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# Second Amendment Principles

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# SECOND AMENDMENT PRINCIPLES

Jamie G. McWilliam*

ABSTRACT

In *United States v. Rahimi*, the Supreme Court explained that firearm regulations "must comport with the principles underlying the Second Amendment." This Article examines what those principles are, how to derive them, and how to apply them in concrete cases. It begins with the Second Amendment's core principle of defense of self and community, which traces its lineage back to classical thinkers like Aquinas and Grotius. The tradition of firearm regulation that surrounded the adoption of the Second Amendment depended on this fundamental principle. But it also developed subsidiary principles that implement the defense principle in specific ways. This Article analyzes a spectrum of these historical laws from the colonial through the antebellum periods and extracts the "principles that underpin our regulatory tradition."

While the Court's explicit direction to rely on these principles is new, its entire line of Second Amendment case law, from *Cruikshank* to *Rahimi*, engages with them at some level. Implementing these principles as the Court has provides a robust framework for adjudicating contemporary Second Amendment challenges. This Article provides examples of how to apply these principles in cases involving concealed carry regulations, "assault weapons" bans, and felon-in-possession laws. And looking forward, this Article argues that courts need only grapple with the Second Amendment's fundamental defense principle to understand the "historical tradition of firearm regulation" that now determines the scope of our Second Amendment rights.

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## INTRODUCTION: *RAHIMI*'S RETURN TO FIRST PRINCIPLES

The Second Amendment cannot be divorced from defense. It traces its genealogy to the English right of Protestants to "have arms for their defence."[1] And the Amendment itself was born out of a war in which Americans sought to defend against a tyrannical government and repel British forces seeking to reclaim their colonies. In *United States v. Rahimi*, the Supreme Court explained that firearm regulations must "comport with the principles underlying the Second Amendment."[2] Those principles are principles of *defense*—both personal self-defense and defense

[1] G. BARNETT SMITH, *The Bill of Rights, 1689*, *in* 2 HISTORY OF THE ENGLISH PARLIAMENT 561, 562 (London, Ward, Lock, Bowden & Co. 1894); *see also* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1481 (2024) (describing an early state court view that "the federal constitutional right to bear arms . . . and the right to bear arms declared by the English Bill of Rights were approximately equivalent").

[2] 602 U.S. 680, 692 (2024).

of the community against foreign invasion or domestic tyranny. From the tradition of firearm regulation that surrounded the adoption of the Second Amendment, we can derive subsidiary regulatory principles that implement the core defense principles in concrete ways. Taking seriously the Court's consideration of the Second Amendment's first principles, this Article examines the breadth of our regulatory tradition and extracts specific historical regulatory principles. These principles can be used to resolve the many pressing legal questions facing our courts today, including the constitutionality of concealed carry regulations, "assault weapons" bans, and felon-in-possession laws.

For over a decade, lower courts analyzed the Second Amendment under a two-step interest-balancing regime.[3] This standard was rejected in *New York State Rifle & Pistol Ass'n v. Bruen*, where the Court explained that firearm regulations must be "consistent with this Nation's historical tradition of firearm regulation."[4] Then in *Rahimi*, the Court clarified this standard further, characterizing the *Bruen* standard as asking "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition."[5]

*Rahimi* involved an individual with a long history of abusing a firearm.[6] In one incident, Rahimi dragged his girlfriend to his car "and shoved her in, causing her to strike her head against the dashboard."[7] After noticing a bystander watching them, he retrieved a gun.[8] His girlfriend "took advantage of the [distraction] to escape."[9] As she fled, Rahimi fired the gun, though the record was unclear whether he fired at his girlfriend or the bystander.[10] Eleven months later, Rahimi threatened a different woman with a firearm.[11] This began a streak of alleged firearm misuse in which he shot at a customer to whom he sold drugs, fired at other drivers during two separate incidents, shot into the air in a residential neighborhood, and fired into the air at a restaurant after his friend's credit card was declined.[12]

Following the first incident, Rahimi's girlfriend obtained a restraining order that prohibited him from contacting her except to discuss matters relating to their child.[13] Importantly, the order "found that [family] violence was 'likely to occur again' and that Rahimi posed 'a credible threat' to the 'physical safety'" of his girlfriend and

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[3] Jamie G. McWilliam, *The Unconstitutionality of Unfinished Receiver Bans*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 8–9.

[4] 597 U.S. 1, 17 (2022).

[5] 602 U.S. at 692 (emphasis added).

[6] *Id.* at 687–88.

[7] *Id.* at 686.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 687.

[12] *Id.* at 687–88.

[13] *Id.* at 686–87.

child.[14] The order lasted two years, unless Rahimi was imprisoned on the date it was set to expire.[15] In that case, "the order would instead terminate either one or two years after his release date, depending on the length of his imprisonment."[16]

Rahimi was eventually arrested for his later misconduct.[17] At that time, the police conducted a search of his residence and discovered two firearms and ammunition.[18] He was subsequently indicted under 18 U.S.C. § 922(g)(8), which prohibits firearm possession by one subject to a restraining order like Rahimi's.[19] He then challenged the constitutionality of § 922(g)(8), eventually appealing all the way to the Supreme Court.[20]

In approaching this issue, the Supreme Court rejected a version of the history and tradition test that permitted new regulations only if they were "identical to ones that could be found in 1791."[21] Instead, the Court clarified that the appropriate inquiry was "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition."[22]

The Court then turned to our history of imprisoning (and therefore disarming) those who either had threatened or were likely to threaten the physical safety of others. These laws—known as going-armed and surety laws, respectively—are discussed in more detail below. At this point, what is important is that the Court extracted from these historical laws a principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[23] It was this principle, rather than a strict comparison to individual laws, that the Court used to uphold the constitutionality of § 922(g)(8).[24]

*Rahimi* therefore looks beyond historical regulations to the first principles that led to their valid enactment in the first place. But as the Court[25]—and Justice Gorsuch in particular[26]—repeatedly reminded us, *Rahimi* was a narrow decision. It

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[14] *Id.* at 687.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 688.

[19] *Id.* at 689.

[20] *Id.* at 689–90.

[21] *Id.* at 692.

[22] *Id.*

[23] *Id.* at 698. The Court in *Rahimi* articulates this standard in a few different ways. Aside from the one noted above, the Court elsewhere writes that "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id.* at 700. And near the end of the opinion: "An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 702.

[24] *Id.* at 702.

[25] *Id.* ("[W]e conclude only this . . . .").

[26] *Id.* at 713 (Gorsuch, J., concurring) (describing all of the questions the Court did *not* answer in *Rahimi*).

therefore left open the broader question of how to ascertain and apply the principles behind the Second Amendment in unrelated cases. This is the question that this Article addresses.

Part I describes the core philosophical principles underlying the Second Amendment. Three interrelated concepts form a general principle of defense. First is the idea that it is good to defend innocent life, so individuals should be equipped to defend themselves against threats of immediate personal violence. Second, a community as a body is justified in defending itself against violent aggression by foreign states. Finally, the community is equally right to resist injustices perpetrated by its ruler. The Second Amendment is ultimately a decision by the Founders that the best way to implement these principles is through a broad right for the people to keep and bear arms.

Part II then turns to early American arms regulations, and the way that these general principles were specifically executed. Laws like concealed carry bans, sensitive places regulations, and restrictions on the carrying of certain types of arms all protected public safety without limiting the ability of citizens to carry arms in a manner sufficient for reasonable self-defense or own arms adequate to partake in community defense. Meanwhile, laws disarming rebellious groups or violent individuals furthered the defense principle by disarming those who might create situations in which violent defense is necessary. Throughout, these laws were generally consistent with the core principles underlying the Second Amendment. And from these laws, this Article extracts specific subsidiary principles that can guide review of future arms regulations.

Part III examines how the Supreme Court has interpreted these principles in the past. Starting with *Cruikshank*, which recognized the pre-Constitutional nature of the Second Amendment right, this Part traces the Court's reasoning through two tracks of cases: those that analyzed the community defense aspect of the right and those focused on personal self-defense. Each of these culminates in *Rahimi*, which recognized a core principle that implicitly ties these tracks of cases together.

Finally, Part IV looks to the future, and how courts can apply the principles-based historical reasoning of *Rahimi* across the spectrum of Second Amendment cases. Although the core principles behind the Amendment remain the same, they apply differently to different types of arms regulations. Carry restrictions could be consistent with the broader principles so long as they do not practically obstruct one's ability to defend against immediate threats of personal violence. Categorical arms bans face tougher scrutiny because the communal defense aspects of the right require citizens to be able to own (but not necessarily carry day-to-day) arms of a type sufficient to resist governmental force. And prohibited persons laws fulfill the Second Amendment's core principles if they target those that create situations in which one would be justified in resorting to violent self-defense.

## I. THE SECOND AMENDMENT'S CORE PRINCIPLES

*Rahimi* requires courts to consider "the principles that underpin our regulatory tradition," which, of course, flow from "the principles underlying the Second Amendment" itself.[27] In enacting the Second Amendment, the Founders sought to implement a principle derived from their natural law tradition.[28] At its core, this principle is one of defense.[29] But it is not limited to individual self-defense. Individuals can come together as a community to defend themselves as a group, both from foreign aggression and tyrannical rulers.[30] The Founders viewed all three aspects of this defense principle—defense against personal violence, foreign aggression, and domestic tyranny—as underlying the Second Amendment.[31] And by keeping all three in mind, the contours of our historical tradition of firearm regulation become more clear.

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[27] *Id.* at 692 (majority opinion); *see also* Range v. Att'y Gen., 124 F.4th 218, 232 (3d Cir. 2024) (en banc) (Matey, J., concurring) (discussing the "classical principles respecting the natural rights that inform 'our regulatory tradition'").

[28] *See* Robert S. Barker, *Natural Law and the United States Constitution*, 66 REV. METAPHYSICS 105, 124 (2012) ("[T]he freedoms [in the Bill of Rights] are treated as having . . . their ultimate origin in the nature of man, that is, in the Natural Law."); *id.* at 106 (describing the classical natural law ideas that influenced the Founders); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 236 (2008) ("The right to arms (unlike, say, the right to grand jury indictment) is *not* a right which is granted by the Constitution. It is a pre-existing natural right which is recognized and protected by the Constitution . . . ."); David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 519, 559 (2006) [hereinafter Kopel, *The Catholic Second Amendment*] (describing the Founding's natural law roots).

[29] *See March 17*, N.Y. J. SUPP., Apr. 13, 1769, at 1–2, *reprinted in* BOSTON UNDER MILITARY RULE, 1768–1769, at 79, 79 (Oliver Morton Dickerson ed., 1936) (arguing that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence"); Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 240 (2000) ("[T]he Second Amendment was intended, at least in part, to enable individuals to exercise their natural right to self-defense.").

[30] *See* Kopel, *The Catholic Second Amendment*, *supra* note 28, at 535 ("The Founders viewed resistance to tyranny simply as an application of the right of self-defense, which was a natural right regardless of whether a person was attacked by a lone criminal, or by a large criminal gang, in the form of a tyrannical government."); Simeon Howard, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston (June 7, 1773) (describing how the moral justifications and requirements for personal defense can be extrapolated to war).

[31] Kopel, *The Catholic Second Amendment*, *supra* note 28, at 535; *see also* David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 80–81 ("All three purposes [of the Second Amendment] were grounded in a form of self-defense. . . . defending one's self . . . . defense against an external invasion. . . . [and] defen[se] . . . against the sovereign."); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1189 (1996) (describing the "militia" to which the Second Amendment refers as "a system under which every household and every man of military age was required to own a gun in order to defend the community against tyranny, foreign invasion, and crime" (quoting *An Open Letter on the Second Amendment*, NEW REPUBLIC, Mar. 15, 1993, at 15)).

*A. Defense Against Immediate Personal Violence*

The tradition that the Founders inherited[32] has approved of self-defense for millennia.[33] Roman statesman Cicero approved of the use of arms for defense, stating that "the meaning . . . of our swords" is a law "imbibed from nature herself" that "if our life be in danger from . . . open violence . . . every means of securing our safety is honorable."[34] Classical thinkers from Aquinas[35] to Grotius[36] accepted and expanded on this philosophical justification for self-defense. And their ideas informed the Founders who drafted the Second Amendment.[37]

That it is right to defend one's own life is "implicit in the very nature of humanity."[38] When faced with danger, our natural inclination is to preserve our own life. This drive compels us to take action to do so.[39] If one stands on a ladder and starts to lose their balance, they will instinctively reach out to stop themself from plummeting to the earth. To borrow some examples "of this basic human purpose" from John Finnis:

> [T]he crafty struggle and prayer of a man overboard seeking to stay afloat until the ship turns back for him; the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical schools, etc.; road safety laws and programmes; famine relief expeditions; farming and rearing and fishing; food

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[32] *See* Barker, *supra* note 28, at 106 ("[T]he Natural Law as understood by the Founding Fathers of the Constitution was the Natural Law that for two millennia had been a traditional and essential element of Western Civilization; that is, Natural law as understood and explained by, for example, Sophocles, Aristotle, Cicero, St. Thomas Aquinas, and Francisco de Vitoria.").

[33] *See* John. J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 46 (2010) ("The right of self-defense is as old as history . . . .").

[34] Marcus Tullius Cicero, Speech in Defence of Titus Annius Milo (c. 52 B.C.), *in* 3 ORATIONS OF MARCUS TULLIUS CICERO 390, 394 (C.D. Yonge trans., 1913).

[35] THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 64, art. VII ("Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible.").

[36] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 76 (A.C. Campbell ed. & trans., 1901) (1625).

[37] Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43, 78 (1960) (describing the "considerable" influence of thinkers like Grotius, Aquinas, and Bellarmine on James Madison, George Mason, and others).

[38] Jamie G. McWilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 MINN. L. REV. HEADNOTES 315, 322 (2024) [hereinafter McWilliam, *Refining the Dangerousness Standard*].

[39] *See* Merriam, *supra* note 33, at 50 ("A man's strongest inclination is the preservation of his own life, and thus the natural law compels man to do those things that preserve his life and thwart those things that would threaten it.").

> marketing; the resuscitation of suicides; watching out as one steps off the kerb.[40]

Paraphrasing Aquinas, to keep oneself "in 'being'" as long as possible is only natural.[41] For this same reason, "if one is attacked, [they are] urged by their very nature to attempt to repel their aggressor."[42]

This compulsion drives the classical view that it is right to defend oneself and others.[43] Since life is a natural good, preserving it is also good.[44] But the right to do so was not classically viewed as unqualified—preserving life is not *carte blanche* for taking any action, no matter how drastic. Aquinas described the scope of permissible self-defense with his theory of "double effect."[45] Since life is a natural good, taking the life of another "harms the common good."[46] But Aquinas argued that "[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention."[47] One can engage in self-defense with the sole intention of preserving his own innocent life.[48] That action can then have two consequences: both the preservation of his life and the taking of another's.[49] Since "moral acts take their species according to what is intended," the ancillary effect of harming another does not render the self-defense unjust.[50]

Classical thinkers also generally thought that one engaging in self-defense must "satisfy the natural requirements of necessity and proportionality."[51] Aquinas thought that self-defense must not be "out of proportion to the end."[52] As he put it, "if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful."[53] Grotius thought self-defense was justified by a lack of alternatives in situations of immediate

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[40] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86 (2d ed. 2011).

[41] AQUINAS, *supra* note 35, pt. II-II, q. 64, art. VII.

[42] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 322.

[43] 3 WILLIAM BLACKSTONE, COMMENTARIES *4 ("[Self-defense] is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.").

[44] FINNIS, *supra* note 40, at 86 ("A first basic value, corresponding to the drive for self-preservation, is the value of life.").

[45] AQUINAS, *supra* note 35, pt. II-II, q. 64, art. VII.

[46] Kopel, *The Catholic Second Amendment*, *supra* note 28, at 553.

[47] AQUINAS, *supra* note 35, pt. II-II, q. 64, art. VII.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Jamie G. McWilliam, *A Classical Legal Interpretation of the Second Amendment*, 28 TEX. REV. L. & POL. 125, 152 (2024) [hereinafter McWilliam, *Classical Legal Interpretation*].

[52] AQUINAS, *supra* note 35, pt. II-II, q. 64, art. VII.

