In the district court's reading, because militia service came with some regulation, the Second Amendment does not protect the right to keep and bear arms, absent that regulation. *Id.*

Second, Defendants argue that the militia laws don't show anything about young adults' right to bear arms, because states in the 19th and 20th centuries also criminalized transferring firearms to young people, and because the age of majority during much of this country's history was 21 years old, not 18. *Id.* at 1326-27.

We agree with Plaintiffs: the historical record shows that the Second Amendment protects young adults' right to keep and bear arms. We address Plaintiffs' argument and then each of Defendants' counterarguments in turn.

1

"Sixteen was the minimum age for colonial militias almost exclusively for 150 years before the Constitution" and "[a]t the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in every state became eighteen." *NRA II*, 714 F.3d at 340 (Jones, J.,

dissenting from denial of rehearing en banc). This historical militia tradition supports Plaintiffs' reading. Indeed, the historical evidence is so strong that even the dissenting judge in the vacated *Hirschfeld* opinion found it "persuasive," did not dispute it, and simply assumed that the law did burden Second Amendment rights, disagreeing only at step two. 5 F.4th 407, 463 (4th Cir. 2021) (Wynn, J., dissenting), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021). The Second Amendment refers to the militia, and young adults had to be in the militia and bring their own firearms. This reference implies at least that young adults needed to have their own firearms.

2

Defendants' first argument to the contrary is unpersuasive. Defendants agree that young adults needed to have firearms for the militia and that the Second Amendment refers to the militia. Even so, Defendants argue that the Second Amendment only protects older adults' right to keep and bear arms, and not that of young adults. In other words, young adults could keep and bear arms and had to serve in the militia, but their ability to keep and bear arms was not protected by the Second Amendment and could have been abridged at any time without posing any burden on the right. Because it strays from the most obvious historical interpretation, this reading would need to be supported by powerful evidence. It is not.

To begin, the district court's main premise has already been rejected. "[T]he Second Amendment conferred an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The right is *not* conditioned on militia service. *Id.* at 599-600. Indeed, that was the position of the dissenters in *Heller*, and the Court rejected it. *Id.*

The district court's position here is a variation on that same, already-rejected argument. Rather than argue that *all* citizens' right to bear arms is conditioned *entirely* on militia service, as the dissenters did in *Heller*, the district court held that *some* citizens' right to bear arms is conditioned on *some aspects* of militia service. *Jones*, 498 F. Supp. 3d at 1327. And there is another problem with the district court's analysis. At the first step, we just ask whether the regulations burden Second Amendment rights at all. Few, if any, of our constitutional rights are absolute, and asking if a right is burdened is different from asking if a particular burden is constitutional. That there were some firearm regulations associated with militia membership could show that some restrictions can be constitutional. But the regulations themselves cannot dispositively show that there is no burden.

The historical analysis controls the first step of the inquiry but not the second. In applying a tier of scrutiny in the second step, we focus not on the historical record (i.e., what kinds of regulations were present at the founding), but on the gravity of the state's interest (compelling/significant/legitimate) and the degree of tailoring between the regulation and that interest (narrow

tailoring/reasonable fit/rational relation). In finding no burden on Second Amendment rights, the district court improperly relied on founding-era regulations.

3

We now turn to Defendants' second argument, which relies on laws passed in the 19th and 20th centuries.

First, Defendants fail to adequately address the founding-era militia tradition: "19th-century sources may be relevant to the extent they illuminate the Second Amendment's original meaning, but they cannot be used to construe the Second Amendment in a way that is inconsistent with that meaning." *NRA II*, 714 F.3d at 339 n.5 (Jones, J., dissenting from denial of rehearing en banc). Defendants argue, citing *NRA I*, that "a regulation can be deemed 'longstanding'" even if it cannot boast a precise founding era analog." 700 F.3d at 196. But even if we were to agree, that would not save the argument. Here, there is not just a vacuum at the founding-era: instead, the founding-era evidence of militia membership undermines Defendants' interpretation.

Even putting that aside, the Reconstruction-era laws themselves are not convincing. On top of the deeply offensive nature of many of them, nineteen out of twenty-eight banned only the sale of handguns, and California's handgun ban is not at issue. The Reconstruction-era laws show that long guns were far less regulated than handguns. Ruling out other state laws that are similarly inapplicable (laws only requiring parental consent, only banning dangerous and deadly weapons, and only applying to children under fifteen years old), we are left with only five complete bans on sales of firearms to minors. Of these five laws, three were passed in states without a Second Amendment analog in their state constitution. So only two states — Kentucky and Michigan — banned the sale of firearms to minors, *see* 1873 Ky. Acts 359, 1883 Mich. Pub. Acts 144, and had a Second Amendment analog, *see* Ky. Const. of 1850, Art. 13, § 25; Mich. Const. of 1850, Art. 17, § 7. These two laws — both passed over a decade after the ratification of the Fourteenth Amendment — cannot contravene the Second Amendment's original public meaning.

4

As to Defendants' argument relying on the age of majority being 21, rather than 18, we agree with the Fifth Circuit and the Fourth Circuit's vacated opinion in *Hirschfeld* that "majority or minority is a status that lacks content without reference to the right at issue." 5 F.4th at 435; *NRA I*, 700 F.3d at 204 n.17. "As Blackstone's *Commentaries* makes clear, the relevant age of majority depended on the capacity or activity." *Hirschfeld*, 5 F.4th at 435 (citing 1 William Blackstone, *Commentaries* at 463-65). We also agree that "constitutional rights were not generally tied to an age of majority, as the First

and Fourth Amendments applied to minors at the Founding as they do today" and that "the age of majority Blackstone identifies for different activities tells us little about the scope of the Second Amendment's protections." *Id.*

5

Finally, Defendants argue that California's laws are just "conditions and qualifications on the commercial sale of arms," or "longstanding prohibitions on the possession of firearms" by certain groups. Because of the hunting license exception, the long gun regulation is more naturally considered a "condition or qualification," while the semiautomatic rifle ban is more aptly categorized as a "prohibition." *Heller* itself called such measures "presumptively lawful," 554 U.S. at 626-27 n.26, so Defendants argue that California's laws pose no burden on Second Amendment rights. We disagree. These laws burden Second Amendment rights, notwithstanding this observation from *Heller*.

First, the "longstanding prohibitions" referred to in *Heller* were "prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 626, not prohibitions on a broader set of groups. Young adults are neither felons nor mentally ill. The semiautomatic rifle law does not fall within the Supreme Court's enumerated categories.

Second, as to the long gun law, there is a more fundamental problem. In *Heller*, the Supreme Court noted just that "nothing in [its] opinion should be taken to cast doubt on" laws such as "conditions and qualifications on the commercial sale of arms," and that such laws were "presumptively lawful." *Id.* at 627, n.26. But this does not mean that all such laws pose no burden on Second Amendment rights at all. "On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny." *Pena*, 898 F.3d at 976 (citing *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010)). The answer need not be the same for every regulation. Some presumptively lawful measures might burden conduct unprotected by the Second Amendment, while others might presumptively pass the applicable level of scrutiny.

Here, our historical analysis leads us to conclude that young adults have a Second Amendment right to keep and bear arms. Because that right includes the right to purchase arms, both California laws burden conduct within the scope of the Second Amendment. The long gun law is a "condition[] . . . on the commercial sale of arms," *Heller*, 554 U.S. at 627, but it still burdens Second Amendment rights. The Supreme Court's observation in *Heller* is no obstacle to this holding.

Ultimately, the Second Amendment protects the right of the people to keep and bear arms and refers to the militia. Young adults were part of the militia and were expected to have their own arms. Thus, young adults have Second

Amendment protections as "persons who are a part of a national community." *Id.* at 580 (citing *Verdugo-Urquidez*, 494 U.S. at 265). Defendants point to contemporaneous regulations, arguing that some states banned young adults from having firearms later on, and that the age of majority was 21, not 18. But these observations do not prove their point: permissible regulations can still burden the right, later laws cannot contravene the original public meaning, and the age of majority depends on the conduct. The California laws burden Second Amendment rights and the district court erred in concluding otherwise. . .

ii

As to the semiautomatic rifle ban, we part company with the district court. Strict scrutiny applies. The main difference between this ban and the long gun regulation is the exceptions. The long gun regulation has a readily available exception, at least on its face — young adults can get hunting licenses.

The semiautomatic rifle ban has no such exception: the only young adults who can buy semiautomatic rifles are some law enforcement officers and active-duty military servicemembers.

It's one thing to say that young adults must take a course and purchase a hunting license before obtaining certain firearms. But to say that they must become police officers or join the military? For most young adults, that is no exception at all. In effect, this isn't an exception that young adults can avail themselves of by joining the police force or military; it is a blanket ban for everyone except police officers and servicemembers.

We have never held that intermediate scrutiny applied to a rule that banned the purchase of a major category of firearm. . .

Handguns are the quintessential self-defense weapon, *see Heller*, 554 U.S. at 629, but young adults already cannot purchase them, Cal. Penal Code § 27505, 18 U.S.C. § 922(b)(1). And under this ban, they also cannot purchase semiautomatic centerfire rifles. That leaves non-semiautomatic centerfire rifles, rimfire rifles, and shotguns. Non-semiautomatic rifles are not effective as self-defense weapons because they must be manually cycled between shots, a process which becomes infinitely more difficult in a life or death situation. Rimfire rifles generally aren't good for self-defense either, because rimfire ammunition has "poor stopping power" and are mostly used for things like hunting small game. David Steier, Guns 101, 13 (2011). So for self-defense in the home, young adults are left with shotguns.

Even acknowledging that shotguns are effective weapons for self-defense in the home, shotguns are outmatched by semiautomatic rifles in some

situations.[24] Semiautomatic rifles are able to defeat modern body armor, have a much longer range than shotguns and are more effective in protecting roaming kids on large homesteads, are much more precise and capable at preventing collateral damage, and are typically easier for small young adults to use and handle.

Thus, we hold that California's ban is a severe burden on the core Second Amendment right of self-defense in the home. Young adults already cannot buy the quintessential self-defense weapon, *Heller*, 554 U.S. at 629, and this ban now stops them from buying semiautomatic rifles, leaving only shotguns. So handguns aside, this law takes away one of the two remaining practical options for self-defense in the home, and leaves young adults with a self-defense weapon which is not ideal or even usable in many scenarios. That is a severe burden.

In arguing that the burden is not severe, the dissent points first to the intrafamily transfer and loan provisions. Dissent at 87. We disagree that these provisions sufficiently alleviate the burden. To start, young adults remain severely restricted in getting firearms through family transfers: Gifts from parents and grandparents are allowed but strawman purchases are not. *See* Cal. Penal Code §§ 27875 (family transfers), 27515 (strawman purchases). Moreover, allowing family transfers but not purchases makes young adults' Second Amendment rights conditional on the rights of others. The family transfer provision is unavailable to young adults whose parents or grandparents have passed away, do not have a gun to transfer, or are unable or unwilling to participate in a transfer. The first loan provision, which permits loans of up to thirty days from a slightly broader subset of family members, suffers from similar problems, and is temporally limited. Cal. Penal Code § 27880. And the remaining loan provisions are only available in even more limited circumstances: for only three days and only if the firearm is used in the presence of the loaner, Cal. Penal Code § 27885; if the firearm stays only at the loaner's residence, Cal. Penal Code § 27881; or if the loan is only for the hunting season, which is only part of the year, Cal. Penal Code § 27950. These provisions do not alleviate the sales ban's severe burden on the right of self-defense in the home.

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[24] Defendants argue that we may not consider Plaintiffs' facts about these categories of guns, because they were not submitted below. But these facts are legislative facts, "which have relevance to legal reasoning and the lawmaking process," rather than adjudicative facts, which "are simply the facts of the particular case." Advisory Comm. Note, Fed. R. Evid. 201. We have previously considered this kind of fact in a Second Amendment challenge, even over a defendant's challenge that it was not in the record below. *See Chovan*, 735 F.3d at 1140-41 (considering social science studies). In any case, Defendants did not contest Plaintiffs' evidence about rimfire semiautomatic rifles, and we agree with Defendants that semiautomatic shotguns likely are effective self-defense weapons.

The dissent's second rationale is that California's ban does not impose a severe burden because young adults can just wait to buy semiautomatic rifles until they are 21. Dissent at 87. It's true that we've applied intermediate scrutiny to a ten-day waiting period. *Silvester*, 843 F.3d at 827. But telling young adults to wait up to three years is a much more severe burden than having to wait a week and a half. We are not aware of any precedent that has adopted the dissent's rationale. Indeed, telling an 18-year-old that he can vote when he turns 21 would hardly minimize the existing constitutional deprivation.

Finally, the dissent argues that our reasoning is circular because any subset of guns can be considered a category. Dissent at 88; *see Worman v. Healey*, 922 F.3d 26, 32 n.2 (1st Cir. 2019). But we do not hold that a ban of any kind or subset of gun must necessarily receive strict scrutiny. We hold just that this ban of semiautomatic rifles requires strict scrutiny, because handguns are already banned, and semiautomatic rifles are now effectively banned. That means two of the three types of effective self-defense firearms are banned, leaving young adults with limited or ineffective alternatives in many self-defense scenarios, and severely burdens their Second Amendment rights. . .

Defendants will likely be able to show that California's long gun regulation is a reasonable fit for the stated objectives. The main effect of the rule is to require young adults to take a hunter education class before they can get long guns. So whether the rule is a reasonable fit depends on what the law requires to happen in these hunter education classes.

Some context for the hunter education classes is helpful. Generally, before purchasing a gun, Californians must get an FSC. Getting the certificate requires passing a multiple-choice test and a safe handling demonstration, both of which can happen at the point of sale. *Id.* In enacting the regulation at issue, however, California changed the requirements for young adults. Rather than having to get an FSC, a young adult must instead get a hunting license, which requires them to first take and pass a hunter education class. California offers in-person and hybrid class options. The course takes approximately ten hours and costs less than $30. After passing the course, a young adult may purchase a hunting license for $54.

The class covers "firearm safety information" that is "more extensive" than what is covered by the FSC test and demonstration. The class also discusses other aspects of hunting that are less relevant to non-hunting uses of long guns (e.g., conservation). Cal. Fish & Game Code § 3051(a).

So, overall, California wants to "increase public safety through sensible firearm control." *Jones*, 498 F. Supp. 3d at 1330. We agree with the district court that sensible firearm control includes things like "proper training and maintenance of firearms." *Id.* California has pursued that end by requiring young adults to take a class which teaches them, among other things, "firearm

safety information." Because the hunting classes include other, unrelated information, the requirement is not a perfect fit. In other words, this requirement likely is neither narrowly tailored nor the least restrictive means for achieving California's goal. But it doesn't have to be: it only has to be a reasonable fit. And it likely is.

Before moving on to the semiautomatic rifle ban, we pause to make one last point. In their complaint, Plaintiffs have challenged the long gun regulation facially and as applied. But they appeal the denial of the preliminary injunction only on the basis that the law is facially invalid. And in evaluating a facial challenge, we consider only the text of the law — we judge the law on its face, not in its application. *See Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020). Nothing we have said forecloses the possibility that the regulation might still be unconstitutional as applied. For example, if the hunter education courses were prohibitively expensive or were only offered on a limited basis, then California might be applying the regulation unconstitutionally. Still, as to the facial challenge at issue, the district court did not abuse its discretion in finding that the regulation would survive intermediate scrutiny.

3

As to the semiautomatic rifle ban, because we have held that strict scrutiny applies, we reverse on that basis. Even so, we also hold in the alternative that, even if intermediate scrutiny were to apply, the district court still abused its discretion in finding that the ban was likely to survive, and reverse on this alternative basis as well. (Because we hold that the ban is unlikely to survive intermediate scrutiny, we also by implication hold that it is even less likely to survive strict scrutiny.) We first clarify the nature of the intermediate scrutiny test, and then discuss its application here. . .

ii

California's stated objective for the semiautomatic rifle ban is the same as for the long gun regulation: to promote public safety and reduce gun violence and crime. *Jones*, 498 F. Supp. 3d at 1330. The question is whether the ban — prohibiting commerce in semiautomatic rifles for all young adults except those in the police or military — is a reasonable fit for that aim.

We agree with Defendants that the fit need only be reasonable, not perfect. *Jackson*, 746 F.3d at 969. But the fit here is likely not even reasonable. The district court abused its discretion in finding that Defendants could likely show a reasonable fit.

In *Craig v. Boren*, the Supreme Court considered a law that was a much better fit than this law and still found the fit unreasonable. 429 U.S. 190 (1976). The law in *Craig v. Boren* banned the sale of some beer to men between 18 and 21, but not to women in the same age range. *Id.* at 191-92. Intermediate

scrutiny applied, and the objective of the law was to enhance traffic safety. *Id.* at 199. The state argued that its law was a reasonable fit for that objective because young men were more than ten times more likely to be arrested for driving under the influence than young women. *Id.* at 199-201. But the plaintiff argued that the law was overbroad: only 2% of young men were arrested for drunk driving, but the law regulated all young men. In other words, the law regulated fifty times more men than was ideal: it regulated 100% of them, even though only 2% would drive drunk.

The Supreme Court struck down the law. "While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device." *Id.* at 201. In other words, a ten times increase in risk cannot justify regulating fifty times more people than is ideal: "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" *Id.*

The fit here is far more tenuous than that. In adopting the ban at issue, the California legislature considered various statistics. In particular, it knew that young adults were less than 5% of the population but accounted for more than 15% of homicide and manslaughter arrests. In other words, young adults are more than three times more likely to be arrested for homicide and manslaughter than other adults. But as Plaintiffs point out, only 0.25% of young adults are arrested for violent crimes. In other words, California's law sweeps in 400 times (100% divided by 0.25%) more young adults than would be ideal.[25] Because it regulates so much more conduct than necessary to achieve its goal, the law is unlikely to be a reasonable fit for California's objectives. . .

We pause here for an observation. The Second Amendment "does not demand 'an individualized hearing' to assess Plaintiff's own personal level of risk." *Mai*, 952 F.3d at 1119 (citing *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 698 n.18 (6th Cir. 2016) (en banc)). But still, one way that states can improve regulations' fit is by having exceptions or more individualized assessment. *See, e.g.*, *Singh*, 979 F.3d at 725 (reasonable fit because statute "carves out exceptions"); *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015) (reasonable fit because "a person for whom a parent's signature is not available can appeal to the Director of the Illinois State Police"). There are only limited exceptions here, and no individualized assessment of any sort. . .

Ultimately, in applying intermediate scrutiny, the district court had to do two things: identify the proper legal test for "reasonable fit," and measure the semiautomatic rifle ban against that test. Properly identifying the legal

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[25] The law actually sweeps even more broadly that, because the 400 times over regulation figure does not account for repeat offenders. And the denominator is also inflated because it includes all violent crimes, not just homicide and manslaughter.

standard is a question of law that we review de novo; applying it is a mixed question that we review for abuse of discretion. The district court used the wrong legal rule. Because the district court misapprehended the intermediate scrutiny test, it abused its discretion by getting the law wrong. . .

The district court also erred in its analysis of the irreparable harm preliminary injunction factor. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal quotation marks omitted)…

V

In conclusion, the district court erred by holding that the California laws did not burden Second Amendment rights. It properly applied intermediate scrutiny to the long gun regulation and did not abuse its discretion in finding it likely to survive. But it erred in applying intermediate scrutiny to the semiautomatic rifle ban. And even if intermediate scrutiny applied, the district court abused its discretion in finding the ban likely to survive. Finally, the district court erred in its application of the irreparable harm factor. Thus, as to the long gun regulation, the district court's order is **AFFIRMED**. And as to the semiautomatic centerfire rifle ban, the district court's order is **REVERSED**. We **REMAND** the case to the district court for further proceedings consistent with this opinion.

LEE, Circuit Judge, concurring:

As explained in Judge Nelson's excellent opinion, California's law effectively banning the sale or transfer of semiautomatic firearms to young adults conflicts with the text, tradition, and history of the Second Amendment. I join the opinion in full but write separately to highlight how California's legal position has no logical stopping point and would ultimately erode fundamental rights enumerated in our Constitution. Simply put, we cannot jettison our constitutional rights, even if the goal behind a law is laudable.

California justifies its law by citing statistics showing that young adults constitute less than 5% of the population but represent more than 15% of homicide and manslaughter arrests. The state argues that intermediate scrutiny should apply and that it survives that test because the law is a "reasonable fit" for the state's important public safety goal. But even assuming intermediate scrutiny applies, the state's assertion of a "reasonable fit" reduces that requirement to a malleable and meaningless limit on the government's power to restrict constitutional rights. As the majority opinion capably points out, only 0.25% of young adults commit violent crimes. So California limits the

rights of 99.75% of young adults based on the bad acts of an incredibly small sliver of the young adult population. That is not a "reasonable fit."

If we accept the state's argument, it redefines intermediate scrutiny as a rational basis review with a small sprinkle of skepticism in Second Amendment cases. And that would allow the government to trample over constitutional rights just by relying on anecdotal evidence and questionable statistics that loosely relate to a worthwhile government goal. If California can deny the Second Amendment right to young adults based on their group's disproportionate involvement in violent crimes, then the government can deny that right — as well as other rights — to other groups. For example, California arguably has a more compelling case if it enacts a similar gun-control law that targets males of all ages instead of young adults. Statistics — and science — show that men almost exclusively commit violent crimes. Take mass shootings for instance. Men have been involved in *99%* of all mass shootings in America since 1966, according to a database maintained by the Violence Project.[2] California can thus theoretically claim that if men cannot own firearms, it will eliminate 99% of mass shootings.

But as tempting as that solution may sound to some, such a law almost certainly would not pass constitutional muster. And the reason is obvious: its scope would not be remotely, let alone reasonably, tailored to the praiseworthy goal of curbing gun violence. *Cf. Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480, (1989) (requiring the "governmental goal to be substantial, and the cost to be carefully calculated" under intermediate scrutiny). While men constitute almost all mass shooters, 99.9999%[4] of men are not mass shooters. In other words, such a hypothetical law would strip all men of their Second Amendment rights based on the actions of 0.000001% of the male population.

The Supreme Court rejected such tenuous logic in *Craig v. Boren* when it struck down a state law banning the sale of some beer to young men, who

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[2] The Violence Project Database, https://www.theviolenceproject.org/mass-shooter-database/ (last visited December 15, 2021). Of the 172 mass shootings since 1966, only four of them involved women. But of the four, two of them were assisting their male counterparts in the mass shooting. The organization used Congressional Research Service's definition of a mass shooting, *i.e.*, "a multiple homicide incident in which four or more victims are murdered with firearms . . . within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity . . . and the murders are not attributable to any other underlying criminal activity or commonplace circumstance."

[4] Since 1966, there have been 170 mass shootings involving men. According to the U.S. Census estimate, there were 163,073,046 males as of 2020. *See* https://www.census.gov/quickfacts/fact/table/US/PST045219#PST045219 (last visited Dec. 15, 2021). That means that only 0.0001% of the male population committed a mass shooting. And even that miniscule percentage is still inflated because it assumes a static denominator based on the male population as of 2020 instead of all males alive since 1966.

overwhelmingly are much likelier than young women to drive under the influence and cause car accident deaths. 429 U.S. 190 (1976). Applying intermediate scrutiny for gender-based classifications, the Court acknowledged the statistical disparity but held that the state cannot use "a gender line as a classifying device." *Id.* at 201. Even though that state law would have likely saved thousands of lives — almost certainly more so than California's law — the Court invalidated it because good intentions alone cannot salvage a law.

So, too, here. To accept the state's argument would mean allowing the government to restrict *individuals*' enumerated constitutional rights based solely on their *group* membership. Unlike other gun-control laws that target a person's specific and individual characteristics or actions (*e.g.*, commission of felony, mental illness), California's law strips individuals of their fundamental constitutional rights based solely on what other people in their group may have committed in the past. That is antithetical to the very nature of individual rights and leads us down a dark path. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656, (1972) (the Bill of Rights protects the "citizenry from overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.").

We also do not typically limit constitutional rights based on the age of adults. Young adults have the same constitutional rights as the middle-aged or the elderly — even if some of them may not necessarily have the wisdom or judgment that age and experience can bring — for the same reason that we do not limit fundamental rights based on supposed intelligence, maturity, or other characteristics. We thus allow 18-year-olds to join the military and lay down their lives in defense of our freedoms. We even allow minors to take actions that their parents may strongly oppose: the Supreme Court has held that parents and the government must yield to the wishes of, say, a 14 or 15-year-old who wants an abortion. *Bellotti v. Baird*, 428 U.S. 132, (1976).

None of this is to downplay the tragedy of gun violence. Although we must remain impartial as judges, we are citizens, too. And whenever we hear of gun violence, our stomachs sink and our hearts break for those who have lost families or friends in these terrible and tragic events. But only a tiny number of people abuse their rights and wield guns for unlawful violence. Such cold numbers admittedly offer little solace to those who have lost loved ones because of gun violence, but it does provide a perspective on whether we should restrict a constitutional right for the larger population based on a minuscule percentage of the populace who abuses that right.

Our Constitution provides a guarantee of our rights and freedoms. For the most part, people exercise their rights in responsible and productive ways. A tiny percentage, however, does not. But we should not sanction restricting a constitutional right by solely focusing on the few who abuse it.

As judges and lawyers, we revere the First Amendment as a core fundamental right. And rightfully so: It has allowed Americans to protest unjust wars abroad as well as racism and other injustices on our soil, changing this country for the better. But in our paeans to the First Amendment, we sometimes forget that the right also allows the people to do horrendous things. The First Amendment thus empowers Nazis to march down Main Street in the predominantly Jewish suburb of Skokie. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43, 43-44 (1977). It also allows amoral and perhaps immoral businesspeople to invoke the majesty of our Constitution to market despicable videogames to minors, even though they depict people being "dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces," and encourage players to engage in "'ethnic cleansing' [of] . . . African-Americans, Latinos, or Jews" and to "rape a mother and her daughters" in the videogames. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 789-804 (2011) (invalidating law restricting violent videogames).

But we do not impinge on the First Amendment based on the outlier actions of a few who may abuse that right. Nor should we with the Second Amendment.

In sum, we cannot allow good intentions to trump an enumerated and "fundamental right" deeply rooted in the history and tradition of this country. *See McDonald*, 561 U.S. at 778.

STEIN, District Judge, dissenting in part:. . .

Aside from the explicit exceptions contained in section 27510, California has preserved several avenues for young adults to possess and use long guns, including semiautomatic rifles. Contrary to plaintiffs' contentions, section 27510 does not regulate possession or use; rather, it merely regulates the purchase of firearms through FFLs. California emphasizes that, as long as young adults follow otherwise applicable California laws, they may *use* long guns, including semiautomatic rifles for self-defense in the home or elsewhere and for a number of other lawful purposes.

Indeed, the challenged regulations permit acquisition and loan of long guns, including semiautomatic rifles, in several ways. For instance, young adults may receive long guns from immediate family "by gift, bequest, intestate succession, or other means from one individual to another[.]" Cal. Penal Code §§ 16720, 27505, 27585. Young adults may also be loaned firearms, including handguns, from a wide range of people for varying periods of time, *see* Cal. Penal Code §§ 27880, 27885, or for the entirety of a hunting season if they are licensed hunters. Cal. Penal Code § 2795. . .

Given the statute's several qualifications and exemptions, I disagree with the majority's conclusion that the semiautomatic rifle regulation constitutes a ban on commerce and conclude instead that the regulation is "consistent with

a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety.". . .

I also take issue with the majority's repeated reference to the historic age of militia service — around 16 years — to support the notion that young adults have a Second Amendment right to bear arms. Despite its insistence that "[t]he right is not conditioned on militia service," the majority makes the following syllogism: "[t]he Second Amendment refers to the militia, and young adults had to be in the militia and bring their own firearms. This reference implies at least that young adults needed to have their own firearms." In drawing this conclusion, the majority makes the same mistake as plaintiffs in confusing "the age for military service with the separate question of the age at which society can draw a line at the sale of firearms to minors." Regardless, the district court reminds us that even "[m]ilitias were well regulated by each state in the Founding Era." *Jones*, 498 F. Supp. 3d at 1327. For example, "members of the militia were required to meet regularly for weapons inspection and registration, and members who did not show up with the required equipment could be fined." *Id.* The lower court was correct to deduce that the regulations on militia duty "demonstrate that as far back as the Founding Era, firearm regulations were considered necessary and an individual's right to firearm possession came with obligations to ensure public safety." *Id.* If young adults were historically members of the militia, then these regulations would have applied equally to them. . .