[53] *Id.*

personal violence.[54] Self-defense is therefore just when violence is correctly perceived to be unavoidable.[55]

This idea of defense can also be applied to protecting other individuals subject to personal attack.[56] Locke, for example, approved of self-defense.[57] But Locke's view that mankind is to be preserved has been interpreted more broadly than simply preserving one's own life; it also includes a "[d]ut[y] to preserve others (when this does not conflict with self-preservation)."[58] Defending others is doubly good, in that it preserves both the natural goods of life and the relationships we have with each other.[59] And this is particularly so when the threat targets one's family, since it endangers the additional goods of marriage[60] and family.[61]

Of course, just because people have a natural right to self-defense does not mean that the state does not play a role in securing the safety of the community. Government

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[54] Merriam, *supra* note 33, at 56 (citing GROTIUS, *supra* note 36, at 76).

[55] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 152.

[56] Robert Leider, Justifying Self-Defense, Defense of Others, and the Use of Force in Law Enforcement 211 (2009) (Ph.D. dissertation, Georgetown University), https://repository.digital.georgetown.edu/handle/10822/553195 [https://perma.cc/B9SY-CJL2] (arguing that "self-defense and defense of others serve precisely the same interests: defending a person's autonomy against unjust attack, allowing the person to seek a remedy in court to vindicate his rights, and protection of society and society's legal institutions").

[57] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 207 (Rod Hay ed., 1999) ("[In] a state of war . . . every one has a right to defend himself, and to resist the aggressor."); *id.* at 208 ("Self-defence is a part of the law of Nature . . . .").

[58] A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 60 (1992).

[59] FINNIS, *supra* note 40, at 86, 88 (describing the "basic goods" of life and sociability (or friendship)).

[60] John Finnis, *Marriage: A Basic and Exigent Good*, 91 THE MONIST 388, 389 (2008) ("Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person *into existence* as conceptus, embryo, child, and eventually adult, fully able to participate in human flourishing in his or her own responsibility." (footnotes omitted)).

[61] *See* ALFONSO GOMEZ-LOBO & JOHN KEOWN, BIOETHICS AND THE HUMAN GOODS: AN INTRODUCTION TO NATURAL BIOETHICS 14 (2015) ("Life . . . and health . . . are certainly not the only 'basic' human goods—goods, that is, that are ends in themselves and not merely instrumentally good, as means to another good. Having family . . . [is] also [a] basic good[] that make[s] for a truly flourishing human life."); A. Leo White, *Truthfulness, the Common Good, and the Hierarchy of Goods*, *in* TRUTH MATTERS: ESSAYS IN HONOR OF JACQUES MARITAIN 137, 144 (John G. Trapani, Jr. ed., 2004) (arguing that by understanding "the good of [the] immediate family" one can recognize the good "of society as a whole"); SIMMONS, *supra* note 58, at 169–70 (describing Locke's view that rights can be properly exercised in favor of "family over others"). Defense of one's home and family is also implicated in the long-standing "castle doctrine." As Founder James Wilson wrote, "[h]omicide is enjoined, when it is necessary for the defence of one's . . . house." 3 HON. JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 84 (Bird Wilson ed., Phila., Bronson & Chauncey 1804).

is formed with the duty and concomitant authority to preserve the common good.[62] This includes the defense of the populace.[63] And so the state is generally free, within the bounds of reason,[64] to establish laws it deems necessary to secure that defense[65] and inhibit that state of chaos and violence that Hobbes called the "warre of every one against his neighbour."[66] But even to Hobbes, the ardent defender of state power in the natural law tradition, the right of self-defense was one that could never be abandoned to the state in the name of public safety.[67]

Those who drafted the Second Amendment shared the general view that it is morally good to defend ourselves and others,[68] while simultaneously legislating in ways aimed at preserving public safety. Indeed, the Second Amendment itself could be thought of as lawmaking by the state to secure public safety—simply at the constitutional level.[69] The ability to defend self and community was a rallying cry

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[62] *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 28 (2022) (discussing the transmission of duty and authority from the people to the government they form); U.S. CONST. pmbl. (citing "to . . . establish Justice, . . . provide for the common defence, [and] promote the general Welfare" among the core reasons for establishing the Constitution); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 14 (2022) ("In the end, every legitimate act of government works with some conception or other of the common good; that is inescapable.").

[63] *See* THOMAS HOBBES, LEVIATHAN 136 (1929) (1651) ("[T]he End of this Institution[ ] is the Peace and Defence of . . . all . . . .").

[64] It is worth noting that in the classical tradition, reasonableness is perhaps a stricter standard than many are used to today. A legal action is reasonable not if it has some plausible justification but rather if it comports with those basic principles of reason that comprise the natural law. *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 133 ("The *ius naturale* thus provides the basic bounds of reason within which such determinations for the common good can be made.").

[65] *See* HOBBES, *supra* note 63, at 136 ("[I]t belongeth of Right, to whatsoever Man, or Assembly that hath the Soveraignty, to be Judge both of the meanes of Peace and Defence . . . ."); Darrell A.H. Miller, *Common Good Gun Rights*, 46 HARV. J.L. & PUB. POL'Y 1029, 1046–47 (2023) (describing how the right to keep and bear arms is for "providing *safety*"—"[a]nd not just safety in the atomized sense of personal physical safety . . . . but safety in the sense of the 'flourishing of a well-ordered political community' capable of supplying the classical common goods of 'peace, justice and abundance'" (quoting VERMEULE, *supra* note 62, at 7)); *id.* at 1052 (describing regulations of the right to bear arms that might be consistent with classical defense principles, such as "training and proficiency requirements, or insurance mandates, or guarantees of capacity or virtue in order to carry firearms").

[66] HOBBES, *supra* note 63, at 239.

[67] *Id.* at 105, 107 ("For (as I have shewed before) no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment . . . .").

[68] *See, e.g.*, Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 170 (1999) (describing how, around the time of the Founding, "[d]efending oneself and one's family from criminal violence was a public service on which the community relied").

[69] *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 175 ("The Founders, in drafting the Second Amendment, made a determination that implemented [the three

by some for the inclusion of a written bill of rights in the proposed Constitution.[70] And the Founders' perception of the Second Amendment right was informed by this purpose.[71] In describing the Amendment shortly after its ratification, St. George Tucker noted that "[t]he right of self defence is the first law of nature."[72] James Wilson argued that "[t]he defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law."[73] Thomas Jefferson followed the eighteenth-century criminologist Cesare Beccaria in being skeptical of arms regulation because it would impede self-defense while doing little to stop violent attacks.[74] Early state court decisions regularly upheld the right to peaceably carry arms for lawful purposes, including self-defense.[75] And many early firearms laws specifically accounted for defending one's family in addition to one's

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aspects of the right of defense] through the right to 'keep and bear arms.'"); Miller, *supra* note 65, at 1046–47 (arguing that the Second Amendment "must be about providing *safety*").

[70] Stephen P. Halbrook, *To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?*, 21 FEDERALIST SOC'Y REV. 46, 51 (2020) (discussing those who demanded "a right to bear arms for the defense *of themselves* and their [home] state" (emphasis added) (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623–24 (Merrill Jensen et al. eds., 1976))). Self-defense itself is an ancient doctrine, *see* Merriam, *supra* note 33, at 46 (describing it as "as old as history"), and was strongly entrenched in the common law of the states by the time of the Founding, *see* Joseph Blocher, *Safe Storage and Self-Defense from* Heller *to* Bruen, 102 N.C. L. REV. 1353, 1372 (2024) (citing Blackstone for the proposition that the contours of the right of self-defense "are set by the common law").

[71] *See* District of Columbia v. Heller, 554 U.S. 570, 603 (2008) ("That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right.").

[72] 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. D, at 300 (1803).

[73] JAMES WILSON, *Of the Natural Rights of Individuals*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1053, 1082 (Kermit L. Hall & Mark David Hall eds., 2007).

[74] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (1764) ("[L]aws that forbid the carrying of arms . . . disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man."), *quoted in* THOMAS JEFFERSON, 2 THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT 314 (Gilbert Chinard ed., 1926).

[75] *See, e.g.*, Simpson v. State, 13 Tenn. (5 Yer.) 356, 360 (1833) (concluding that peaceable carrying was not unlawful because under the state corollary to the Second Amendment, "all the free citizens of the state [could] keep and bear arms for their defence, without any qualification whatever as to their kind"); State v. Huntley, 25 N.C. (3 Ired.) 418, 422–23 (1843) ("[T]he carrying of a gun *per se* constitutes no offence. For any lawful purpose . . . the citizen is at perfect liberty to carry his gun.").

self.[76] So while defense of one's self and others was not the sole purpose for the enactment of the Second Amendment, it was certainly one aspect of the right it secured.[77]

### *B. Defense Against Foreign Aggression*

Another aspect of the classical defense principle involves repelling attacks by foreign nations. If it is good to defend an individual life, then it follows that the lives of many and the sustained good of the community are similarly worthy of preservation.[78] Indeed, many classical thinkers viewed personal self-defense and communal defense through war "as two types of the same thing."[79] So while war disrupts the common good and causes violence, it can be good when necessary to safeguard the lives and peace of the populace.[80] St. Augustine recognized that, sometimes, "war is waged in order that peace may be obtained."[81] George Washington agreed, stating in his first annual address to Congress that "[t]o be prepared for war is one of the most effectual means of preserving peace."[82]

The primary difference between personal self-defense and defense of the community against a foreign state is who exercises the power to engage in violence as a means of defense. It is the individual's right to life that justifies resorting to violent self-defense against another, so it is the individual who exercises it when the threat

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[76] *See, e.g.*, 1836 Mass. Acts 748, 750, ch. 134, § 16 (allowing "go[ing] armed" with an "offensive [and] dangerous weapon" when one fears violence to his family); 1847 Va. Acts 127, 129, ch. 14, § 16 (same).

[77] *See* C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 WYO. L. REV. 89, 111 (2024) (recognizing that "[s]elf-defense is undoubtedly inherent to the Second Amendment" while arguing that it encompasses many more "lawful purposes"); McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 151 (tracing the Founding-era militia "back to the bedrock *ius naturale* principle of self-defense, applicable to situations involving immediate personal violence, foreign aggression, and unjust rulers who inflict harm on their polity").

[78] *See* David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 72 (2007) ("The legitimacy of state warfare is . . . derivative of the personal right of self-defense . . . .").

[79] *Id.* at 77 ("Like Giovanni da Legnano, Grotius classified 'Private War' (which was justifiable individual self-defense) and 'Public War' (which was justifiable government-led collective self-defense) as two types of the same thing.").

[80] *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 153 ("While peaceful conduct in the abstract is clearly in the common good, it is not necessarily so in practice. For a populace to roll over and allow a violent invasion does not conduce to their common good.").

[81] St. Augustine, Letter 189 (A.D. 418), *in* NEW ADVENT, https://www.newadvent.org/fathers/1102189.htm [https://perma.cc/TQL3-J22T]; *see also* C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 326 (Walter Hooper ed., 1970) ("[I]f war is ever lawful, then peace is sometimes *sinful*." (emphasis added)).

[82] George Washington, First Annual Address to Congress (Jan. 8, 1790), *in* THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/first-annual-address-congress-0 [https://perma.cc/M7Z2-5E5K].

is immediate personal violence. But at the community level its members have transmitted a portion of their authority to effectuate the common good to its sovereign.[83] The good of defense is no different. Because the threat arises to the community at the whole, it is up to he who has "the care of the community" to engage in defense against external threats.[84] Therefore, "unlike for situations involving personal self-defense, a just war requires the authority of the sovereign."[85]

Like personal self-defense, however, a just defense of the community requires the right intent. In personal defense, one's primary intent must be to save his own life, rather than to harm the aggressor.[86] Similarly, Aquinas described war as "peaceful" when "waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good."[87]

War also requires a "just cause"—"namely that those who are attacked, should be attacked because they deserve it on account of some fault."[88] This is comparable to the necessity requirement for personal defense. Individuals are not justified in taking violent acts against another unless the other has created a situation that requires it.[89] Similarly, war cannot be entered into at the whims of the sovereign, but only in response to wrongs committed or when necessary to secure the peace of the community. "Where a sovereign wages war for a just cause and with a good intent 'rather than for cruel or selfish motives,' they have performed a natural good as if they had defended their own lives."[90]

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[83] *See* Alicea, *supra* note 62, at 8 ("Thus, *everyone* in a society is vested with political authority as an original matter, but because the common good will rarely be achievable by direct democracy, the people have a moral duty to transmit a portion of their political authority . . . to distinct governing personnel. This is the process of constituting a government . . . .").

[84] Aquinas explained:

> For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Romans 13:4): "He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil"; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.

AQUINAS, *supra* note 35, pt. II-II, q. 40, art. I.

[85] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 153.

[86] *See supra* Section I.A.

[87] AQUINAS, *supra* note 35, II-II, q. 40, art. I.

[88] *Id.*

[89] *Id.* pt. II-II, q. 64, art. VII.

[90] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 153.

While the traditional view of just war placed the power to engage in it in the hands of the sovereign, it was necessarily carried out through the individual members of the community. For example, England imposed a duty on all men to "own arms and be prepared to defend the nation" as early as 870 A.D.[91] The types of arms citizens were required to keep varied depending on their wealth and social status.[92] This duty was perceived as so important that an additional requirement was eventually imposed that the mandated arms could not be sold or otherwise alienated.[93]

The drafters of the Second Amendment inherited this traditional view of war.[94] The defensive body in colonial America was the militia,[95] which at the time was comprised of "all males physically capable of acting in concert for the common defense."[96] Like the citizen soldiers of medieval England, these men supplied their own weapons of war, regularly keeping such arms at hand in their homes so they would be ready to take up the defense of their community when called upon.[97] And they regularly did so.[98] "The survival of the colonies, particularly in their early stages, rested on active citizen militia participation for self-defense and law enforcement."[99]

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[91] Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 199–200 (1997).

[92] *Id.* at 200.

[93] *Id.*

[94] *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 150 ("[The Founders] inherited the millennia-long tradition of relying on citizens bearing their own private arms to protect the common good."); Herd, *supra* note 91, at 204 ("Americans entered the eighteenth century conditioned by the English heritage of a population armed for the common defense, but altered by their unique American experience." (quoting Robert J. Cottrel & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1012 (1995) (book review))).

[95] Even once the Constitution was ratified, it gave Congress the power to "provide for calling forth the Militia to . . . repel Invasions." U.S. CONST. art. 1, § 8, cl. 15.

[96] United States v. Miller, 307 U.S. 174, 179 (1939); *see also* George Mason, Address to the Virginia Ratifying Convention, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 33, 425 (Jonathan Elliot ed., D.C., 2d ed. 1836) ("I ask, Who are the militia? They consist now of the whole people . . . ."); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553 (1991) ("[The militia] was composed of all of the citizens, deriving its legitimacy from them and being virtually synonymous with them.").

[97] *See Miller*, 307 U.S. at 179 ("[O]rdinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."); Barnett & Kates, *supra* note 31, at 1189 (describing how, under the Founding-era militia system, "every household and every man of military age was required to own a gun in order to defend the community" (quoting *An Open Letter on the Second Amendment*, *supra* note 31, at 15)).

[98] Herd, *supra* note 91, at 204 (describing colonial defense against "Indian attacks and . . . the Dutch, French and Spanish colonial rivals of Britain").

[99] *Id.*

Given their recent experience fighting in the Revolutionary War against England, the warfaring or militia aspect of keeping arms was fresh in the minds of the Founders when the Second Amendment was ratified.[100] Alexander Hamilton, though he supported a professional army, thought it was imperative that "the people at large" be "properly armed and equipped."[101] Meanwhile, the pseudonymous Federal Farmer, writing in opposition to the establishment of a "select militia," argued that "it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."[102] Thomas Jefferson ascribed the colonies' success in the Revolutionary War partially to militia members' use of and intimacy with their own personal arms.[103] As Joseph Story later wrote regarding the Second Amendment, "[t]he militia is the natural defence of a free country against sudden foreign invasions . . . ."[104]

### *C. Defense Against an Unjust Government*

Just as the good of self-defense can be extrapolated to defending a nation from external threats, it also extends to communal defense from *internal* ones.[105] The sovereign of a nation has a duty to act to preserve the common good, so when it subjugates the good of its subjects to its own private good, it violates the duty it owes its citizens.[106] The violence committed by such a ruler was perceived by

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[100] *See id.* at 206 ("The debate over the Second Amendment at the Constitutional Convention focused on the best means for providing the defense of the new nation while maintaining individual liberties.").

[101] THE FEDERALIST NO. 29 (Alexander Hamilton).

[102] RICHARD HENRY LEE, *Letter XVIII, January 25, 1788*, *in* ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER 166, 170 (1962).

[103] Letter from Thomas Jefferson to Giovanni Fabbroni (June 8, 1778), https://founders.archives.gov/documents/Jefferson/01-02-02-0066 [https://perma.cc/ARH7-E4RY] (ascribing the Colonies' success in battle "to our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy").

[104] JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 265 (Bos., Thomas H. Webb & Co. 1842).

[105] *See* Michel & Moros, *supra* note 77, at 93 n.17 ("Resisting tyranny is itself also a form of self-defense, but on a more societal level."); Kopel, *The Catholic Second Amendment*, *supra* note 28, at 535 ("The Founders viewed resistance to tyranny simply as an application of the right of self-defense, which was a natural right regardless of whether a person was attacked by a lone criminal, or by a large criminal gang, in the form of a tyrannical government."); Kopel et al., *supra* note 78, at 60 (noting that classical scholars generally saw "no fundamental difference between individual violence and government violence").

[106] *See* Kopel, *The Catholic Second Amendment*, *supra* note 28, at 557 ("A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler . . . ." (quoting AQUINAS, *supra* note 35, at 584)). Many of the classical descriptions of this idea were written at a time when "the sovereign" was equated with "the

classical thinkers as an extension of personal violence, for "[w]hether murder, rape, and theft be committed by gangs of assassins, *tyrannous officials and judges* or pillaging soldiery was a mere detail; the criminality of the 'invader and plunderer' lay in his violation of natural law and rights, regardless of the guise in which he violated them."[107]

Where such tyranny occurs, many thought that the community was justified—or even obligated—to take action against its ruler.[108] Of course, like any other implementation of self-defense, such action is subject to certain conditions. The requirements of necessity and proportionality apply equally here.[109] Armed resistance should be undertaken only when necessary.[110] That the Founders agreed can be readily seen from the words of the Declaration of Independence: "Governments long established should not be changed for light and transient causes . . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government . . . ."[111] Similarly, resistance must be performed with minimally necessary force, so that the community does not "suffer greater harm from the consequent disturbance than from the tyrant's government."[112]

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king." But the idea is just as applicable to those exercising the sovereign power of the United States through elected office.

[107] Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Preservation*, 9 CONST. COMMENT. 87, 93 (1992) (emphasis added).

[108] *See* Kopel, *The Catholic Second Amendment*, *supra* note 28, at 532 (describing the classical view that "the tyrant, as the image of depravity, is for the most part even to be killed" so "tyrannicide was 'honourable' when tyrants 'could not be otherwise restrained'"); Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/tree-liberty-quotation [https://perma.cc/V22K-VLUS] ("The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.").

[109] At least one Founding-era sermon extolled this exact point. In his June 7, 1773, sermon to an artillery company in Boston, Simeon Howard began by describing the "universally allowed" law of self-defense. Howard, *supra* note 30. He then extrapolated this to war against a tyrant king:

> After a people have been forced into war for their own security, they ought to set reasonable bounds to their resentment, or they may become as guilty as the first aggressors. They should aim at nothing more than repelling the injury, obtaining reparation for damages sustained, and security against future injuries.

*Id.*

[110] *See* Kopel et al., *supra* note 78, at 95 (discussing eighteenth-century Genevan theorist Jean-Jacques Burlamaqui's view that citizens "may initiate an armed revolt 'when they find that all his [the prince's] actions manifestly tend to oppress them, and that he is marching boldly on to the ruin of the state'").

[111] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[112] Kopel, *The Catholic Second Amendment*, *supra* note 28, at 557; *see also* LOCKE, *supra* note 57, at 208 ("Wherefore, if the king shall . . . cruelly tyrannise over the whole . . . the

As others have persuasively argued, giving U.S. citizens the means to resist governmental tyranny was a primary purpose in adopting the Second Amendment.[113] After all, a war had just been fought to overthrow a king widely viewed in the Colonies as tyrannical.[114] James Madison argued that with "the advantage of being armed, which the Americans possess over the people of almost every other nation, . . . . the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."[115] Patrick Henry stated to the ratifying convention that to ensure that "[t]he militia [remains] our ultimate safety" against tyranny, "[t]he great object is that every man be armed."[116] Alexander Hamilton wrote that any tyrannical "army can never be formidable to the liberties of the people while there is a large body of citizens little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens."[117] Other Founders expressed similar views.[118]

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people have a right to resist and defend themselves from injury . . . . They may repair the damages received, but must not, for any provocation, exceed the bounds of due reverence and respect. They may repulse the present attempt, but must not revenge past violences." (quoting WILLIAM BARCLAY, DE REGNO ET REGALI POTESTATE [CONTRA MONARCHOMACHOS] 159 (1600))).

[113] *See, e.g.*, Michel & Moros, *supra* note 77, at 93–94 ("[The Second Amendment] *also* exists as a final defense against tyranny . . . ."); Halbrook, *supra* note 70, at 51 ("The attempt by the British to disarm the Americans and the need to guard against tyranny and invasion were the only concerns voiced during the critical debates in the Virginia convention."); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 642 (2012) ("[T]he chief function of the right to bear arms was to . . . deter tyrannical acts by government.").

[114] *See* Michel & Moros, *supra* note 77, at 97 ("The Bill of Rights was written by people who had just violently overthrown their former government. They were understandably very fearful the new government they were forming would likewise become tyrannical. Because of their recent fight for freedom, the authors included the Second Amendment, at least in part, as a fail-safe.").

[115] THE FEDERALIST NO. 46 (James Madison).

[116] Patrick Henry, Debate at the Virginia Ratifying Convention, *in* 2 THE DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 199, 290–91 (Jonathan Elliot ed., D.C., Jonathan Elliot 1828).

[117] THE FEDERALIST NO. 29 (Alexander Hamilton).

[118] George Mason explained that disarming the people is "the best and most effectual way to enslave them." George Mason, Debate at the Virginia Ratifying Convention, *in* 2 THE DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 116, at 286. William Patterson wrote that the militia is "the people themselves prepared to act as soldiers for the purpose of resisting oppression and securing their rights." Richard P. McCormick, *Political Essays of William Patterson*, 18 J. RUTGERS U. LIBR. 38, 41 (1955). Noah Webster argued that "[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF

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The Second Amendment therefore embodies a core principle of defense. It secures the ability of the people to possess and carry arms for personal self-defense and defense of the community against foreign aggression and the tyranny of an unjust government.[119] And it was from these core principles that early American lawmakers crafted "our Nation's tradition of firearm regulation."[120] These principles, which informed Founding-era lawmakers, should therefore be considered in understanding the content of our regulatory history.[121] As Judge Matey explained in a recent concurrence, "[a]bsent exploration of the natural principles that support our legal tradition, we overlook those 'certain primary truths, or first principles, upon which all subsequent reasonings must depend.'"[122] "In other words, an appropriate historical inquiry cannot be conducted while blind to the 'reason and spirit' of the law."[123]

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THE FEDERAL CONSTITUTION 43 (Phila., Prichard & Hall 1787). And Tench Coxe described the Second Amendment as "confirm[ing] . . . [the people's] right to keep and bear their private arms" because "civil rulers, not having their duty to the people before them, may attempt to tyrannize." *Tench Coxe*, JAMES MADISON RSCH. LIBR & INFO. CTR. (1999) (quoting Tench Coxe, *Remarks on the First Part of the Amendments to the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789, at 2 (under the Pseudonym 'A Pennsylvanian')), https://www.madisonbrigade.com/t_coxe.htm [https://perma.cc/Z6N4-45FJ]. Other examples abound.

[119] *See, e.g.*, McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 158 ("With these arms [secured by the Second Amendment] the people could defend themselves and secure the community from the personal violence of an unconstrained populace. Further, in the case of invasion or unjust governance, the people could use their arms to 'restore constitutional rule.'"); Michel & Moros, *supra* note 77, at 93–94 ("There is no doubt the Second Amendment protects gun owners for the lawful purposes of hunting, sport shooting, recreation, and self-defense. However, it *also* exists as a final defense against tyranny, whether that tyranny comes in the form of a foreign invader or a homegrown autocrat who attempts to overthrow our constitutional order."). For a description of various early views of the purpose of the right, see Clayton E. Cramer et al., *"This Right Is Not Allowed by Governments That Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 825–26 (2010) ("Some articulated its purpose as resistance to tyranny—a conception of the right that protected the option of political violence. Even with this public purpose, the right was individual. Others acknowledged the purpose of resisting tyranny, but explicitly recognized that the right also included individual self-defense.").

[120] United States v. Rahimi, 602 U.S. 680, 700 (2024); *see also* Range v. Att'y Gen., 124 F.4th 218, 244 (3d Cir. 2024) (en banc) (Matey, J., concurring) (describing the "principles [that] run continuous throughout history from Cicero to Founding-era America").

[121] *See Range*, 124 F.4th at 233 (Matey, J., concurring) ("Surveying history helps us understand the reasons relied on to regulate the right, ensuring a 'continuity of principles' faithful to our inherited tradition." (alterations omitted)).

[122] *Id.* at 234–35 (quoting THE FEDERALIST NO. 31, at 195 (Alexander Hamilton) (C. Rossiter ed., 1961)).

[123] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

## II. HOW EARLY LAWS IMPLEMENTED THESE PRINCIPLES

In *Rahimi*, the Supreme Court directed courts to "consider[] whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[124] As discussed above, at bottom, the principle underlying the Second Amendment and the regulations it controls is one of defense of self and community.[125] Historical regulations from the colonial era through the enactment of the Fourteenth Amendment implemented this principle in different ways, but each ultimately fulfills it. It is the goal of this Part to illustrate the way a variety of historical laws adhere to this core principle, while recognizing subsidiary regulatory principles along the way. This is not intended to be a comprehensive examination of the history—that would take a tome—but a general survey of the categories of historical laws relevant to the wave of litigation that is likely to follow *Rahimi*. The focus is on the "principles . . . underpin[ning] our regulatory tradition" rather than any specific implementations of those principles, and how these regulatory principles ultimately fulfill the broader defense principles described above.[126]

### *A. Concealed Carry Bans*

During the early to mid-nineteenth century, many states enacted laws regulating the concealed carrying of certain types of weapons. These laws were typically narrow, targeting only specific arms. They also often included exceptions while traveling.

In 1813, Louisiana made it a crime to be "found with any concealed weapon, such as a dirk, dagger, knife, pistol or any other deadly weapon concealed in his bosom, coat or in any other place about him that do not appear in full open view."[127] Kentucky similarly punished "wear[ing] a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey."[128] Seven years later, Indiana made it a misdemeanor to "wear[] any dirk, pistol, [or other certain arms], concealed," but excluded "travellers" from this restriction.[129] Arkansas later criminalized "wear[ing] any pistol, dirk, butcher or large knife, . . . concealed as a weapon, unless upon a journey."[130] And in Alabama in 1839, one could not "carry concealed about his person any species of fire arms, or any bowie knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or any other deadly

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[124] United States v. Rahimi, 602 U.S. 680, 692 (2024).
[125] *Supra* Part I.
[126] *Rahimi*, 602 U.S. at 692.
[127] 1813 La. Acts 172.
[128] 1813 Ky. Acts 100.
[129] 1819 Ind. Acts 39.
[130] 1837 Ark. Acts 280.

weapon."[131] These types of restrictions were so common that one scholar estimated that, by the time of the Civil War, around seventeen states had begun regulating concealed carry.[132]

At first blush, it might appear as if these laws disregard the defense principle outlined above.[133] After all, today, most people who regularly carry guns for self-defense do so concealed.[134] And it would be shocking to many to see a handgun holstered openly on the side of someone's hip while they ride the subway. But in early America, the situation was quite different. Concealed carrying was viewed by many as a dishonorable method of carrying arms, common primarily with criminals.[135] Meanwhile, open carry was seen as an appropriate manner of preparing for self-defense.[136] So instead of opposing the principle of defense, historical laws incentivizing open carrying were specifically grounded in it.

Indeed, early state supreme courts who considered the legitimacy of these laws typically analyzed them in light of the background principle of self-defense. The Louisiana Supreme Court upheld the state's 1813 law, reasoning that "[i]t interfered with no man's right to carry arms . . . 'in full open view,' which . . . . [is] guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country . . . ."[137] The Kentucky Supreme Court reached the opposite result regarding its concealed carry ban but still relied on a principle of defense.[138] It stated that the right was "to bear arms in defense of the citizens and state . . . and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution."[139] And in upholding Alabama's 1839

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[131] 1839 Ala. Laws 67.

[132] Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 63 n.48 (2017) (collecting sources). But it is worth acknowledging that these laws were primarily concentrated in the South, *see* Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 50 (2020) (describing "Southern hostility toward the concealed carrying of weapons"), and may not represent a national tradition.

[133] *Supra* Part I.

[134] A 2017 study suggested that 66% of handgun owners "always carried their handguns concealed," while only 10% "always carry their weapons openly." *Study: 3 Million Americans Carry Loaded Handguns Daily*, UNIV. WASH. MED. NEWSROOM (Oct. 12, 2017), https://newsroom.uw.edu/news-releases/study-3-million-americans-carry-loaded-handguns-daily [https://perma.cc/KLY5-XSKW].

[135] State v. Chandler, 5 La. Ann. 489, 490 (1850); State v. Reid, 1 Ala. 612, 619 (1840); *see also* Campbell, *supra* note 132, at 50 ("Southern hostility toward the concealed carrying of weapons, for instance, was shaped by norms of masculinity and honor that treated concealing weapons as unmanly and dishonorable.").

[136] *Chandler*, 5 La. Ann. at 490.

[137] *Id.*

[138] Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 91–92 (1822).

[139] *Id.*

law, the state supreme court reasoned that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless *for the purpose of defence*, would be clearly unconstitutional."[140] The court concluded that "the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State," but since "it is only when carried openly, that they can be efficiently used for defence," the regulation of *concealed* carrying was lawful.[141]

Georgia went further than many other states in regulating both the concealed and open carrying of arms.[142] The Georgia Supreme Court reasoned that, "inasmuch as it does not deprive the citizen of his *natural* right of self-defence," the regulation of "carrying certain weapons *secretly* . . . is valid."[143] But the court cautioned that "so much of [the law], as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*."[144] As scholar Joseph Greenlee has explained, this holding reflected a view that *either* open or concealed carry must be available, while incorporating "the legislature's preference for open carry."[145] "Since open carry was available, citizens could still defend themselves."[146] "But had open carry been prohibited also, the concealed carry ban would have deprived citizens of the natural right of self-defense and therefore would have violated the Second Amendment."[147]

Nor did the early concealed carry laws inhibit the principle of communal defense. Community defense does not require the daily carrying of arms sufficient to resist governmental threats—it is generally enough that the people *possess* them at home and are prepared to retrieve them during times of national crisis.[148] Since these laws typically regulated only the carrying of certain concealable arms, they did not inhibit the people's right to *possess* arms of more general types.

Some state supreme courts explicitly relied on this community defense reasoning to uphold their state laws. For example, the Tennessee Supreme Court upheld

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[140] *Reid*, 1 Ala. at 616–17 (emphasis added).

[141] *Id.* at 619. The empirical validity of this statement is questionable at best, but it is representative of views that were commonly held, particularly in the antebellum South. *See* Campbell, *supra* note 132, at 50 ("Southern hostility toward the concealed carrying of weapons, for instance, was shaped by norms of masculinity and honor that treated concealing weapons as unmanly and dishonorable.").

[142] *See* 1837 Ga. Laws 90 ("[I]t shall not be lawful for any . . . persons whatsoever . . . to have about their person or elsewhere, any . . . pistols [or certain other weapons], save such pistols as are known and used as horseman's pistols.").

[143] Nunn v. State, 1 Ga. 243, 251 (1846).

[144] *Id.*

[145] Joseph G.S. Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 FEDERALIST SOC'Y REV. 32, 35 (2019).