While I do not dispute that the semiautomatic rifle regulation places burdens on young adults who wish to purchase or otherwise receive semiautomatic centerfire rifles from FFLs, I do not find that it is a "severe burden" on young adults' Second Amendment rights. Even if the regulation means most young adults are "unable to purchase a subset of semiautomatic weapons" from FFLs, this "does not significantly burden the right to self-defense in the home." *Pena*, 898 F.3d at 978. As the majority acknowledges, young adults still have access to reasonable alternatives for self-defense in the home, including the shotgun and other forms of long gun. Moreover, the time-limited nature of the regulation and the various avenues it leaves open to young adult possession of semiautomatic centerfire rifles mitigate its severity. . .

In sum, the district court was correct to hold that both the long gun regulation and the semiautomatic rifle regulation do not impermissibly burden Second Amendment rights. . .

NOTES & QUESTIONS

8. [New Note] Reaching the opposite result of the 2012 Fifth Circuit case in the textbook, the Fourth Circuit held that the federal statute forbidding persons aged 18 to 20 from buying handguns from retail firearm dealers violated the Second Amendment. *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco &*

Explosives, 5 F.4th 407 (4th Cir. 2021). After the opinion was announced, but before the mandate was issued, the plaintiff turned 21. The case now being moot, the Fourth Circuit vacated its opinion, and the opinion of the district court. 14 F.4th 322 (4th Cir. 2021).

9. [New Note] Post-*Bruen*, there have been many challenges to statutes restricting Second Amendment rights of young adults, and some of the challenges have succeeded. The federal greenleeban on FFL handgun sales to persons ages 18 to 20 — 18 U.S.C. § 922(b)(1) & (c)(1) — was held unconstitutional in *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 2023 WL 3355339 (E.D. Va. May 10, 2023). But the ban was upheld in *Reese v. Bureau of Alcohol Tobacco Firearms & Explosives*, 2022 WL 17859138 (W.D. La. Dec. 21, 2022).

After two years of litigation, which began before *Bruen*, the State of Tennessee conceded that its law against issuing handgun carry permits of persons 18-20 is unconstitutional. The court approved a joint motion to approve a settlement, by which Tennessee would begin issuing permits. *Beeler v. Long*, No. 3:21-cv-152 (E.D. Tenn.).

Worth v. Harrington, 2023 WL 2745673 (D. Minn. Mar. 31, 2023), held a similar Minnesota ban on carry permits for 18-to-20-year-olds held unconstitutional under Bruen. Although the judge made it clear that he would have upheld the ban under a balancing test, and that he thinks a balancing test is superior to *Bruen*'s history-based standard, the court followed the *Bruen* methodology. The court rejected the Attorney General's analogies to late-nineteenth century bans on handgun sales to minors; sales bans cannot be analogized to carry bans, which were very rare in the nineteenth century.

Firearms Policy Coal. v. McCraw, 2022 WL 3656996 (N.D. Tex. Aug. 25, 2022), held unconstitutional a Texas statute that prohibits defensive carry outside the home by law-abiding 18-to-20-year-olds. Texas filed a notice of appeal to the 5th Circuit, but later withdrew it, and the Texas Department of Public Safety announced that it will stop enforcing the ban. The announcement cautioned that some local law enforcement officials might still enforce the ban.

Commenting on *McCraw*, Professor George A. Mocsary argued that "[t]o be a full citizen is to be allowed to bear arms; to be denied the right to bear arms is to be denied inclusion in the polity." By striking the Texas statute, the court treated young adults — who can be executed, drafted, and even compelled by Texas law enforcement under the state's posse comitatus laws to pursue a violent criminal or suppress a riot, but not carry a firearm (even for self-defense from a violent criminal or during a riot — like full citizens. George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607 (2023).

The Eleventh Circuit, examining Florida's 2017 statute banning young adults from all long gun purchases, whether at stores or from private persons, held that because the Second Amendment was made enforceable against the

States by the Fourteenth Amendment in 1868, that year is the proper date for considering American legal history tradition. *National Rifle Association v. Bondi*, 61 F.4th 1317 (11th Cir. 2023). As of 1868, three States restricted handgun access by minors, and in the following decades, others followed. The panel considered it irrelevant that 18-to-20-year-olds are not considered minors today. Although no state restricted minors' access to long guns before 1900, the handgun restrictions were a good enough analogy for long gun restrictions today. In July 2023, the Eleventh Circuit granted a petition for rehearing en banc.

10. [New Note] Commenting on *Firearms Policy Coal. v. McCraw*, Professor George A. Mocsary argued that "[t]o be a full citizen is to be allowed to bear arms; to be denied the right to bear arms is to be denied inclusion in the polity." By striking the Texas statute, the court treated young adults — who can be executed, drafted, and even compelled by Texas law enforcement under the state's posse comitatus laws to pursue a violent criminal or suppress a riot, but not carry a firearm (even for self-defense from a violent criminal or during a riot — like full citizens. George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607 (2023).

11. [New Note] This wide-ranging symposium examines age discrimination in many contexts: Gerald L. Neuman, *Discrimination on the Basis of Chronological Age: November 2022 Workshop Proceedings and Working Papers* (April 25, 2023).

Ryder Gaenz, *You'll Grow Into It: How Federal and State Courts Have Erred in Excluding Persons Under Twenty-One from 'the people' Protected by the Second Amendment*, 17 FIU L. Rev. 197 (2023):

> "[D]uring the colonial and founding eras, persons as young as sixteen often were required to bear arms not only for militia purposes, but generally and irrespective of military service or purpose. Additionally, the Court's long-standing First Amendment, Fourth Amendment, and privacy-abortion jurisprudence is clear: Constitutional rights do not vest only when a person attains a particular age. Instead, individual, constitutional rights protect persons of all ages, although the rights of minors under eighteen — while meaningful — are often less robust than their adult counterparts. In light of this history and jurisprudence, courts should begin recognizing that persons eighteen and older enjoy full Second Amendment rights, while minors under eighteen maintain truncated — albeit meaningful — Second Amendment rights."

E. UNLAWFUL ALIENS

NOTES & QUESTIONS

4. [New Note] *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022). Applying the Eleventh Circuit's (now-invalid, per *Bruen*), Two-Step Test, a panel upheld 18 U.S.C. § 922(g)(5)(A), which bans firearms and ammunition possession and use by any "alien" who is "illegally or unlawfully in the United States." The decision followed every other Court of Appeals that had addressed the issue.

Judge Kevin Newsom, author of the panel opinion, also wrote a concurring opinion with used a text and history approach. This was prescient because a month later *Bruen* instructed lower courts to use a similar methodology. Relying on Founding Era sources, the concurrence argued that "the people" in the Second Amendment do not include aliens who have not taken affirmative steps (e.g., applying for and being granted permanent residency) to affiliate with the American republic. The decision is analyzed in Elizabeth McDaniel, *Ready. Aim. Fire! The Eleventh Circuit Takes its Shot at the Second Amendment's Application to Illegal Aliens*, 74 Mercer L. Rev. 1581 (2023).

5. [New Note] Following *Bruen*, unlawful aliens raising constitutional challenges of 18 U.S.C. § 922(g)(5) have fared no better than previously. *See United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023) ("unlawful aliens are not part of 'the people' to whom the protections of the Second Amendment extend"; the Canadian fugitives and drug traffickers had 67 guns and many prior convictions); *United States v. Escobar-Temal*, 2023 WL 4112762 (M.D. Tenn. June 21, 2023); *United States v. Vizcaíno-Peguero*, 2023 WL 3194522 (D.P.R. Apr. 28, 2023); *United States v. Trinidad-Nova*, 2023 WL 3071412, at *5 (D.P.R. Apr. 25, 2023); *United States v. Pierret-Mercedes*, 2023 WL 2957728 (D.P.R. Apr. 14, 2023); *United States v. Leveille*, 2023 WL 2386266 (D.N.M. Mar. 7, 2023); *United States v. Carbajal-Flores*, 2022 WL 17752395 (N.D. Ill. Dec. 19, 2022); *United States v. DaSilva*, 2022 WL 17242870 (M.D. Pa. Nov. 23, 2022).

6. [New Note] Pratheepan Gulasekaram, *The Second Amendment's 'People' Problem*, 76 Vanderbilt L. Rev. (forthcoming):

> This Article is the first to examine the relationship between "the people," immigration status, and the right to keep and bear arms, in the wake of both *Heller* and *Bruen*. . . . This Article concludes that a more coherent theory of second amendment rightsholders would necessarily include most noncitizens, at least when the right is grounded in self-defense from interpersonal violence. This conclusion casts doubt on current federal law that categorically criminalizes possession by certain groups of noncitizens, as well as deportation rules that banish all noncitizens for firearms violations. More capacious

interpretations of the second amendment's "the people" in turn, helps ensure noncitizens' inclusion under other core constitutional protections.

F. THE FORMERLY MENTALLY ILL

6. [New Note] *Post-Bruen cases.* California's ban on arms possession within five years after release from a mental health facility was upheld in *Clifton v. United States Dep't of Justice*, 615 F. Supp. 3d 1185 (E.D. Cal. 2022). A plaintiff's due process challenge to past psychiatric certification was rejected in *Pervez v. Becerra*, 2022 WL 2306962 (E.D. Cal. June 27, 2022).

Preliminary injunction was entered against the Honolulu rule that if gun registration applicants disclose on the written application that they have been diagnosed with a "behavioral, emotional, or mental" disorder, they must provide a written certification of mental health from a doctor. The plaintiff's possession of firearms was compliant with state law, so Honolulu could not add an extra condition. Honolulu later agreed to a permanent injunction. *Santucci v. City and County of Honolulu*, 2022 WL 17176902 (D. Haw. Nov. 23, 2022).

G. PERSONS SUSPECTED OF BEING DANGEROUS

1. Red Flag Laws

Before 2022, facial challenges to state red flag laws had not succeeded. But two recent cases have held New York's red flag law facially void. Both cases came from New York's "Supreme Court," which is the trial course of general jurisdiction. In most other states, that court would be called a "district court."

In one case, an ex-boyfriend had filed a red flag petition against his ex-girlfriend. Pursuant to New York's red flag law, a Supreme Court judge issued an ex parte temporary order against the girlfriend, and so her pistol permit was revoked. After the girlfriend retained a lawyer who appeared at the later hearing for long-term gun ban, the court found the red flag law unconstitutional, because:

- The law allows the confiscation of other people's guns if the respondent has constructive possession (*e.g.*, group living situation).
- The N.Y. red flag law does not provide the due process protections that exist in the N.Y. Mental Hygiene Law. For example, the latter requires "a *physician's* determination" that the person is likely to harm herself.
- "While some may advocate that 'the ends justify the means' in support of § 63-a, where those means violate a fundamental right under our Bill of Rights to achieve their ends, then the law, on its face, cannot stand."

"Therefore, the 'Temporary Extreme Risk Protection Order' (TERPO) and 'Extreme Risk Protection Order' (ERPO) are deemed to be unconstitutional by this Court as [it] is presently drafted. It can not be stated clearly enough that the Second Amendment is not a second class right, nor should it ever be treated as such." *G.W. v. C.N.*, 78 Misc. 3d 289 (N.Y. Sup. Ct., Monroe County, Dec. 22, 2022). Another case followed similar analysis to the same result. *R.M. v. C.M.,* 79 Misc. 3d 250 (N.Y. Sup. Ct., Orange Cty. 2023).

Two important empirical studies of Red Flag laws have been published recently. The first is K. Alexander Adams, *The Impact of Extreme Risk Protection Orders on Homicide and Suicide: Are there Any Red Flags?* (Feb. 25, 2023). This paper reviews prior research on Red Flag laws, and then presents its own research.

> This paper contributes to the existing literature in multiple ways. First, it uses a new form of synthetic control model, the Generalized Synthetic Control Model (GSCM), which improves both upon the synthetic control models used in past papers but also avoids the pitfalls of difference-in-difference models used by other researchers. Second, the dataset for this paper ranges between 1980-2018, making it one of the largest datasets used to test the effect of red flag laws to date. And third, this paper directly tests whether or not the substitution effect is at play regarding the impact of ERPOs on suicide rates.

The paper finds no statistically significant effects in reduction of total homicide, total suicide, firearms homicide, or firearms suicide. As the author points out, the study does not examine crime other than homicide, nor does it examine mass shootings in particular — the latter being such a small percentage of firearms homicides that any changes would be unlikely to have a statistically discernable effect on overall firearms homicide figures.

The second new study is Royce Barondes, *Red Flag Laws, Civilian Firearms Ownership and Measures of Freedom*, 35 Regent U. L. Rev. 339 (2023). Examining Maryland's law, the article suggests that "adoption of these statutes causes blameless persons to be subject to being killed by the government at a rate comparable to or in excess of the murder rate."

The article also argues that 2022 federal legislation offering funding to states to adopt Red Flag laws "will require courts to consider more favorably firearms rights reinstatement petitions filed by criminals with old convictions. That is because congressional adoption of this legislation is inconsistent with the strongest premise on which courts have heretofore rejected those claims — that courts are not competent to assess whether individuals have a heightened propensity to commit firearms crimes."

3. The Intoxicated

The first post-*Bruen* article to address Second Amendment issues for users of intoxicants is F. Lee Francis, *Armed and Under the Influence: The Second*

Amendment and the Intoxicant Rule After Bruen, 107 Marquette L. Rev. (forthcoming). It argues that firearms bans may not be applied to intoxicant users who wear or shoot firearms only when sober.

H. BUSINESSES

Several cases have upheld 18 U.S.C. § 922(a)(1)(A), which prohibits dealing in firearms without an FFL. All of the criminal defendants were plainly engaged in dealing as defined by federal law (repetitive transactions for profit). The courts not only upheld the statute, they opined that firearms dealers and business have no Second Amendment rights. *See United States v. King*, No. 2022 WL 17668454 (E.D. Pa. Dec. 14, 2022) ("the Second Amendment does not protect the commercial dealing of firearms"); *United States v. Tilotta*, 2022 WL 3924282 (S.D. Cal. Aug. 30, 2022 (The Second Amendment does not apply to the "buying, selling, storing, shipping, or otherwise engaging in the business of firearms."); *United States v. Flores*, 2023 WL 361868 (S.D. Tex. Jan. 23, 2023) (agreeing Ninth Circuit's en banc *Texiera* decision that firearms stores have no Second Amendment rights).

In a less extreme approach, another U.S. district court pointed out that defendant's series of crimes were not conduct covered by the plain text of the Second Amendment: "[T]he violations involve false statements to acquire firearms, the repeated transfer of firearms without a license, and proceeds derived from those activities. These types of regulations do not in any way limit Mr. Gonzales' ability to defensively arm himself." *United States v. Gonzalez*, 2022 WL 17583769 (D. Utah Dec. 12, 2022).

In a civil case where some firearms businesses proactively objected to certain gun control laws, a court held that the Second Amendment does not apply to corporations. *Gazzola v. Hochul*, 2022 WL 17485810, at *14 (N.D.N.Y. Dec. 7, 2022).

CHAPTER 14
WHERE? RIGHT TO CARRY

A. CARRYING HANDGUNS FOR SELF-DEFENSE IN PUBLIC PLACES

Massive Resistance to Bruen.

After *Bruen*, several states enacted statutes to comply nominally with *Bruen* by issuing handgun carry permits, while declaring most of the state to be off-limits for licensed carry. As this Supplement is written, litigation has just begun in Hawaii, California, and Maryland, and Massachusetts became the last state that had to change its laws because of *Bruen* to enact some provisions of the New York law discussed next. (New Jersey, Maryland, and Hawaii, passed near clones of New York's law; California's attempt failed because of a procedural issue but is likely to be reintroduced; and Massachusetts proposed the vampire rule (discussed below).)

New York's statute (*See supra*, *New York State Rifle and Pistol Association v. Bruen* Note 9), enacted days after *Bruen*, has been orally argued before the Second Circuit. The Circuit has stayed all lower court decisions favorable to licensed carry, except for "persons who have been tasked with the duty to keep the peace at places of worship, airports, and private buses." 2022 WL 18228317 (2d Cir. Dec. 7, 2022).

Following the Second Circuit stay, the plaintiffs in one of the New York cases petitioned the U.S. Supreme Court to overturn the stay. The Court requested a response from the New York Attorney General. While the Court was considering the stay, the Second Circuit announced that it would expedite the appeals, and oral argument was scheduled for March 2023. The Court declined to overturn the Second Circuit stay. Justice Alito, joined by Justice Thomas, did not dissent, but they did issue a "Statement" contrasting the District Court's "thorough opinion" with the Second Circuit's nonopinion. *Antonyuk v. Nigrelli*, No. 22A557 (U.S. Jan. 11, 2023).

The four cases currently consolidated and argued in the Second Circuit are:

- *Antonyuk v. Hochul*, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022). Preliminary injunction granted for
  - Discretionary standard of "good moral character."
    - NB: With respect to California's similar "good moral character" provision, Attorney General Robert Bonta said that "Legal

judgments of good moral character can include . . . absence of hatred and racism, fiscal stability" or "[a]ny arrest in the last five years, regardless of the disposition."
    - Applicants must provide a list of family members and cohabitants.
        - NB: In New York City, applicants must obtain their cohabitants' assent to the approval of the would-be permit holder's application.
    - Applicants provide a list of social media accounts for prior three years.
    - Applicants must provide "such other information required by the licensing officer."
    - Applicants must meet in-person with the licensing officer.
    - "Any location providing . . . behavioral health, or chemical dependance care or services."
    - "Any place of worship or religious observation."
    - "aviation transportation" "airports" (outside the sterile zone) and "buses."
    - "any establishment issued a license . . . where alcohol is consumed"
    - "theaters," "conference centers," and "banquet halls."
    - "any gathering of individuals to collectively express their constitutional rights to protest or assemble."
- Preliminary injunction denied for:
    - Minimum of 18-hour in-person live firearms safety training course.
        - NB: Boston's new live-fire test requires one to take off work and go to its police shooting range on an island in Boston Harbor to qualify with a double-action .38 revolver with a 4-inch barrel. Recognizing that many applicants — the elderly, people with arthritis, women, for example — who could easily fire another type of handgun would have difficulty with the heavy trigger pull of a double-action .38 revolver, Professor Nicholas J. Johnson likened the law to the "superficial appeal and submerged discrimination of . . . racist literacy tests that some states used to restrict voting access."
    - "nursery schools [and] preschools"
    - "public playgrounds." By analogy to schools.
    - Zoos. Plaintiffs lack standing, but the court indicates skepticism about the ban on the merits.

The other portions of New York's law were not challenged in *Antonyuk*.

- *Hardaway v. Nigrelli*, 2022 WL 16646220 (W.D.N.Y. Nov. 3, 2022). Preliminary injunction against ban on all firearms possession in places of worship.

- *Spencer v. Nigrelli*, 2022 WL 17985966 (W.D.N.Y. Dec. 29, 2022). Same

as *Hardaway.* Decision based on the Second Amendment under Bruen and on the First Amendment Free Exercise and Establishment Clauses.

- *Christian v. Nigrelli*, 2022 WL 17100631 (W.D.N.Y. Nov. 22, 2022). Preliminary injunction against vampire rule for private property. Discussed below, the vampire rule criminalizes all entry by a licensed carrier only private property, unless the owner has given advance permission.

- *Gazzola v. Hochul*, 2022 WL 17485810 (N.D.N.Y. Dec. 7, 2022). Firearms businesses ask for preliminary injunction against various N.Y. statutes. All failed because they lack as least one of standing, irreparable injury, or likelihood of success on the merits. Petition for Supreme Court certiorari before judgement denied.

Not included in the expedited appeal discussed above are: *Frey v. Nigrelli*, 2023 WL 2473375 (NSR) (S.D.N.Y. Mar.13, 2023) (denying PI for New York's longstanding ban on open carry, regulation that New York State residents who live outside of New York City obtain a separate license from the NYPD costing $340 to carry in the City, ban on carry on public transportation, and ban on carry in and near Times Square; New York's law referred to "Times Square," which New York City defined as the few blocks traditionally thought of as Times Square and many streets around it); *Goldstein v. Hochul*, 2023 WL 4236164 (S.D.N.Y. June 28, 2023) (Jewish congregants unlikely to succeed on merits in challenge to house of worship ban).

The most thorough decision thus far comes from the U.S. District Court for the District of New Jersey, with a 230-page opinion involving its near-clone of New York's law. The opinion involved two consolidated cases, *Koons v. Platkin* and *Siegel v. Platkin*, 2023 WL 3478604, (D.N.J. May 16, 2023). The opinion noted the New Jersey Attorney General's implicit contempt for its duty to justify infringements on civil rights:

> Remarkably, despite numerous opportunities afforded by this Court to hold evidentiary hearings involving the presentation of evidence, the State called no witnesses. And despite assurances by the State that it would present sufficient historical evidence as required by *Bruen* to support each aspect of the new legislation, the State failed to do so. . . .
>
> The legislative record reveals the Legislature paid little to no mind to *Bruen* and the law-abiding New Jerseyans' right to bear arms in public for self-defense. . . . When Assemblymen Brian Bergen asked the law's primary sponsor, Assemblymen Joseph Danielsen, if he had read *Bruen*, Danielsen responded "me reading the Court's decision is not part of the bill." . . . And when pressed by Bergen on whether the Founding Founders limited the Second Amendment to "town squares," "taverns," "public parks," and "beaches," Danielsen refused to answer the question, telling Bergen to "stay on the bill." . . . Throughout his questioning with Bergen, Danielsen evaded

> questions on the historical support for the new law. At another hearing, when Assemblywomen Victoria Flynn simply asked Danielsen where law-abiding citizens could conceal carry, Danielsen's response included such statements as: "reasonable persons exercising common sense would have an expectation that guns are not being brought in except by law enforcement . . . you are not going to mindlessly put a loaded firearm on your person and just leave the house." . . .
>
> This has left the Court to do what the Legislature had said it had done, but clearly did not. The Court has conducted its own exhaustive research into this Nation's history and tradition of regulating firearms that *Bruen* mandates. . . .
>
> [W]hat the State and the Legislature-Intervenors ignore, and what their empirical evidence fails to address, is that this legislation is aimed primarily — not at those who unlawfully possess firearms — but at law-abiding, responsible citizens who satisfy detailed background and training requirements and whom the State seeks to prevent from carrying a firearm in public for self-defense.
>
> Simply owning a firearm in New Jersey requires a lengthy and intensive background check. To acquire a firearm, an individual must have been issued a Firearms Identification Card, which requires a fingerprint background check and safety training. On top of that, every single handgun acquisition requires a separate permit to purchase. Permits are issued by local police departments. A FID card is valid until revoked, whereas a carry permit lasts only two years.

Here are the specific issues on which the court ruled, and its reasoning:

Carry license requirements.

Rejection of applicants who pass the background check. An applicant may be denied if the issuing officer finds that the applicant "would pose a danger to self or others." The determination is subject to judicial review. The discretion was upheld based on the long historical tradition of disarming dangerous people. The court was skeptical of the notion that the Second Amendment applies only to persons whom the legislature deems to be "virtuous citizens," but even setting that ahistorical notion aside, the historical statutory precedents were more than sufficient to uphold the new statute. A vagueness challenge was also rejected.

Four endorsers. Carry permits and permits to purchase handguns must have four endorsers. Although the State failed to provide any precedents for the endorser requirement in general, the Court conducted its own research and found sufficient precedents in some historic laws requiring endorsements for arms possession by certain disfavored groups — namely slaves, religious minorities (occasionally), and disloyal persons in wartime.

In-person interview for endorsers. For carry permits, the applicants and the endorsers must be interviewed in person. The latter requirement was held to be unduly burdensome.

"Such other information." Under the new law, an applicant must provide "such other information" that the licensing officer requests. Plaintiffs alleged

that the ominbus information requirements chills their free speech, but they failed to provide any specific examples, so the First Amendment request for a PI was denied.

The "such other information" requirement raises serious privacy concerns, such as if the issuing officer required urinalysis or medical records. Thus, the "such other information" is judicially limited "to only those objective facts bearing on the applicant's dangerousness or risk of harm to the public." As such, the requirement is consistent with *Bruen*'s affirmation of the legality of background checks for "Shall Issue" carry permits.

Fees. Before the state legislature enacted clone of New York's law in 2022, the fees were $5 for a FID, $2 for a handgun purchase permit, and $50 for a carry permit. These were raised to $50, $25, and $200. The court was skeptical that these fees were "exorbitant" (which *Bruen* forbids), and noted that the Second Circuit had previously upheld New York City's $340 fee for handgun possession license applicants, based on proof that the amount actually did reflect the City's costs in processing and investigating applications. The court was annoyed that New Jersey had failed to present any evidence about the costs justifying the fees, but the court declined to enjoin the provision.

Insurance mandate. Carry applicants must prove that they have a $300,000 policy "insuring against loss resulting from liability imposed by law for bodily injury, death, and property damage sustained by any person arising out of the ownership, maintenance, operation or use of a firearm carried in public."

This law has no historical precedent. Nineteenth century surety of the peace statutes are inapposite. They merely required the posting of a bond for six months or a year if a person had been judicially found to be threatening to breach the peace.

Likewise inapposite are 19th century tort laws imposing strict liability on firearms users for injuries. These laws are not analogous to a blanket mandate for everyone who bears arms.

Bans on carry at particular places.

Heller stated that some laws are "presumptively constitutional," including bans on carrying arms in "sensitive places such as schools and government buildings." The rule cannot be extended to cover all property owned by a government.

Public gatherings. The statute forbids carry "within 100 feet of a place for a public gathering, demonstration or event is held for which a government permit is required." Yet many colonial period laws *required* bringing arms to some or all public gatherings.

Some late nineteenth-century state or territorial laws did forbid arms carrying at a few or most public gatherings. Some of these laws were upheld by state courts based on an (incorrect) militia-centric understanding of the

Second Amendment. There are not enough of them to create a national tradition.

Traditionally, "sensitive places" are locations where certain core government functions take place, such as legislative chambers, courthouses, or polling places, and those places were traditionally protected by armed security provided by the government. Thus, the public gatherings ban is overbroad.

Zoos. Although a few zoos in the nineteenth century banned arms carry, many did not. The fact that children visit zoos does not turn zoos into sensitive places. The State's purported fear of poaching is "strained."

Parks, Beaches, Recreational Facilities, and Playgrounds. There is zero historical support for a ban at beaches. The playground ban was upheld as analogous to bans at schools. The history of carry bans in parks comes almost entirely from the late nineteenth century, and the one state law plus 25 municipal laws only covered 10% of the U.S. population and did not establish a representative tradition, especially considering their lateness.

Youth Sports Events. Upheld as analogous to schools.

Public Libraries and Museums. Void. The few late nineteenth-century laws did not establish a representative tradition.

Bars and Restaurants Where Alcohol is Served. A late nineteenth century Oklahoma law against firearms anyplace that liquor is sold, plus an 1859 Connecticut law against selling alcohol near a military encampment do not establish a representative tradition. Laws against selling guns to intoxicated persons are not analogous. Of course, private restaurant or tavern owners are free to ban carry if they choose.

Entertainment Facilities. Late nineteenth-century Tennessee, Texas, and Missouri laws plus the New Orleans law against firearms at public ballrooms do not establish a tradition.

Casinos. Gambling facilities are older than the United States. There is no historical precedent for a ban. [But all New Jersey casinos, presumably seeking to avoid trouble for their highly regulated industry, implemented carry bans.]