[146] *Id.*

[147] *Id.*

[148] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 159–60.

the 1837 iteration of the state's concealed carry law because it did not ban possession of "ordinary military equipment" or inhibit the people's ability to "bear them for the common defence."[149] The Texas Supreme Court later reasoned that a prohibition on carrying "dirks, daggers, slungshots, sword canes, brass knuckles and bowie knives" was lawful because it did not stop people from possessing or carrying "the arms of a militiaman or soldier" or doing so "in the lawful defense of himself or the state."[150]

The common thread among the early American concealed carry laws and the state supreme court opinions analyzing them is that the regulations were lawful insofar as they did not stop the people from keeping and bearing arms for defense of themselves and their community.[151] The laws were generally limited to carrying discrete types of arms, and they often included exceptions for traveling, when the need for self-defense would likely be highest. They did not ban mere possession or carrying generally and were typically narrow in the scope of arms they affected. These regulations are therefore consistent with the principle of defense that is central

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[149] Aymette v. State, 21 Tenn. (2 Hum.) 154, 158, 160 (1840). The Tennessee Supreme Court reiterated this reasoning thirty-one years later. *See* Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187 (1871) (stating that if the law at issue extended to "a soldier's weapon . . . then the prohibition of the statute is too broad to be allowed to stand").

[150] English v. State, 35 Tex. 473, 476–78 (1871). The court went on to describe these arms as "the musket and bayonet; . . . the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms." *Id.* at 476.

[151] For a set of laws that might oppose this principle, see late-nineteenth-century regulations on carrying arms within western settlements. *See* Joseph Blocher, *Firearms Localism*, 123 YALE L.J. 82, 117–18 (2013) (citing and discussing examples of this trend). From the 1860s through the 1890s, a number of western jurisdictions established complete bans on public carry. Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION 233, 247 n.108 (Joseph Blocher et al. eds., 2023) (listing Arizona, Idaho, New Mexico, and Wyoming as examples). But these regulations were generally short-lived. For example, Idaho's law was judicially invalidated, *id.*, while Wyoming shifted to "the public carry model that was at the heart of the Western tradition in which open carry was broadly allowed, while concealed carry was severely restricted," George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 347 (2021). And these laws generally did not proliferate until the time of or after the ratification of the Fourteenth Amendment. *See* Blocher, *supra*, at 118 (describing how the "situation changed in the 1880s and 1890s" (quoting David T. Courtwright, *The Cowboy Subculture*, *in* GUNS IN AMERICA: A READER 86, 96 (Jan. E. Dizard et al. eds., 1999))); Leider, *supra*, at 247 n.108 (citing laws spanning from 1860 to 1893). Since "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 early sources.'" N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 614 (2008)). This later tradition is therefore likely not as useful to courts examining Second Amendment questions post-*Bruen* as the ones relied on by this Article.

to the Second Amendment.[152] But this history also stands for two subsidiary principles. First, carry regulations are lawful if they do not stop people from bearing arms in a manner and of a type sufficient for reasonable personal self-defense.[153] Second, they pass constitutional muster if they do not stop citizens from possessing (not necessarily carrying) "ordinary military equipment" necessary for defense of the community against tyranny[154] or foreign invasions.[155]

*B. Sensitive Places*

So-called "sensitive places laws" were rare in early American history. Indeed, "[l]aws that *required* colonists to carry arms [in places that today would be considered sensitive] were more common."[156] These laws mandated carrying in places including "church, court, musters, or to work on the roads or in the fields."[157] Universal carrying was so prevalent that St. George Tucker noted in his edition of Blackstone's *Commentaries* that "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side."[158]

Nonetheless, "a few jurisdictions in the colonial or Founding periods did adopt analogues to the English laws against bringing arms to legislative proceedings or to court hearings."[159] For example, Maryland made it a crime to "come into the howse of Assembly (whilst the howse is sett) with any weapon uppon perill of such fine or censure as the howse shall thinke fit."[160] Delaware adopted certain provisions in its 1776 Constitution aimed at "prevent[ing] armed intimidation of polling places," including carrying arms or mustering a militia near polls on election day.[161] Shortly

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[152] *See Heller*, 554 U.S. at 599, 628 (describing self-defense as "the *central component* of the right itself").

[153] *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846) (holding that a carry regulation is lawful "inasmuch as it does not deprive the citizen of his *natural* right of self-defence").

[154] *See Aymette*, 21 Tenn. at 157–58 (describing disarmament by tyrants as "these historical facts" in reference to which the Amendment was adopted).

[155] *See* Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179 (1871) (describing the right to bear arms as one protecting "the efficiency of the citizen as a soldier, when called on to make good 'the defence of a free people;' and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country").

[156] Greenlee, *supra* note 145, at 34 (emphasis added).

[157] *Id.* (collecting sources).

[158] 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. B, at 19 (1803).

[159] David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 234–35 (2018) [hereinafter Kopel & Greenlee, *Sensitive Places*].

[160] 1650 Md. Laws 216.

[161] Kopel & Greenlee, *Sensitive Places*, *supra* note 159, at 235 (citing DEL. CONST., art. 28 (1776)).

after the Founding, Virginia prohibited "com[ing] before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms."[162]

Until the Reconstruction Era, such sensitive places laws were rare.[163] Then, "in an attempt to limit intimidation by the Ku Klux Klan around polling places, Louisiana, Maryland, and Texas passed laws restricting the carrying of arms within certain distances of polling locations."[164] Louisiana banned carrying at all during polling hours and within one-half mile of voter registration offices.[165] Maryland regulated the carrying of arms in certain counties "on the days of election."[166] Texas, meanwhile, prohibited carrying within one-half mile of a polling place while the polls were open.[167] Other sensitive places restrictions that began to appear or become more prevalent in the later nineteenth century include bans on carrying in a courthouse,[168] on students (but not faculty or others) carrying on university campuses,[169] and on carrying in places of public congregation like churches and ballrooms.[170]

Besides sensitive *places* there are also examples of laws regulating carrying at sensitive *times*. The colony of South Carolina prohibited the firing of "any Gun or Pistol in the Night Time after Dark and before Day-Light, without Necessity."[171] During the nineteenth century, North Carolina banned carrying "a shot-gun, rifle or pistol" "off of their premises on the Sabbath."[172] Virginia did similarly unless the individual had "good and sufficient cause" to carry.[173]

Sensitive places laws did not become prevalent until after the ratification of the Fourteenth Amendment, so under the Supreme Court's current guidance, it is unclear

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[162] 1786 Va. Acts 35.

[163] These laws were more prevalent in England. In 1313, English law provided that "in all parliaments, treatis, and other assemblies which should be made in the realm of England for ever, every man shall come without all force and armour, well and peaceably." 7 Edw. 2, 170 (1313). This was followed in 1328 by a law stating that "no man great nor small . . . [shall] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with forms and arms . . . ." 2 Edw. 3, c. 3 (1328).

[164] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 163–64.

[165] 1870 La. Acts 159–60.

[166] 1886 Md. Laws 315.

[167] Act Regulating Elections, § 31, *in* GENERAL LAWS OF THE STATE OF TEXAS: PASSED AT THE SESSION OF THE THIRTEENTH LEGISLATURE 20, 29–30 (1873).

[168] *See* Hill v. State, 53 Ga. 472, 478–79 (1874) (upholding such a statute).

[169] For example, the Board of Visitors of the University of Virginia "banned students (but not faculty or other employees) from keeping on school premises any . . . weapon." Kopel & Greenlee, *Sensitive Places*, *supra* note 159, at 250. And Mississippi made it a crime for "any student of any university, college or school"—though not professors or staff—to "carry concealed . . . any weapon [of a certain kind]." 1878 Miss. Laws 176. For a more comprehensive examination of these and similar laws, see Clayton E. Cramer, *Guns on Campus*, 27 ACAD. QUESTIONS 417, 418–20 (2014).

[170] *See, e.g.*, 1870 Tex. Laws 63.

[171] ACTS PASSED BY THE GENERAL ASSEMBLY OF SOUTH-CAROLINA 22 (1740).

[172] 1868–1869 N.C. Sess. Laws 59–60.

[173] 1877 Va. Acts 305, § 21.

whether these laws form a part of the historical tradition that can justify modern regulations.[174] Nonetheless, they still broadly comport with the general underlying principle of defense. Sensitive places laws were typically geographically narrow,[175] tailored to the nature of the place, and often confined to locations where a form of security was present.[176] If carrying arms fulfills the principle of defense by enabling quick action against immediate personal violence,[177] then restrictions that allow for other, realistic means of defense against such situations also satisfy the principle.[178] Sensitive places laws that still allowed certain groups to carry, such as judges and officers in court,[179] or faculty and staff on a university campus,[180] are therefore consistent with the Second Amendment's core defense principle so long as those groups are realistically able to respond quickly to spontaneous acts of violence.[181]

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[174] There has been some scholarly debate as to what the appropriate time period is for interpreting the meaning of the Second Amendment. *Compare* Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439 (2022) (arguing that the adoption of the Fourteenth Amendment invested the Bill of Rights with new 1868 meanings), *and* Cramer et al., *supra* note 119, at 824 ("Assessing the constitutional right to arms in the context of the Fourteenth Amendment is different from assessing it purely as a matter of Second Amendment originalism."), *with* Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1 (reasoning that the Second Amendment should be interpreted as of the time *it* was adopted). Justice Barrett has also questioned whether nineteenth-century regulations should be considered at all. *See* United States v. Rahimi, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) ("In *Bruen*, the Court took history beyond the founding era, considering gun regulations that spanned the 19th century. I expressed reservations about the scope of that inquiry but concluded that the timing question did not matter to *Bruen*'s holding." (citation omitted)). But the Court has been clear that "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.'" N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 614 (2008)).

[175] *See, e.g.*, 1650 Md. Laws 216 (limited to legislative buildings); 1870 La. Acts 159–60 (limited to one-half mile of voter registration places); 1786 Va. Acts 33, ch. 21 (limited to those "com[ing] before the Justices of any Court"); Act Regulating Elections, *supra* note 167, § 31 (limited to one-half mile of polling locations).

[176] For example, Virginia's 1786 courthouse firearms prohibition provided for court officials to carry arms. *See* 1786 Va. Acts 33, ch. 21 (banning carrying arms by those "except the Ministers of Justice in executing the precepts of the Courts of Justice, or in executing of their office, and such as be in their company assisting them"). The court officials would have had no duty to protect particular individuals, just as police officers do not today, *see generally* Castle Rock v. Gonzales, 545 U.S. 748 (2005), but the presence of armed officials acts to dissuade violence.

[177] *Supra* Section I.A.

[178] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 164.

[179] *See, e.g.*, 1786 Va. Acts 33, ch. 21.

[180] *See, e.g.*, 1878 Miss. Laws 176.

[181] The importance of the condition that such ability must be realistic cannot be understated. If people are disarmed in a dangerous area, and security or police forces are unable

To the extent that these laws are appropriate to consider as a historical tradition post-*Bruen*,[182] they therefore also stand for an auxiliary principle that arms carrying can be banned in locations in which one's safety is practically secured by other means.[183]

### *C. Restrictions Focused on Certain Types of Arms*

In early colonial and American history, restrictions on types of arms generally focused on *carrying* those weapons, rather than simply *possessing* them.[184] The concealed carry laws discussed above[185] are therefore also the primary examples of laws targeting specific types of arms. These focused on preventing the concealed carry of arms that were particularly identified with the "purposes of private assassination."[186]

For example, Louisiana criminalized the concealed carrying of "a dirk, dagger, knife, pistol or any other deadly weapon."[187] Kentucky did the same with "a pocket pistol, dirk, large knife, or sword in a cane."[188] Indiana targeted "any dirk, pistol, sword in cane, or any other unlawful weapon."[189] A Tennessee law covered "a dirk, sword cane, French knife, Spanish stiletto, belt or pocket pistols."[190] Arkansas prohibited the concealed carrying of "any pistol, dirk, butcher or large knife, or a sword in a cane."[191] And Alabama regulated "any bowie knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon."[192] Each of these laws was aimed primarily at *carrying* the specified arms.

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to respond with sufficient speed, then the defense principle has been neutered. This idea can be seen in *Bruen*'s refusal to characterize "the island of Manhattan [as] a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 31 (2022). In your average location in a city, it is unrealistic to expect police forces to arrive in time to stop a mugging, armed robbery, rape, etcetera. But in locations like a courthouse, where a bailiff stands armed and ready to take action at a moment's notice, it might be reasonable to assume that one will be safe even without an arm for self-defense.

[182] As discussed previously, *supra* note 174, they likely are not.

[183] This principle is further supported by some states' mandate that people actually *carry* arms in sensitive places where there was no other form of security. Greenlee, *supra* note 145, at 34 (collecting sources). In both situations, whether one should, or can, carry arms in a given "sensitive" location is dependent on what realistic alternatives exist.

[184] *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 369 (2024) ("From 1607 through 1899, American bans on possession or sale to adults of particular arms were uncommon.").

[185] *See supra* Section II.A.

[186] Aymette v. State, 21 Tenn. (2. Hum.) 154, 160 (1840).

[187] 1813 La. Acts 172.

[188] 1813 Ky. Acts 100.

[189] 1820 Ind. Acts 39.

[190] 1821 Tenn. Pub. Acts 15–16.

[191] 1837 Ark. Acts 280.

[192] 1839 Ala. Laws 67.

Indeed, the only law between the Founding and the Civil War the author is aware of that truly banned acquiring or possessing a certain type of arm was Georgia's 1837 law making it a crime for anyone "to sell, . . . to keep, or to have about their persons, or elsewhere" certain weapons including Bowie knives and pistols.[193] And as discussed above,[194] this law was not long for the world. In under a decade, the Georgia Supreme Court invalidated it except as applied to concealed carry.[195]

On the flip side, another type of historical law regarding types of arms were colonial mandates that certain people *actually possess* some types of arms. These laws typically applied to militia-eligible men, and sometimes men with exemptions from service,[196] as well as women.[197] The types of arms required varied, but generally included some form of cutting weapon, like a knife, sword, or bayonet, or a type of firearm, such as a musket, carbine, or pistol.[198] These mandates phased out as professional soldiers eventually replaced the militiaman, but they nonetheless form an important part of our regulatory tradition.

Again, these types of laws generally comport with the Second Amendment's underlying defense principle. The types of arms the laws regulated were generally viewed as used more commonly by criminals than by regular citizens for defense of self or community.[199] That is why the *Heller* Court referred to these laws as "the

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[193] 1837 Ga. Acts 90.

[194] *See supra* Section II.A.

[195] Nunn v. State, 1 Ga. 243, 251 (1846).

[196] *See, e.g.*, Del. Act of 1741, *in* 2 MILITARY OBLIGATION: THE AMERICAN TRADITION, A COMPILATION OF THE ENACTMENTS OF COMPULSION FROM THE EARLIEST SETTLEMENTS OF THE ORIGINAL THIRTEEN COLONIES IN 1607 THROUGH THE ARTICLES OF CONFEDERATION 1789, at 171, 176 (1947) ("[Those exempted] being nevertheless obliged, by this Act, to provide and keep by them Arms and Ammunition as aforesaid, as well as others.").

[197] *See, e.g.*, 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 224, 226 (William Waller Hening ed., N.Y., R. & W. & G. Bartow 1823) [hereinafter THE STATUTES AT LARGE, VIRGINIA] ("*All* persons except negroes to be provided with arms and ammunition . . . ." (emphasis added)); Acts and Orders of 1647, *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 178, 183–84 (Donald S. Lutz ed., 1998) (requiring that "*every Inhabitant* of [Rhode] Island above sixteen or under sixty years of age, shall always be provided with a Musket" (emphasis added)).

[198] *See* Kopel & Greenlee, *supra* note 184, at 244–54 (listing various arms requirements).