Airports. At oral argument, New Jersey said that people could carry handguns when dropping off or picking up passengers, as long as they do not enter the airport building. The court enjoined enforcement against passengers checking firearms in baggage pursuant to TSA rules, as long as the firearm is in a TSA-compliant locked case before it enters the airport, and the passengers do not linger with the case before checking it in. Absent evidentiary hearing, the court declined to go further at this stage.

Transportation Hubs. In briefing, the State contended that a "transportation hub" is only something that is multi-modal, such as Newark Penn Station, where subway and train lines meet. A "hub" does not include a mere stop at a train-only station. Awaiting further factual development, the court declined to issue an injunction.

Health Care Facilities. Plaintiffs had demonstrated standing only for medical offices and ambulatory care facilities. There being no precedents to justify a ban, the ban was enjoined for these locations.

Public Film Locations. Analogized to entertainment facilities and, as such, enjoined for lack of historical precedent.

Vehicles. A carry permit holder may not have a functional firearm in her own automobile. Instead, the handgun must be unloaded and stored in a locked case or in the trunk. This is a huge infringement on the right to bear arms for self-defense and is contrary to colonial tradition of protecting arms carry while traveling. The 1876 Iowa law against shooting at trains is hardly analogous. Two 1871 municipal laws against carrying gunpowder in vehicles were fire safety measures addressing the volatile blackpowder of the time. There are not such risks for modern metal-cased ammunition.

Fish and Game Restrictions. No plaintiffs had standing for the carry ban at a "state game refuge," because no plaintiffs have declared an intent to visit such a place. One plaintiff wanted to carry a handgun for personal protection while hunting with a shotgun. The ban was upheld based on historic fish and game laws. The ban on having a functional firearm in the vehicle while driving to or from hunting is void for the same reason as the general ban in vehicles.

Vampire rule for all private property. This is by far the most important restriction. It forbids licensed carriers from entering any private property unless the owner affirmatively grants permission for carrying. The term "vampire rule" arises from the myth that a vampire can only enter a home if it is invited in by its residents. As applied to private property that is not held open to the public, the court held that this presumption does not implicate the Second Amendment or any other part of the Constitution.

Some private property, however, is traditionally open to the public without special conditions, absent express signage to the contrary. This includes retail establishments. "Here, the State, not private landowners, burdens carriers' lawful entry onto the property of another with a 'no-carry' default. The Default Rule is thus state action insofar as the State is construing the sound of silence."

The vampire rule is not supported by historic laws against hunting or trapping on someone else's enclosed land without permission. Three broader Reconstruction-era laws from Texas, Louisiana, and Oregon are insufficient to establish a tradition under *Bruen.*

Other issues.

Equal protection. Exempting judges and prosecutors from the location restrictions does not violate Equal Protection, because they are at higher risk of criminal attack and are more thoroughly vetted than ordinary citizens.

Unjustified display. The ban on unjustified display is saved by the State's concessions that a *mens rea* of "knowing" is required and that the ban does not apply to drawing a handgun for self-defense.

"All guns are bad." This was the basic public interest argument of the legislative intervenors against a preliminary injunction. However, "the Intervenors' argument ignores the fundamental right of self-defense. Although the Intervenors cite to statistics involving gun violence, they do not cite to statistics involving law-abiding citizens with carry permits who used their firearms to save lives." Indeed, "despite ample opportunity for an evidentiary hearing, the State has failed to offer any evidence that law-abiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence."

In sum, the New Jersey statute "went too far, becoming the kind of law that Founding Father Thomas Jefferson would have warned against since it 'disarm[s] only those who are not inclined or determined to commit crimes [and] worsen[s] the plight of the assaulted, but improve[s] those of the assailants.'"

The New Jersey Attorney General asked the Third Circuit for a stay of the preliminary injunction pending appeal. The court granted the stay for most of the sensitive places, but not for the vampire rule or the automobile carry ban.

NOTES & QUESTIONS

3. [Add to Note] Subsequently a civil jury was convened for the purpose of removing her from office on bribery allegations. The sheriff resigned while the trial was in progress, allowing her to keep her pension. Three days after her resignation, the civil jury returned its verdict. It found that Sheriff Laurie Smith had committed six acts of corruption and willful misconduct in a pay-to-play scheme, where she doled out concealed carry permits to campaign donors and members of her inner circle, as well is failing to report gifts in exchange for the permits. Robert Salonga, *Court Formally Expels ex-Santa Clara County Sheriff Laurie Smith*, The Mercury News (Nov. 30, 2022).

Sheriff Smith has appealed her civil "conviction" which only resulted in her removal from office. She had been the sheriff of Santa Clara County for 24 years and served in law enforcement for nearly 50 years. *Id.*

In a pre-*Bruen* world where permits to carry a firearm in public could be a highly controversial decision in certain jurisdictions, is the granting of permits under a may-issue system only to close friends and inner-circle associates necessarily evidence of corruption? Isn't it just as likely that the permit issuer was simply employing a vetting process in which she had personal knowledge of the character of the people to whom she was issuing permits? Is it possible the Sheriff Smith was making the best of a corrupt system that made exercise of a fundamental right a discretionary (may-issue subjective) act — rather than a ministerial (shall-issue to all qualified applicants) act?

10. [New Note] Some states require that an applicant for a concealed carry

permit must achieve a certain score on a live shooting test. One scholar, observing that such requirements have no basis in the American historical tradition of firearms regulation, argues they are unconstitutional. Daniel F. Mummolo, *Bruen's Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment,* 136 Harv. L. Rev. 1412 (2023).

11. [New Note] *Permitless carry.* When *Bruen* was decided, 25 states allowed permitless concealed carry of handguns by adults who are not prohibited from owning firearms. In 2023, Florida and Alabama, having previously been shall-issue states, adopted permitless carry, bringing the state total to 27. In all permitless carry states except Vermont, carry permits are still available for willing applicants. A carry permit may be useful for a person who wants to carry when visiting another state, pursuant to state reciprocity agreements to honor each other's permits. In some states, licensed carry is allowed in certain areas that permitless carry is not. Reflecting on the trend, one writer urges that states should adopt "bifurcated statutory systems in which unlicensed and licensed carry coexist." In constitutional-carry states,

> concealed-carry permits should remain available, and citizens should have to undergo extensive training and background checks to obtain them. But data shows that permit numbers drop precipitously when states enact constitutional carry. Therefore, to incentivize armed citizens to voluntarily undergo thorough training and vetting, states should exempt permit holders from most location-based restrictions on firearms. By banning unlicensed and open carry in many public spaces — but authorizing licensed concealed carry — states can limit the number of firearms in public (especially those in untrained hands) while still complying with *Bruen*. This Article presents a comprehensive framework for how states should do so.

Tyler Smotherman, *More Rights, More Responsibilities: A Post-Bruen Proposal for Concealed-Carry Compromise* (2023).

12. [New Note] *D.C. 20-round limit*. A District of Columbia regulations said that a concealed handgun licensee could carry at most two ten-round magazines. DCMR § 24-2343.1. After *Bruen*, Dick Heller brought a case against the carry limit, and asked for a preliminary injunction. In response, the District repealed the ammunition carry limit. Metropolitan Police Department, Emergency Rulemaking, Repealing 24 DCMR § 2343.1 (Sept. 14, 2022). The parties then entered into a settlement agreement, which included voluntary dismissal of the case with prejudice. *Heller v. District of Columbia*, No. 22-cv-1894 (D.D.C. 2022) ("Heller IV").

13. [New Note] *Pre-Bruen offenses.* In New York, defendants can still be prosecuted for possession of unlicensed firearm if they did not apply for a carry permit pre-*Bruen*, even though the application is very expensive and obviously

would have been futile. *People v. Williams*, 76 Misc. 3d 925 (N.Y. Sup. Ct. 2002); *People v. Rodriguez*, 76 Misc. 3d 494 (N.Y. Sup. Ct. 2022). However, one court implied that New York's may-issue law did not make it impossible to get a carry permit as an ordinary citizen without particular self-defense needs. *See Williams*, 76 Misc. 3d at 930. In New York, the "Supreme Court" is the trial court of general jurisdiction.

B. LOCATION RESTRICTIONS

NOTES & QUESTIONS

6. [New Note] Joseph Blocher & Reva Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 NYU L. Rev. (forthcoming 2023). "Since the Founding era, governments have banned guns in places where weapons threaten activities of public life." "In this Article we argue that *Bruen*'s analogical method looks to the past to guide change in weapons regulation, not to foreclose change. We illustrate the kinds of sensitive place regulations *Bruen* authorizes with examples spanning several centuries and close by demonstrating — contrary to recent court decisions — that a 1994 federal law prohibiting gun possession by persons subject to a domestic violence restraining order is constitutional under *Bruen*." "Governments traditionally have protected activities against weapons threats in sites of governance and education: places where bonds of democratic community are formed and reproduced. We argue that *Bruen*'s historical-analogical method allows government to protect against weapons threats in new settings — including those of commerce and transportation — so long as these locational restrictions respect historical tradition both in terms of 'why' and 'how' they burden the right to keep and bear arms." "Just as *Bruen* extends the right of self-defense to weaponry of the twenty-first century, it also recognizes democracy's competence to protect places of public gathering against weapons threats of the twenty-first century."

7. [New Note] Here are some of the post-*Bruen* cases on various types of sensitive places:

- *D.C. government transit system*. The District bans licensed carry on all aspects of the government's mass transit system. D.C. Code § 7-2509.07(a)(6). Plaintiffs have no standing for a preenforcement challenge; although enforcement against plaintiffs is "credible," it is not "imminent." *Angelo v. District of Columbia*, No. 22-1878 (RDM) (D.D.C. Dec. 28, 2022).

- *National Institutes of Health*. Carry is banned by 45 C.F.R. § 3.42(g). Ban upheld in *United States v. Power*, 2023 WL 131050 (D. Md. Jan. 9, 2023); *United States v. Robertson*, 2023 WL 131051 (D. Md. Jan. 9, 2023); *United States v. Marique*, 2022 WL 17822443 (D. Md. Dec. 20, 2022); *United States v. Tallion*, 2022 WL 17619254 (D. Md. Dec. 13, 2022).
- *Minnesota State Fair*. In 2021, the State Agricultural Society adopted Rule 1.24, to ban licensed carry at State Fair. People who had already bought fair tickets for that year sued for a writ of mandamus. Defendant's motion to dismiss was granted. The ban passes strict scrutiny, and the fair is a sensitive place. *Christopher v. Ramsey County*, 621 F.Supp.3d 972 (D. Minn. 2022).
- *Almost all municipal property*. Glendale, California, banned guns on all city property, including parking lots, but not on public rights-of-way, such as streets and sidewalks. A facial challenge failed because plaintiffs conceded that at least some of the places may be prohibited. The as-applied challenge failed for lack of specificity about where plaintiffs want to carry. *California Rifle & Pistol Ass'n, Inc. v. City of Glendale*, 2022 WL 18142541 (C.D. Cal. Dec. 5, 2022).
- *Parks and recreation.* A 2021 Winchester, Virginia, ordinance banned guns in public parks, permitted events, and recreation centers. Winchester City Code § 16-34. A preliminary injunction was issued against the ban in public parks and at permitted events. The ruling was based on the Virginia Constitution right to arms, as informed by *Bruen*. A PI was denied for the ban in recreation centers, because since they are "government buildings," per *Heller*. *Stickley v. City of Winchester*, No. CL210206 (Cir. Ct. Winchester Sept. 27, 2022).
- *Public housing projects.* Lease prohibitions on tenant arms possession have been held unconstitutional ever since *Heller*. *See*, *e.g.*, *Winbigler v. Warren County Housing Authority*, 2013 WL 1866908 (C.D. Ill., May 1, 2013); *Doe v. East St. Louis Housing Authority*, no. 3:18-CV-545-JPG-MAB (S.D. Ill., Apr. 11, 2019).

  So a government-subsidized housing landlord cannot evict tenants for on possessing firearms in their own apartments. *Columbia Hous. & Redevelopment Corp. v. Braden*, 2022 WL 727567 (Tenn. Ct. App. Oct. 13, 2022).
- *Day care and foster homes*. Illinois requires a license to operate a day care or be a foster parent. By regulation, day care licensees and foster parent licensees may not have handguns in the home. Long guns must be disassembled and locked in a container. 89 Ill. Admin. Code §§ 406.8(a)(17)-(18). Pre-*Bruen*, the ban was upheld under intermediate scrutiny. *Miller v. Smith*, 2022 WL 782735 (C.D. Ill. Mar. 14, 2022). The

Seventh Circuit remanded for reconsideration in light of *Bruen*. *Miller v. Smith*, 2023 WL 334788 (7th Cir. Jan. 20, 2023).

C. SCHOOLS

Interpreting the separation of powers in the Montana Constitution, the Montana Supreme Court held that the Montana legislature did not have the power to enact House Bill 102, which limited the power of state university regents to forbid bearing arms on university campuses. *Board of Regents v. State*, 512 P.3d 748 (2022).

NOTES & QUESTIONS

2. [New Note] After the Supreme Court decision in *Lopez v. United States* (Ch. 9.B.3.b), Congress re-enacted the federal Gun-Free School Zones Act, this time with a nominal jurisdictional predicate about interstate commerce, phrased broadly enough so as to cover every firearm. The Act bans gun carrying within a thousand feet of a school, which is to say, virtually everywhere in most towns or cities. The act exempts licensed carry pursuant to a state license *issued by the state where the school is located.* This does not include persons who are carrying pursuant to interstate reciprocity — such as when two states agree to recognize each other's permits, so that a visitor from state A can carry in state B. Law enforcement officers and retired officers have national carry rights pursuant to the federal Law Enforcement Officer Safety Act (LEOSA). 18 U.S.C. §§ 926B & 926C. LEOSA, however, does not over-ride the ban on carry in thousand-foot school zones. A recent article suggests that Congress should amend the Act "to establish a more reasonable tie to interstate commerce and to exempt the lawful carry and defensive use of firearms by off-duty police officers and private citizens." Tyler R. Smotherman, *Troubleshooting the Gun-Free School Zones Act: A Call for Amendment in the Age of Constitutional Carry*, 55 Tex. Tech L. Rev. 359 (2023).

3. [New Note] A challenge to the University of Michigan's gun ban was remanded for reconsideration in light of *Bruen*. *Wade v. University of Michigan*, 981 N.W.2d 56 (Mich. 2022). Concurring, Justice Viviano details some things to be investigated on remand:

- "[I]t is not at all apparent that *Heller*'s brief discussion of sensitive places was intended to establish a rule that all entities historically known as 'schools' could permissibly ban firearms, meaning the only question that would remain for future cases is whether the entity at

issue was considered a 'school.' Nor is it even clear that the Court meant to include universities and coroser

- lleges in its reference to 'schools,' let alone to say that such locations can completely ban firearms."
- Historical prohibitions on campus carry were more limited. *E.g.*, only for students, or only for concealed carry.
- "[A]re large modern campuses like the University of Michigan's so dispersed and multifaceted that a total campus ban would now cover areas that historically would not have had any restrictions?"
- "Many areas on campus, such as roadways, open areas, shopping districts, or restaurants, might not fit the 'sensitive place' model suggested by *Heller*…"
- "[B]ecause the campus is so entwined with the surrounding community, the ban might also burden carrying rights on locations outside campus, as many individuals will regularly go from campus to off-campus environments, even in a single trip; because they cannot bring a gun on campus, they will not feasibly be able to bring the gun to the off-campus locations either."

On remand, the Michigan Court of Appeals upheld the University's ban. *Wade v. Univ. of Michigan*, 2023 WL 4670440 (Mich. App. July 20, 2023).

> . . . Plaintiff also relies heavily on Justice VIVIANO's concurrence, but the question posed by Justice VIVIANO is not the correct inquiry and his suggested analysis is inconsistent with *Bruen*. *Bruen* expressly stated that the inapplicability of the Second Amendment to sensitive places is settled. Finally, Justice VIVIANO's concurrence rests on the incorrect premise that colleges and universities are inherently larger and more complex institutions than K-12 schools. All sensitive places abut other property and that proximity alone cannot render a firearm prohibition invalid. . . .
>
> . . . Samuel Johnson's dictionary from 1773 defines "school," in part, as: "A house of discipline and instruction[,]" and "[a] place of literary education; an university. It defines "university" as "[a] school, where all the arts and faculties are taught and studied." Thus, considering either time period [1791 or 1868], the term "school" included universities.
>
> Notably, the reference to "schools" being sensitive places was first made by Justice SCALIA in *Heller*. In discussing the "longstanding" tradition of laws forbidding firearms in sensitive places such as "schools and government buildings," Justice SCALIA did not define the term "school," nor did he cite or rely on any authority. *Heller*, 554 US at 626. Given that the term "school" is not found in the Second Amendment, but was first used by Justice SCALIA, it is not clear that either 1791 or 1868 are the correct time periods to determine the meaning of that term as used in *Heller*. Nonetheless, the plain meaning of "school" when Justice SCALIA used the term in 2008 similarly includes universities. Merriam-Webster's Collegiate Dictionary (2003) defines "school," in part, as "an organization that provides instruction," such as a "college, university." Significantly, in the law review article cited in *Bruen* by Justice THOMAS, the authors presume that Heller's reference to "schools"

included universities. *See The "Sensitive Places" Doctrine*, 13 Charleston L Rev. 205, 251-52 (2018). Thus, at all potentially relevant time periods, the term "school" includes universities, and thus, the University is a "sensitive place." . . .

Finally, GOA [Gun Owners of America], as amicus in support of plaintiff, argues that the "sensitive places" doctrine is a mere presumption, which can be rebutted absent a historical analogue. In *Heller*, 554 US at 627 n 26, the Court stated in a footnote following its reference to "sensitive places" the following: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Thus, it is true that the Court in *Heller* referred to such regulations as only *presumptively* lawful. However, in *Bruen*, the Court clearly and unequivocally pronounced that it could assume that it was "settled that these locations were 'sensitive places' where arms carrying *could be prohibited* consistent with the Second Amendment." *Bruen*, 142 S Ct at 2133 (emphasis added). Accordingly, there is no support for the assertion that the finding of a "sensitive place" results in a mere presumption that may be rebutted.

CHAPTER 15

WHAT? LAWS ON TYPES OF ARMS

A. "ASSAULT WEAPON" AND MAGAZINE BANS

Bruen's rejection of the "tiers of scrutiny" or "means-end" analysis in Second Amendment cases and its reaffirmation of the Text, History, and Tradition test means that "assault weapon" and magazine bans will receive greater judicial scrutiny. The constitutionality of such bans already is being litigated or re-litigated under the *Bruen* test. After deciding *Bruen,* the Supreme Court granted certiorari, vacated the judgment, and remanded (GVR'd) *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), *vacated* 142 S. Ct. 2898 (Mem.) (June 30, 2022), a case challenging Maryland's ban on "assault weapons." Prior to *Bruen,* the Fourth Circuit upheld the ban under its decision in *Kolbe.* After *Bianchi v. Frosh* was vacated and remanded, the Fourth Circuit heard oral arguments in December 2022 and has yet to issue an opinion.

Several post-*Bruen* challenges have been filed against state and local "assault weapon" bans. Two federal district judges in Colorado temporarily restrained enforcement of municipal ordinances banning "assault weapons." *See Rocky Mountain Gun Owners v. Board of County Commissioners of Boulder County,* 2022 WL 4098998 (D. Colo. Aug. 30, 2022) (2022 WL 4098998)*; Rocky Mountain Gun Owners v. Town of Superior,* No. 22-cv-01685-RM (D. Col. July 22, 2022). The latter case was closed on October 12, 2022, with a new case filed the same day. *See Rocky Mountain Gun Owners v. Town of Superior,* No. 22-cv-02680-NW.

Federal district judges in *Bevis v. City of Naperville,* 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023), and *Herrera v. Raoul,* 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023), declined to issue preliminary injunctions against state and local bans in Illinois, while another federal district judge enjoined the state's ban in *Barnett v. Raoul,* 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023). The Seventh Circuit consolidated appeals from these decisions and heard oral arguments in June 2023.

A preliminary injunction against Delaware's "assault weapon" and magazine bans was denied in three consolidated cases, *Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety and Homeland Security,* No. 2023 WL 2655150 (D. Del. Mar. 27, 2023), *Gray v. Attorney General Delaware,*

No. 1:22-cv-01500, and *Graham v. Attorney General Delaware,* No. 1:23-cv-00033. The three consolidated cases currently are on appeal to the Third Circuit.

A federal district judge declined to issue a preliminary injunction against enforcement of Washington State's "assault weapons" ban in *Hartford v. Ferguson,* 2023 WL 3853011 (June 6, 2023). The case continues to be litigated in district court.

The Ninth Circuit in *Rupp v. Bonta,* 2022 WL 2382319 (9th Cir. June 28, 2022), and *Miller v. Bonta,* 2022 WL 3095986 (9th Cir. Aug. 1, 2022), vacated district court decisions upholding and invalidating, respectively, California's "assault weapons" ban and remanded those cases for consideration under *Bruen.* Both *Rupp* and *Miller* currently are pending in district courts.

Other cases challenging state "assault weapon" bans are pending in Connecticut (*National Ass'n for Gun Rights v. Lamont*), Massachusetts (*Capen v. Campbell*), and New Jersey (*Cheeseman v. Platkin*).

Plaintiffs challenging "assault weapon" bans in the post-*Bruen* cases typically emphasize *Heller's* "common use" test for determining whether possession and use of a particular arm is protected by the Second Amendment. They argue that "assault weapons" such as the widely-popular civilian AR-15 semiautomatic rifle are commonly possessed by ordinary, law-abiding citizens for the lawful purposes, including self-defense. If such firearms are "in common use," they may be dangerous (as are all firearms), but they are not "unusual," and thus not within our historical tradition recognized in *Heller* of prohibiting "dangerous and unusual" weapons. A complete ban on such protected firearms is both self-contradictory and unconstitutional, and renders that protection meaningless. Once it is determined that a firearm is commonly used for lawful purposes, the analysis ends and no historical inquiry is necessary.

Government defendants argue that "assault weapons" like the AR-15 are far too dangerous for citizens to own and therefore can be banned in the interest of protecting public safety. They assert that the AR-15 is exceptionally dangerous in its rate of fire, wounding power, usefulness in high-fatality mass shootings, and danger to law enforcement and the public. They next either (1) reconceive *Heller's* historical tradition of prohibiting "dangerous and unusual" weapons into bans on "unusually dangerous" firearms or (2) attempt to establish a historical tradition of banning commonly owned firearms that subsequently are recognized as exceptionally dangerous. The latter argument typically requires reading *Heller*'s "in common use" test as simply creating the *presumption* of that possessing such weapons is constitutionally protected, but that presumption can be overcome by contrary historical analogues. The government defendants then point to historical examples of regulations on Bowie knives, billy clubs, slungshots, trap guns, multi-shot revolvers, some semiautomatic weapons, and, much later, automatic weapons under the NFA, state, and local laws. The cited laws were not widespread and mostly regulated

how such weapons were used; complete bans were rare. Yet, some courts have found them sufficiently analogous to deny motions for preliminary injunctions.

NOTES & QUESTIONS

20. [New Note, updated from 2022 Supplement] How does Heller's "in common use" test fit with Bruen's emphasis on historical tradition? Does it matter whether the challenged law is a regulation or complete ban? (Remember, there was no dispute about handguns being protected arms in Bruen, only whether New York's restrictive public carry regulation was historically supported.). If a firearm is commonly possessed by law-abiding citizens for lawful purposes, does the analysis end there when the challenged law operates as a complete ban on possession and use of that firearm? Or does a firearm being "in common use" at the time merely create a rebuttable presumption that the challenged ban is unconstitutional, shifting the burden to the government to show that the law is justified by historical analogues?

21. [New Note] How does *Heller*'s recognition of a historical tradition of prohibiting "dangerous and unusual" weapons affect the constitutional analysis in cases involving "assault weapon" bans? Is "dangerous and unusual" the same as "unusually dangerous"? *See Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in the judgment) (explaining that "this is a conjunctive test: [a] weapon may not be banned unless it is *both* dangerous and *unusual*.") (original emphasis). Can the government justify such bans by pointing to historical analogues establishing a tradition of banning commonly-owned firearms because of their exceptional dangerousness?

22. [New Note] Even if there is a historical tradition banning weapons — even commonly owned firearms — that are unusually dangerous, there remains the separate question of whether the "assault weapons" covered by modern bans are far more dangerous than other firearms. The exceptional lethality of such firearms is the centerpiece of the government defendants' arguments supporting the bans: AR-style rifles are far more dangerous than other modern firearms and ill-suited for lawful activities like self-defense, therefore bans on such firearms are both justified and constitutional. This argument has strong emotional appeal. But is it accurate factually? Are AR-style rifles *in fact* far more dangerous than other firearms, especially other rifles and shotguns? Is the AR-15 too dangerous for civilians to possess? For arguments refuting such claims made by both lower courts and government defendants, see Brief *Amicus Curiae* The International Law Enforcement Educators and Trainers Ass'n, et al., in Support of Plaintiffs-Appellants, Delaware State Sportsmen's Assoc., Inc., et al., v. Delaware Department of Safety and Homeland Security, et al., (Nos. 23-1633, 23-1634, 23-1641), 3rd Cir. (July 10, 2023); David Kopel & E. Gregory Wallace, *AR Rifle Ammunition Is Less Powerful Than Most*

Other Rifle Ammunition, The Volokh Conspiracy (Apr. 11, 2023); David Kopel & E. Gregory Wallace, *How Powerful Are AR Rifles?*, The Volokh Conspiracy (Feb. 27, 2023).

23. [New Note] For an extensive survey of restrictions on particular types of arms before 1900, see *The History of Bans on Types of Arms Before 1900*, 50 J. of Legis. (forthcoming 2024) (2023 Supp. Ch. 6.D).

24. [New Note] One argument justifying "assault weapon" bans is that they easily can be modified to fire as rapidly as a fully-automatic weapon (machine gun) by using bump stocks, trigger cranks forced-reset triggers, or binary triggers. *See* 2023 Supp. Chs. 8.E.2.b, 15.D.3. The "Glock Switch" is a "relatively simple, but illegal, device that allows a conventional semi-automatic Glock pistol to function as a fully automatic firearm. The switch is classified as a machine gun under federal law." Bureau of Alcohol, Tobacco, Firearms and Explosives, *Internet Arms Trafficking*. Glock switches have surged in popularity among criminals the last few years. Would that be an argument for banning Glock handguns? Why or why not?

25. [New Note] What effect do laws limiting magazine capacity to 10 rounds or less have on defensive gun uses? The Heritage Foundation says "bans on the civilian possession of standard-capacity magazines threaten to have devastating effects on law-abiding gun owners who find themselves outnumbered, outgunned, or otherwise at a disadvantage against criminal actors." Amy Swearer, *If You Can't Beat 'Em, Lie About 'Em: How Gun Control Advocates Twist Heritage's Defensive Gun Use Database in the "Larger-Capacity" Magazine Debate*, Heritage Found. (May 17, 2023). The report concludes that "[a]dvocates of magazine capacity limits overstate their potential public safety benefits and underestimate the myriad ways criminals can circumvent such limits."

B. SERIAL NUMBERS

The first post-*Bruen* case on serial numbers held unconstitutional a particular application of serial number laws. A U.S. District in West Virginia agreed with the government that requiring firearms manufacturers to engrave or cast serial numbers is constitutional. 18 U.S.C. § 923(i). The requirement is an example of "laws imposing conditions and qualifications on the commercial sale of arms." Such laws were said to "presumptively constitutional" in *Heller*, 554 U.S. at 626-27.

But *United States v. Price* did not involve a commercial regulation. Federal law prohibits possession of a firearm whose serial number is removed,

obliterated, or altered. 18 U.S.C. § 922(k). Defendant Price was a convicted felon caught with a pistol, and convicted of being a felon in possession under 18 U.S.C. § 922(g)(1). He was also charged with the 922(k) violation, which makes possession of a firearm with an altered/obliterated number unlawful for everyone. *United States v. Price*, 2022 WL 6968457 (S.D.W.Va., Oct. 12, 2022).

Because the ban on simple possession, unconnected to interstate commerce, is not a commercial regulation, the court examined the tradition and history of serial number laws.

> Serial numbers were not broadly required for all firearms manufactured and imported in the United States until the passage of the Gun Control Act of 1968 . . . Notably, these prohibitions were only on transporting, shipping, or receiving firearms — that is to say, when the firearms were in the stream of commerce.
>
> . . . In fact, it was not until the Crime Control Act of 1990 that Section 922 was amended to insert 'or to possess or receive . . .'"
>
> . . . According to *Bruen*, that the societal problem [gun crime] addressed by Section 922(k) was likely in existence at the founding but not addressed by similar means "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.". . .
>
> A firearm without a serial number in 1791 was certainly not considered dangerous or unusual compared to other firearms because serial numbers were not required or even commonly used at that time.

A different result was reached in Indiana. *United States v. Reyna*, 2022 WL 17714376 (N.D. Ind. Dec. 15, 2022):

> Guns with obliterated serial numbers belong to "those weapons not typically possessed by law-abiding citizens for lawful purposes" so possession of such guns isn't within the Second Amendment's scope. . . . A law-abiding citizen who uses a gun for self-defense has no reason to prefer a deserialized gun to a gun with serial number intact.
>
> . . . Prohibiting possession or use of a particular type of gun might bring a regulation within the Second Amendment's scope if the class of firearms is defined by its functionality. [As in *Heller*'s explanation why many persons prefer handguns.]. . .
>
> . . . [T]he § 922(k) prohibition applies to a class of guns defined solely by a nonfunctional characteristic: the serial number. See *United States v. Marzzarella*, 614 F.3d [85, 94 (3d Cir. 2010)](Ch. 16.B) ("Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. Heller distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality.").

C. NONFIREARM ARMS

5. Electric Weapons

A U.S. District Court in Rhode Island held that the state's bans on electric stun guns violated the Second Amendment according to *Heller*. The opinion also explained why the judge believed *Heller* to have been wrongly decided. *O'Neil v. Neronha*, 2022 WL 782547 (D.R.I. Mar. 15, 2022).

6. Billies

In the nineteenth century, "billie" and "billet" were used for some flexible impact weapons — short leather bags containing a weight at one end, used as a bludgeon. Robert Escobar, *Saps, Blackjacks and Slungshots: A History of Forgotten Weapons* 9 (2018). But by the twenty-first century American law was treating them like a "billy club" — a hardwood straight stick.

Pre-*Bruen*, a challenge to California's ban on the "billy" failed because the law was 104 years old, and therefore "longstanding" under *Heller*. *Fouts v. Bonta*, 561 F. Supp. 3d 941 (S.D. Cal. 2021). Post-*Bruen*, the decision was reversed and remanded for reconsideration in light of *Bruen*. 2022 WL 4477732 (9th Cir. Sept. 22, 2022).

A Hawaii statute outlawed possession of a "billy" outside the home. Haw. Rev. Stats. § 134-51. Hawaiian law had prohibited possession of billy clubs by defining them as dangerous weapons. The suit was brought on Second Amendment grounds arguing that clubs are protected arms. Like Federal Judicial Security guard Dick Heller, who carried a handgun at work but was not allowed to have one at home, the plaintiffs in Hawaii were security guards at federal buildings. They wished to carry batons when not at work.

As the case was framed, "Plaintiffs say a 'billy' is the same as a 'baton.' They mean 'the same type of baton/billy policemen are usually issued and an expandable baton for self-defense and other lawful purposes.'" *Yututake v. Lopez*, No. 22-00323 (Jan. 10, 2023).

On March 23, 2023 a Stipulated Final Judgment and Permanent Injunction was filed. The injunction permanently enjoins enforcement against the named plaintiffs and "all other persons who are not otherwise legally prohibited from possession of a "billy" [as that term is defined by HRS § 134-51(a)]."

The stipulation provides that "baton" and "billy" meant the same thing. They are "designed for self-defense," "not dangerous and unusual weapons," "in common use," and "[t]he typical use of a baton is for a lawful purpose." The stipulated judgment does not prevent prosecution for unlawful use of a "billy" (defined in the stipulation as: cudgels, truncheons, police batons, collapsible batons, billy clubs, or nightsticks), nor does the stipulated judgment impede the enforcement of HRS § 134-51(a) against any person with respect to "any

dirk, dagger, blackjack, slug shot, . . . metal knuckles, pistol, or other deadly or dangerous weapon." The stipulated judgment effectively excludes billy clubs from the definition of "other deadly or dangerous weapon" in HRS § 134-51(a).

D. NEW TECHNOLOGIES

2. Homemade Guns, Computer Numerical Control (CNC), and 3D Printing

According to the Giffords Law Center, the District of Columbia, and ten states (California, Connecticut, Delaware, Hawaii, Nevada, New Jersey, New York, Rhode Island, Virginia, and Washington) have enacted laws to restrict homemade firearms, as have some cities. The Nevada provision has been held to violate the Second Amendment. *Polymer 80, Inc. v. Sisolak, et al.*, No. 21-CV-00690 (Nev. 3rd Dist. Dec. 10, 2021). The decision is being appealed.

A similar injunction was issued against Delaware's new statute broadly banning home manufacture. 11 Del. C. § 1459A; HB 125. The court granted a preliminary injunction against the prohibition of possession of unfinished firearm frames and receivers, the prohibition of possession of unserialized firearms, and the prohibition of manufacture of unserialized firearms. *Rigby v. Jennings*, 2022 WL 4448220 (D. Del. Sept. 23, 2022).

A preliminary injunction was denied for the prohibition on distribution of unserialized firearms. If FFLs are not allowed to transfer unserialized guns, the same restriction can be applied to private transactions. Also denied, under First Amendment intermediate scrutiny, was an injunction for the prohibition on distribution of 3D-printing gun files.

In California, a new statute prohibits anyone other than an FFL from using, possessing, selling, or transferring a computerized numerical code ("CNC") milling machine that has a sole or primary purpose of manufacturing firearms. Cal. Pen. Code § 29185; AB 1621 § 25. The district court denied a motion for a preliminary injunction. The plain text of the Second Amendment does not cover personal manufacture. *Defense Distributed v. Bonta*, 2022 WL 15524977 (C.D. Cal. Oct. 21, 2022), *adopted* 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

Anonymous users of websites that disseminate instructions for 3D printing of firearms uploaded instructions for printing parts and accessories with marks belonging to Everytown for Gun Safety. Everytown sued, alleging trademark infringement; defendants argued that the marks were parody, which is an exception to trademark protection. The Second Circuit remanded the case to the district court to determine whether the defendants can proceed anonymously. *Everytown for Gun Safety Action Fund v. Defcad, Inc., et al.*, No. 22-1183 (2d Cir. July 12, 2022) (nonprecedential summary order).

For the ATF's new regulation on homemade firearms, see Chapter 9.D of this 2023 Supplement.

NOTES & QUESTIONS

12. [New Note] Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35 (2023). This is first law review article to examine the legal and policy history of home manufacture. The article explains "why the knowledge for building arms was essential in colonial America," "the arms shortages throughout the Revolutionary War and how domestic arms production filled the void," "how many of the most important innovations in firearms and ammunition were inspired by self-made arms, including the wheellock mechanism, percussion ignition, detachable box magazines, and classic firearms such as the Henry Rifle, M1 Garand, and AR-15." Finally, the article surveys "the history of regulations on arms built for personal use," and finds those laws to be "uncommon and of recent vintage." Whereas "the tradition of building arms for personal use is deeply rooted in American history, . . . there is no tradition of regulating self-built arms. Moreover, under Supreme Court precedent, common arms are constitutionally protected regardless of how they are acquired. Thus, the Second Amendment protects an arm that is self-built if that type of arm is commonly possessed."

3. Improved Triggers and Other Modifications

See Chapter 8.E.2.b of this 2023 Supplement for ATF's new enforcement actions against Forced Reset Triggers, with the Bureau expressly distinguishes from binary triggers.

Binary triggers are banned (or partially banned) in these states: California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Maryland, New Jersey, New York, Rhode Island, and Washingon. They also are banned in Washington, DC. Several states ban "trigger activators" that simulate machine-gun fire, but not all of those laws cover binary triggers, as opposed to trigger cranks or forced-reset triggers. Giffords Law Center lists state laws on trigger activators and summarizes the content of each state's law.

E. BANS BY OTHER MEANS: USING GENERAL LAWS OR APPROVED GUN LISTS TO BAN FIREARMS AND AMMUNITION

1. Federal Consumer Product Safety Act

A new article argues that Congress should empower the Consumer Product Safety Commission "to regulate the safety of guns as products, without granting the Commission authority over 'gun control' as traditionally understood." "Under this approach, the firearms industry would be obligated to report safety defects, recall dangerously defective firearms, and offer

remedies to consumers. The Commission could also consider adopting common-sense product safety standards (such as regulations to ensure that new firearms have functional safety devices, and do not discharge without a trigger pull), just as the Commission adopts safety standards for many other consumer products. But the Commission would be precluded from regulating guns to curtail gun violence or suicide, or to reduce guns' prevalence." Benjamin L. Cavataro, *Regulating Guns as Products*, 92 Geo. Wash. L. Rev. (forthcoming 2024).

3. Massachusetts Consumer Protection Act

In decision a few weeks before *Bruen*, the Massachusetts law was upheld by a district court under intermediate scrutiny. Granata v. Healey, 603 F.Supp.3d 8 (D. Mass 2022). The First Circuit vacated and remanded for reconsideration under *Bruen*. *Granata v. Campbell*, 2023 WL 4145911 (1st Cir. Apr. 7, 2023).

4. California's List of Permissible Handguns

In November of 2020, *Renna v. Becerra,* Case No.: 3:20-cv-2190, was filed in the United States District Court for the Southern District of California seeking to renew a challenge to California's Unsafe Handgun Act (UHA), that was upheld *in Pena v. Lindley,* 898 F.3d 969 (9th Cir. 2018), *cert. denied at Pena v. Horan,* 141 S. Ct. 108 (2020).

After extensive pre-trial litigation, the district court in *Renna* issued an Order Granting In Part and Denying In Part Plaintiffs' Motion for Preliminary Injunction on April 3, 2023. California sought a stay and appealed to the Ninth Circuit, *Renna v. Bonta, California Attorney General,* Case No.: 23-55367. The case is set for oral argument on August 23, 2023.

Shortly after the U.S. Supreme Court filed *Bruen*, another case was filed in federal court also seeking to relitigate a challenge to California Unsafe Handgun Act. *Boland, et al., v. Bonta, California Attorney General,* Case No., 8:22-cv-01421, was filed in the Central District of California on August 1, 2022. The District Court issued an injunction granting plaintiffs' motion for are preliminary injunction on March 20, 2023. California sought a stay and appealed to the Ninth Circuit, *Boland v. Bonta,* Case No.: 23-55276. The principle briefs have been filed in this matter, but has not yet been set for oral argument.

In both cases, considerable testimony (both written and oral) was reviewed in order to apply the new *Bruen* test to gun control policies that existed at the time of the ratification of the Second Amendment, and to determine whether any of these modern laws being challenged today have founding era analogues.

Both district courts ultimately granted preliminary injunctions against the California roster's requirement for magazine disconnects, chamber loaded indicators, and the impossible microstamping requirement. The courts observed that *Bruen's* legal history analysis shows zero evidence of a tradition allowing the government to mandate that firearms have certain features. Nineteenth century laws in Massachusetts and Maine had required "proofing" of firearms manufactured in those states. (With an exception for the federal armory in Springfield, Massachusetts).

But proof-testing is simply testing an individual gun to make sure that it can function properly — for example, that it is strong enough to withstand the gunpowder explosion and not explode in the user's hands. Proof-testing against manufacturing defects is not analogous to requiring manufacturers to provide specific features on firearms.

The decisions did not hold the California roster itself unconstitutional. The district court did not rule against the requirement that manufacturers must submit sample firearms to testing labs to ensure that, for example, the model of firearm does not discharge when dropped. *Renna v. Bonta*, 2023 WL 2756981 (S.D. Cal. Mar. 31, 2023); *Boland v. Bonta*, 2023 WL 2588565 (C.D. Cal. Mar. 20, 2023).

The California Attorney General's request for stay pending appeal was granted, but only as to the magazine disconnect and chamber loaded indicator requirements – not the impossible microstamping requirement. As a result, new firearms models that have both a CLI and a magazine disconnect are now eligible to be added to the California roster. As this Supplement is being written, the first and only model to be added to the roster is the SIG SAUER P320.

5. [New Section] *Restrictions on Speech about Firearms*

a. [New Section] California Ban on Firearms Advertising for Minors

Enacted in 2022, section 22949.80 of the California Business & Professions Code forbids any "firearm industry member" to "advertise, market, or arrange for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." Several associations, businesses, firearms instructors, and gun rights groups filed a First Amendment lawsuit. One of the plaintiffs, the Second Amendment Foundation, is represented by Professor Donald Kilmer, coauthor of this textbook. *See* Complaint, *Junior Sports Magazines v. Bonta*, 2022 WL 14365026 (C.D. Cal., July 8, 2022).

The District Court denied the plaintiffs' motion for a preliminary injunction. *Junior Sports Magazines v. Bonta*, 2022 WL 14365026 (C.D. Calif. Oct. 24, 2022). An appeal to the Ninth Circuit was filed and was argued to a

three-judge panel in on June 28, 2023 in Pasadena, CA. This case was related to, but not consolidated with, *Safari Club International v. Bonta*, 2023 WL 184942 (E.D. Calif. Jan 12, 2023), *appeal filed*, *Safari Club International v. Bonta*, No.: 23-15199 (9th Cir. Feb. 14, 2023)

The statute applies to "commercial speech." Commercial speech is regulated by its own four-part *Central Hudson* test, which is a weaker version of normal First Amendment intermediate scrutiny.

Applying *Central Hudson*, the court found that some of the speech was not categorically unprotected. The ban covers some speech that is not about an unlawful product and is not misleading. "For example, an advertisement for a firearm that depicted a minor possessing a firearm while engaged in a recreational sport under parental supervision would not concern unlawful activities or be misleading."

However, the ban was upheld because of the government's interest in addressing the "substantial problem of firearm-caused deaths among minors" "When compared to advertising restrictions on alcohol and tobacco products, § 22949.80's focus on advertising that is attractive to minors — despite possibly sweeping within its ambit some advertising that may also appeal to adults — almost certainly survives intermediate scrutiny."

"[I]t is likely that a restriction on firearm advertising directed towards minors will lead to a reduction in the demand for firearms by minors, it follows that there will be fewer firearms in the hands of minors, and, as 'simple common sense' dictates, fewer instances of gun violence — whether intentional or unintentional . . ."

The appeal was argued before the Ninth Circuit on June 28, 2023. This case was related to, but no consolidated with *Safari Club International v. Rob Bonta*, Case No.: 23-15199.

b. [New Section] **Required Firearm Dealer Disclosure**

Anne Arundel County, Maryland, requires gun stores to distribute health literature selected by the county health department. The county choose a suicide prevention pamphlet jointly produced by the National Shooting Sports Foundation and the American Foundation for Suicide Prevention. The health department also requires a one-page pamphlet on conflict resolution resources, produced by the department. Plaintiff association's claims of harms to its members were insufficient for standing. And the First Amendment allows some compelled commercial speech, such as safety disclosures. *Maryland Shall Issue v. Anne Arundel County*, 2023 WL 2599548 (D. Md. Mar. 21, 2023).

Under Texas law, private businesses can exclude licensed handgun carriers by posting a sign with specified language and format. Carrying in violation of the sign is a criminal trespass. Alternatively, a business can just orally tell a handgun carrier to leave, and if that carrier does not leave, he is guilty of

trespass. Texas Penal Code §§ 30.06-07. A church and coffee shop wanted to exclude licensed carry with a sign, but using their own words, rather than the statutory language. Plaintiffs had no standing, since they suffered no injury that could be redressed by a judgement in their favor. *Bay Area Unitarian Universalist Church v. Paxton*, 2023 WL 2563998 (S.D. Tex. Mar. 16, 2023).

c. [New Section] **Federal Trade Commission**

The Federal Trade Commission (FTC) has been granted authority by Congress to act against "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An advertisement is "unfair" if it causes "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id.* § 45(n). Anyone may file a complaint with the FTC, but the FTC has no obligation to respond or take any action.

In 1996, two petitions were filed asking the FTC to prevent advertising on the protective benefits of handgun ownership. They argued that handguns make a home more dangerous, not safer, and that defensive gun use is rare. Center to Prevent Handgun Violence et al., Petition before the Federal Trade Commission; Jon S. Vernick et al., *Regulating Firearm Advertisements that Promise Home Protection: A Public Health Intervention*, 277 JAMA 1391 (1997) (describing petition and other work by the Johns Hopkins Center for Gun Policy and Research). The FTC did not take action on the petitions. The petitions are critiqued in David B. Kopel, *Treating Guns Like Consumer Products*, 148 U. Penn. L. Rev. 1701 (2000).

In April 2022, Brady United (the new name for the 1996 Center to Prevent Handgun Violence), along with the Giffords Law Center, March for Our Lives, and the Firearms Accountability Task Force filed a new FTC petition, this one much longer than the 1996 version.

6. [New Section] ***Qualified Immunity for Illegal Seizures of Arms***

The ratification of the Fourteenth Amendment in 1868 granted clear textual power for Congress to enact civil rights legislation. Section 5 of the Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Accordingly, Congress revised and re-enacted the Civil Rights Act of 1866 (Ch. 7.C), and added new laws. One of them was the 1871 Ku Klux Klan Act; it was one of the three Enforcement Acts aimed at stopping the Klan's reign of terror in the former Confederate states. The Acts succeeded, and the administration of President Ulysses Grant (1969-77) crushed the First Ku Klux Klan. The 1871 Act created a federal cause of action against government employees who violate a victim's civil rights. 42 U.S.C § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The violation must be "under color" of law. That is, the government employee must at least be purporting to be carrying out official duties. So if a police officer who was off-duty and out of uniform attacked a random person for no reason, the act would not be under color of law. The legal remedy would not be a section 1983 action; rather, the victim would be able to sue under ordinary state tort law for assault and battery.

Suppose instead that the officer were carrying out official duties, but used grossly excessive force against a motorist who had been stopped for a traffic violation. If so, the motorist could file a section 1983 suit against the officer.

In 1967, the U.S. Supreme Court adopted the doctrine of *qualified immunity* for Section 1983 cases. The decision was based on the common law defenses of good faith and probable cause to tort lawsuits for false arrest. *Pierson v. Ray*, 386 U.S. 547 (1967). While *Pierson*, like the common law, required a section 1983 defendant to have at least subjective good faith in the legality of his actions, a broader immunity was created in a 1982 case. That case set the modern doctrine that Section 1983 defendants are immune whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The current breadth of qualified immunity has been criticized by Justices Sotomayor and Thomas. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (The Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (criticizing current doctrine for going beyond common law defenses, ignoring legal history, and amounting to free-standing judicial interest-balancing); *see also Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), withdrawn on rehearing and replaced by 928 F.3d 457 (5th Cir. 2019) ("[O]wing to a legal *deus ex machina*

— the "clearly established law" prong of qualified-immunity analysis — the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. . . . [T]he entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal.").

A continuing controversy in the "clearly established" rule is how clearly something must be established — how closely the facts of a precedent holding some governmental action to be unconstitutional must match a later unconstitutional act in order to be "clearly established." Some cases have required very close fits, and others less so.

A district court's denial of qualified immunity is immediately appealable, pre-trial. Many appellate qualified immunity cases end with a court holding that a defendant is entitled to qualified immunity because the illegality of the defendant's acts were not "clearly established." But the appellate decisions do not then address whether the defendant's acts were in fact illegal. Thus, the grant of qualified immunity dismissal is used to prevent a judicial resolution of the legality of law enforcement conduct even prospectively.

Two professors suggest that aggressive use of the qualified immunity doctrine could be a useful tool for firearms confiscation post-*Bruen*.

> [A] state law enforcement officer may, after *Bruen*, confiscate an individual's firearm if the officer deems that person too dangerous to possess it. The officer's justifications may conflict with the federal courts' understanding of *Bruen* or the Second Amendment — perhaps flagrantly. But unless a previous, authoritative legal decision examining near-identical facts says so, the officer risks no liability. And because each individual act of disarmament will be unique, such prior decisions will be vanishingly rare. The result is a surprisingly free hand for states to determine who should and should not be armed, even in contravention of the Supreme Court's dictates.

Guha Krishnamurthi & Peter Salib, *Qualified Immunity as Gun Control*, Notre Dame L. Rev. Reflection (forthcoming 2023).

7. [New Section] *California's Fee Shifting Statute for Gun-Law Challenges*

"That to secure these rights, Governments are instituted among Men, deriving their just powers from the content of the governed. . . " comes from the second paragraph of the Declaration of Independence. How exactly do constitutional rights get enforced, when the most likely source of any violation will be the government itself? Whether attributed to Plato or the satirical poet Juvenal (Declmus Junius Juvenalls) the phrase: "who will guard the guards themselves" (quis custodiet ipsos custodes) asks a very practical question in the context of a political model that is based on limited government.

The generation that produced the Constitution and Bill of Rights were aware of the challenge. In 1788, James Madison, in Federalist No. 51 wrote: "You must first enable the government to control the governed; and in the next place to control itself."

Eighty years later, after the government established by that Constitution survived a Civil War, the Constitution was amended to address the causes of that war. Congress produced a set of statutes and constitutional amendments that "federalized" the enforcement of civil and (new and old) constitutional rights. *See* Ch. 7.C. The animating theme of the American Constitution is a system of checks and balances — using "ambition to check ambition." Federalist No. 51 (James Madison).

Over the years, Congress has established many federal agencies to enforce various constitutional and statutory rights. The Equal Employment Opportunity Commission investigates and brings suits to remedy employment discrimination. The Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity performs the same function with respect to housing discrimination. The U.S. Department of Justice's Civil Rights Division has taken on its share of violations since its establishment, but is often driven by the politics of any given administration. Federal agencies enforcing violations of a constitution is still a paradigm in which one type of guardian (the federal government) is guarding another type of guardian (state and local governments, and in some cases private employers and corporations.)

Congress's innovation for motivating the ambition of nonguardians to guard the guardians, was to provide for the *private* enforcement of constitutional rights against violations by state governments, local governments, and private actors. *See* 42 U.S.C. §§ 1981, 1982 (violations of economic and civil rights based on racial animus by both state and private actors), 1983 (violations of federally recognized constitutional rights by state actors), 1985 (conspiracy to violate constitutional rights by both state and private actors), and 1986 (negligent failure to prevent wrongs under § 1985). Violations of constitutional rights by federal actors is addressed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and case law. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), *cf. Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017) (limiting damage remedies under *Bivens.*)

To further inspire private actors, Congress provides for the payment of attorney fees and costs to parties when they succeed in lawsuits brought to enforce constitutional rights. 42 U.S.C. § 1988. This fee shifting policy is the fuel ensuring that ambitious lawyers, expert witnesses, and civic organization will "invest" the time, energy, and money necessary to enforce the Constitution against deep-pocketed ambitions of (usually) government defendants.

In 2022, the State of California attempted to undermine 42 U.S.C. § 1988 by passing Senate Bill 1327. As amended, California's Code of Civil Procedure

§ 1021.11 would provide a cause of action for any government agency in California to bring suit (with 3 years retroactive effect) to recover the government's cost of litigation — including attorney fees — when defending any gun law, regardless of the outcome of litigation in any other state or federal court. The law was modeled on a Texas law that both the Governor and Attorney General of California had publicly criticized. California had even filed an amicus brief opposing the Texas law in a U.S. Supreme Court case arguing that the Texas statute was unconstitutional.

When the law was challenged, the California Attorney General declined to defend SB 1327. The Governor intervened to defend it. The preliminary injunction halting enforcement described the law as follows:

> The Intervenor-Defendant Governor describes the California law as identical or virtually identical to a Texas law known as S.B. 8. But that is not quite accurate. S.B. 8, among other things, creates a fee-shifting provision that applies only to cases challenging abortion restrictions. It is codified at Texas Civil Practice & Remedies Code § 30.022. California's Code of Civil Procedure § 1021.11 applies only to cases challenging firearm restrictions. Both provisions tend to insulate laws from judicial review by permitting fee awards in favor of the government, tilting the table in the government's favor, and making a plaintiff's attorney jointly and severally liable for fee awards. California's law then goes even further. As a matter of law, a California plaintiff cannot be a prevailing party. See § 1021.11. The Texas statute has no similar provision and thus it appears that a Texas prevailing plaintiff can be awarded his attorney's fees. The California provision, on the other hand, denies prevailing party status to a plaintiff, even a plaintiff who is entirely successful, and thus denies any possibility of recovering his attorney's fees. The California plaintiffs-never-prevail provision is not insignificant. And although both § 1021.11's and § 30.022's effect on court access should be constitutionally scrutinized, it is important to note that only § 1021.11 applies to laws affecting a clearly enumerated constitutional right set forth in our nation's founding documents. Whether these distinctions are enough to save the Texas fee-shifting provision from judicial scrutiny remains to be seen. And although it would be tempting to comment on it, the Texas law is not before this Court for determination. . . .
>
> A state law that threatens its citizens for questioning the legitimacy of its firearms regulations may be familiar to autocratic and tyrannical governments, but not American government. American law counsels vigilance and suspiciousness of laws that thwart judicial scrutiny. The Supreme Court does not countenance such efforts by Congress. "The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). How much more problematic are states that enact laws that insulate its own laws from legitimate judicial challenge?

S. Bay Rod & Gun Club v. Bonta, 2022 WL 17811113 (Dec. 19, 2022 S.D. Calif).

The Court found that SB 1327 chilled not only Second Amendment rights, but also the First Amendment right to petition the government for redress of grievances by limiting the public's access to the courts. The Court also went on to find SB 1327 violated the Supremacy Clause of the Constitution (ART. VI, CL 2) in attempting to nullify 42 U.S.C. § 1988.

NOTES & QUESTIONS

1. [New Note] Senate Bill 1327 also creates a private right to action against the sale or import of "assault weapons," .50 BMG caliber rifles, and unfinished frames for home manufacturing of firearms. All of these were already illegal under California law. Private litigants may be awarded $10,000 per item for every item they prove was unlawfully brought into California. The bill also raised the age for more firearms purchases from 18 to 21; this provision is discussed in Chapter 13.B of this Supplement.

The lawsuit provision becomes inoperable if both of the following occur: the Texas abortion law is held unconstitutional by the U.S. or Texas Supreme Courts, *and* the Texas statute is then repealed.

2. [New Note] The California and Texas statutes are criticized in Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, Yale L.J. (forthcoming). The authors argue that Texas SB 8 (on abortion) and California's parallel law (on gun control) are "unprecedented and deeply threatening" to "fair play, access to courts, and legitimate contestation of bitterly disputed issues. Accepting its proliferation will result in a profound aggrandizement of state power that is inconsistent with federalism and separation of powers principles as well as due process and First Amendment rights."

F. BODY ARMOR

In New York, effective July 6, 2022, the purchase, taking possession of, sale, exchange, giving or disposing of body armor is prohibited, unless a person is engaged or employed in an eligible profession. *See* N.Y. Exec. Law § 144-a; N.Y. Gen. Bus. Law § 396-eee; N.Y. Penal Law §§ 270.20, 270.21, 270.22. Eligible professions include police officers and persons in military service, but not members of the "unorganized militia." *See* 19 N.Y.C.R.R. Ch. XIX, Part 905 (regulations on eligible professions for purchase, sale, and use of body armor). Professions currently under review include journalists and broadcast news crews, process servers, firearms instructors, and nuclear security officers.

An earlier law, hastily adopted after the mass shooting in Buffalo, New York on May 14, 2022, banned only "bullet-resistant soft body armor" and would not have prohibited the hard-plated armor worn by the Buffalo shooter.

On July 1, 2022, a new law was signed, effective July 6, 2022, that defines "body armor" as "any product that is a personal protective body covering intended to protect against gunfire, regardless of whether such product is to be worn alone or is sold as a complement to another product or garment." N.Y. Penal Law § 270.20(2).