[199] *See* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) (describing the regulated arms as "those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin"); State v. Reid, 1 Ala. 612, 617 (1840) (describing Alabama's regulation of specific arms as "a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others"); Nunn v. State, 1 Ga. 243, 251 (1846) (concluding that concealed carry regulations of "certain weapons" are valid "inasmuch as it does not deprive the citizen of his *natural* right of self-defence"); State v. Chandler, 5 La. Ann. 489, 489–90 (1850) (stating that

historical tradition of prohibiting the carrying of dangerous and unusual weapons."[200] The laws did nothing to prohibit the general carrying of arms "in common use at the time" for self-defense.[201] Nor did they inhibit the possession of "ordinary military equipment" that would be sufficient for communal self-defense.[202] Like the tradition of regulating concealed carry to which these laws are closely related,[203] the tradition governing "dangerous and unusual weapons" supports two general subsidiary principles.[204] Laws targeting specific types of arms should not stop people from bearing arms commonly used for self-defense.[205] Nor should they inhibit people from possessing a wider category of arms sufficient to defend the community against invasion or tyranny.[206]

### *D. Disarming Dangerous Groups*

The fundamental right embodied in the Second Amendment did not extend to "rebel[ling] against a just government."[207] This limitation led to a long tradition in Anglo-American law of disarming those who were feared likely to take up arms against the state.[208] These laws started in England, where they targeted "those

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Louisiana's regulation of certain arms "became absolutely necessary to counteract a vicious state of society . . . to prevent bloodshed and assassinations committed upon unsuspecting persons").

[200] District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (internal quotations omitted).

[201] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 47 (2022) (quoting *Heller*, 554 U.S. at 627).

[202] *Aymette*, 21 Tenn. at 158.

[203] *See supra* Section II.A.

[204] *Heller*, 554 U.S. at 627 (internal quotations omitted).

[205] *See* Nunn v. State, 1 Ga. 243, 251 (1846) (holding that a carry regulation is lawful "inasmuch as it does not deprive the citizen of his *natural* right of self-defence").

[206] *See* Andrews v. State, 50 Tenn. (3 Heisk) 165, 179 (1871) (describing the right to bear arms as one protecting "the efficiency of the citizen as a soldier, when called on to make good 'the defense of a free people;' and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country"); *Aymette*, 21 Tenn. at 157–58 (describing disarmament by tyrants as "these historical facts" in reference to which the Amendment was adopted).

[207] Range v. Att'y Gen., 124 F.4th 218, 244 (3d Cir. 2024) (en banc) (Matey, J., concurring).

[208] As will become clear to the reader, these laws were often discriminatory and in their specific forms would likely be unconstitutional today. There is some disagreement over what this means for their usefulness as historical analogues. Some think that, because their discriminatory nature would make them categorically unconstitutional today, they should simply be ignored. *See, e.g.*, Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 26 (2024) ("*Bruen* makes clear that discriminatory laws cannot form a historical tradition."); George Mocsary, *In Denial About the Obvious: Upending the Rhetoric of the Modern Second Amendment*, 2024 CATO SUP. CT. REV. 201, 215–20 (agreeing with Justice Thomas's rejection of many of these laws as

involved in or sympathetic to rebellions and insurrections."[209] An early example, which was later brought to the colonies, targeted Catholics.[210] In the New World, similar laws affected enslaved and free Black people, Native Americans, and Loyalists during the Revolutionary War.[211]

1. Catholics

During the sixteenth and seventeenth centuries, England disarmed Catholics because they were viewed as "potentially disloyal and seditious" to the Protestant king.[212] The ban was complete until Catholics were granted an exception in 1689 "to possess arms 'for the defence of his House or person' with permission from the justice of the peace."[213] The Catholic-Protestant divide on arms came to a head in the days of the Glorious Revolution. First, Protestants were disarmed because they were thought disloyal to King James II, then, after the revolution, Catholics were disarmed because they were "perceived as posing a threat to King William III and Queen Mary II."[214] After Protestant rule was restored, their former disarmament was used to justify the inclusion in the English Bill of Rights of protection for "Protestants . . . hav[ing] arms for their defence."[215]

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comparators in his *Rahimi* dissent). Others suggest that broader, unproblematic principles can nonetheless be drawn from these laws and applied today. *See, e.g.*, McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 320 ("I propose that the takeaway from history should be the tradition of 'dangerousness' more broadly, rather than a particular conception thereof."); Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 35, 42 (2023) (arguing for an "Abstraction Approach" where "the lawyer or judge would condemn the historical application of these laws, but abstract from their specific application a broader principle that might be applied consistently with contemporary values and understandings" because "the past determines the scope of legislative authority to regulate guns today [and] slicing off portions of that history diminishes the regulatory power the founding generation understood the state to possess"). The Court's blessing of drawing higher order principles from history in *Rahimi* suggests that the latter might be the approach the Court would prefer moving forward. *See* United States v. Rahimi, 602 U.S. 680, 693–94 (2024).

[209] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 258 (2020); *see also Range*, 124 F.4th at 240 (Matey, J., concurring) (describing how, in England, "government could disarm classes of people that posed an actual risk of sedition or treason").

[210] *Id.*

[211] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 318–19 (collecting sources).

[212] Greenlee, *supra* note 209, at 258.

[213] *Id.* at 258–59 (quoting 1 W. & M. c. 15 (1688) (Eng.)).

[214] *Id.* at 259.

[215] 1 W. & M. c. 1, § 6, c. 2, § 7 (Eng.), *in* 2 HISTORY OF THE ENGLISH PARLIAMENT 561, 561–62 (G. Barnett Smith ed., N.Y., Ward, Lock, Bowden & Co. 1892).

Catholic suspicion crossed the Atlantic with British settlers, and with it came similar disarmament laws in the colonies. During the French and Indian War, these were justified by fears that Catholic colonists would side with Catholic France.[216] Indeed, "Protestants at the time expressly stated that they disarmed Catholics to prevent violence."[217] Many "worried that their Catholic neighbors were plotting with Catholic France to impose Catholic rule throughout America."[218]

Based on these fears, Maryland required that "all such Armour, Gunpowder, and Ammunition, of whatsoever Kinds, as any Papist . . . hath . . . be taken from such Papist . . . ."[219] Pennsylvania did similarly.[220] Stating that "it is dangerous at this time to permit Papists to be armed," Virginia disarmed any "Papist or reputed Papist . . . [who] shall or may have or keep . . . any arms, weapons, gunpowder, or ammunition."[221] Virginia included exemptions for those willing to take a loyalty oath, and also allowed Catholics to keep "such necessary weapons as shall be allowed to him, by order of the justices of the peace, at their [court], for the defence of his house or person."[222] These restrictions, while prevalent under English control, became unnecessary following the Revolution since the United States became allied with Catholic France.[223]

2. Black and Enslaved People

Just as many colonists worried Catholics would take up arms against them alongside the French, they were similarly concerned about enslaved and free Black people engaging in an armed uprising against the slaveholding governments.[224] To

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[216] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 319; *see also* JOSEPH L.J. KIRLIN, CATHOLICITY IN PHILADELPHIA 78–79 (John Jos. McVey ed., 1909) (describing the Pennsylvania governor's fear that "the French might march in and be strengthened by the German and Irish Catholics who are numerous [in Pennsylvania]").

[217] Greenlee, *supra* note 208, at 35, 35 n.218 (citing PA. GAZETTE, June 13, 1754, at No. 1329, which reported Lieutenant Colonel Thomas James's statements urging the militia to disarm Catholics).

[218] *Id.* at 35–36.

[219] Act of May 22, 1756, *in* VOTES AND PROCEEDINGS OF THE LOWER HOUSE ASSEMBLY OF THE PROVINCE OF MARYLAND 88, 95 (1757).

[220] 3 PENNSYLVANIA ARCHIVES 131–32 (Samuel Hazard ed., Phila., Joseph Severns & Co. 1853).

[221] Act of 1756, *in* 7 THE ECCLESIASTICAL STATUTES AT LARGE 509, 510 (James Thos. Law ed., London, William Benning & Co. 1847).

[222] *Id.*

[223] Additionally, at least James Madison viewed the Second Amendment as rectifying the "crucial defect[]" of excluding Catholics from the English Bill of Rights' right to possess weapons. *See* David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 244 (2008).

[224] *See* Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 581 (1998).

prevent such violence, many colonies and early states prohibited enslaved people (or Black people more generally) from possessing weapons.[225]

For example, Virginia's 1639 mandate to carry arms applied to all persons "except negroes."[226] In New York, it was illegal "for any Slave . . . to have or use any gun Pistoll sword Club or any other Kind of Weapon whatsoever" unless accompanied by their master.[227] Maryland law provided that "no Negro or other Slave . . . shall be permitted to carry any Gunn."[228] South Carolina made it unlawful "for any slave . . . to carry or make use of fire arms . . . unless such negro or slave shall have a . . . license . . . from his master."[229] In 1755, Georgia enacted a similar law that forbade "any Slave . . . to Carry and make use of Fire Arms" without a license.[230]

These types of laws continued after the Founding. The threat of uprising by "slaves and freedmen" persisted until the Civil War, so states continued to enact and enforce restrictions on arms against them.[231] In 1805, Alabama forbade enslaved people to "keep or carry any gun, powder, shot, club, or other weapon whatsoever."[232] Louisiana made it illegal for any "slave [to] carry any visible or hidden arms, not even with . . . permission for so doing."[233] And Delaware stopped "free negroes and free mulattoes" from owning or possessing "a gun, pistol, sword or any warlike instrument."[234]

### 3. Native Americans

Tensions between European settlers and Native Americans existed since the colonists first arrived. Armed conflicts frequently broke out all along the frontier, and during the French and Indian War, Native Americans allied with France against the

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[225] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 319–20.

[226] Act of January 6, 1639, *in* 1 THE STATUTES AT LARGE, VIRGINIA, *supra* note 197, at 224, 226.

[227] Act of 1664, *in* 2 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 679, 687 (Alb., James B. Lyon 1894).

[228] Act of September 29, 1704, *in* PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 254, 261 (William Hand Browne ed., 1906).

[229] Act of 1740, *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 404 (Thomas Cooper & David McCord eds., Columbia, S.C., Republican Printing Co. 1840).

[230] Act of 1755, *in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 102, 117–18 (Allen D. Candler ed., 1910).

[231] Greenlee, *supra* note 209, at 269.

[232] Act of March 6, 1805, *in* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 539, 540 (C.C. Clay ed., Tuscaloosa, Marmaduke J. Slade 1843).

[233] Act of June 7, 1806, *in* 1 A NEW DIGEST OF THE STATUTE LAWS OF THE STATE OF LOUISIANA 48, 50 (Henry A. Bullard & Thomas Curry eds., New Orleans, E. Johns. & Co. 1842).

[234] Act of March 18, 1863, *in* 12 LAWS OF THE STATE OF DELAWARE 330, 332 (Del., James Kirk 1861).

English colonies.[235] To defend against violent attacks from their Indian neighbors, many colonies began imposing arms regulations on Native Americans. But, unlike those applied to Catholics or enslaved people, these were typically in the form of trade prohibitions, rather than direct bans on possession.[236]

Virginia established a law in 1619 forbidding anyone to "sell or give any Indians any piece shott, or poulder, or any other armes offensive or defensive."[237] Dutch New Netherland (which later became New York and neighboring states) made it a crime "to sell any Guns, Powder or Lead to the Indians."[238] The Massachusetts Bay colony banned selling or bartering "any gun or guns, powder, bullets, shot, lead, to any Indian whatsoever."[239] Connecticut prohibited its residents to sell guns to Native Americans or repair any firearms they already had.[240] And in 1763, Pennsylvania outlawed selling, bartering, exchanging, or giving a Native American "any guns, gunpowder, shot, bullets, lead or other warlike stores without license."[241]

Following independence, Native American tribes continued to pose a danger to the young United States, particularly on the frontiers. As a result, in 1796, the federal government made it illegal for anyone to "purchase, or receive of any Indian, in the way of trade or barter, a gun."[242] Some of the more rural states and territories followed suit. In 1813, the Illinois Territory enacted a law substantially similar to that passed by Congress.[243] The Florida Territory later mandated that, if a Native American were encountered outside of a reservation, its residents should "cause [his] gun . . . (if he has one) to be taken from him."[244] And Missouri made it a crime to "sell, exchange or give, to any Indian, any . . . gun."[245]

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[235] *See* Greenlee, *supra* note 208, at 40.

[236] *Id.* at 29 ("Laws preventing firearm transfers to American Indians—which were not prohibitions on possession—also focused on mitigating danger.").

[237] 1 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 1619–1658/59, at 13 (Henry Read McIlwaine & John Pendleton Kennedy eds., 1915).

[238] Ordinance of March 31, 1639, *in* LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 18, 19 (E.B. O'Callaghan ed. & trans., Alb., Weed, Parsons & Co. 1868).

[239] Act of 1633, *in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 132, 133 (Bos., T.B. Wait & Co. 1814).

[240] THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY 529–30 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850).

[241] Act of October 22, 1763, *in* 6 THE STATUTES AT LARGE OF PENNSYLVANIA 319, 320 (James T. Mitchell & Henry Flanders eds., Penn., WM Stanley Ray 1899).

[242] Act of May 19, 1796, ch. 30, § 9, 1 Stat. 469, 471.

[243] Act of Dec. 8, 1813, *in* LAWS AND JOINT RESOLUTION PASSED BY THE LEGISLATIVE COUNCIL AND HOUSE OF REPRESENTATIVES OF ILLINOIS TERRITORY AT THEIR SECOND SESSION HELD AT KASKASKIA IN 1813, at 14, 14 (1920).

[244] Act of 1827, *in* LAWS OF THE COLONIAL AND STATE GOVERNMENTS, RELATING TO INDIANS AND INDIAN AFFAIRS, FROM 1633 TO 1831, INCLUSIVE 247, 247 (1832).

[245] Act of February 27, 1845, *in* THE REVISED STATUTES OF THE STATE OF MISSOURI 576, 577 (1845).

4. Loyalists

During the Revolutionary War, one group in particular posed an outsized threat to the community: those who remained loyal to Great Britain. One British historian wrote that "we may safely say that 50,000 soldiers, either regular or militia, were drawn into the service of Great Britain from her American sympathizers."[246] It was a common view at the time that these "loyalists—even those simply providing supplies to the British—[should be considered] redcoats themselves."[247] John Adams believed that Loyalists were "guilty of the very invasion in Boston, as they [were] constantly aiding, abetting, comforting, and assisting the army there."[248]

In 1775, relying on "the immutable laws of self-defence," New York disarmed anyone found guilty of furnishing aid to the British forces.[249] The next year, Massachusetts disarmed anyone who "fled to the British fleet or army," aided those forces, or refused to sign a declaration supporting American independence.[250] New Jersey disarmed any "disaffected" individuals.[251] And many other states did likewise, generally targeting those who were proven to sympathize with the British or who "refus[ed] to take and ascribe [an] oath or affirmation" supporting the American cause.[252] Of course, these laws were temporary in two respects. Many of them allowed individuals to regain their arms by taking an oath of allegiance to the revolutionary governments.[253] And the laws themselves also became unnecessary after the war was won.[254]

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[246] H.E. EGERTON, THE CAUSES AND CHARACTER OF THE AMERICAN REVOLUTION 178 (1923).

[247] Greenlee, *supra* note 208, at 52.

[248] Letter from John Adams to Gen. Washington (Jan. 8, 1776), *in* 4 AMERICAN ARCHIVES, FOURTH SERIES 604, 604 (Peter Force ed., D.C., M. St. Clair Clarke & Peter Force 1843).

[249] 3 AMERICAN ARCHIVES, FOURTH SERIES 573 (Peter Force ed., D.C., M. St. Clair Clarke & Peter Force 1840).

[250] Act of May 1, 1776, *in* 4 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 479, 479–80, 483–84 (1881).

[251] Act of 1777, *in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 90, 90 (Burlington, N.J., Isaac Collins 1777).

[252] *See, e.g.*, Act of June 13, 1777, *in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 110, 111–13 (James T. Mitchell & Henry Flanders eds., 1903); *see also* Act of 1775, *in* 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1775, TO JUNE 1776, at 192, 193 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1890); Act of 1776, *in* 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 566, 567 (John Russell Bartlett ed., Providence, A. Crawford Greene 1862); Act of 1777, *in* 24 THE STATE RECORDS OF NORTH CAROLINA 84, 89 (Walter Clark ed., 1905).

[253] *See, e.g.*, Act of June 13, 1777, *supra* note 252, at 110–12.

[254] C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB.