Unlawful wearing of body armor is a felony, N.Y. Penal Law § 270.20(1), while unlawful purchase or possession of such armor is a misdemeanor for the first offense and a felony for the second offense, N.Y. Penal Law § 270.21. Unlawful sale of body armor is a misdemeanor for the first offense and a felony for the second offense, N.Y. Penal Law § 270.22, and is subject to additional civil fines, N.Y. Gen. Bus. Law § 366-eee(4).

New York's ban on body armor may not be constitutional after *New York State Rifle & Pistol Ass'n. v. Bruen.* Body armor likely is a protected "arm" under the Second Amendment. (See Ch. 15.F). *Heller* relied on dictionaries to define "arms," and all of those dictionaries included armor in the definition:

> Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

Heller, 554 U.S. at 581.

Until New York's law, no state had adopted a broad ban on body armor for law-abiding citizens. While the federal government and many states punish the use of body armor in a crime or forbid convicted criminals from possessing armor, there is no American historical precedent or analogues for such a broad prohibition on law-abiding citizens.

The only English precedent is of no use under *Bruen*'s rule that the only English precedents that matter are longstanding ones that were adopted in the American colonies and that continued into the Founder Era. In 1181, King Henry II promulgated the Assize of Arms. It required everyone to possess certain types and quantities of arms — no more and no less — based on economic class. Ch.2.; online Ch. 22.B. The Jewish section of the Assize stated: "7. Item, no Jew shall keep in his possession a shirt of mail or a hauberk [an armored shirt made of mail or leather], but he shall sell it or give it away or alienate it in some other way, so that it shall remain in the king's service."

In 1285, however, King Edward I replaced the Assize of Arms with the Statute of Winchester (Ch. 2.B; online Ch. 22.B). It too required minimum quantities of arms and armor, based on economic class. But there were no maxima, and no rule against someone in a particular class also voluntarily acquiring arms and armor that were mandatory for another class. As for Jews, Edward I expelled them from England, following incidents in which armed Jews had used arms and armor to resist mob attacks. Neither the Assize of Arms nor the Statute of Winchester arms and armor requirements were ever adopted in the American colonies, the types of arms and armor described in those statutes being mostly obsolete by the time the Virginia Company landed in 1607.

CHAPTER 16

HOW AND WHY? OTHER RESTRICTIONS

C. WAITING PERIODS AND LICENSING

In 2015 Wisconsin repealed its two-day waiting period in 2015, and in 2018 Florida enacted a three-day wait. Examination of these two natural experiments found no "support for any positive effect of waiting period restrictions for handgun purchases on suicide or homicide rates." E.J. Morera & K. Alexander Adams, Empirically Testing Waiting Period Restrictions to Challenge the Underlying Legal Paradigm, Duke Ctr. for Firearms L. (July 26, 2022) (describing paper presented at Works-in-Progress workshop held by the Duke Center for Firearms Law and University of Wyoming College of Law Firearms Research Center).

A novel requirement of gun licensing is a requirement that the owner have insurance against misuse of a firearm. For example, after the *Bruen* decision, the New Jersey legislature, acknowledging that local police departments would have to start issuing carry permits, enacted a statute requiring Carry Permit applicants to show proof of insurance. N.J. Stat. Ann. §§ 2C:58-3, -4. The applicant must have at least $300,000 coverage "insuring against loss resulting from liability imposed by law for bodily injury, death, and property damage sustained by any person arising out of the ownership, maintenance, operation or use of a firearm carried in public." *Id.* at 4(d)(4).

When the mandate was challenged, the New Jersey Attorney General argued that that an applicant's homeowner's or renter's insurance policy would suffice. The argument is valid for firearms accidents. But insurance law generally forbids insurance for intentional crimes perpetrated by the insured, as intentionally shooting a third person without legal justification. *See* George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209 (2014).

A U.S. District Court for New Jersey held the mandate unconstitutional. *Koons v. Platkin*, 2023 WL 3478604 (D.N.J. May 16, 2023). The nineteenth-century surety laws (Ch. 6.B.5) were not persuasive precedents. First, they required a judicial finding that the particular individual was threatening to breach the peace, generally in response to a complaint brought by someone else. Second, the civil penalty for violating the surety by breaching the peace with a firearm was forfeiture of the bond, whereas New Jersey imposes a

sentence of up to 18 months imprisonment. Third, surety bonds were time-limited, whereas the New Jersey mandate is perpetual.

The New Jersey court distinguished the San Jose *National Association for Gun Rights* case (discussed next) on the grounds that the San Jose insurance ordinance for home possession of a firearm was materially different: insurance was only required against accidents; the law exempted anyone with a concealed carry permit or who could not afford insurance; and the only penalty for noncompliance was a civil fine.

The New Jersey court rejected the San Jose court's reliance on surety laws. Contrary to the San Jose court's claim, insurance underwriting does not actually include individualized determination of the likelihood that an individual will misuse a firearm.

In the nineteenth century, some jurisdictions imposed tort liability for injuries caused by another person's firearm, under theories of strict liability or trespass. The availability of tort redress, said the *Koons* court, "demonstrates that the Insurance Mandate is unconstitutional." *Id.* at *42. As *Bruen* said, "[I]f earlier generations addressed the societal problem, but did so through materially different means, that . . . could be evidence that a modern regulation is unconstitutional." *Id.* (quoting *Bruen*, 142 S. Ct. at 2131). "Firearm injuries have occurred throughout this Nation since its founding. Yet the State has not shown that earlier generations addressed this problem by mandating that all arms bearers obtain insurance or post a bond to prevent injuries that may not occur." *Id.*

Accordingly, the court issued a preliminary injunction against the insurance mandated — and also against many other provisions of the new New Jersey statute. *See* 2023 Supp. Ch. 14.A The New Jersey Attorney General immediately sought an emergency stay from the Third Circuit. The panel issued a stay for many of the "sensitive places" in the new statute, but declined to stay the preliminary injunction against the insurance mandate. *Koons v. Platkin*, No. 23-1900 (3d Cir. June 20, 2023). Oral argument on the appeal against the preliminary injunction is scheduled for October 2023.

The San Jose, California, case involved an insurance mandate for gun owners, and other requirements. An ordinance enacted in 2022 required gun owners to pay an Annual Gun Harm Reduction Fee, which the City Council will distribute to a nonprofit. Gun owners must also have insurance, unless they have a Concealed Handgun License or would suffer "financial hardship." San Jose ordinances, §§ 10.32.200-250.

The laws were immediately challenged in *National Association for Gun Rights v. City of San Jose*, 618 F. Supp. 3d 901 (N.D. Cal. 2022). Plaintiffs' motion for a preliminary injunction was denied in all respects.

Some claims failed for lack of ripeness, such as First Amendment speculation that the yet-to-be-chosen nonprofit that gets the money will use the money for speech with which plaintiffs disagree. Similarly, until the fee is

set, the court could not determine whether the fee is so high as to violate the Second Amendment.

The insurance requirement was upheld because: (1) Historically, gun owners could be sued for accidents, under theories of negligence or strict liability. (2) Gun carriers who were found by a court to be threatening to breach the peace could be required to post a bond if they wanted to continue carrying. "[T]he mid-19th century surety statutes, cited by the City and discussed at length in *Bruen*, bear striking analogical resemblances to the Insurance Requirement." (3) *Bruen* approved of various requirements for shall-issue carry permits, such as safety training. The court later granted a motion to dismiss for all but the fee claims. *National Association for Gun Rights v. City of San Jose*, No. 22-cv-00501 (N.D. Call. July 13, 2023).

Further reading: Adam B. Shniderman, *Gun Insurance Mandates and the Second Amendment*, S.C. L. Rev. (forthcoming) (examining the history of tort law, insurance law, and surety of the peace statutes (Ch. 6.B.5), the article concludes that "insurance mandates are ineffective and unconstitutional."; this article was cited with approval in *Koons v. Platkin*); George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209 (2014) ("examining whether mandating liability insurance for firearm owners would meet its avowed goals of efficiently compensating shooting victims and deterring unlawful and accidental shootings").

D. EMERGENCIES

In January 2022, a Ninth Circuit panel ruled in *McDougall v. County of Ventura*, 23 F.4th 1095 (9th Cir. 2022), that Ventura County's pandemic lockdowns of gun stores and shooting ranges had violated the Second Amendment, since the county had allowed other businesses with comparable (small) risks to stay open. The three-judge panel had rigorously applied the Ninth Circuit's particular rules for the Two-Step Test.

The exercise of constitutional rights cannot be treated *worse* than other activities that are comparably dangerous. The U.S. Supreme Court took a similar approach to the free exercise or religion. The Court held that California could not impose Covid-19 lockdowns on home religious gatherings when California allowed other, larger, and at least equally risk gatherings to take place for other purposes. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Judge Lawrence VanDyke, author of the *McDougall* panel opinion, also wrote a "concurring opinion" in which he predicted that *McDougall* would be en-banced. Judge Van Dyke's concurrence was a "draft" opinion for the future en banc, upholding the Ventura County lockdown. He explained, "Since our court's Second Amendment intermediate scrutiny standard can reach any

result one desires, I figure there is no reason why I shouldn't write an alternative draft opinion that will apply our test in a way more to the liking of the majority of our court. That way I can demonstrate just how easy it is to reach any desired conclusion under our current framework, and the majority of our court can get a jump-start[.]" *Id.* at 1119-20. The "concurring" opinion's footnotes explained Judge Van Dyke's disagreements with what he argued was sloppy and biased reasoning in the circuit's en banc gun cases. He noted that, since *Heller*, the Ninth Circuit had heard at least 50 Second Amendment challenges, of which none succeeded. Every panel case in which a challenger won was reversed en banc — even if no party had petitioned for en banc review.

As predicted, the *McDougall* decision was en banced a few weeks later, despite neither party having asked for en banc review. 26 F.4th 1016 (9th Cir. Mar. 8, 2022) (en banc). But after the *Bruen* decision, the Ninth Circuit remanded *McDougall* to the district court, for reconsideration in light of *Bruen*. 2022 WL 2338577 (Mem.) (9th Cir. June 29, 2022).

Further Reading: Jessica R. Graham & Kyle J. Morgan, *God, Guns, and Hair Salons: Public Perceptions of Rights and Liberties During the COVID-19 Pandemic*, 125 W. Va. L. Rev. 87 (2022) (analyzing a database of letters to the editor submitted to 33 newspapers early in the pandemic, the authors report that the public generally had a "nuanced" view of lockdowns and was willing to trade liberty for security).

E. GUN CONTROL BY NONSTATE ACTORS

NOTES & QUESTIONS

3. [New Note] A well-informed overview of current controversies involving bank actions against firearms businesses is Dru Stevenson, *Guns and Banks: New Laws & Policies*, Duke Ctr. for Firearms L. (Apr. 7, 2022).

4. [New Note] Drury D. Stevenson, *William Rotch and Second Amendment History*, 100 U. Det. Mercy L. Rev. 413 (2023). During the American Revolution, prominent Quaker businessman William Rotch "was summoned before a revolutionary tribunal because he sank a boatload of desperately needed bayonets at sea to prevent their use in the war; and he faced treason charges over his attempt to declare his home island of Nantucket neutral or independent during the war." The author uses Rotch's plight, and the conscientious objectors clause in James Madison's first draft of the future Second Amendment (Ch. 5.D), to argue that state anti-boycott laws should not infringe the conscience rights of businesses that refuse to have any dealings with the firearms industry, such as banks that refuse to accept firearms businesses as customers.

5. [New Note] California registers all gun owners and all their guns. The state government discloses personal identifying information to research institutions that work on preventing "gun violence." Among the information transmitted is Social Security Numbers of concealed carry applicants. At present, the data are given to gun control research organizations at U. Cal. Davis and Stanford. A federal court denied a motion for a preliminary injunction. If the government can collect the data (as plaintiffs concede) why can't the government share it? Concerns that personal identifying will be leaked by malice or negligence are speculative. Doe v. Bonta, 2023 WL 187574 (S.D. Cal. Jan. 12, 2023); AB 173. But a preliminary injunction was granted by a state court. Plaintiffs were likely to succeed in their claim on privacy rights under the California Constitution.

> . . . while this motion has been pending, a massive data breach reportedly occurred that leaked personal identifying information from the firearm databases for concealed carry applicants in or about June of 2022. . . .
>
> The California Department of Justice is enjoined from transferring to researchers (1) personal identifying information collected in the Automated Firearms System pursuant to Penal Code section 11106(d) and (2) personal identifying information collected in the Ammunition Purchase Records File pursuant to Penal Code section 30352(b)(2), until further notice and order by the Court.

Brandeis v. Bonta, 37-2022-00003676-CU-CR-CTL (Oct. 13, 2022).

6. [New Note] In 2022, the major American credit card companies, responding to requests from Democratic lawmakers, announced plans to create a new merchant category code (MCC) for stores that sell firearms. The code was created by the International Organization for Standardization (ISO), on Sept. 9, 2022, at the request of Amalgamated Bank, which declares itself to be "proud to support candidates, political parties, political action committees, and political organizations as they seek to build power for progressive change." The new MCC would mean that, for example, a cardholder's purchases from Cabela's would be put in a category different from purchases from department stores. The MCC, in its current form, does not reveal what items were purchased at a particular store. The new MCC was said to be a means of finding out about large purchases by incipient mass shooters.

Several states have enacted legislation forbidding a separate MCC for stores that sell firearms. *See* HB 2004 (West Virginia), HB 295 (Idaho), HB 1110 (Mississippi), HB 1487 (North Dakota), SB 214 (Florida), SB 359 (Montana), and HB 2837 (Texas). These laws made it impossible for the credit card companies to implement the code on a large scale without large changes to their technology infrastructures. This, perhaps combined with widespread public objections, prompted several credit card companies temporarily to

suspend the MCC's implementation. Meanwhile, California is considering AB-1587, to require financial institutions to use the new MCC.

F. TRAINING AND RANGES

NOTES & QUESTIONS

3. [New Note] *Drummond v. Robinson Township*, 9 F.4th 217 (3d Cir. 2021). The Third Circuit applied intermediate scrutiny to zoning restrictions in a Pittsburgh suburb. The panel held that the government failed to provide a "close fit" (intermediate scrutiny's analogue to strict scrutiny's "narrowly tailored") for the two zoning rules: shooting ranges could only be operated by nonprofits, and rifle ranges for calibers other than .22 rimfire were forbidden.

4. [New Note] Joseph G.S. Greenlee, *The Right to Train: A Pillar of the Second Amendment*, 31 Wm. & Mary Bill of Rts. J. 93 (2022). The first detailed historical analysis of the legal history of the right to train examines English law, American colonial law, the American Revolution, the adoption of the Constitution and the Bill of Rights, historical restrictions on firearms practice, and modern cases. The modern cases all agree that there must be a right to train, but the cases have not yet investigated legal history in depth. In the author's view, "training is a pillar of the right to keep and bear arms because it is required to develop the skills necessary to effectively exercise the other protected rights, such as self-defense, hunting, and militia service. Given the historical foundation of the right to train, courts should ensure that it is robustly protected by the Second Amendment, as the Founders intended."

5. [New Note] A Michigan business wanted to build a public outdoor shooting range, including 1,000 yard bay. The township changed the zoning to stop the range. After the U.S. District Court dismissed the case, the Sixth Circuit reversed and remanded for reconsideration under *Bruen*. *Oakland Tactical Supply, LLC v. Howell Twp., Michigan*, 2022 WL 3137711 (6th Cir. Aug. 5, 2022). On remand, the case was dismissed again. According to the court, "the plain text of the Amendment says nothing about long-range firing or even, for that matter, training more broadly . . . [T]he zoning ordinance does not prohibit 'training with firearms.' Rather, their proposed conduct is the construction and use of an outdoor, open-air 1,000-yard shooting range. And that conduct is clearly not covered by the plain text of the Second Amendment." *Oakland Tactical Supply, LLC v. Howell Twp., Michigan*, 2023 WL 2074298 (E.D. Mich. Feb. 17, 2023). The decision has been appealed to the Sixth Circuit.

G. FIREARMS LITIGATION FOR NEW ATTORNEYS

6. [New Section] ***Firearms Forensics***

Cases involving the misuse of a firearm often turn on forensic evidence. In firearms with rifled barrels (that is, all rifles and the very large majority of handguns), the bullet engages with the bore as it travels through the barrel, and the barrel imparts marks onto the bullet. Due to slight differences in the manufacturing process (*e.g.*, drilling the firearm's bore), and also due to differences in use over time, bores from the same model of a firearm impart different marks on a bullet.

Sometimes, forensic scientists compare the marks on bullets discovered at different crime scenes to determine whether they were fired from the same gun. Or a forensic examiner might testify that a particular bullet, recovered at a crime scene, was likely or certainly fired from a particular gun — namely, the gun belonging to a defendant.

Likewise, the firing pin or striker leaves a mark on the shell, and the shell may also receive marks from being inserted into and removed from the firing chamber. The history of firearms forensic analysis, including growing acceptance over the twentieth century and some more recent skepticism, is described in Brandon L. Garrett, Eric Tucker & Nicholas Scurich, *Judging Firearms Evidence*, Duke L. Sch. Pub. L. & Leg. Theory Series No. 2023-10.

In the first decade of the twentieth century, some gun control groups advocated that every handgun must be test-fired and the forensic results placed in a state government database, for future use in criminal investigations. These proposals have been criticized by Professor David B. Kopel because they would make forensic analysis more difficult and time-consuming. When an examiner is using a computer database of ballistic images, computers can narrow down candidates for a match, but the examination of the finalist images must be performed carefully by humans. Flooding the databases with huge numbers of images (*e.g.*, all handguns) would overwhelm the system with false positives. Professor Kopel and co-author Sterling Burnett argue that the better approach is for databases to comprise only images from particular guns or bullets that have been associated with criminal activity. The Kopel-Burnett monograph details the process of ballistic matching analysis. Sterling Burnett & David B. Kopel, *Ballistic Imaging: Not Ready for Prime Time*, National Center for Policy Analysis, Policy Backgrounder No. 160 (Apr. 2003).

Maryland's Supreme Court recently held 4-3 that forensic experts may not testify that a particular bullet was definitely fired from a particular gun. Instead, the expert may only testify that the marks on a bullet were consistent (or inconsistent) with having come from a particular gun. *Abruquah v. Maryland*, no. 10 (June 20, 2023). The decision comes in the context of growing

concerns that some forms of forensic evidence are unreliable pseudo-science. For example, "bite mark analysis," once widely used by courts, is now generally discredited. No-one claims that forensic analysis of bullets or cases is purely junk science, but the scope of what such analysis can prove is now more carefully scrutinized than in the past.

Another forensic subject for attorneys practicing criminal law is wound ballistics. In this forensic field, examination of gunshot wounds attempts to reconstruct how the shooting occurred. For example, if the gunshot victim's clothing has gunpowder residue around the bullet hole, the residue indicates that the muzzle of the gun was in contact with the victim when the bullet was fired. *See*, *e.g.*, Vincent J.M. DiMaio & Vernon J. Geberth, Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques (3d ed. 2021).

NOTES & QUESTIONS

6. [New Note] *New York Rifle & Pistol Assoc. v. Bruen,* has instigated a blizzard of litigation seeking to apply the Court's "plain text presumption" and permissible "analogues of laws from the founding" when modern courts must adjudicate the constitutionality of modern gun laws. Recall that once the presumption is met (e.g., that the law infringes on the keeping and bearing arms), the burden of proof and persuasion shifts to the government to show that the modern law has a pedigree (or analogue) that can be traced back to the 1790s.

Firearms-law practitioners (and judges) might be tempted to delegate resolution of this task solely to historians as expert witnesses. That would be a mistake. The task is more properly a collaborative effort between the historian as consultant, the lawyers as advocates, with judges retaining the final *legal* determination of applicable ancient legal texts under the test articulated in *Bruen.*

It is a "false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 399 (2012).

> "Lawyers are . . . necessarily historians . . . . If they do not take this task seriously, they will not cease to be historians. They merely will be bad historians."
>
> Max Radin, *The Law and You* 188–89 (1948).

> Originalism admittedly requires lawyers and judges to engage in historical semantics. It is often charged that they are ill equipped for the task: "It is quite true that lawyers are for the most part extremely bad historians. They often make up an imaginary history and use curiously unhistorical methods." The leveler of that charge, Max Radin, cited a British example of a 1939 judicial

misinterpretation of sources dating back to 1215 — in a different language altogether (medieval Latin and Law French). The example serves as a useful admonition. But note that Radin was an originalist:

> We have thus imposed a new burden on the lawyer on the bench. Besides all the other things asked of him, he is also to be a historian. But there is no help for it. There is simply no way by which the law can be made either simple or easy.

Nor is it a valid refutation of originalism that "no one can reconstruct original understanding precisely." Our charge is to try.

Id., at 399-400. (footnotes omitted)

To illustrate this point, *Reading the Law*, references *Heller*,

> which upheld the individual right to possess firearms, one of the significant aspects of the Second Amendment was that it did not purport to *confer* a right to keep and bear arms. It did not say that "the people shall have the right to keep and bear arms," or even that "the government shall not prevent the people from keeping and bearing arms," but rather that "the right of the people to keep and bear arms" (implying a *preexisting* right) "shall not be infringed." This triggered historical inquiry showing that the right to have arms for personal use (including self-defense) was regarded at the time of the framing as one of the fundamental rights of Englishmen. Once the history was understood, it was difficult to regard the guarantee of the Second Amendment as no more than a guarantee of the right to join a militia. Moreover, the prefatory clause of the Second Amendment ("A well regulated militia being necessary for the defense of a free state") could not be logically reconciled with a personal right to keep and bear arms without the historical knowledge (possessed by the framing generation) that the Stuart kings had destroyed the people's militia by disarming those whom they disfavored. Here the opinion was dealing with history in a broad sense.
>
> It is reasonable to ask whether lawyers and judges can adequately perform historical inquiry of this sort. Those who oppose originalism exaggerate the task. In some cases, to be sure, it is difficult, and originalists will differ among themselves on the correct answer. But that is the exception, not the rule. In most cases — and especially the most controversial ones — the originalist answer is entirely clear. There is no historical support whatever for the proposition that any provision in the Constitution guaranteed a right to abortion, or to sodomy, or to assisted suicide. Those acts were criminal in all the states for two centuries. Nor is there any historical support for the proposition that the Eighth Amendment (which prohibits cruel and unusual punishments) prohibited the death penalty, which was the only penalty for a felony (indeed, the definition of a felony) at the time of the framing.
>
> Today's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an evergrowing body of scholarship produced by the legions of academic legal historians populating law and history faculties at our leading universities. No history faculty of any note would consider itself complete without legal experts; and no law faculty would consider itself complete without its share of expert historians.

Id., at 400-01.

7. [New Note] What can the advocate do to assist the Court in applying the *Bruen* test? Prepare exhibits that can be attached to briefs setting forth the original text of the law from the 1790s that will be used to justify a modern law. And since many of this ancient statutes will have been recodified, repealed, re-written, they may not be available in standard legal reporters.

Common courtesy, both to opposing counsel and the court, should necessitate links to or legible and accurate copies of the ancient text to be adjudicated. (Seek guidance from your court as to its preference for hard copies of old statutes or hyperlinks.)

The use of tables and spreadsheets is highly advantageous and useful to the Court. For example:

Brief Page	Year Passed	Jurisdiction	Citation in Brief	Primary Source Link	Comments
13	1647	Maryland	1647 Md. Laws 216	Proceedings and Acts of the General Assembly January 1637/8-September 1664, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--215.html	The lower house of the colonial Maryland legislature was making rules for its legislative sessions rather than statutes applicable to the public at large.
9	1836	Connecticut	An Act Incorporating the Cities of Hartford, New Haven, New London, Norwich and Middletown, 1836 Conn. Acts 105 (Reg. Sess.), chap. 1, § 20	Public acts passed by the General Assembly of the state of Connecticut, 1836-1850, https://collections.ctdigitalarchive.org/islandora/object/30002%3A22002122#page/102/mode/2up	This state law grants powers to cities to regulate (via fine or forfeiture) "the bringing in, and conveying out, or storing of gun-powder." The State's citation omits the following: quantities of gun-powder that do not exceed twenty-five pounds are not subject to fine or forfeiture.

Whether an ancient law regulating the storage and sale of gun powder is sufficiently analogous to a modern law regulating the sale of firearms may be

a question of law for the judge to answer. But failing to provide the Court with the context of a gun powder law (regulation of quantities for personal use vs. regulation of quantities that pose a fire hazard) risks misleading the Court on the underlying context and purpose of the ancient statute.

Providing the Court with original source material (hard copy or reliable hyperlink to reputable databases), and putting that original source material in a useable format, will establish your credibility with the Court.

CONCLUDING EXERCISES

3. Emergency Powers: Tyranny Control

War in Ukraine

Following the 2022 Russian invasion of Ukraine, Ukrainian President Volodymyr Zelensky urged ordinary citizens to take up arms to defend their homeland. He offered to supply them with weapons or invited them to bring their own.

In one day, the Ukrainian government distributed as many as 18,000 assault rifles to civilians. These were genuine assault rifles in the precise military sense — intermediate size rifles capable of firing automatically and semiautomatically, with the flip of a selector switch.[69] Most were Kalashnikov rifles from the days when Ukraine was occupied by the Soviet Union. The rifles are updated models of the famous AK-47 ("Avtomat Kalashnikov," invented by Mikhail Kalashnikov in 1947.)

Previously, Ukrainians had not been allowed to own machine guns. The government plans to arm as many as a million citizens to fight the Russians.

Just days before the invasion, Zelensky had signed a law allowing citizens to carry firearms in public and act in self-defense. He later signed another law regulating the procedure of providing firearms and ammunition to civilians and absolving them of any liability for use of such weapons against those carrying out armed aggression against Ukraine.

Interior Minister Denys Monastyrsky, Ukraine's top law-enforcement official, has proposed loosening the country's restrictive gun laws once the war ends. He noted that "Russia's war showed that 'tens of thousands' of guns, including assault weapons, that have been distributed by the government for national defense were proof that Ukrainian citizens can 'handle arms.'"

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[69] As opposed to the amorphous term "assault weapon" in U.S. politics, which has at various times been said to encompass almost every type of firearm *other* than automatics. Ch. 15.A.1.

Ukraine's arming of ordinary civilians to resist the invading Russians was largely a last-minute effort. Finland has a different model, requiring young civilian males to undergo a short but intense period of military training, followed by shorter refreshers for most of their adult life.

Organized by the National Shooting Sports Foundation, the trade association for America's firearm industry, the industry is donating guns, ammunition, optics, and accessories to Ukraine to assist in efforts to fight the Russian invaders. Some have noted that American leaders support sending semi-automatic rifles to Ukrainian civilians, while urging bans on such rifles in the U.S.

Some of the newly armed Ukrainian citizens have been organized into Territorial Defense units, who receive three days of training. Like the militia of the American Revolution (Ch. 4.B.9), they are not expected to confront Russian infantry in pitched battles. Rather, their objectives are to harass occupation forces, make it unsafe for small groups of the invaders to leave their base, provide intelligence for artillery strikes, and so on. Active partisan resistance behind the lines of Russian occupation is currently taking place in eastern Ukraine — just as Ukrainian partisans resisted Nazi and Soviet invaders in the twentieth century.

Below the level of the Territorial Defense units, armed citizens participate in defense of their villages — similar to the "alarm list" of early America. As was demonstrated in the 1942-43 Battle of Stalingrad, and in much urban warfare before and after, small partisan units can cause enormous trouble for even a well-equipped invading army, providing the partisans know some basic tactics. For example: Do not lean out of a building window to fire on invaders in the street; instead, fire from within the building to avoid visual exposure. Create safe interior or underground passages from one building to another, and do not stay in the same location after shooting at the invaders.

Ukraine's arming of civilians has given their nation a greater chance at repelling the Russian invasion, demonstrating the importance of an armed populace in resisting tyranny from within and without.

Further reading: *Forces: Ukraine Must Decide*, StategyPage.com (Apr. 18, 2022) (comparing and contrasting militia and territorial defense systems of Ukraine, Israel, Switzerland, Sweden, and Finland); Stephen Halbrook, *Ukraine war reintroduces U.S. politicians to the Second Amendment: Ukrainian police should burn their gun registration records now*, Wash. Times (Apr. 2, 2022); Online Chapters 19.D.2-3 (discussing armed resistance to mass murder by government, with case studies of Christians in the Ottoman Empire during World War I, Jews in Europe in World War II, the Chinese under the Mao Zedong regime, and Tibetans after the Mao invasion).

NOTES & QUESTIONS

9. [New Note] Kindaka Sanders, *Let My People Go, Part One: Black Rebellion and the Second Amendment Political Necessity Defense*, 31 Wm. & Mary Bill of Rts. J. 764 (2023). This is the first in a two-part article. Current U.S. legal doctrine does not recognize a necessity defense when a defendant violates law A in order to protest law B. The article argues that current doctrine is inconsistent with the Boston Tea Party, the Stamp Act Riots, and illegal marches by the Civil Rights Movement. The author argues that the Second Amendment should be construed so as to allow the possibility of a "political necessity defense" even when the law being violated is not the law that is the source of the violators' grievances.

CHAPTER 17

FIREARMS POLICY AND STATUS

A. FIREARMS POLICY AND THE BLACK COMMUNITY

3. Divergent Views on Race and Firearms Policy from a Long-Term Historical Perspective

NOTES & QUESTIONS

2. [New Note] Nicholas J. Johnson, *A Considered African American Philosophy and Practice of Arms*, 107 J. Afr. Am. Hist. 156 (2022). Examines Black attitudes and practice of self-defense and of political violence from antebellum days to the present, including in the Civil Rights Movement.

3. [New Note] Jennifer L. Behrens & Joseph Blocher, *A Great American Gun Myth: Race and the Naming of the "Saturday Night Special"*, 108 Minn. L. Rev. Headnotes (forthcoming 2024). In an influential 1976 article in *The Public Interest*, Barry Bruce-Briggs stated that "Saturday Night Special" (a derisive term for small, inexpensive guns) was derived from the phrase "ni[**]ertown Saturday night." B. Bruce-Briggs, *The Great American Gun War*, Pub. Int. 37, 50 (Fall 1976). (*The Public Interest* was later absorbed by *National Affairs*, and the former's archives are hosted on the latter's website.) Professors Behrens and Blocher find the phrase "Saturday Night Special" being used as early as the 1910s to describe firearms, and before that in use for train schedules or for special sales in stores. The phrase also appears in the first half of the twentieth century for a girl who was easy to date. The authors conclude that the phrase, as applied to inexpensive guns, does not have a racist origin.

4. [New Note] An ongoing case against the District of Columbia Metropolitan Police Department's Gun Recovery Unit (GRU) alleges that it "unlawfully targets predominately Black neighborhoods and young Black males specifically." For example, the GRU is claimed to carry out stop and frisks with no genuine reasonable suspicion or probable cause. The actions are then supported by fabrications in sworn testimony by officers. The plaintiffs are individuals who allege that they were subjected to the above misconduct.

Defendants are individual officers, plus the D.C. government for its patterns and practices. The district court denied the officers; claim of qualified immunity; the officers' (alleged) false statements indicate that they knew their conduct was illegal. Defendants' motions to dismiss were denied in every regard. Accordingly, plaintiffs may proceed with their Fourth and Fourteenth Amendment claims. *Crudup v. District of Columbia*, No. 20-cv-1135 (TSC) (D.D.C. Mar. 29, 2023).

E. CATEGORIES OF PROHIBITED PERSONS: MENTAL ILLNESS, MARIJUANA, AND THE MILITARY

2. Marijuana Users

Following *Bruen*, a variety of defendant's have challenged the constitutionality of federal prohibition on possession of firearms by persons who have violated federal drug laws. This prohibition might implicate either 18 USC § 922 (g)(1) (felon drug conviction), (g)(3) (unlawful user of or addicted to any controlled substance), or both.

This 2023 update goes beyond only marijuana, and addresses the federal prohibition for anyone "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. § 922(g)(3). The prohibition was enacted by the Gun Control Act of 1968, but that banned receipt and commerce in firearms; the prohibition on simple possession by drug users was added in the Firearms Owners' Protection Act of 1986. *See United States v. Carter*, 669 F.3d 411, 417-18 (4th Cir. 2012) (1986 bill closed a "loophole").

Before 1968, some laws prohibited intoxicated persons from wearing or shooting firearms, and very few banned possession or acquisition based on based use of drugs or alcohol. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211 (2020); Ch. 13.F.3.

According to ATF policy, any illegal use of any controlled substance in the past year qualifies for the federal felony. Although marijuana use is legal under at least some circumstances in most states, it remains prohibited federally, including for medical use. Most federal circuits require that the government prove some pattern of illegal use, whereas the Eighth Circuit adopted the ATF position that a single use in the past year is sufficient proof for a felony conviction. *United States v. Carnes*, 22 F.4th 743 (8th Cir. 2022). A Cato Institute amicus brief in support of an unsuccessful cert. petition describes the extraordinary breadth of the implications of the ATF rule. For example, if a husband with prescription Ambien (Schedule 5 in the Controlled Substances Act) gives his wife a single pill to help her sleep on a long airplane

flight, she becomes a federal felon. Cato Inst., amicus brief in *Carnes v. United States*, No. 22-76 (U.S. Aug. 25, 2022). The brief argued that the ATF interpretation is impossible to justify under *Bruen*.

A leading post-*Bruen* case upholding section 922(g)(3) in general, although not necessarily the single-use interpretation, was *Fried v. Garland*, 2022 WL 16731233 (N.D. Fla. Nov. 4, 2022). The case was brought by the Florida Commissioner of Agriculture, on behalf of Florida-legal medical marijuana users. The court ruled that medical marijuana users are violating federal law, and thus not the "law-abiding citizens" protected by *Heller*. The ban is analogized to historic bans on using firearms while intoxicated with alcohol, and against gun possession by the mentally ill. *See also* United States v. Lewis, 2023 WL 187582 (W.D. Okla. Jan. 13, 2023); United States v. Black, 2023 WL 122920, at *4 (W.D. La. Jan. 6, 2023); United States v. Sanchez, 2022 WL 17815116 (W.D. Tex. Dec. 19, 2022).

A Utah U.S. District Court held that 922(g)(3) is void for vagueness, because there is no notice of "temporal nexus." Also, "user" is vague; as the statute says, an "unlawful user" is different from an "addict." *United States v. Morales-Lopez*, 2022 WL 2355920 (D. Utah June 30, 2022).

As this Supplement is written, the issue is pending before the Fifth Circuit, in a defendant's appeal of *United States v. Daniels*, 2022 WL 2654232 (S.D. Miss. July 8, 2022). Two other district courts in the Fifth Circuit held the ban unconstitutional under *Bruen*. *United States v. Connelly*, 2022 WL 17829158 (W.D. Tex. Apr. 6, 2023) (The ban "deviates from our Nation's history of firearm regulation." It is like "a law that would prevent individuals from possessing cars at all if they regularly drink alcohol on weekends."); *United States v. Harrison*, 2023 WL 1771138 (W.D. Okla. Feb. 3, 2023) (Historic bans on people actually intoxicated are not analogous to bans on sober people who sometime use intoxicants.).

After party briefing in the *Daniels* case, the Fifth Circuit called for additional briefing from amici. Among the responses was one co-authored by Professors Mocsary (as co-counsel) and Kopel (representing the Independence Institute). Focusing only on marijuana (the drug at issue in *Daniels*) and only on users who are not "addicts," the brief argued against the application for 922(g)(3) to Mr. Daniels. Examining history and tradition, as shown by historic laws pertaining to alcohol, the brief argued that shooting or wearing firearms while intoxicated may be prohibited, but not use while sober. *See* Scholars of Second Amendment Law as Amici Curiae Supporting Defendant-Appellant Urging Reversal, *United States v. Daniels*, No. 22-60596 (5th Cir. July 6, 2023).

The next case involves a defendant with a prior felony drug conviction under 18 U.S.C. § 922(g)(1). The one after that involves raises a preliminary challenge to the constitutionality of the charge that she was an unlawful controlled substance user in possession of a firearm under 18 U.S.C. § 922(g)(3); it has an interesting element related to a Presidential pardon.

2023 WL 3559737 (S.D.W.V. Mar. 8, 2023), *adopted by* 2023 WL 3121230 (S.D.W.V. Apr. 27, 2023)

Omar J. Aboulhosn, United States Magistrate Judge. . . .

BACKGROUND

The Defendant was charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) in an indictment returned on March 29, 2022 (ECF No. 1). The indictment charges that, on or about May 26, 2020, the Defendant knowingly possessed a firearm, a Mossberg, model 500AT, 12-gauge shotgun. The indictment further alleges that at the time the Defendant possessed the firearm, he knew that he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year, as defined in 18 U.S.C. § 921(a)(20), that is, convicted on or about November 29, 2006 in the Circuit Court of Raleigh County, West Virginia of Delivery of a Controlled Substance in violation of W. Va. Code § 60A-4-401.

Neither party disputes the fact that the Defendant possessed a firearm. However, the Defendant asks this Court to dismiss the indictment returned against him on the basis of the recent opinion set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111(2022) concerning Second Amendment challenges to gun regulations.

DISCUSSION

The Defendant contends that pursuant to *Bruen,* which instructs courts to consider only the Second Amendment's plain text and history, that if the Second Amendment covers an individual's conduct, then the Constitution presumptively protect that conduct. (ECF No. 41 at 1-2) Further, the Defendant asserts that because possession of a firearm falls within the Second Amendment's plain text, thus, his conduct is presumptively protected, and it is the government's burden to rebut that presumption. (*Id.*) The Defendant points out that prior to *Bruen*, courts employed a "means-end scrutiny" to assess the government's interest in firearm restrictions against a challenger's interest in exercising the right to keep and bear arms — however, *Bruen* now instructs courts that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation . . . [o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." (*Id.* at 2-5, quoting *Bruen*, at 2126)

Since there were no laws barring convicted felons from possessing firearms during the ratification of the Second Amendment, and that the pertinent felon-disarmament law contained in this indictment did not come to pass until 1938,

such laws are not "longstanding" and therefore given a pass under the enhanced scrutiny endorsed by *Bruen*. To that extent, the Defendant argues that this Court must examine the historical record to determine whether Section 922(g)(1) is consistent with the Second Amendment, and cannot rely on *dicta* that did not explicitly restrict the right to keep and bear arms only to "law-abiding, responsible citizens" — statutory law during the founding era regarding governing the militia did not exclude felons. The *dicta* identified by the Defendant the "presumptively lawful regulatory measures" the *Heller* Court acknowledged with respect to felon-disarmament laws, however, whether such regulatory measures were constitutional was not the issue before the Court.

The Defendant further argues that the government cannot carry its burden by identifying historical statutes that disarmed "dangerous" or "unvirtuous" individuals because *Bruen* is clear that such restrictions must be drawn narrowly; to justify Section 922(g)(1) as being constitutional by relying on a handful of founding-era statutes that disarmed certain groups (slaves, Native Americans, and disloyal subjects), would be the result of impermissible expansion of these groups excepting them from Second Amendment rights. This leads to the means-end balancing that *Bruen* forbids. Accordingly, the Defendant asks this Court to follow the framework established by *Bruen* which supports a finding that Section 922(g)(1) is unconstitutional.

In response, the United States asserts that *Bruen* nevertheless recognized that firearm regulations are permissible, and significantly, did not invalidate Section 922(g)(1). Noting that *Bruen* also did not abrogate the presumption that the right to bear arms belongs to "law-abiding, responsible citizens" endorsed by *Heller,* the United States asserts that Section 922(g)(1) is constitutional: despite the Defendant's emphasis that this *dicta* is not to be relied upon in lieu of exploring the historical underpinnings of Section 922(g)(1), the United States points out that the concurring opinions in the *Bruen* decision emphasized that these protections still apply to law-abiding gun owners, and the Second Amendment is not applicable to dangerous, non-law-abiding people, including those with felony convictions. The United States points out that *Bruen* did not abrogate longstanding prohibitions on the possession of firearms by felons.

The United States further asserts that other decisions within this District have also rejected similar *Bruen*-based challenges to Section 922(g)(1). . . While the United States, along with the Defendant, acknowledges that one court of appeals decision has considered and rejected a post-*Bruen* challenge to the constitutionality of Section 922(g)(1) is currently under review by the en banc court (citing *Range v. Att'y Gen.,* 53 F.4th 262 (3d Cir. 2022), *reh'g en banc granted, opinion vacated*, 2023 WL 118469 (3d Cir. Jan. 6, 2023)), the

United States also cites a plethora of other courts that have similarly rejected *Bruen* challenges: . . . [70] . . .

It is noted that the regulation at issue in *Bruen* limited permits to carry firearms outside the home to those who could show good cause, and that the opinion focuses on regulations impacting law-abiding citizens, rather than prohibiting certain people, such as convicted felons, from carrying firearms based on their conduct or characteristics. Of interest here is that while it is debatable that such restrictions enjoy a "longstanding history" in this Nation, the Supreme Court nevertheless explicitly stated: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by *felons* and the mentally ill[.]" See *Bruen* at 2162 (Kavanaugh, J., concurring) (emphasis added). While the undersigned recognizes that the Defendant contends that this language cannot be treated as a holding, notwithstanding that it is Supreme Court *dicta* that this Circuit has typically given great weight, the undersigned also simply cannot ignore the fact that at least two Justices[4] attempted to rein in the majority decision by *excluding* those firearm regulations governing convicted *felons*. Notably, *Bruen* also recognized that background checks did not offend the U.S. Constitution, which demonstrates that the Supreme Court acknowledged that the Second Amendment was not unlimited. To accept otherwise is nonsensical, as it expands *Bruen* well beyond the intent of the Supreme Court's opinion.

Even the Defendant recognizes that "no court has yet held that § 922(g)(1) is unconstitutional after *Bruen*[.]"While Bruen changed the legal landscape as to assessing the constitutional validity of firearm regulations, it did not wholesale find restrictions or criminalization of firearm possession by convicted felons unconstitutional.[6]

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[70] [The Magistrate Judge here lists dozens of cases, but without details about the subject matter of each case. Interested readers are encouraged to review the list in the original opinion or elsewhere.—EDS.]

[4] Chief Justice Roberts joined in Justice Kavanaugh's concurring opinion.

[6] During the hearing, counsel for the Defendant advised the Court that a recent decision from the 5th Circuit held that Section 922(g)(8) failed to pass constitutional muster and vacated the defendant's conviction under this offense. The undersigned observes that the Fifth Circuit held:

> Doubtless, 18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society. Weighing those policy goals' merits through the sort of means-end scrutiny our prior precedent indulged, we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But Bruen forecloses any such analysis in favor of a historical analogical inquiry into the scope of the

Accordingly, the Court DENIES the Defendant's *Motion to Dismiss the Indictment Under the Second Amendment*.

United States v. Posey

2023 WL 1869095 (N.D. Ind. Feb. 9, 2023)

JON E. DEGUILIO, Chief Judge

The Defendant, Vanessa Posey, has moved for count three of the indictment against her to be dismissed. Defendant argues this count should be dismissed as the statute underlying the charge, 18 U.S.C. § 922(g)(3), is unconstitutional in light of the Supreme Court's recent decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, (2022). Further, Defendant argues this statute is unconstitutional as applied to her in light of a pardon issued by President Biden on October 6, 2022. For the following reasons, this motion will be denied.

A. Factual Background. . .

The alleged facts underlying this charge are that Defendant possessed multiple firearms while also being a user of marijuana, which is a Schedule I controlled substance.

For the limited purpose of adjudicating this motion, the Court assumes these alleged facts to be true. The Court will reiterate that Defendant remains presumed innocent of the charges against her, and the Court takes no position on the question of her guilt, or the veracity of any factual allegation presented by the Government.

B. Legal Standards. . .

A constitutional challenge to a statute can be brought either as a facial challenge, or an as-applied challenge. Defendant brings both types of challenges against § 922(g)(3) in her motion. To succeed on a facial challenge to the constitutionality of a statute, the moving party must show that the statute is unconstitutional in all applications. *City of L.A. v. Patel*, 576 U.S.

> allowable burden on the Second Amendment right. Through that lens, we conclude that § 922(g)(8)'s ban on possession of firearms is an "outlier[] that our ancestors would never have accepted." *Id.* Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated.

United States v. Rahimi, 2023 WL 2317796, at *12 (5th Cir. Mar. 2, 2023) (2023 Supp. Ch. 13.A). Although the undersigned appreciates this analysis, it nevertheless does not address the precise issue that is presented to this Court in this particular proceeding.

409, 415, 418, (2015). To succeed on an as-applied challenge, the moving party must show it is unconstitutional because the way it was applied to the particular facts of their case. *See United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011).

C. Discussion

Defendant's motion challenges the constitutionality of 18 U.S.C. § 922(g)(3). This statute provides that "[i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . [to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(3). Defendant argues that "as applied to [her], § 922(g)(3) is not a well defined firearm restriction" because the government is attempting to criminalize her firearm possession based on her status as an unlawful user of marijuana, when marijuana use during the relevant period was no longer unlawful by effect of a presidential pardon. Defendant's facial challenge is that § 922(g)(3) violates the Second Amendment. The Court will address each argument in turn. . . .

(2) *Defendant's as-applied challenge fails as the presidential pardon is irrelevant to the charged offense in count three of the indictment*

The Court will begin with Defendant's as-applied challenge. The Court finds that this argument is without merit.

Underlying this argument is the fact that on October 6, 2022, President Biden pardoned all individuals who committed the offense of simple possession of marijuana in violation of 21 U.S.C. § 844 or D.C. Code § 48-904.01(d)(1) on or before the date the pardon was issued. Granting Pardon for the Offense of Simple Possession of Marijuana, 87 Fed. Reg. 61441 (Oct. 12, 2022) (Pardon issued on October 6, 2022, and published in Federal Register on October 12).

Defendant argues that the presidential pardon extends to her alleged conduct of marijuana use and therefore dismissal is compelled because of the pardon's retroactive effect. In other words, Defendant argues that on February 10, 2022, she was no longer "an unlawful user" of a controlled substance. Therefore she cannot be legally culpable for the offense of being an unlawful user of a controlled substance in possession of a firearm. In support Defendant cites dicta from a Supreme Court decision issued over 100 years ago stating that a "pardon not merely releases the offender from the punishment described for the offence, but that it obliterates in legal contemplation the offense itself." (quoting *Carlisle v. United States*, 83 U.S. 147(1872). Defendant also argues that this pardon implicated the *Bruen* analysis as the Government would not be able to offer a historically analogous regulation based on substance use which the sitting President has proclaimed is no longer punishable conduct.

These arguments are without merit for several reasons. First, the text of the pardon itself precludes Defendant's arguments. President Biden's pardon expressly limits its effect to pardoning violations of 21 U.S.C. § 844 or D.C.

Code § 48-904.01(d)(1). Pardon for the Offense of Simple Possession of Marijuana, 87 Fed. Reg. at 61441. President Biden goes on to indicate that he does not intend for the pardon to be applicable to any other offense.

"*My intent by this proclamation is to pardon only the offense of simple possession of marijuana* in violation of Federal law or in violation of D.C. Code 48-904.01(d)(1), *and not any other offenses related to marijuana or other controlled substance*s. *No language herein shall be construed to pardon any person for any other offense*, ..." *Id.* (emphasis added).

This express limitation on the legal effect of the pardon forecloses Defendant's as-applied challenge. Defendant has conceded as much by not responding to the Government's argument of this point in her reply.

Second, Defendant's argument is contrary to the established body of law holding that pardons preclude further punishment for the pardoned offense but *do not* erase the underlying conduct of that offense. *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679, 682-83 (7th Cir. 2005) ("The question we must answer, then, is whether the CFTC's denial of Hirschberg's registration is impermissible punitive action *or simply a consequence of the conduct underlying the conviction that the pardon could not erase*.") (emphasis added); *United States v. Flynn*, 507 F. Supp. 3d 116, 136 (D.D.C. 2020) (holding a pardon cannot "erase a judgment of conviction, or its underlying legal and factual findings.") (internal citations omitted); *United States v. McMichael*, 358 F.Supp.2d 644, 647 (E.D. Mi. 2005) ("A [presidential] pardon does not entail the expungement of judicial records or otherwise negate the facts of the underlying conviction.") (citing *United States v. Doe*, 556 F.2d 391 (6th Cir. 1977)).

Defendant's citation to *Carlisle* does not meaningfully challenge this understanding. Besides being nonbinding dicta, the statement in *Carlisle* that a pardon "obliterates in legal contemplation the offense itself" does *not* state that the facts underlying the offense are likewise obliterated. 83 U.S. at 151. Moreover, *Carlisle* is bookended by Supreme Court decisions which are in line with the understanding that a pardon only precludes further punishment for the pardoned offense and does not erase the underlying facts. *See Carlesi v. New York*, 233 U.S. 51, (1914) (Upholding a New York state court's use of a prior, pardoned, federal offense as a sentencing enchantment); *United States v. Wilson*, 32 U.S. 150, (1833) (holding a pardon exempts the individuals from *punishment* for the offense committed).

Third, Defendant's characterization, in her motion, of count three being predicated on the conduct of "marijuana possession" is simply not a correct description of the law. § 922(g)(3) criminalizes being a *user* of or *addicted to* a controlled substance in possession of a firearm, not being a possessor of a controlled substance and possessing a firearm. This is reflected in count three of the indictment which charges Defendant with being a *user*. As previously

discussed, the pardon's narrow limitation to two specific possession offenses makes it unavailing to Defendant here.

Defendant's second argument, that the existence of this pardon raises the Government's burden to offer a historical analogy of regulating firearms based on substance use which the President has proclaimed is no longer punishable, is incorrect for all the previously stated reasons. Further, as the Government rightly notes in their response, the pardon did not legalize marijuana and it remains a controlled substance. Therefore it is inaccurate to claim that the President proclaimed marijuana use was no longer punishable conduct given the President only forgave two specific offenses related to marijuana possession. Moreover, the pardon did not attempt to effect any change upon the firearms laws of the United States and has no bearing on how the *Bruen* analysis is applied.

Therefore, the Court denies Defendant's as-applied challenge.

(3) *Defendant's facial challenge to § 922(g)(3) also fails*

The Court will now apply the two-pronged analysis for Second Amendment challenges laid out in *Bruen* to assess Defendant's facial challenge.

(a) *The Court assumes, without deciding, Defendant's conduct is protected by the Second Amendment*

The first step of a Second Amendment challenge is deciding whether the regulated conduct falls within the scope of the Second Amendment's plain text. *Bruen*, 142 S. Ct. at 2129-30. Therefore, the Court must determine whether Defendant, presumed for this motion to be an unlawful drug user as prohibited under § 922(g)(3), is among those protected by the Second Amendment.

The Government argues that Defendant's conduct is unprotected as "the people" for the purposes of the Second Amendment only includes those who are law-abiding citizens. Some legal scholars have dubbed this the "civic virtue" theory of the Second Amendment. The Court's research indicates that while several of our sister courts have endorsed this view, it is currently subject to a lively debate among federal jurists. *See United States v. Black*, 2023 WL 122920, *3 (W.D. La. Jan. 6, 2023) (collecting cases and helpfully summarizing holdings).

The Seventh Circuit has briefly engaged with this theory prior to *Bruen*, but it seems to be divided on the merits. In *United States v. Yancey*, the Seventh Circuit stated, "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" 621 F.3d 681, 684-85 (7th Cir. 2010) (internal citation omitted). The court went on to use that logic, in part, to uphold the categorical disarmament of habitual drug users by § 922(g)(3). *Id.* at 685. However, five years later in *United States v. Meza-Rodriguez* the Seventh Circuit concluded that an unlawfully present

noncitizen could invoke the Second Amendment. 798 F.3d 664, 672 (7th Cir. 2015) (reviewing a Second Amendment challenge to 18 U.S.C. § 922(g)(5)). The *Meza* court expressly declined to read *Heller*'s language of "law-abiding citizens" and "members of the political community" as defining the scope of "the people" for Second Amendment purposes. *Id.* at 669-70. The Court instead concluded "the people" had the same meaning as in other parts of the Bill of Rights. *Id.* This conclusion would suggest the Seventh Circuit had rejected civic virtue theory as discussed in *Yancey*. However, despite citing to *Yancey*, for a different proposition of law, the *Meza* court never addressed the tension between these two decisions.

Four years after *Meza*, in *Kanter v. Barr*, the Seventh Circuit indicated that *Meza* had not settled this question. 919 F.3d 437 (7th Cir. 2019) (reviewing a Second Amendment challenge to 18 U.S.C. § 922(g)(1)). In *Kanter*, the majority cited to both *Meza* and *Yancey* without reconciling the tension between the two in defining "the people" for purposes of the Second Amendment. *Id.* at 445-46. The *Kanter* court contemplated applying the civic virtue theory, stating "If, as we suggested in *Yancey* and as most scholars have concluded, the founders conceived of the right to bear arms as belonging only to virtuous citizens, even nonviolent felons like Kanter would fall outside the scope of the Second Amendment." *Id.* at 446. However, the court ultimately demurred on reaching such a conclusion and resolved the case at the second step of the pre-*Bruen* Second Amendment framework.

It is tempting to embrace the conclusion in *Meza* as the most direct guidance on this question. However, the Court will decline to do so for three reasons. First, as previously discussed, *Kanter* suggests that *Meza* did not actually decide this issue and there is no binding precedent to be applied. *Id.* Second, individual panels of the Seventh Circuit cannot implicitly override prior panel decisions. *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) ("One panel of this court cannot overrule another implicitly."). Therefore, to the extent *Yancey* made a holding on the scope of "the people" for Second Amendment purposes that decision could not be overridden implicitly by *Meza*. Or to the extent *Kanter* sought to overturn a holding in *Meza*, the same impediment applies. Third, the *Meza* court acknowledged its decision was in conflict with at least three other circuits at the time. 798 F.3d at 669 (citing Fourth, Fifth, and Eighth Circuit decisions). It is possible that in light of *Bruen*, the Seventh Circuit would reach a different conclusion based on additional guidance provided in that case and subsequent developments in other circuits.

As this case can be resolved on the second prong of *Bruen*, the Court will leave this question for the Seventh Circuit to resolve. The Court will assume, without deciding, that Defendant is part of "the people" and the possession of a firearm is protected by the Second Amendment. The Court will now advance to the second prong of the *Bruen* analysis.

(b) *The void for vagueness challenge Defendant raised in her reply brief is without merit*

Prior to engaging with the properly presented arguments on the second prong of the *Bruen* test, the Court will address the new argument Defendant raised for the first time in her reply brief. Defendant raises the argument that the term "user" in § 922(g)(3) is not defined by statute and therefore is too vague to be considered "a well-defined or reasonable restriction on firearm possession as *Bruen* demands" The Court will deny this argument for two reasons. First, this argument makes no appearance in the motion to dismiss and is therefore waived. *White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021) ("[A]rguments raised for the first time in [a] reply brief are waived because they leave no chance to respond." (internal citations omitted)).

Second, and in the alternative, the Court would reject this argument on the merits. Contrary to Defendant's assertion, the term "user" is defined. Specifically, there is a federal regulation implementing the statute which defines the term. 27 C.F.R. § 478.11. Further, in *United States v. Cook*, the Seventh Circuit rejected a challenge to § 922(g)(3) predicated on the term "user" being unconstitutionally vague. 970 F.3d 866 (7th Cir. 2020). Reaffirming prior Circuit precedent on the question, the court held that the term "user" means "one who regularly or habitually ingests a controlled substance in a manner other than prescribed by a physician." *Id.* at 874 (citing *Yancey*, 621 F.3d at 682). Moreover, *Cook* expressly held that the statute is not "so indefinite as to inhibit the legitimate exercise of Second Amendment rights." *Id.* . . .