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It is worth noting that many of these group disarmament laws—targeting Catholics, enslaved people, Native Americans, and Loyalists—would likely fail judicial scrutiny today, and for good reason. We should not be deciding the scope of constitutional rights based off race or religious status. But while the laws themselves are flawed, at a higher level of abstraction, they are generally consistent with the core principle underlying the Second Amendment: that it is good to justly defend oneself and community.[255] As previously discussed, one method of defending the community is by providing the people with arms sufficient to repel an invasion or resist tyranny. But another part of communal defense might be temporarily *disarming* the enemies of the community.[256] After all, for an army to equip an opposing force is essentially to use those weapons against itself—the opposite of defense. This was the primary goal of the group disarmament laws: to inhibit the ability of "persons expected to take up arms against the government" or community to do so.[257] And in many cases, such as the laws affecting Catholics or Loyalists, people could avoid disarmament by simply swearing an oath of loyalty.[258] Some laws also specifically provided for arms to be returned for purposes of self-defense.[259] In other words, the laws were often narrowly tailored to their specific purpose of defending the community from the violent attacks of enemy combatants,[260] while simultaneously taking specific account of the personal defense aspect of the right to bear arms.[261] So while we should not approve of these laws if they were replicated today, they do provide

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POL'Y 695, 726 (2009) ("[T]here is good reason to consider [these laws] not to have survived through the Founding . . . .").

[255] *See supra* Part I.

[256] *See* McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 323 ("[A] corollary [to bearing arms in self-defense] could be that the Second Amendment does not protect such a right for those who have *actually* committed the types of crimes that necessitate violent self-defense in the first place.").

[257] Greenlee, *supra* note 209, at 285.

[258] *See, e.g.*, Act of 1756, *supra* note 221, at 509–10 (allowing Catholics to take an oath and keep their arms); Act of June 13, 1777, *supra* note 252, at 111–13 (allowing suspected Loyalists to do the same).

[259] *See, e.g.*, Act of 1756, *supra* note 221, at 510 (providing for court orders granting Catholics the ability to carry arms for personal self-defense).

[260] Describing their purpose:

> [T]he danger feared by those drafting the historical disarmament laws was always physical violence. Catholics might have raised arms alongside the French against Protestant England. The Loyalists may have attacked their fellow colonists during the Revolutionary War. Slaves and Indians may have inflicted violence on the white settlers as revenge for their enslavement or for occupying their land. In each historical scenario, danger meant one thing: a violent attack.

McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 324–25.

[261] *Id.* at 324.

guideposts that courts can use to analyze laws that disarm groups who seek to harm the community.

In implementing the defense principle in this manner, this regulatory tradition therefore stands for an auxiliary principle: groups who have aligned with an enemy of the nation, or who have or are likely to engage in violent insurrection, can be disarmed for the duration of the threat they pose. Importantly, this particular historical tradition was always aimed at defending against communal violence—therefore, under this principle, the threat *must* be tied to violence against the community. Disarming a group, the members of which are viewed as more likely to engage in *personal* violence, would not fit within the "principle[] that underpin[s] [this] regulatory tradition."[262] And to remedy the constitutional problems of the historical laws, the disarmament should be based on more than mere race or religious status. Courts should seek proof that individuals are actually members of a group that "pose[s] an actual risk of sedition or treason."[263]

### *E. Disarming Dangerous Individuals*

Just as the natural right to bear arms did not extend to rebelling against a just government, it could also not be used to harm another innocent human life.[264] The laws described immediately above targeted groups perceived as dangerous, but there were other laws that focused on threats posed by individuals. As the Supreme Court noted in *Rahimi*, "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[265] Unlike the tradition of disarming whole groups, however, these did not take aim at "persons expected to take up arms against the government," but at "persons guilty of committing violent crimes" or "persons with violent tendencies."[266] In other words, while the group disarmament laws targeted communal violence, these laws sought to inhibit personal violence.

#### 1. Going-Armed Laws

A common example of these individual disarmament laws are those applied to persons who carried arms to the terror of the public.[267] The English Statute of

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[262] United States v. Rahimi, 602 U.S. 680, 692 (2024); *see* McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 325–26 ("Today, if certain groups are more likely to be convicted of minor crimes, and if prior non-violent offenses are used as evidence of an increased likelihood of violence in the future, then it would be a simple matter for judges to deem entire groups *dangerous* . . . .").

[263] Range v. Att'y Gen., 124 F.4th 218, 240 (3d Cir. 2024) (en banc) (Matey, J., concurring); *see also* McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 324–26 (making a similar argument in the context of felon disarmament).

[264] *Range*, 124 F.4th at 244 (Matey, J., concurring).

[265] *Rahimi*, 602 U.S. at 690.

[266] Greenlee, *supra* note 209, at 285.

[267] In one sense, these might be characterized as a restriction on the manner of carrying,

Northampton, dating to 1328, prohibited "bring[ing] . . . force in affray of the peace."[268] "Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of arming oneself to the Terror of the People."[269] These acts, though they weren't necessarily violent in themselves, were considered to "lead almost necessarily to actual violence."[270] In an effort to discourage personal violence therefore, affrays were punished with "forfeiture of the arms . . . and imprisonment."[271]

The scope of the English going-armed law is illustrated by *Sir John Knight's Case*.[272] Knight was charged with "walk[ing] about the streets armed with guns, and [going] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects."[273] The Chief Justice affirmed that "the meaning of the statute . . . was to punish people who go armed to terrify the King's subjects."[274] He explained that the "statute be almost gone in desuetudinem" since "there be a general connivance to gentlemen to ride armed for their security."[275] "[Y]et where the crime shall appear to be malo animo, it will come within the Act."[276] While the prosecution evidently argued that Knight carried arms with malo animo[277] to terrify the people, he was eventually found not guilty.[278] It therefore appears well-settled that this law applied only to carrying in a manner deemed "terrifying."[279]

Several states adopted similar laws both before and after the Founding. New Hampshire arrested and disarmed "all affrayers . . . or any other who shall go armed

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as in Section II.A, *supra*. But because the focus of these laws was not on the carrying, per se, but on the misuse of firearms while carrying, they are perhaps better categorized as laws punishing those likely to commit personal violence. *See* State v. Huntley, 25 N.C. (3 Ired.) 418, 422–23 (1843) (per curiam) ("[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence . . . [but] [h]e shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.").

[268] 2 Edw. 3 c. 3 (1328) (Eng.).

[269] *Rahimi*, 602 U.S. at 697 (internal quotations omitted).

[270] *Huntly*, 25 N.C. at 422.

[271] 4 WILLIAM BLACKSTONE, COMMENTARIES *149.

[272] Sir John Knight's Case (1686) 87 Eng. Rep. 75 (KB); Rex. v. Sir John Knight (1686) 90 Eng. Rep. 330 (KB).

[273] *Sir John Knight's Case*, 87 Eng. Rep. at 76.

[274] *Id.*

[275] *Sir John Knight*, 90 Eng. Rep. at 330.

[276] *Id.*

[277] "With evil or wrongful intent." *Malo Animo*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/malo%20animo [https://perma.cc/7GTN-APGX] (last visited Apr. 17, 2025).

[278] *Sir John Knight*, 90 Eng. Rep. at 330.

[279] *See* Baude & Leider, *supra* note 1, at 1485 ("But the [affray law] . . . did not prohibit the possession of military weapons in the home. It instead banned carrying arms in public under circumstances that were likely to terrify the people. And treatise writers had long recognized that individuals did not commit the . . . offense by keeping such arms in their homes or by bearing them in public for defense of the community and for law enforcement purposes.").

offensively, or put his Majesty's subjects in fear."[280] In Massachusetts, it was unlawful to "ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth."[281] Maine similarly punished "all affrayers . . . and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State."[282]

The North Carolina Supreme Court found this general rule to be within the state's common law.[283] In doing so, it noted that the right to bear arms "secures to him a *right* of which he cannot be deprived."[284] But there was also a "*duty* in execution of which that right is to be exercised."[285] The court reasoned that "[i]f he employ those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested."[286]

### 2. Surety Laws

While going-armed laws generally punished past misuse of a weapon, another mechanism—the "surety"—was aimed at "*preventing* the commission of crimes and misdemeanors."[287] When there was probable cause to suspect a person "of future misbehavior," surety laws required them to post a bond to ensure that "such offense . . . shall not happen."[288] If they refused to provide surety, they could be jailed.[289] And if they posted bond but later committed the suspected crime, their bond would be forfeited.[290]

Sometimes surety provisions were enacted as stand-alone regulations, while other times they were incorporated into going-armed laws. For example, Massachusetts's going-armed law included an obligation that "the offender . . . find sureties for his keeping the peace, and being of the good behavior."[291] In Oregon, if anyone went "armed with a . . . pistol, or [certain other weapons], without reasonable cause to fear

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[280] ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE, IN NEW ENGLAND 1 (1761).

[281] Act of January 29, 1795, *in* 1 THE GENERAL LAWS OF MASSACHUSETTS, FROM THE ADOPTION OF THE CONSTITUTION, TO FEBRUARY, 1822, at 454, 454 (Theron Metcalf ed., Bos., Wells & Lilly and Cummings & Hilliard 1823).

[282] Act of March 15, 1821, *in* 1 LAWS OF THE STATE OF MAINE 352, 353 (Brunswick, J. Griffin 1821).

[283] State v. Huntly, 25 N.C. (3 Ired.) 418, 421–22 (1843).

[284] *Id.* at 422.

[285] *Id.*

[286] *Id.*

[287] 4 BLACKSTONE, *supra* note 271, at *251.

[288] *Id.*

[289] United States v. Rahimi, 602 U.S. 680, 697 (2024).

[290] 4 BLACKSTONE, *supra* note 271, at *253.

[291] Act of January 29, 1795, *supra* note 281, at 454.

an assault . . . to his person" and gave others "reasonable cause to fear an injury," he could "be required to find sureties for keeping the peace for a term not exceeding six months."[292] Michigan similarly required surety for "any person [who] shall go armed with a . . . pistol . . . on complaint of any person having reasonable cause to fear an injury."[293] These are examples of a broader trend of comparable laws.[294]

Like the group disarmament laws, going-armed and surety laws targeted those who created a situation that would necessitate resorting to armed defense. These laws "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon."[295] So while these laws were meant to apply to those committing personal, rather than communal, violence, these too are consistent with the general principle of defense.[296] After all, one way of protecting citizens is to allow them to defend themselves—another is to take arms from those who *create* violent situations. Therefore, the individual disarmament laws stand for the subsidiary principle that particular individuals can be disarmed if they, specifically, have been found to "pose[] a clear threat of physical violence to another."[297] Such disarmament is particularly likely to comport with the Second Amendment and its background principles if it provides reasonable leeway for the individual to continue carrying for personal self-defense. For example, Oregon's surety law permitted carrying when one had "reasonable cause to fear an assault . . . to his person."[298]

### *F. Unregulated Conduct*

This examination of our regulatory tradition would not be complete without recognizing conduct that was *not* generally regulated. Around the time of the Founding, much arms-bearing conduct went unregulated. Of course, as Justice Barrett and

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[292] THE STATUTES OF OREGON, ENACTED AND CONTINUED IN FORCE BY THE LEGISLATIVE ASSEMBLY, AT THE SESSION COMMENCING 5TH DECEMBER, 1853, at 220 (Or., Asahel Bush 1854) [hereinafter THE STATUTES OF OREGON 1853].

[293] Act of May 18, 1846, *in* THE REVISED STATUTES OF THE STATE OF MICHIGAN, PASSED AND APPROVED MAY 18, 1846, at 690, 692 (Sanford M. Green ed., Det., Bagg & Harmon 1846).

[294] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 56 n.23 (2022).

[295] United States v. Rahimi, 602 U.S. 680, 699 (2022).

[296] *See* McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 323 ("[A] corollary [to the defense principle] could be that the Second Amendment does not protect [a right to bear arms] for those who have *actually* committed the types of crimes that necessitate violent self-defense in the first place."); Range v. Att'y Gen., 124 F.4th 218, 239 (3d Cir. 2024) (en banc) (Matey, J., concurring) ("[T]he surety system illustrates the long-standing idea that liberty cannot be used for lawless violence, consistent with the natural law principles prohibiting individuals from exercising their right to bear arms to tarnish the shared life or dignity of the community.").

[297] *Rahimi*, 602 U.S. at 698.

[298] THE STATUTES OF OREGON 1853, *supra* note 292, at 220.

others have pointed out, the fact that certain conduct was unregulated does not necessarily mean that lawmakers thought they *couldn't* regulate that conduct.[299] But where such legislative silence is consistent with other evidence such as Founding-era practices, sentiments, and regulatory schemes, it can confirm the importance of the unregulated conduct to our tradition of keeping and bearing arms. Again, this Section is not intended to set forth a comprehensive view of such activities; instead, it provides a sketch of those that appear most relevant to litigation moving forward.

1. Privately Made Arms

In colonial and early America, most weapons were privately made. Indeed, "[a]t the founding, there was no centralized firearm manufacturing industry."[300] Weapons were either made at home or built by individual gunsmiths—either way "every gun was handmade and unique."[301] Not until the mid-nineteenth century did names like Remington, Colt, Winchester, and Smith & Wesson make the transition from small shops to large-scale production.[302]

The tradition of privately making arms was extensive—indeed one firearms historian described colonial arms-making as "primarily a civilian activity."[303] Examples abound of blacksmiths, locksmiths, and even attorneys moonlighting as amateur gunsmiths.[304] One scholar estimated that "there were over 4,000 gunsmiths

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[299] *See, e.g.*, *Rahimi*, 602 U.S. at 739–40 (Barrett, J., concurring) (writing that a strict historical analogues approach "assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority"); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 111 (2023) ("Under *Bruen*'s test, it appears that if the government cannot point to past legal regulation (that is, enacted laws), it cannot regulate today. . . . And yet, for the absence of evidence (of regulations) to serve as evidence of absence (of regulatory authority), the Court must make assumptions about historical lawmaking that do not seem justified.").

[300] McWilliam, *supra* note 3, at 12.

[301] *Id.*

[302] *See This Is Remington Firearms*, REMINGTON, https://www.remarms.com/about-us [https://perma.cc/KF9Y-NLRG] (last visited Apr. 17, 2025); *The Colt Story*, COLT, https://www.colt.com/timeline [https://perma.cc/RYR7-KH9T] (last visited Apr. 17, 2025); *The Complete History of Winchester Repeating Arms*, WINCHESTER REPEATING ARMS, https://www.winchesterguns.com/news/historical-timeline.html [https://perma.cc/643Z-S3Y3] (last visited Apr. 17, 2025); *Our Story*, SMITH & WESSON, https://www.smith-wesson.com/ourstory [https://perma.cc/6VAS-QXD3] (last visited Apr. 17, 2025).

[303] *Stop Gun Violence: Ghost Guns: Hearing Before the Subcomm. on the Const., of the S. Comm. on the Judiciary*, 117th Cong. 12 (2021) [hereinafter *Hearings*] (written testimony of Ashley Hlebinsky, Curator Emerita & Senior Firearms Scholar, Cody Firearms Museum), https://www.judiciary.senate.gov/imo/media/doc/Ashley%20Hlebinsky%20Written%20Testimony%20Final.pdf [https://perma.cc/PBM3-9S32].

[304] McWilliam, *supra* note 3, at 12–13 (collecting sources).

and armorers in colonial America."[305] And the majority of their shops were "mere cabins on the outskirts of the wilderness [where] one man with or without an apprentice did every part of the work."[306] Many of these gunmakers built the entire firearm from scratch, crafting "not only . . . guns, but also the tools with which to do their work."[307] Others assembled arms from components obtained from Europe.[308] Most gunpowder and bullets were similarly homemade.[309]

During the Revolutionary War, the civilian nature of arms-making became crucial to America's success.[310] Under the pressure of a British arms embargo, the Continental Army relied on these local gunsmiths. Massachusetts, Maryland, Virginia, New Hampshire, South and North Carolina, New York, and Connecticut all officially developed programs to support and have arms supplied through American gunsmiths.[311] To defeat the British arms embargo, one delegate to the Continental Congress opined that "Americans ought to be more industrious in making those articles at home, every Family should make saltpetre, every Province have powder Mills and every body encourage the makings of Arms."[312] And John Hancock, as President of the Continental Congress, appointed a committee "to contract for the making of arms" by the "great number of gunsmiths in this and the neighbouring Colonies."[313]

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[305] Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 48 (2023). There is some scholarly dispute over the number of these gunsmiths who actually built firearms as opposed to those who simply repaired them. Brian DeLay, for example, has argued that "[m]ost gunsmithing in eighteenth century America amounted to repair work." Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 215). As discussed further below, even if this is true, the quantum of those who repaired guns as opposed to who built them does not rebut the broader tradition in early America of supporting private arms-makers.