(c) § *922(g)(3) is consistent with the historical tradition of firearms regulation in the United States*

The Court now turns to the dispositive issue of this case, has the Government carried its burden on the second prong of *Bruen* to show that § 922(g)(3) is consistent with historical firearms regulation in the United States? The Court finds the answer is yes.

The Government concedes that the specific regulation contained in § 922(g)(3), prohibition on the possession of firearms by unlawful drug users, did not exist at the time the Second Amendment was enacted. The Government also concedes that this federal statute was enacted in 1968 and is therefore not a longstanding restriction itself. However, the Government argues two relevant historical regulations are sufficiently analogous to support § 922(g)(3)'s constitutionality. The first is a history of state legislatures restricting the right of habitual drug users or alcoholics to possess or carry firearms. The second is a history of restrictions aimed at preventing persons considered to be dangerous or untrustworthy from possessing and using firearms. The Court agrees that both are sufficiently analogous to uphold § 922(g)(3).

Regarding the first argument, the Government points to the Seventh Circuit's decision in *United States v. Yancey*, a pre-*Bruen* decision upholding § 922(g)(3). 621 F.3d 681 (7th Cir. 2010). *Yancey* recognized that while Congress had not barred habitual drug users from owning guns until 1968, this development did not occur in a vacuum. *Id.* at 684. Instead, contrary to Defendant's assertion that § 922(g)(3) only reflects late 20th Century concerns, numerous state legislatures had "entrenched" regulations "restric[ing] the right of habitual drug users or alcoholics to possess or carry firearms." *Id.* at 684 (collecting state statutes and cases). These regulations demonstrated that Congress was not alone in considering habitual drug users unfit to possess firearms and that the prohibition was "the latest incarnation of the states' unbroken history of regulating the possession and use of firearms dating back to the time of the amendment's ratification." *Id.*

The Government argues that *Yancey*'s historical analysis, showing similar regulations have long existed without question to their constitutionality, directs the Court to uphold §922(g)(3) in this case. The Court agrees. Defendant's only argument against *Yancey* is that it utilized the pre-*Bruen* test for Second Amendment claims. This is true, however, *Yancey*'s historical analysis, of state law disarming alcoholics and habitual drug users, at the first step of the old test was recognized as "broadly consistent with *Heller*" and remains valid. *Bruen*, 142 S. Ct. at 2127-29. Furthermore, the historical analysis in *Yancey* has been positively cited by our sister courts in rejecting *Bruen* challenges to § 922(g)(3) which indicates its continued validity. *See e.g. United States v. Daniels*, 2022 WL 2654232, *3 (S.D. Miss. July 8, 2022) (upholding § 922(g)(3) in part based on the historical analysis in *Yancey* and other circuit court decisions); *United States v. Seiwert*, 2022 WL 4534605 (N.D. Ill. Sept. 28, 2022) (upholding § 922(g)(3) and citing to *Daniels*); *Black*, 2023 WL 122920 at *4 (upholding § 922(g)(3) and citing to *Yancey*'s analysis).

Moreover, a sister court examining a *Bruen* challenge to § 922(g)(3) recognized additional historical support for the statute in the form of early American intoxication laws. In *Fried v. Garland*, the court recognized a history of statutes from the founding and reconstruction eras which restricted gun possession by the intoxicated. 2022 WL 16731233, *7 (N.D. Fla. Nov. 4, 2022) (describing a 1655 Virginia statute, a 1771 New York statute, and several from the era following the ratification of the Fourteenth Amendment). Some of these statutes prevented individuals from carrying firearms while intoxicated, and others prohibited individuals from firing a gun while intoxicated. *Id.* The Court finds these additional historical examples, of statutes regulating firearm possession and use by individuals using intoxicating substances, supplement and affirm the historical findings in *Yancey*.

Defendant's argument that the regulation in § 922(g)(3) is of a "wholly recent vintage" is unpersuasive in light of the historical record indicating entrenched state provisions for regulating this type of behavior. The same

holds true for her argument that the scope of this regulation, i.e. banning possession of a firearm at all by users or addicts, is without a historical analogue. Further, *Fried* nicely describes how the prohibition in § 922(g)(3) can be analogized to the historical intoxication statutes. Under those historical regulations the intoxicated could not carry or use firearms, while under the modern regulation an *active drug user* cannot possess firearms. 2022 WL 16731233 at *7. So, for the duration of the period individuals are using intoxicating substances, their Second Amendment rights are impaired. *Id.*; *see also Yancey*, 621 F.3d at 687 ("the gun ban [in § 922(g)(3)] extends only so long as Yancey abuses drugs"). Both groups are then able to regain their Second Amendment rights by simply ending their substance use. *Fried*, 2022 WL 16731233 at *7. These historical regulations may not be "dead ringer[s]" for § 922(g)(3), but they are not required to be and are nonetheless sufficiently analogous. *Bruen*, 142 S. Ct. at 2133. As such, the scope of § 922(g)(3) is in line with these historical examples. . . .

The historical record shows a tradition of regulating firearm possession by individuals using intoxicating substances which is analogous to § 922(g)(3). Therefore, the Court finds that Government has met its burden and concludes that § 922(g)(3) is constitutional.

In the alternative, the Court would also uphold § 922(g)(3) as it is analogous to historical regulations preventing dangerous persons, such as felons and the mentally ill, from possessing firearms.

While a judge on the Seventh Circuit, Justice Amy Coney Barrett made the keen observation that "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J. dissenting). It is well established that there is a history and tradition in the United States of disarming persons who would pose a threat to public safety if allowed to possess firearms. *See e.g. United States v. Barber*, 2023 WL 1073667 (W.D. Tex. Jan. 27, 2023) (summarizing historical record); *see also United States v. Rahimi*, 59 F.4th 163, 2023 WL 1459240, *8 (5th Cir. Feb. 2, 2023) (noting historical examples of laws disarming classes or groups of people determined to be dangerous in order to preserve political and social order).[7] This tradition includes the long-standing, and presumptively valid, regulations of disarming

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[7] Defendant filed *Rahimi* as supplemental authority in this case, arguing it supports her position. The Court disagrees. *Rahimi* struck down § 922(g)(8), which is quite dissimilar from § 922(g)(3). § 922(g)(8) prohibits firearm possession by individuals subject to domestic violence restraining orders based on their threat to a specific individual, and not a defined class of persons based on their danger to society writ large (such as the felon restriction). As noted above, *Rahimi* actually endorses the latter type of restrictions as consistent with the historical record. As § 922(g)(3) resembles the latter type of restrictions, the findings in *Rahimi* support the constitutionality of the statute at issue in this case.

felons and the mentally ill. *Heller*, 554 U.S. at 626, 627 n. 26; *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J. concurring). Since *Bruen*, several sister courts have upheld § 922(g)(3) by finding it is analogous to the these regulations. *See e.g. Fried*, 2022 WL 16731233 at *7-*8; *Black*, 2023 WL 122920 at *3-*4; *Daniels*, 2022 WL 2654232 at *3-*4; *Seiwert*, 2022 WL 4534605 at *2; *United States v. Sanchez*, 2022 WL 17815116, *3 (W.D. Tex. Dec. 19, 2022); *United States v. Lewis*, 2023 WL 187582, *4-*5 (W.D. Okla. Jan. 13, 2023); *but see United States v. Harrison*, No. CR-22-328-PRW (W.D. Ok. Feb 3, 2023) (striking down § 922(g)(3) and finding it is not analogous to these historical regulations). The Court agrees with these courts and finds that § 922(g)(3) is sufficiently similar to these long-standing regulations to pass constitutional muster.

As previously stated, the key inquiry is "whether modern and historical regulations impose a comparable burden on the right of [law-abiding citizens to] armed self-defense and whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133. In terms of burden, § 922(g)(3) prevents a certain, clearly defined, group of people from possessing a firearm. This is the same mechanism by which the bar on felons and the mentally ill from possessing firearms operates. In fact, § 922(g)(3) is actually less onerous than the provisions regulating felons and the mentally ill. The burden imposed by § 922(g)(3) only endures for as long as the individual is an unlawful user or addict, leaving them free to regain their full Second Amendment rights at any time. *Yancey*, 621 F.3d at 687; *Fried*, 2022 WL 16731233 at *7. In contrast, the burden imposed upon convicted felons and the mentally ill is a lifelong one. *Yancey*, 621 F.3d at 687. Therefore, the Court finds that this, relatively lenient, burden placed on a defined group of persons is directly analogous to the burden placed on felons and the mentally ill.

In terms of justification, it is undisputed that Congress enacted the exclusions in § 922 to "keep guns out of the hands of presumptively risky people." *Yancey*, 621 F.3d at 683. Common sense and an empirical record support Congress' conclusion that individuals who unlawfully use, or are addicted to, controlled substances may be dangerous if they possess firearms. *Yancey*, 621 F.3d at 685-86. Defendant does not dispute this conclusion about dangerousness. Therefore, the negative implications for the maintenance of good social and political order posed by dangerous persons carrying firearms needs no further elaboration. As such, the Court finds that the exact same justification underlies § 922(g)(3) and the well-established regulation of firearm possession by felons and the mentally ill. Accordingly, the Court would alternatively find that § 922(g)(3) is analogous to the historical firearms regulations which disarmed dangerous persons and the Government had carried its burden here as well.

The Court concludes that the government has established that the restrictions imposed by § 922(g)(3) are consistent with the history and tradition of firearms regulation in the United States and that the Government has

carried its burden on the second prong of the *Bruen* test. Therefore, the Court denies Defendant's facial challenge to the statute.

D. Conclusion

Accordingly, for the reasons previously stated, Defendant's motion to dismiss count three of her indictment is DENIED.

F. Lee Francis*

Pardoning Marijuana Possession While Using Marijuana to Criminalize Firearm Ownership

(prepared for this work)

On October 6, 2022, President Joseph R. Biden issued a presidential proclamation that pardons federal convictions for simple marijuana possession.[1] This proclamation also extends to District of Columbia marijuana offenses.[2] In his official statement, President Biden said "no one should be in jail just for using or possessing marijuana."[3] Citing issues of mass incarceration and racial bias, Biden further explained that "Sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit. Criminal records for marijuana possession have also imposed needless barriers to employment, housing, and educational opportunities."[4] The President's comments lament that marijuana use and possession is a federal offense punishable by imprisonment. This Essay examines the effect of the President's actions on the federal enforcement of marijuana. Specifically, this Essay focuses on the decline of marijuana prosecutions, save for those cases generally involving 18 USC § 922 offenses.

Article II, section 2 of the Constitution vests the president with the power "to grant Reprieves and Pardons for Offences against the United States."[5] The Framers understood a pardon's benefit on an individual. But they believed such a power would be of far greater use to the sovereign as a mechanism for

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[1] Joseph R. Biden, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana* (Oct. 6, 2022).

[2] *Id.*

[3] Joseph, R. Biden, *Statement from President Biden on Marijuana Reform*, (Oct. 6, 2022).

[4] *Id.*

[5] U.S. Const. art. II, § 2, cl. 1.

national peace.[6] Generally speaking, past presidential pardons comported with the Framers intent.[7] Today, however, critics argue the president is merely "legislat[ing] by pardon" because Congress has failed to act.[8]

The President stressed that his intention was to pardon only those convicted of simple possession of marijuana.[9] But his decision drastically altered how federal marijuana offenses were prosecuted.

Between 2014 and 2021, the number of federal offenders sentenced for simple possession of marijuana decreased from 2,172 to 145.[10] In January 2022, that number dropped to zero.[11] Federal prosecutions of firearm offenses — specifically Section 922(g) related convictions — increased nearly 30 percent from 2018 to 2022.[12] Of those federal offenders, more than 97 percent were sentenced to an active term of imprisonment.[13]

The data on marijuana prosecutions under Section 922(g)(3) paints a different picture. A Westlaw search for 922(g)(3) marijuana offenses yielded zero prosecutions of simple possession in 2022, while there were at least 82 cases brought against defendants under 922(g)(3) solely on the basis on marijuana possession or use between January 2021 to July 2023.[14] In that same time period, there were 151 prosecutions for all drug offenses under 922(g)(3). Nearly 54 percent of all 922(g)(3) cases from January 2021 to July 2023 involved marijuana and firearms. At bottom, the government has virtually ignored all marijuana related offenses, except for those cases brought under 922(g).

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[6] The Federalist No. 74, at 386 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("In seasons of insurrection and rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.").

[7] *See* William F. Duker, The *President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475 (1977).

[8] George Demos, *Biden's Pot Pardon Introduces Presidential Nullification of Federal Law*, The Hill (Oct. 13, 2022).

[9] https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ ("My intent by this proclamation is to pardon only the offense of simple possession of marijuana in violation of Federal law or in violation of D.C. Code 48-904.01(d)(1), and not any other offenses related to marijuana or other controlled substances.").

[10] Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System, U.S. Sentencing Commission (Jan. 2023).

[11] *Id.* ("As of January 2022, no offenders sentenced solely for simple possession of marijuana remained in the custody of the Federal Bureau of Prisons.").

[12] 18 U.S.C. § 922(g) Firearms Offenses, U.S. Sentencing Commission (2023).

[13] *Id.*

[14] The Westlaw search used was "adv: 18 USC 922(g)(3) and marijuana".

Main Justice considers marijuana possession cases a low priority.[15] This trend has shifted downward to United States Attorneys' Offices throughout the country.[16] Following the president's announcement, countless marijuana cases were either dismissed or the government declined to prosecute.

Prosecutorial discretion is widely accepted. However, prosecutors do not have the authority or discretion to prosecute many of the marijuana related offenses. If the government chose to prosecute a marijuana offense, a firearm was almost always involved.

Marijuana has become a proxy for targeting firearms. This is particularly evident in states where marijuana is legal for recreational use and purchase.[17] What is more, many of the individuals charged under 922(g)(3) have no violent criminal history and would otherwise lawfully possess a firearm but for the presence of marijuana.

The President and Main Justice effectively tied the hands of prosecutors with marijuana cases. To be clear, the drug is still illegal under federal law as it is in many states. Yet, without any congressional action, the President unilaterally made marijuana *per se* legal.

The government believes that no one should be in jail for possessing marijuana, but that sentiment does not track the government's prosecutorial pattern and practice. Simple possession of marijuana, according to our government, is effectively harmless and should not be criminalized. But .44 grams of marijuana and a firearm could send an individual to federal prison.[18]

NOTES & QUESTIONS

6. [New Note] Note how the opinion integrates the *Bruen* and *Heller*. Note also the reference in n. 6 of *Manns* to the Fifth Circuit decision in *Rahimi*. As discussed earlier in this Supplement, the Supreme Court has granted cert in *Rahimi*. Consider whether the reasoning in *Manns* (integrating *Bruen* and *Heller*) might also apply to *Rahimi.* Might the Supreme Court qualify the *Bruen* analysis in a way that preserves the category of presumptively lawful

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[15] *See, e.g.*, Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General before the S. Comm. on the Judiciary 24 (Feb. 28, 2021) (statement of J. Merrick Garland) ("The Department of Justice has not historically devoted resources to prosecuting individuals for simple possession of marijuana.").

[16] *See* Mikaela Lefrak & Matthew F. Smith, *New U.S. attorney for District of Vermont to focus on violent and white-collar crime; cannabis not a top priority*, VERMONT PUB. (January 18, 2022) ("There are potential matters involving marijuana that we would potentially consider prosecuting. But, as a general matter, that is not an area that's on the top of our priority list.").

[17] *See* Graham v. Williams, 2023 WL 2374367, at *1 (S.D. Ill. Mar. 6, 2023).

[18] *See* Brief of Appellant at 17, United States v. Daniels, 610 F. Supp. 3d 892 (S.D. Miss. 2022).

regulations discussed in Heller. How would the Court qualify *Bruen* in order to achieve that. Is the *Bruen* standard only properly applied to the regulations on the law-abiding as suggested in n.1 of *Manns*.

7. [New Note] Consider the different approaches taken in *Manns* and *Posey*. Which approach is more durable? Is it viable to identify a class of restrictions on lawbreakers that are controlled by the plain declaration in *Heller* of presumptive validity of restrictions on lawbreakers. What about restrictions on those who are not convicted criminals but still deemed untrustworthy by the legislature — e.g., others prohibited under Section 922 like those adjudicated mentally ill, or who have renounced their citizenship, or are subject to a domestic violence restraining order (like Rahimi)? Are those restrictions presumptively lawful under *Heller* as the *Manns* analysis might suggest. Or is the *Manns* analysis limited to lawbreakers?

CHAPTER 19
COMPARATIVE LAW

B. MULTINATIONAL COMPARATIVE STUDIES OF THE EFFECTS OF PRIVATE GUN OWNERSHIP ON CRIME AND VIOLENCE

4. Statistical Data in Cultural Context

NOTES & QUESTIONS (AFTER THE KOPEL, MOODY & NEMAROV EXCERPT)

12. [New Note] Royce Barondes, *Red Flag Laws, Civilian Firearms Ownership and Measures of Freedom*, 35 Regent U.L. Rev. 339 (2023). While the first half of this article critiques Red Flag laws, particularly as implemented in Maryland, the second half advances on the Kopel et al. study: It covers 86 nations, rather than 59. Like Kopel et al., it uses Transparency International's Corruption Perception Index. Unlike the Kopel article, Professor Barondes does not use the Heritage Foundation's overall scores for economic freedom, but instead two components of that score: Judicial Effectiveness and Government Integrity. Whereas Kopel et al. used overall firearms per capita, Barondes also calculates registered firearms versus unregistered, law enforcement firearms per capita, and violent crime rates. He also refines the data geographically for Africa, America, Europe, Asia, and Oceania.

The study finds, at the 99% confidence level, that "lawful civilian firearms ownership is associated with increased freedom in all model constructs." At the same time, several measures of freedom are associated with higher levels of serious crime. As Barondes cautions, showing a strong association, as he does, does not prove causation, and does not prove a method of causation.

C. GUN CONTROL AND GUN RIGHTS IN SELECTED NATIONS

3. Canada

NOTES & QUESTIONS

7. [Replace with the following] Canada's lower house, the House of Commons, has passed Bill C-21, to prohibit sale or transfer of handguns, and to outlaw a wide variety of firearms. The bill is currently before the Canadian Senate. In

the House, a proposed amendment to ban many manual action firearms, such as bolt action or pump action, was withdrawn. However, C-21, in its current form, would create a Firearms Advisory Committee with the power to ban any firearm by regulation.

Seven Canadian scholars with expertise in firearms policy have sent an open letter to the Canadian Senate, arguing that C-21 is useless for public safety, and very harmful to sports, businesses, and social trust.

Separately, in 2020, the government issued an Order in Council to prohibit possession of many long guns. Registration, Can. Gaz. SOR/2020-96 (May 1, 2020). Current owners have until October 2023 to either surrender their guns or have them permanently deactivated.

An Order in Council is similar to a regulation. Formally speaking, an Order in Council is issued by the Governor-General of Canada, who is the representative of the king or queen of Commonwealth of Nations. (As of 2020, Queen Elizabeth II, presently King Charles III.) But the Governor-General plays no policy-making role; the decision to issue an Order in Council is made by the Canadian Prime Minister and his cabinet.

A variety of plaintiffs, including the Province of Alberta, brought lawsuits challenging OIC. In April 2023, an eight-day trial was held in the Trial Division of the Federal Court of Canada, in Ottawa. A decision is pending

The Federal Court has jurisdiction over certain issues involving the federal government, with immigration cases being most common. There is a Trial Division and a Federal Court of Appeal, and above that, the Supreme Court of Canada.

One of the plaintiffs in the OIC cases, the Canadian Center for Firearms Rights, has written a detailed report of the courtroom proceedings.

The plaintiffs' arguments included:

The Order in Council is contrary to the authority granted in 1995 by Bill C-68, for administrative gun bans; the banning power specifically exempted all arms that are "reasonable" for hunting and other sporting purposes. Plaintiffs argued that the availability of other, nonbanned firearms, that are also reasonable for such purposes does not change C-68's protection of every firearm that is reasonable for hunting and sports. The OIC forced Canadian target shooting athletes to train abroad, their competitive arms having become illegal.

The Order's prohibition of "variants" is vague, confusing, and irrational. Even the Royal Canadian Mounted Police (RCMP, the national police) firearms lab cannot define the term. Over 600 firearms models have been banned as "variants" of the 1,500 models named in the OIC.

For example, the Alberta Tactical Rifle Supply ATRS Modern Hunter was designed so that it cannot use parts from any other model of rifle. The rifle even has a proprietary barrel. Yet it is classified as a "variant" of the AR-15.

The arms selected for prohibition were chosen on the basis of superficial features, such as whether a gun has a black plastic stock rather than a brown wooden one.

The OIC also outlaws guns with a muzzle energy of over 10,000 joules. An average firearms owner has neither the skills nor the special equipment to measure the muzzle velocity of her gun to discover whether it exceeds the limit. The government responds that a gun owner can just look up ballistics data in an ammunition reference book.

The prohibitions are effected by a Firearms Reference Table (FRT) published by the RCMP's Canadian Firearms Program (CFP). There was never any statutory authorization for the creation of the FRT, nor any executive instruction telling the RMCP to create it. Therefore, the FRT, having never been authorized by a delegation or sub-delegation, is *ultra vires.* As of the time of the trial, the RCMP did not continuously update the FRT online. (However, the linked file above is dated July 17, 2023.)

The government responds that although police officers using the FRT in making charging decisions, the FRT itself is just an opinion document that has no force of law.

Plaintiffs also argued that it is irrational that Canadian law, implementing an earlier prohibition of machine guns, allows grandfathered machine gun owners to keep their guns, but there is no grandfathering for owners of semiautomatics.

Plaintiffs contended that the OIC violates several sections of the Canadian Charter of Rights and Freedoms. After each section, the government's response is supplied:

Section 1: Charter rights may only be reasonably limited by laws "as can be demonstrably justified in a free and democratic society." Pursuant to case law, the government must attempt to use less restrictive alternatives. Government: Plaintiffs have not met their heavy burden of proving the government acted unreasonably in pursuit of public safety.

Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." And Section 8: "Everyone has the right to be secure against unreasonable search or seizure." Government: Nobody's property has been seized, yet. (But many businesses have been deprived of the use of their property.) Moreover, Section 7 can be breached for the public good.

Section 15: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Government: This only applies to categories that are analogous to the named categories. Canadian traditional "gun culture" has no equal protection rights.

Section 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." Government: Canadian gun owners have no rights, only privileges as allowed by the government.

The Canadian government further argued that all the banned arms are "assault style firearms" (ASF) that have place no in civil society, other than among indigenous people, who are partially temporarily exempted from the OIC. The OIC only affects 150,000 Canadians. (Plaintiffs say 500,000.) According to government expert witness Simon Chapman (Ch. 19.C.6, Australia), the Australian gun confiscation program was a great success. The existing restrictions on magazines (no more than five rounds for a semiautomatic long gun) are insufficient to prevent mass shootings. Nobody needs firearms for protection; bear spray can be used instead. Whether an OIC is efficacious for its purpose has no bearing on its legality.

Also in 2023, Alberta passed the Alberta Firearms Act. Pursuant to a regulation thereunder, municipalities in Alberta may not enter into agreements with the federal government to carry out the OIC gun confiscation.

9. [Add to Note] Gary A. Mauser, *The Right to Bear Arms in Canada: The Continuing Tension between Elite and Popular Beliefs* (Jan. 23, 2023).

> As former English colonies, both Canada and the United States inherited the right to bear arms from the English Bill of Rights of 1689. Despite their common heritage, the paths of the two neighbors diverged widely. . . . The central question in this paper is: how did Canadians lose the legal right to bear arms even though popular support has long existed for such a right? I argue that Canadian elites squandered the right to keep and bear arms despite widespread popular support, primarily because Canada lacks the constitutional protections built into American political institutions.

Putting aside the Second Amendment, can you think of other differences between the U.S. constitutional system and the Canadian parliamentary system (similar to that of the United Kingdom) that make the enactment of gun control more difficult in the U.S.?

4. Mexico

NOTES & QUESTIONS

5. [Add to Note] In the Boston case, the district court granted a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. *Estados Unidos Mexicanos v. Smith & Wesson Brands*, 633 F.Supp.3d 425 (D. Mass. 2022). The case was obviously preempted by the PLCAA, notwithstanding Mexico's creative claims that foreign governments are exempt from the PLCAA. For example, in torts, "choice of law" is usually where the

injury occurred. But there is no "choice" to make, because the PLCAA is jurisdiction-stripping. The "presumption against extraterritoriality" in congressional legislation is not violated. The PLCAA simply controls the operation of government functions (courts) inside the U.S., and protects the lawful conduct of businesses within the U.S. The case is presently on appeal to the First Circuit, with oral argument held in July 2023.

A new Mexico government complaint has been filed in U.S. District Court in Arizona, against Arizona firearms dealers. Estados Unidos Mexicanos v. Diamondback Shooting Sports, No. 4:2022cv00472 (Oct. 10, 2022). Among other facts alleged in the complaint said to create civil liability, one gun dealer retweeted a vulgar tweet from the Firearms Policy Coalition criticizing a new policy by Federal Express on shipping gun parts. Id. at 103 ("F[**]k FedEx").

6. Australia

Further reading : Brandon Raynes, *The Shot Heard Around the Outback: Why Adopting Australia's Firearm Laws Would Flout American Constitutionalism and Jus Cogens Norms*, 68 S.D. L. Rev. 133 (2023). "[T]he right to keep and bear firearms should evidently be viewed as a fundamental predicate of international jus cogens norms, including the individual right to self-defense and the imperative that citizens ought to have the unfettered ability to rebel against a tyrannical government."

11. South Africa

In 2021, the Minister of Police published the Firearms Control Amendment Bill (FCAB), 2021, to prohibit use or ownership of firearms for self-defense. *See* Windell Nortje & Shane Hull, *Disarming the dispirited South African: A critical analysis of the proposed ban on firearms for self-defence*, 27 Law, Democracy and Development 123 (2023). As of July 2023, the prohibition has not been enacted.

CHAPTER 22
UNITED KINGDOM

F. ARMS CARRYING

1. The Statute of Northampton

On page 2095, insert the following at the end of the jump paragraph at the top of page:

Judge Gardiner's article perhaps influenced the Supreme Court. Justice Thomas's opinion for the *Bruen* Court listed several post-Northampton English enactments, which are also cited in the Gardiner article, that treated the Statute of Northampton as applying to armor and lances, not to hand-carried weapons such as knives. *Bruen*, 142 S. Ct. at 2140. The Gardiner article has recently been published in a law journal. Richard E. Gardiner, *The True Meaning of" Going Armed" in the Statute of Northampton: A Response to Patrick J. Charles*, 71 Cleveland State L. Rev. 947 (2023).

CHAPTER 23

THE EVOLUTION OF FIREARMS TECHNOLOGY

A. FIREARMS TECHNOLOGY IN GREAT BRITAIN FROM EARLY TIMES

2. The Flintlock, the Brown Bess Musket, and Fowlers

On page 2194, insert the following at the end of the Section:

Initially, the flintlock could not shoot further or more accurately than a matchlock. Paul Lockhart, Firepower: How Weapons Shaped Warfare 105 (2021). It could also shoot much more rapidly. A matchlock takes more than a minute to reload once. *Id.* at 107. In experienced hands, a flintlock could be fired and reloaded five times in a minute, although under the stress of combat, three times a minute was more typical. *Id.* at 107-08. A flintlock was more likely than a matchlock to ignite a gunpowder charge instantaneously, rather than with a delay of some seconds. *Id.* at 104. "The flintlock gave infantry the ability to generate an overwhelmingly higher level of firepower." *Id.* at 107.

The Theoretical Lethality Index (TLI) is a measure of a weapon's effectiveness in military combat. The TLI of a seventeenth-century musket and eighteenth-century flintlock are 19 and 43. Trevor Dupuy, *The Evolution of Weapons and Warfare* 92 (1984).