[306] 1 CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 145 (1910).

[307] Greenlee, *supra* note 305, at 47 (quoting SAWYER, *supra* note 306, at 145–46).

[308] As explained elsewhere:

> Further, this tradition did not just include those smiths who hammered components from raw iron. Rather, just as it is today with unfinished receivers, it was often more practical and efficient for home gun-makers to assemble pre-made components than to start with raw materials. The colonial-era home firearm-builders purchased firing mechanisms from continental Europe, barrels from England, and stocks from local carpenters.

McWilliam, *supra* note 3, at 13.

[309] Greenlee, *supra* note 305, at 48.

[310] *See Hearings*, *supra* note 303, at 6 (testimony of Ashley Hlebinsky) (describing "gunmaking at home [as] *essential* to the Continental Army").

[311] Greenlee, *supra* note 305, at 54–58 (describing the various state programs).

[312] Letter from Joseph Hewes to Samuel Johnston (Feb. 13, 1776), *in* 10 COLONIAL RECORDS OF NORTH CAROLINA 445, 447 (William L. Saunders ed., 1890).

[313] Letter from John Hancock to George Washington (Mar. 6, 1776), *in* 5 AMERICAN ARCHIVES, FOURTH SERIES 83, 83 (Peter Force ed., D.C., M. St. Clair Clarke & Peter Force 1844).

Historian Brian DeLay has suggested that the results of these programs were lackluster.[314] He illustrates how wartime firearm production efforts largely centered on constructing weapons using imported European locks and barrels, rather than crafting those components here.[315] Relying on the distinction between *building* firearms and *assembling* them, DeLay argues that American revolutionaries obtained weapons through traditional markets rather than "through a 'tradition of self-made arms.'"[316] But even taking DeLay's historical evidence at face value, it does little to rebut the broader point surrounding the prevalence of privately made firearms (as the term is used today)[317] at the time of the Revolution. The use of pre-built components in making a new product is standard fare.[318] The fact that Lamborghini has used taillights also employed in Ford products and farming equipment[319] does not mean that Lamborghini did not "make" the Lamborghini Diablo.[320] And we would say that a home constructor "built" a house even though he did not cut the two-by-fours from raw lumber himself. In each case, the builder "made" their product. Similarly, Revolutionary War–era gunsmiths "built" firearms even though they used premade components in doing so. The key takeaway from the history is not that Founding-era gunsmiths individually developed mine-to-firearm supply chains, but that firearms were largely made by craftsmen and their efforts were supported and incentivized by the Revolutionary government.

Following independence, "[g]un crafting was one of several ways Americans expressed their unrestrained democratic impulses at the time of the adoption of the Bill of Rights."[321] "Even after technological advancements at the federal armories in the mid-nineteenth century made the mass production of high-quality firearms possible, [m]any later craftsmen made guns in small shops . . . out of respect for the craft, or as a way to augment their incomes from other trades."[322] On the frontier,

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[314] DeLay, *supra* note 305 (manuscript at 225–26) ("[T]hose results were deeply underwhelming.").

[315] *Id.* (manuscript at 227).

[316] *Id.* (manuscript at 231).

[317] *See* McWilliam, *supra* note 3, at 3–4 (describing the options available to amateur gun makers for building firearms today); *see also* DeLay, *supra* note 305 (manuscript at 198–99) (same).

[318] *See, e.g.*, Mike Bartholomew, *10 Times Supercars Borrowed Parts from Cheap Cars*, CAR THROTTLE (Feb. 16, 2025), https://www.carthrottle.com/news/10-times-supercars-borrowed-parts-cheap-cars [https://perma.cc/2JMB-WT6R].

[319] *See id.*

[320] DeLay presents his own automobile-related example, showing how there is an obvious difference between "auto *manufacturing*, auto *maintenance*, and auto *repair*." DeLay, *supra* note 305 (manuscript at 211–12). He concedes, however, that "[s]ome . . . professional mechanics and hobbyists have the requisite skill and experience to build cars from imported parts." *Id.* (manuscript at 211). And if they were to do so, they would have "built" a car in the same sense that Ford, Toyota, Tesla, or any other car manufacturer "builds" cars. *See id.* (manuscript at 211–12).

[321] JAMES B. WHISKER, THE GUNSMITH'S TRADE 91–92 (1992).

[322] Greenlee, *supra* note 305, at 68 (internal quotations and citation omitted).

where gunsmiths were typically "hundreds of miles away," people "had to know how to build and repair arms themselves to survive."[323] And in the dual American spirit of arms-bearing and ingenuity, inventions like the repeating revolver, repeating rifle, and machine gun were all privately made inventions.[324]

Where arms were privately made for personal use, their manufacturing went unregulated for much of early American history.[325] Thomas Jefferson noted that American "citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them."[326] And while some places enacted laws in the nineteenth century regulating the public sale of guns, these were "typically for quality control or to mitigate the dangers of gunpowder."[327] As one scholar has noted, "the manufacture of arms, for personal use or otherwise was not [generally regulated]."[328]

The general lack of regulation regarding privately made arms makes sense given the background defense principle and the Revolutionary War context in which the Second Amendment was adopted. The Revolutionary War was fought to escape the perceived tyrannies of the British government.[329] And in breaking the chains of British rule, the Founders relied heavily on the use of privately made arms.[330] If the right to bear arms "exists as a final defense against tyranny,"[331] then the right to *build* those arms stands as the last line of defense of *that* right. Bearing arms is the tool of resisting tyranny.[332] Once the tyrant confiscates the peoples' arms as they are

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[323] *Id.*

[324] *See id.* at 73–76 (describing Samuel Colt's invention of the repeating revolver, the inception of the repeating rifle, and John Garand's development of a machine gun, among other advancements in firearm technology made by private citizens).

[325] *Id.* at 78 ("[T]here were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries."); *id.* at 79 ("[T]he building of firearms for any purpose was widely celebrated and virtually never regulated.").

[326] Letter from Secretary of State Thomas Jefferson to British Ambassador to the United States George Hammond (May 15, 1793), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 325, 326 (Paul Leicester Ford ed., 1904).

[327] Greenlee, *supra* note 305, at 80.

[328] *Id.*; *see also* Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 481 (2014) ("The right to make arms for personal use, more so than commercial manufacturing, historically has been subject to virtually no regulations.").

[329] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

[330] *See Hearings*, *supra* note 303, at 6 (testimony of Ashley Hlebinsky) (describing "gunmaking at home [as] *essential* to the Continental Army"); Letter from Joseph Hewes to Samuel Johnston, *supra* note 312, at 447 (stating that to defeat the British, "Americans ought to be more industrious in making those articles at home, every Family should make saltpetre, every Province have powder Mills and every body encourage the makings of Arms").

[331] Michel & Moros, *supra* note 77, at 93.

[332] *See* 1 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION 13 n.5 (Thomas P. Whitney trans. 1974) ("[I]f, during

wont to do,[333] nothing remains but to build them at home. By implementing a principle of defense against tyranny, the Second Amendment necessarily includes a secondary principle that the people must be able to build arms themselves[334]—for that is the only way to absolutely ensure that they are able to possess those arms when they are ultimately needed.[335]

### 2. Possessing Types of Arms

As discussed above, there were a number of early states that enacted laws directed at certain types of arms.[336] But, of the ones that survived judicial scrutiny,[337] it appears that most were limited to regulating the manner of *carrying* them.[338] Since

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periods of mass arrests . . . people . . . had boldly set up in the downstairs hall an ambush of half a dozen people with axes, hammers, pokers, or whatever else was at hand. . . . [t]he Organs [of the state] would very quickly have suffered . . . and, notwithstanding all of Stalin's thirst, the cursed machine would have ground to a halt!").

[333] Tyrants disarming their populace is basically a trope of violent government. *See* Kopel, *The Catholic Second Amendment*, *supra* note 28, at 548 (describing tyrants' "habit of distrusting the masses, and the policy, consequent upon it, of depriving them of arms" (internal quotation omitted)). This is nothing new—in biblical days, the Philistines disarmed the Hebrews after conquering them. 1 *Samuel* 13:19–20. Hitler was quite vocal in his view that "[t]he most foolish mistake [Nazi Germany] could possibly make would be to allow the subjugated races to possess arms." ADOLF HITLER, HITLER'S TABLE TALK, 1941–1944, at 321 (H.R. Trevor-Roper ed., Gerhard L. Weinberg trans., 2d ed. 2007). A number of other despotic governments in the twentieth century likewise disarmed their populace before committing mass atrocities. *See* David B. Kopel, *Guns Kill People, and Tyrants with Gun Monopolies Kill the Most*, 25 GONZ. J. INT'L L. 29, 52 (2022) (listing such examples).

[334] *See* Greenlee, *supra* note 305, at 83 ("[H]istory and tradition . . . reveals that Americans have long enjoyed and depended on the unregulated right to build arms since the colonial days. In sum, the right to build arms for personal use is a right protected by the Second Amendment.").

[335] *See* Blackman, *supra* note 328, at 490 ("A meaningful right to keep and bear arms would require the preliminary steps of being able to create, and obtain guns. Without both of these two prerequisite incidents of the Second Amendment, the right to keep and bear arms would be quite hollow.").

[336] *See supra* Section II.A.

[337] *See, e.g.*, Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 93 (1822) (holding that Kentucky's concealed-carry ban targeting certain weapons was "in conflict with the constitution"); Nunn v. State, 1 Ga. 243, 251 (1846) (concluding that Georgia's carry ban was "in conflict with the Constitution, and *void*" insofar is it "contains a prohibition against bearing arms *openly*"); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 195 (1871) (holding that Tennessee's restriction on carrying certain pistols was unconstitutional); Wilson v. State, 33 Ark. 557, 560 (1878) ("But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.").

[338] *See, e.g.*, 1813 La. Acts 172 (regulating the concealed carrying of certain arms); 1820 Ind. Acts 39 (same); 1837 Ark. Acts 280 (same).

these laws have already been described, it is sufficient to note that, as two scholars recently wrote, "[f]rom 1607 through 1899, American bans on possession or sale to adults of particular arms were uncommon."[339] Of those that did exist, the vast majority were enacted after the adoption of the Fourteenth Amendment,[340] so "they do not provide as much insight into [the Second Amendment's] original meaning as earlier sources."[341]

Those arms that *were* regulated were those of the type the Supreme Court has called "dangerous and unusual"[342]—those typically used for criminal purposes at the time, such as dirks, Bowie knives, Arkansas toothpicks, and certain pistols.[343] Meanwhile, arms commonly employed in defense—whether personal or communal—were not targeted.[344] The Louisiana Supreme Court upheld its law specifically because it did not target arms sufficient for "a manly and noble defence of themselves" but instead applied to carrying certain arms in a manner with a "tendency to secret advantages and unmanly assassinations."[345] And a wide range of arms sufficient for communal defense, such as repeating arms and cannons, went unregulated at all.[346] The Texas Supreme Court found its law constitutional because it did not apply to "arms of a militiaman or soldier" like "holster pistols and carbine; . . . the artillery, the field piece, . . . and mortar, with side arms."[347]

This "historical tradition of prohibiting the carrying of dangerous and unusual weapons"[348] can be traced directly to the defense principle that underpins the Second Amendment. This tradition targets weapons that are typically employed in crime—specifically to create violent situations in which the victim would be justified in resorting to self-defense—while leaving the weapons commonly used for personal and communal defense unregulated. It therefore furthers the defense principle by discouraging violent crime while simultaneously permitting people to defend themselves and their community.

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[339] Kopel & Greenlee, *supra* note 184, at 369.

[340] *Id.* at 369–70 (listing laws).

[341] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

[342] *Heller*, 554 U.S. at 627. It is worth noting that the laws restricting "dangerous and unusual" arms focused on the conduct engaged in with those arms. Going-armed laws, for example, specifically targeted "going about armed with unusual and dangerous weapons, to the terror of the people." State v. Huntly, 25 N.C. (3 Ired.) 418, 420 (1843).

[343] *See supra* Sections II.A, C.

[344] *See, e.g.*, State v. Chandler, 5 La. Ann. 489, 490 (1850).

[345] *Id.*

[346] *See* Kopel & Greenlee, *supra* note 184, at 254–60 (describing the prevalence of these and other arms). It is worth noting that DeLay has suggested that the repeating arms available at the time of the Founding were viewed as "flawed curios" rather than useful weapons. DeLay, *supra* note 305 (manuscript at 149).

[347] English v. State, 35 Tex. 473, 476 (1871).

[348] District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

### *G. "The Principles That Underpin Our Regulatory Tradition"*

The Supreme Court has instructed that laws regulating firearms "must comport with the principles underlying the Second Amendment."[349] Those principles involve defense—of self against threats of immediate personal violence, and of community against invasion and tyranny.[350] Those defense principles form the foundation for further "principles that underpin our regulatory tradition."[351] These secondary regulatory principles implement the broader ideas of defense in a manner sensitive to the public safety needs of the time.

To recap from the above discussion of our historical tradition, the laws regulating carrying certain types of arms and those governing sensitive places stand for two principles. First, firearm regulations should not stop people from bearing arms in a manner and of a type common for self-defense, except in locations in which one's safety is *actually* secured by another force.[352] Second, laws should not inhibit people from possessing a wider category of arms of a type sufficient to defend the community against invasion or tyranny. And as a final security of these principles, regulations must not stop people from building the types of arms they need to engage in personal or communal defense.

On the other hand, the group and individual disarmament laws implement the defense principle in a different way. They secure the safety of the populace by disarming those who create situations in which defense is necessary. These laws therefore overlay a principle that those who are adjudicated to have misused or be likely to misuse weapons against another or take up arms against the nation can be disarmed during the duration of their threat consistent with the Second Amendment and the defense principle it implements.

These are examples of the "principles that underpin our regulatory tradition."[353] The description of our historical laws herein is not intended to be comprehensive, and so neither is this list of principles.[354] But each of these subsidiary principles—and any other valid one—is a different application of the core defense principle. The abstract principles of our regulatory history just scratch the surface of our legal tradition of firearm regulation. To fully understand it, we must look deeper, to the broader defense principle that underlies the Second Amendment itself.[355] So in cases

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[349] United States v. Rahimi, 602 U.S. 680, 692 (2024).

[350] *See supra* Part I.

[351] *Rahimi*, 602 U.S. at 692.

[352] This is not to say that individuals have a claim against the state for protection in sensitive areas. Instead, sensitive areas are simply characterized, in part, by the presence of alternative security measures.

[353] *Rahimi*, 602 U.S. at 692.

[354] For an example of another Second Amendment principle, *see* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 539–41 (2023) (describing a "nondelegation principle" governing discretion in "may issue" carry regimes). Other historical principles abound.

[355] *See* Range v. Att'y Gen., 124 F.4th 218, 241 (3d Cir. 2024) (en banc) (Matey, J.,

involving different specific historical traditions, one need only look to the contours of the defense principle to derive the appropriate secondary one.

## III. THE SUPREME COURT'S INTERPRETATION OF THESE PRINCIPLES

While the Supreme Court did not explicitly direct us to look to the "principles underlying the Second Amendment" until *Rahimi*,[356] these principles have been a consistent undercurrent to the Court's Second Amendment reasoning. Some of the Court's Second Amendment opinions involved logic based on the communal defense aspect of these principles, while others focused on those involving personal defense.[357] But, at root, each eventually depended on the Second Amendment's core underlying principles regarding defense of self and community.[358]

### *A.* Cruikshank

Consider the Supreme Court's first true Second Amendment decision, *United States v. Cruikshank*.[359] *Cruikshank* devoted only a single paragraph to the Second Amendment before going on to focus on various Fourteenth Amendment charges.[360] Nonetheless, its laconic analysis has stuck with the Court, forming an important part

concurring) ("These principles are reflected in our Founding and the Second Amendment, exhibiting respect for the fundamental right to bear arms and its natural limitation that one must not use that liberty to subvert the common good.").