B. COLONIAL AMERICA'S GROWING DIVERGENCE FROM GREAT BRITAIN

3. Breechloaders and Repeaters

On page 2205, please note the following clarification:

New research indicates that the famed English gunmaker John Cookson and the eponymous American may have been the same person. *See* David S. Weaver & Brian Godwin, *John Cookson, Gunmaker*, 19 Arms & Armour 43 (2022). According to the authors, the American Cookson did gunsmithing work,

but it was not his main source of income. The firearm he advertised in Boston in 1756 might have been one that he had made in England.

On page 197, please note the this correction to the Ferguson Rifle discussion:

The Ferguson Rifle was not a repeater. It was single shot breechloader. Unlike muzzleloaders, it was easy to reload while the user was walking.

On page 2194, insert the following at the end of the Section:

The first known advertisement for an American business selling repeaters in ordinary commerce, rather than as special items, appeared in 1785, when South Carolina gunsmith James Ransier of Charleston advertised four-shot repeaters for sale. Columbian Herald (Charleston), Oct. 26, 1785.

C. THE AMERICAN INDUSTRIAL REVOLUTION

1. The Rise of the Machine Tools

On page 2208, insert the following, before Section 23.C.1.a:

As ambassador to France, Thomas Jefferson observed French progress in producing firearms with interchangeable parts. He recommended that the United States do the same. *See* Letter from Thomas Jefferson to John Jay (Secretary of Foreign Affairs under the Confederation government), Aug. 30, 1785, in 1 *Memoirs, Correspondence, and Private Papers, of Thomas Jefferson* 299 (Thomas Jefferson Randolph ed., 1829). In 1801, President Jefferson recounted his French observations to Virginia Governor James Monroe and expressed hope for Eli Whitney's plan for interchangeable gun parts. Letter from Thomas Jefferson to James Monroe, Nov. 14, 1801, in 35 *The Papers of Thomas Jefferson* 662 (Barbara B. Oberg ed., 2008).

4. Repeaters

d. [New Section] **Fast Reloading**

David Kopel
Fast Reloading of Guns in the 19th Century: Manufacturing Improvements Made Affordable Many Types of Guns that Previously had been Available Only to the Wealthy

Reason, Volokh Conspiracy (Aug. 5, 2023) (edited for this work)

This post describes the speediest means of reloading firearms in the 19th century. The main focus is not the ammunition capacity of any particular type

of arm, but rather how quickly various arms could be reloaded after the initial ammunition was spent.

As the post also explains, although the 19th century was, by far, the century of the greatest advances in firearms, many of those advances were not truly new. Rather, the advances were the results of improvements in manufacturing that greatly reduced the price of gun types that previously had been very expensive.

The post covers, in order:

- Spencer lever-action rifles (fast reloads of 7-round tubular magazines);
- Girardoni rifles (20-round tubular speedloaders);
- bolt-action rifles (reloads via detachable box magazines or stripper clips);
- double-barreled shotguns (over 30 shots per minute);
- semiautomatic handguns (detachable box magazines or stripper clips);
- metallic cartridge revolvers (via circular speedloaders);
- cap-and-ball revolvers and pepperboxes (for revolvers, cylinder swaps starting with an 1858 Remington patent);
- finally, and perhaps most surprisingly, the large progress in reloading speed of single-shot muskets and rifles, thanks to the replacement of muzzleloading with breechloading.

Spencer lever-action rifles

The first repeating long guns that became a major commercial success were lever-action rifles. They were introduced in the late 1850s. The first commercially successful lever action was the Henry Rifle of 1860; it held 15 rounds in a tubular magazine under the barrel, plus one round in the firing chamber.

Lever action rifles are fast shooters. Today, the champions of the Single Action Shooting Society can fire 10 shots in 2 seconds. The competition requires use of unimproved replicas of common 19th century arms. Once the user had fired all 16 shots from a Henry — or all 18 shots from its successor, the Winchester Model 1866 — reloading would take some time, as the user would have to drop cartridges one at a time into the magazine.

Much faster reloads were possible with the Spencer lever action repeating rifles and carbines, which was also introduced in 1860. During the Civil War, the Spencer Repeating Rifle Company, of Boston, made 144,500 rifles and carbines (short rifles), including 34,000 subcontracted to the Burnside Rifle Company of Providence, R.I. Burnside also made the Burnside Carbine, similar to the Spencer but with different rifling. The company's founder, Ambrose Burnside, was a Union general, strong advocate of using black volunteers in combat, future R.I. Senator and Governor, future first President of the National Rifle Association, and the namesake of "sideburns."

Of the Boston production, 107,372 were sold to the U.S. government, as were 30,052 of the Providence production. The disposition of the rest was presumably private sale, which would almost certainly include some Union soldiers buying arms for themselves. The Spencer was a preferred firearm for cavalrymen. Norm Flayderman, *Flayderman's Guide to Antique American Firearms* 633 (9th ed. 2007).

The Spencer held 7 rounds in a tubular magazine in the buttstock. After firing 7 rounds, the user could insert 7 fresh rounds using the Blakeslee speedloader, patented in 1864. The Blakeslee cartridge box kit could hold up to 13 tubes, with 7 rounds each.

The principle of the detachable magazine had been put into use long before, albeit not on a scale as large as Spencer's. After the American Revolution, American inventor Joseph Belton moved to England, where starting in 1786 he created 7-shot breechloading repeaters with detachable metal magazines for the British East India Company. The 1786 gun had 7 separate firing pans, each of which needed to be reprimed after a magazine change.

Another ancestor of Civil War Spencer was the lever-action Kalthoff repeater of 17th-century Europe. Some of them could fire 30 rounds without reloading. They "spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost. . . . [A]t least nineteen gunsmiths are known to have made such arms in an area stretching from London on the west to Moscow on the east, and from Copenhagen south to Salzburg. There may well have been even more." Harold L. Peterson, *The Treasury of the Gun* 230 (1962).

However, like all repeaters of the time, the Kalthoffs were much more expensive than standard infantry firearms. This is because repeaters, by their nature, have more intricate internal parts than single-shot guns, and the repeater's parts must fit together more precisely than in single-shots. If a Kalthoff part broke, the gun could only be repaired by a specialist gunsmith. The widespread adoption of lever action repeaters was impractical until the American industrial revolution, when, as described in a previous post, federal government industrial policy created a firearms industry that could mass produce high-quality intricate and interchangeable parts.

Although many Union soldiers provided their own firearms, as did Confederates, the majority of Union soldiers used firearms issued by War Department. When the Civil War ended, the U.S. government owned many more firearms than it would need for the soon-to-be much smaller post-war Army. Pursuant to General Order no. 101 (May 30, 1865), Union soldiers were allowed to buy their government-issued firearm for a deduction from their monthly pay. The most expensive was the Spencer, for $10. Muskets were $6, and revolvers or non-Spencer carbines $8. In 1865, the monthly pay for a Union private was $16. For sergeants it was $17 to $21, for lieutenants $105.50, and more for higher ranks.

Bolt-action rifles

The bolt-action rifle had been invented in 1836. Single-shot bolt-action rifles started becoming widespread in 1866. The magazine-fed bolt-action repeaters became standard infantry arms in the 1880s. Some of them used detachable box magazines, such as the 8-round 1888 British Lee-Metford.

Other models had a fixed (permanently attached) magazine that could quickly be reloaded with stripper clips. The clips held the rounds of ammunition in a straight line at their base, so they could speedily be shoved into an empty fixed magazine.

Girardoni rifles

The Spencers, with their speedloaded tubular magazine, used a system also used by the earlier Girardoni air rifle. Invented for Austrian army snipers in 1779, the Girardoni had a tubular magazines for 21 or 22 rounds, depending on .49 or .46 caliber. Each Girardoni came with four speedloading tubes; once the gun's magazine was empty, pouring in 20 more rounds was simple and fast. Because of the air bladder's finite capacity, a Girardoni could fire about 40 shots before the air bladder needed to be pumped up again. That took 1,500 strokes of the special pump.

Ballistically equal to a powder gun, the Girardoni could take an elk with one shot. The best gun of its time, the Girardoni was used by the Austrian army for decades, but did not become widespread in America. Most importantly, it was quite expensive. Second, after years of rough use, the neck connecting the bladder to pump would weaken, so that air refills became impossible. Like other early firearms, the very expensive Girardoni set a high standard that would eventually become attainable by firearms made for ordinary consumers.

Semiautomatic firearms

These were invented in 1884. The first ones to become major commercial successes were the Mauser C96 pistol starting in 1896, and the Luger in 1899. The former had a fixed magazine fed by stripper clips, the latter a 10-round detachable box magazine.

Double-barreled long guns

The double-barreled gun was invented in 1616. W.W. Greener, *The Gun and Its Development* 102 (9th ed. 1910). By the 1880s, breechloading and metallic cartridges had made the double-barreled shotgun into a fast shooter. With a flip of a switch, the gun could break open: the barrels would tilt down and the two empty cartridges would be ejected. The user could then drop two fresh cartridges into the exposed barrel breeches. The rate of fire was about 26 rounds per minute for aimed shots, and "upwards of thirty" otherwise. *Id.* at 504.

Metallic cartridge revolvers and pepperboxes

The modern form of the metallic cartridge was invented in 1853, and is used by the vast majority of modern firearms. A metal cylinder holds the bullet, gunpowder, and primer all in a single unit. Its predecessors date back to the reign of King Henry VIII.

The first American revolver to use metallic cartridges was the 7-round breechloading Smith & Wesson New Model 1, introduced in 1857.

In the next section, I will explain how previous models of revolvers — the muzzleloading cap-and-ball type — had to be laboriously reloaded by ramming a bullet from the front of the cylinder to the back. The new Smith & Wesson opened on a hinge, exposing all 7 chambers at the back of the cylinder. When reloading, the user would use an attached rod to push out the now-empty shell of a fired cartridge. Then the user could drop a fresh round into the empty cylinder chamber. For a full reload, the process would be repeated for each chamber. The ammunition for the Model 1 was Smith & Wesson's new .22 rimfire short, which is still in use today.

Pepperboxes are similar to revolvers, but have multiple rotating barrels; they are discussed in more detail in the next section. In 1859, the first pepperbox using metallic cartridges was produced by Sharps. Production would be over 150,000. Lewis Winant, *Pepperbox Firearms* 78, 87 (1952).

Reloading a S&W revolver was faster than reloading a pre-1858 cap-and-ball revolver; cap-and-ball reloading became much quicker starting in 1858, thanks to a Remington patent discussed in the next section.

In the 1860s and 1870s, metallic cartridge firearms displaced firearms using older types of ammunition. As the process continued, reloading of revolvers with metallic cartridges sped up.

The S&W New Model 1 broke open from the bottom, via a hinge on the top. Later, "top break" revolvers put the hinge on the bottom. The user did not have to turn the gun upside-down to reload. Opening a top break revolver automatically ejected all the empty shells from the entire cylinder.

In 1879 the first speedloader for revolvers was patented. It was a circular clip that held six rounds of ammunition in the exact position of a revolver cylinder. While 6 rounds had become the standard capacity for revolvers, some models had more or fewer, so they would need speedloaders made for the revolver's particular capacity and caliber.

With the entire back of the cylinder exposed, the user places the speedloader over the empty cylinder and then turns a knob on the speedloader to release the cartridges all at once, dropping them into the cylinder. With some practice, the process is quick, albeit not as fast as swapping detachable box magazines on a semiautomatic firearm. In the days when many or most law enforcement officers carried revolvers — that is, up until about the 1990s — speedloaders were standard on an officer's duty belt.

In 1889 came the swing-out cylinder, which is ubiquitous on modern revolvers. The cylinder is attached to revolver's frame via a hinge called a "crane." Like the top break, the swing-out exposes all cylinder chambers simultaneously. A few years later Smith & Wesson introduced an ejector rod to push out every empty shell from the cylinder all at once. Speedloaders made for a top break revolver can work for a swing-out, and vice versa.

Cap and ball revolvers and pepperboxes

The first repeating firearms to become huge commercial successes in the United States were handguns, starting in the 1830s. Although the Colt revolver was patented in 1836, until the 1850s revolvers were overshadowed by pepperboxes. In a revolver, a cylinder holds several rounds of ammunition, most typically 5 to 7. Before each shot, the cylinder is rotated by mechanical action from the trigger or hammer, and the cylinder aligns the next round in the cylinder's chambers with the barrel. A pepperbox works similarly, except that the pepperbox has a separate barrel for each round of ammunition; the barrels rotate around an axis. (Some earlier models of pepperboxes wrapped the barrels around an axis, but the barrels did not rotate.)

Pepperboxes were less accurate than Colt revolvers, but accurate enough at close range. Many pepperboxes could fire faster than a Colt revolver because they were double-action; that is, they fire as fast as the user can press the trigger. In contrast, the Colt revolvers were single-action; before pressing the trigger, the user had to cock the hammer with his thumb. The first Colt revolvers had five shots, whereas many pepperboxes had six. Perhaps most importantly, the Colt revolver could cost four times as much as a pepperbox. Paul Henry, *Ethan Allen and Allen & Wheelock* 4, 17, 48, 59 (2006) (Allen price of $8 to $8.50 to dealers).

The largest-capacity American-made pepperbox appears to be the 10-shot Pecare & Smith, introduced in 1849. Lewis Winant, *Pepperbox Firearms* 58 (Palladium Press 2001) (1952).

The first American pepperbox patent was by Darling in 1836. Winant at 20. The leading American manufacturers were various companies associated with Ethan Allen. Allen was not the same person as the illustrious Vermont patriot of the American Revolution. The 19th-century Allen *is* the person who founded the company that today sells fine furniture. He "was a pioneer in the transition from handmade to machine-made and interchangeable parts." *Id.* at 28.

"The Allens were very popular with the Forty Niners. . . . The pepperbox was the fastest shooting handgun of its day. Many were bought by soldiers and for use by state militia. Some saw service in the Seminole Wars and the War with Mexico, and more than a few were carried in the Civil War." They were last used in a major engagement by the U.S. Cavalry in an 1857 battle with the Cheyenne. *Id.* at 30.

Like lever actions, neither revolvers nor pepperboxes were truly new. In the 18th century and before, expert gunsmiths made revolvers for wealthy customers, but their main business was single-shot flintlocks. Starting in the 1810s, Eilisha H. Collier of Boston began working on revolving pistols and rifles. He was the first gunsmith "to be known *solely* as a manufacturer of revolvers." John Nigel George, *English Guns and Rifles* 231 (1947). In 1819-20, while working in London, Collier produced 150 revolvers, "a very respectable figure for an expensive hand-made weapon of that type." *Id.* at 236.

In 1715, John Pimm (or Pim) of Boston made a 6-shot flintlock revolver that resembles a modern Smith & Wesson .38 Special. M.L. Brown, *Firearms in Colonial America: The Impact on History and Technology 1497-1792*, at 255-56 (1980). King Henry VIII (reigned 1509-47) owned a four-shot matchlock revolver. Greener at 81-82.

Far more mainstream than King Henry's gun were the magazine-fed Lorenzoni handguns of the 1600s. They used a cylinder that was rotated via a lever into three different positions to load a fresh ball, a fresh gunpowder charge, and fresh priming powder. While the Lorenzoni cylinder did revolve, the cylinder held only one bullet and an appropriate amount of gunpowder at a time. The cylinder was revolved in order to reload a fresh bullet from one internal magazine, and fresh powder from another such magazine.

Pepperboxes also predate 1600. One well-known model was the "Holy Water Sprinkler," consisting of several barrels wrapped around the staff of a mace; some said that Henry VIII carried one. Winant at 7, 11. In the latter 17th century, pepperboxes were made by Jan Flock of Holland, and in the late 18th by Henry Nock of England. *Id.* at 13-14. Once the percussion cap was invented in the early 19th century, an unknown gunsmith in Pennsylvania made a 6-shot pepperbox. *Id.* at 18.

There are two main reasons why pepperboxes and revolvers started to become widely popular in the 1830s rather than the 1540s. The first was a change in firearms ignition.

Previously, firearms had used either flintlock or matchlock ignition. Matchlocks were obsolete in America and England long before 1791. The wheellock, invented by Leonardo da Vinci, was a step on the way to the flintlock. In flintlocks and matchlocks, the firing begins by igniting loose gunpowder in the firing pan. For a flintlock, the ignition is by sparks from a flint striking steel; for a matchlock, by the trigger lowering a slow-burning hemp cord to the firing pan. The firing pan is connected to the main gunpowder charge in the breech (back) of the barrel by a narrow channel that enters the barrel via a small touch hole. In 1805, after 12 years of careful work, Scotland's Rev. Alexander Forsyth invented percussion ignition: the hammer of a firearm would strike a small explosive (the fulminate) and that explosion would ignite the main gunpowder charge in the firearm's barrel. Percussion priming made

it possible to have several rounds ready to fire, without the need to refill a priming pan.

A second reason why revolvers and pepperboxes became ordinary consumer items in the 1830s rather than the 1540s was manufacturing cost. Being mechanically more complex than single-shot guns, repeaters could be, and were, produced artisanally from the fifteenth century onward, but required many hours of expert labor. Mass production for a large consumer market became possible as a result of the Madison-Monroe industrial policy, begun in 1815, of federal investment in research and development of machine tools for the mass production of firearms from interchangeable parts.

All the American pepperboxes, as well as the Colt revolvers in their first decades, were cap and ball firearms. That is, they were a type of muzzleloader. To load a round, the user poured gunpowder into a revolver's cylinder chamber (or one of the barrels on a pepperbox) from the front, and then rammed a bullet into place. At the back of the same cylinder chamber (or barrel, for a pepperbox), the user would place a percussion cap on a nipple. Then the process would have to be repeated for the next cylinder chamber (revolver) or barrel (pepperbox). For revolvers, a short ramrod on a pivot was typically attached underneath the barrel. With the cap and ball system, once a handgun was empty, a full reload was far from instantaneous.

That changed in 1858, with the third version of the new Remington "Beals" revolvers. Remington had patented the first and second Beals models in 1856 and 1857. Charles Schif, *Remington's First Revolvers: The Remington Beals .31 Caliber Revolvers* 6-8 (2007) (Patents 15,167 & 17,359). In the 1858 patent, no. 21,478, the barrel was affixed to the revolver frame by a single pin, and the pin was designed to be easy to remove. The user would push out the attachment pin, replace the empty cylinder with a fresh, preloaded cylinder, put the barrel and pin back into place, and be ready to shoot. *Id.* at 48. As Remington advertising explained, "The efficiency of the arm may be greatly increased by the addition of duplicate cylinders, thus affording the advantage of a brace [pair] of Pistols at a trifling additional expense." *Id.* at 106 (reprinting advertisement that ran in the *George W. Hawes' Ohio State Gazetteer and Business Director* in 1859-60).

Another company, U.S. Starr Arms, made revolvers with a similar mechanism, using a screw for attachment, and designed for fast reloads. Colt revolvers had an attachment pin, but it had not been made with reloads in mind. Thus, some Colt users would file the pin so that was easy to remove, and the gun could then be reloaded just as fast as a Remington. I do not know if Fordyce Beals figured out the idea of a removable attachment pin by noticing what Colt users were doing, or if Colt users got the idea of filing their pins after seeing the Remington Beals revolvers.

Single-shot rifles

The American colonists switched from matchlock firearms to flintlocks much sooner than their European cousins did. (Ch. 23.B.1.) Because a flintlock is much easier to reload, the change quintupled the fire — at least in the hands of a proficient user — from no more than one shot per minute to five per minute.

Flintlock firearms started becoming much more powerful in 1787 when England's Henry Nock patented a new breechblock. Formerly, the touch hole had been located near the back of the main powder charge. Nock moved the touch hole to around the middle of the powder charge, so that all the powder would ignite at once. Greener at 118; George at 188-90. Because all the powder now burned in an instant, gun barrels could be shortened; there was no longer a need for long barrels that provided time for various parts of the powder to combust. George at 190.

Nock's breechblock was one of many inventions that made the flintlocks of 1787 much better than the flintlocks of 1687. George at 103 ("immense improvement in such matters as the cutting of screw threads, the tempering of springs, the case-hardening of working parts and lock-plates, and the accurate fitting of all members of the lock"); 114 ("waterproof" flash-pan allowing moisture to drain out the bottom); 115 ("small bearing-wheel" on the pan cover or pan cover spring that reduced friction and "greatly increased" the speed of opening the pan cover and "lessened the chances of its missing fire").

In the first decades of the 19th century, as percussion ignition became standard, retrofitting a flintlock to use percussion ignition was inexpensive and easy. With percussion ignition, the user no longer had to pour loose priming gunpowder into the firing pan; simply putting a cap on the nipple was much faster. So reloading became faster.

After experimentation, the best form of percussion ignition was determined to be the copper percussion cap, "shaped like a thimble and with a small charge of fulminate in the crown." *Id.* at 258. The cap sat on a nipple near the breech.

The retrofit instantly made a firearm more reliable and powerful. Because the detonation of the fulminate instantly ignited all the gunpowder at once, the gun fired more powerfully. At the time, not everybody with a flintlock owned one with a Nock breechblock, which also ignited all the powder at once. Even with a Nock breechblock, there was sometimes a short delay between when the sparks landed in the firing pan and when main powder charge exploded, since the flame had to travel from the priming pan to the main powder charge. George at 246-48.

Unlike flintlocks, which had loose powder in the firing pan, a percussion cap gun was in little danger of not firing because of rain or heavy moisture. An 1834 British army test, conducted "in all types of weather," fired 6,000 rounds, and reported 936 misfires from flintlocks, compared to only 22 from percussion locks. (At the time, "lock" was the term for what we today call the "action" of gun — the part of the gun that performs the mechanical operations of loading and firing.)

Moreover, as described above, in a flintlock the burning powder in the firing pan communicates with the main power charge via a touch hole in the barrel. Necessarily, some of the burning gas from the main powder charge would escape via the touch hole, rather than staying in the barrel to push the bullet out through the muzzle. When the flintlock touch hole was replaced with the percussion nipple, a path for rearward gas escape was eliminated. "The penetration and recoil are therefore proportionately increased." Greener at 117.

Meanwhile, breechloaders were becoming increasingly common. The vast majority of modern firearms are breechloaders. They load from the back of the barrel (the breech) rather than from the front of the barrel (the muzzle).

Of course, King Henry VIII had breechloaders in 1537. His armory included breechloading matchlock arquebus handguns and rifles. Upon examination centuries later, the guns "with some minor difference in details, were found to be veritable Snider rifles." Charles B. Norton, *American Breech-loading Small Arms* 10 (1872). Invented in 1865, the Snider rifle was the standard British service arm of 1866-74. Greener at 103-04.

But unlike Henry VIII's lever action and revolver guns, the breechloader became widespread well before the 19th century. "[M]any specimens" of breechloaders "may be seen in museums of ancient arms." Greener at 703. "During the seventeenth and eighteenth centuries, breech-loading arms were very numerous and of greatly diversified mechanism." *Id.* at 103-10 (quote at 105); *see also* George at 47. Among the most famous, at least to Americans, was the Ferguson rifle, which was used by the British in the American War of Independence and was "the first breech-loading carbine ever used by a regularly organized British corps." Greener at 108. The user could hit a 200 yard target with six shots per minute while stationary, or four shots per minute while walking and reloading — reloading on the move having hitherto been impossible. George at 149-50.

From an American perspective, the first highly popular breechloader was the 1848 Sharps single-shot rifle. It used percussion ignition, plus old-fashioned paper cartridges that contained the bullet and powder charge, but not the primer. A novice could fire and reload 9 shots per minute. *Sharps' Breech-loading Patent Rifle*, Scientific American, Mar. 9, 1850. The Sharps were especially popular with pioneer families heading West. Nine shots per minute by a novice was a big change from the flintlock's rate of five shots per minute by an experienced user.

But the biggest breakthrough for breechloaders was the invention of the modern metallic cartridge in 1853. As described above, it contains the bullet, powder charge, and primer in a single metal casing. A predecessor had been invented around 1810 by Samuel Johannes Pauly of Switzerland. Building on the invention of percussion ignition, Pauly put the fulminate inside a pan in the center of a short metal case. The Pauly case attached to the rear of a traditional paper cartridge (which contained the gunpowder and the bullet).

The fulminate would be detonated when struck by a firing pin. (As opposed to the standard percussion cap, which was detonated when struck by a hammer.)

You might not be surprised to learn that Henry VIII also had guns that used metallic cartridges. For all breechloaders in every century, there was one fundamental problem that needed to be solved. Unlike with a muzzleloader, the breech of the breechloader must be opened every time new ammunition is inserted. Unless a perfect seal is created at the breech, some of the gas from the burning gunpowder will escape rearward. Whatever gas escapes rearward will be wasted, since it not used to impart forward energy to the bullet. The rear gas could be annoying to the user.

The solution was the metallic cartridge. If the case were precisely as wide as the bore of the barrel, then the case itself would create a gas seal — as Henry VIII's engineers well understood. It took a lot of trial and error to build a metal case that was precisely the size of the bore on the king's breechloaders. George at 17-18. A king could afford the very high labor cost of handcrafted ammunition built for a particular firearm, but few other people could. Even after machine tools greatly reduced variations in bore sizes in a given caliber, bore sizes still varied within a range of tolerance. Some breechloaders were designed with breechblocks that made a perfect gas seal, but over repeated use, the friction of metal moving against metal might eventually thin the metal and allow some gas to escape.

The metallic cartridge of 1853 was the answer. Unlike Henry VIII's ammunition, the 1853 cartridge used an *expansive* shell. This thin-walled shell could readily be dropped into the barrel breech. Then, when the gunpowder ignited, the pressure would expand the wall of the shell to release the bullet, and to form a perfect seal behind the expanding gas. "Probably no invention connected with fire-arms has wrought such changes in gun construction as the invention of the expansive cartridge case." Greener at 133.

The expansive metallic cartridge was greatly beneficial for repeating firearms. First, the mechanics of a repeater are simpler if the primer is contained in the cartridge, rather than having to be loaded separately.

Secondly, for repeating arms, especially if not correctly loaded, there was a risk of "chain fire." That is, the flame that was igniting one round might escape and ignite another round. At the least this could severely damage the gun, and at worst the explosion might injure the user. Today, if you have a reproduction of a 6-shot cap and ball revolver, the safety instructions may encourage you to load only every other round in the cylinder during target practice, to reduce the risk of a chain fire. People who carried fully loaded cap and ball revolvers for defense presumably decided that the small risk of a chain fire was outweighed by the risk of running out of ammunition while under attack. With the metallic cartridge, the risk of chain fire was greatly reduced.

Even on a single-shot rifle, the expansive metallic cartridge was a game-changer because it sped up reloading. As stated in the 1859 annual report by

U.S. War Department Chief of Ordnance Henry Craig, "With the best breech-loading arm, one skillful man would be equal to two, probably three, armed with an ordinary muzzle-loading gun." Carl Davis, *Arming the Union* 117 (1979).

Undoubtedly the Union could have won the Civil War much faster if it had been able to equip all its soldiers with breechloaders. But that was logistically impossible. With production lines running as fast as possible, it took until 1863 — two years into the war — before the Union could supply every infantry soldier with the Army's then-standard arm, the muzzleloading Springfield Model 1848 rifle. Retooling all the muzzleloading production lines to convert them into breechloading was not possible, given the Army's immediate need for huge quantities of rifles. The Union had to make do with whatever breechloaders it could obtain from private companies and from imports. The Union's deficiency in very large-scale firearm production at hitherto unknown quantities was one reason so many Union soldiers brought their personal firearms to service.

Later, when the Army had reverted to its small peacetime size, the single-shot 1873 Springfield rifle was adopted as the standard service arm. According to tests by the Ordnance Department, "A practiced person can fire this arm from 12 to 13 times per minute, loading from the cartridge-box. (It has been fired from the shoulder at the rate of 25 times per minute from the cartridge-box)." Springfield Armory, *Description and Rules for the Management of the Springfield Rifle, Carbine, and Army Revolvers, Caliber* 45 (1887).

Conclusion

During the nineteenth century, firearms that could be reloaded quickly after being emptied became widespread and affordable to a broad market. Many of the developments involved ideas that had been worked out centuries before, but had not become available to average consumers due to the high labor costs of artisanal manufacture before the industrial revolution.