[356] *Id.*

[357] *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 150, 174 ("In *Presser* and *Miller*, the Court analyzed the military aspect of the right . . . . Later, in *Heller*, *McDonald*, and *Bruen*, the Court turned to [the] Amendment's implications for personal defense.").

[358] *See id.* at 174 ("By placing these opinions against the backdrop [principles], the military and personal defense aspects merge together into a unifying principle of self-defense . . . .").

[359] 92 U.S. 542 (1876); *see also* Jamie G. McWilliam, *What* Cruikshank *Really Means for the Second Amendment*, 2024 U. ILL. L. REV. ONLINE 20, 20 ("In 1876, the Supreme Court handed down *United States v. Cruikshank*, and with it, the Court's first opinion analyzing the scope of the Second Amendment.").

[360] Indeed, more has been said about *Cruikshank*'s impact on the Fourteenth Amendment than on the Second. *See, e.g.*, James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014) ("It was *Cruikshank*, not the far more famous *Civil Rights Cases*, that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action. . . . And it was *Cruikshank*, not the notorious *Slaughter-House Cases*, that resolved whether the Privileges or Immunities Clause of the Fourteenth Amendment protected the rights enumerated in the Bill of Rights."); Franita Tolson, *Parchment Rights*, 135 HARV. L. REV. F. 525, 532 (2022) ("The *Slaughter-House Cases*, which interpreted the Privileges or Immunities Clause to protect only a few rights incidental to national citizenship, called th[e] assumption"—"that the Fourteenth Amendment had nationalized the Bill of Rights, constraining both the states and the federal government"—"into question; *Cruikshank* rejected it outright." (footnote omitted)).

of the Second Amendment canon and informing the Court's opinions in *Heller* and later cases.[361] And *Cruikshank* depended heavily on the nature of the Second Amendment's background principles.[362]

Although not apparent from the United States Reports, *Cruikshank* arose from the events of the Colfax Massacre.[363] After a contested gubernatorial campaign in Louisiana led to competing state governments,[364] the Republican leadership in Grant Parish found itself opposed by a group bent on undermining post–Civil War Republican control.[365] The Republican leaders left town to seek military assistance, leaving "a predominantly [B]lack militia—poorly armed and with very little military experience—behind to guard the courthouse in Colfax."[366] On Easter Sunday, a mob of over 150 white men surrounded the courthouse and laid it under siege.[367] Though the militia fought valiantly for hours, they eventually surrendered.[368] Upon leaving the courthouse under the promise of safe passage, the mob chased the militia members down and executed them.[369] Out of what has been called "[t]he bloodiest single instance of racial carnage in the Reconstruction era,"[370] only three people were ultimately convicted of, among other things, conspiracy to deprive the militia members of their Second Amendment rights.[371]

The Supreme Court rejected that charge on the ground that the Second Amendment provided immunity only against "the powers of the national government."[372] In doing so, the Court described the right as "that of bearing arms for a lawful purpose."[373] It then noted that it "is not a right granted by the Constitution [nor] is it in any manner dependent upon that instrument for its existence."[374] In other words,

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[361] *See* McWilliam, *supra* note 359, at 21 ("*Cruikshank*'s analysis laid the groundwork for the Court's later reasoning in *District of Columbia v. Heller* and its progeny.").

[362] *See Cruikshank*, 92 U.S. at 553 ("The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.").

[363] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 167.

[364] Tolson, *supra* note 360, at 529 (describing how both gubernatorial candidates "proceeded as if they each were the lawful executive of the state, . . . filling state and local vacancies with their supporters").

[365] *Id.* at 530–31 (describing how the "Fusionists" claimed to be "the only legitimate government of Grant Parish" in spite of Republicans holding office).

[366] McWilliam, *supra* note 359, at 23.

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] Danny Lewis, *The 1873 Colfax Massacre Set Back the Reconstruction Era*, SMITHSONIAN MAG. (Apr. 13, 2023), https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746 [https://perma.cc/HXT5-5V4L].

[371] United States v. Cruikshank, 92 U.S. 542, 561 (1876) (Clifford, J., dissenting) ("Three of those who went to trial . . . were found guilty . . . ."); *id.* at 553 (majority opinion).

[372] *Id.* at 553.

[373] *Id.* (internal quotations omitted).

[374] *Id.*

the Court characterized the Second Amendment as securing a pre-existing right that the Founders inherited.[375] As shown above, this was the classical right to bear arms for lawful purposes that included defense of self and community.[376] The traditional defense principles that the Founders inherited from a long line of thinkers, from Augustine to Locke,[377] informed their view of that right.[378] *Cruikshank*'s recognition that the Second Amendment right pre-existed the Constitution, therefore, directs us to those core principles on which the Amendment rests.[379]

### *B. The Community Defense Cases*

Following *Cruikshank*, the Supreme Court analyzed two cases that primarily focused on the community defense aspect of the Second Amendment right. The first was *Presser v. Illinois*, in which the Court considered the extent to which the state of Illinois could regulate the activities of militias that were "not . . . a part of . . . 'the regular organized volunteer militia' of the State."[380] The Court relied on the use of the right to keep and bear arms in communal defense, writing that states "cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security."[381] This tracks the community defense principle identified in Part II—that laws should not inhibit people from possessing arms of a type sufficient to defend the community against invasion or tyranny.[382] Since the law at issue "only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law," the Court thought it "clear that the sections under consideration [did] not have this effect."[383]

The next Second Amendment case to come before the Supreme Court was *United States v. Miller*, which presented the constitutionality of the National Firearms Act's regulation of short-barrel shotguns.[384] The case arose on direct appeal from a federal district court, where the judge held that the provision violated the

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[375] McWilliam, *supra* note 359, at 27–29.

[376] *See supra* Part I.

[377] *See* Barker, *supra* note 28, at 106 ("[T]he Natural Law as understood by the Founding Fathers of the Constitution was the Natural Law that for two millennia had been a traditional and essential element of Western Civilization; that is, Natural law as understood and explained by, for example, Sophocles, Aristotle, Cicero, St. Thomas Aquinas, and Francisco de Vitoria.").

[378] *See supra* Part I.

[379] McWilliam, *supra* note 359, at 28–29.

[380] 116 U.S. 252, 254 (1886).

[381] *Id.* at 265.

[382] *See supra* Section II.G.

[383] *Presser*, 116 U.S. at 264–66. Importantly, the law at issue focused on "bodies of men" associating as military organizations and parading with arms, so this case says little about how an individual carrying a weapon for personal self-defense can be treated. *Id.* at 264–65.

[384] 307 U.S. 174, 175 (1939).

Second Amendment and quashed the indictment of two bank robbers who were caught in possession of a short-barrel shotgun without an appropriate tax stamp.[385] "Thereafter, defendants' counsel received notice that the appeal had been accepted and, without even reading the government's brief, suggested that the case be submitted without a brief or argument for the defendants."[386]

The Supreme Court rejected the Second Amendment challenge in a "concise and at points summary opinion."[387] In doing so, the Court examined a number of Founding-era sources that spoke to the importance of the militia—men who were "civilians primarily, soldiers on occasion . . . bearing arms supplied by themselves and of the kind in common use at the time" for the common defense.[388] For example, the Court looked to the English and colonial history of the "assize of arms," under which all adult men had a duty "to possess arms, and, with certain exceptions, to cooperate in the work of defence."[389] And it cited with approval the General Assembly of Virginia's 1785 statement that "[t]he defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."[390]

Reading the Second Amendment with its community defense purpose "in view," the Court reasoned that it was not under judicial notice that short barrel shotguns were "ordinary military equipment or . . . could contribute to the common defense," so their regulation did not infringe the right to keep and bear arms.[391] This logic again parallels the communal defense principle described above: that laws limiting possession can be consistent with the Second Amendment so long as they do not inhibit the ability of people to own weapons sufficient for defense of the community against tyranny or invasion.[392] This community defense principle therefore forms the fabric from which both *Presser* and *Miller* were sewn.

### *C. The Personal Defense Cases*

Since the turn of the millennium, the Supreme Court has heard three cases that presented issues related specifically to the *personal* defense aspect of the Second

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[385] *Id.* at 175, 177; *see also* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 52–58 (2008) (telling the story of the defendants, Jack Miller and Frank Layton).

[386] Jamie G. McWilliam, *The Relevance of "In Common Use" After* Bruen, HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2 (2023).

[387] *Id.*

[388] *Miller*, 307 U.S. at 179.

[389] *Id.* at 179–80 (quoting HERBERT OSGOOD, 1 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY (1904)).

[390] *Id.* at 181 (quoting 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 224, 226 (William Waller Hening ed., Richmond, George Cochran 1823)).

[391] *Id.* at 178 (citing Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840)).

[392] *See supra* Section III.B.

Amendment.[393] Though the analysis the Court undertook during this era of Second Amendment case law focused on individual self-defense, this does not represent a break from the community-defense reasoning in *Presser* and *Miller*. Instead, as discussed in Part I, the community defense aspects of the Second Amendment's underlying principles were derived in part from the good of protecting individual life.[394] The goods of defense of self and community are, therefore, "merely different sides to the same principle."[395]

The line of individual defense cases began with *District of Columbia v. Heller*, in which the Court considered the constitutionality of the District of Columbia's "prohibition on the possession of usable handguns in the home."[396] Justice Scalia, writing for the Court, determined that the Amendment textually supported an "individual right to possess and carry weapons in case of confrontation."[397] The Court then engaged in a comprehensive historical analysis that spanned from pre-colonial England to post–Civil War commentary.[398] It noted that the English Bill of Rights secured the right of Protestants to have "Arms for their Defence."[399] It then looked to the reasons the Founders valued the right to keep and bear arms, which the Court found included both doing so in a militia for communal defense *and* individually for personal self-defense.[400] It found state Second Amendment analogues to confirm this dual purpose, as many explicitly secured the right of the people to "bear arms in defence of themselves *and* the State."[401] The Court then turned to post-ratification history, including commentary by Tucker, Rawle, and Story, that referred to the right to keep and bear arms as an individual right.[402] It relied on pre–Civil War cases like *Nunn*, *Chandler*, and *Aymette*, which have already been discussed, and which the Court recognized all employed a defense-based conception of the right.[403] Then the Court looked to post–Civil War writings, which universally

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[393] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 174 ("[I]n *Heller*, *McDonald*, and *Bruen*, the Court turned to [the] Amendment's implications for personal defense.").

[394] *See supra* Part I; *see also* Kopel et al., *supra* note 78, at 77 ("Grotius classified 'Private War' (which was justifiable individual self-defense) and 'Public War' (which was justifiable government-led collective self-defense) as two types of the same thing.").

[395] McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 170.

[396] 554 U.S. 570, 573 (2008).

[397] *Id.* at 592.

[398] *Id.* at 592–619.

[399] *Id.* at 593.

[400] *Id.* at 599 ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense . . . .").

[401] *Id.* at 602 (emphasis added).

[402] *Id.* at 605–09.

[403] *Id.* at 612–13.

saw this right as an individual one—as particularly evidenced by the writers' view that the disarmament of emancipated Black people infringed their Second Amendment rights.[404]

Ultimately, the holding in *Heller* was relatively narrow: that "the District's ban on handgun possession in the home violate[d] the Second Amendment."[405] But in reaching this conclusion, the Court extracted a broader principle from the history it reviewed. Specifically, that the right to keep and bear arms includes a right to own and carry commonly used arms "for the core lawful purpose of self-defense."[406] Since the District of Columbia's law essentially prohibited both, the Court found it unconstitutional.[407] This principle again echoes those discussed above in Part II. Although the case was specifically focused on possessing and carrying arms *in the home*,[408] taking that principle at its word suggests that laws cannot limit the ability to carry arms commonly used for personal defense or inhibit ownership of those arms.

The Court followed *Heller* with *McDonald v. City of Chicago*, which examined Chicago's handgun ban.[409] The city argued that the holding in *Heller* was inapplicable because the Second Amendment did not operate against the states.[410] The Supreme Court disagreed. It relied on *Heller* in reasoning that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . is 'the *central component*' of the Second Amendment right."[411] Similarly, it thought *Heller*'s historical analysis made clear that this "basic right" is "deeply rooted in this Nation's history and tradition."[412] From this history, the Court concluded that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty,"[413] and therefore incorporated the right against the states through the Due Process Clause of the Fourteenth Amendment.[414]

Although *McDonald* was more preoccupied with the question of incorporation than the scope of the Second Amendment itself, it relied heavily on the fundamental nature of the right of defense secured by the Second Amendment.[415] The case therefore reinforces that, in considering the bounds of the Second Amendment right, the principles to be relied on are those fundamental principles of defense. And

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404 *Id.* at 614–18.
405 *Id.* at 635.
406 *Id.* at 630.
407 *Id.*
408 *Id.* at 573.
409 561 U.S. 742, 750 (2010).
410 *Id.*
411 *Id.* at 767.
412 *Id.* at 767–68.
413 *Id.* at 778.
414 *Id.* at 791.
415 *See id.*

*McDonald* reaffirmed one application of those principles: that laws cannot prohibit the people from possessing and using arms for personal defense at home.[416]

This brings us to *Bruen*, where the Supreme Court held unconstitutional New York's may-issue carry licensing regime because it failed to "respect[] the constitutional right to carry handguns publicly for self-defense."[417] In doing so, the Court rejected the interest-balancing test employed by the lower courts.[418] Instead, it instructed that, "when the Second Amendment's plain text covers an individual's conduct . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[419] The Court then went on to examine that historical tradition.

Beginning with English history leading up to the Founding, the Court concluded that no law stood as an obstacle to publicly carrying for self-defense.[420] As to colonial practice, the history showed "[a]t most, . . . that colonial legislatures sometimes prohibited the carrying of 'dangerous and unusual weapons'"—not weapons "in 'common use' for self-defense today."[421] After surveying an extensive set of historical regulations and case law leading up to the adoption of the Fourteenth Amendment, the Court concluded that "the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense."[422]

Again, the logic of *Bruen* ultimately comes down to the core defense principle. The Court examined our Nation's tradition of firearm regulation, which from beginning to end depended on the idea that the people should be armed for defense of self and community. The specific traditions recognized in *Bruen* support the subsidiary principle that firearm regulations should generally not stop people from bearing arms commonly used for self-defense.[423] The entire line of personal defense cases,

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[416] *Id.* at 780 (reaffirming the "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home").

[417] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 11 (2022).

[418] *Id.* at 19 ("Despite the popularity of this two-step approach, it is one step too many.").

[419] *Id.* at 17.

[420] *See id.* at 45 ("[The Statute of Northampton] 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.'"); *id.* at 46 ("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.").

[421] *Id.* at 47.

[422] *Id.* at 38.

[423] *See, e.g.*, *id.* at 60 ("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.").

from *Heller* to *Bruen*, therefore implicitly supports and relies on the general principle that carry regulations are lawful if they do not stop people from bearing arms in a manner and of a type sufficient for reasonable personal self-defense.[424]

### *D.* Rahimi

*Rahimi* was the first decision by the Supreme Court to explicitly direct that firearm regulations should be analyzed in light of "the principles underlying the Second Amendment" and "that underpin our regulatory tradition."[425] But, as sketched out above, the fundamental defense principles behind the Amendment have played an integral role in the Court's decisions going all the way back to *Cruikshank*. Both the community defense and individual defense lines of cases relied on the ancient idea that it is a basic right to possess and carry arms in defense of self and community.[426] Nonetheless, *Rahimi*'s explicit command provides clarity on how to interpret and apply the principles embodied in our historical tradition of firearm regulation.

*Rahimi* presented the question of whether § 922(g)(8)'s disarmament of those subject to a domestic violence restraining order could be facially applied consistent with the Second Amendment.[427] Like it did in the cases leading up to *Rahimi*, the Court answered this question by examining the tradition of arms regulation that began in pre-colonial England.[428] After briefly discussing various periods of disarmament in England, the Court observed that, while "state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic . . . regulations targeting individuals who physically threatened others persisted."[429]

These regulations generally took two flavors. The first were surety laws, "[a] form of preventative justice" that required an individual to post a bond or face jail time if he gave another "reasonable cause" to fear that he would "misuse" firearms to cause harm.[430] The second were "going armed" laws, which "provided a mechanism for punishing those who had menaced others with firearms."[431] These laws are

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[424] *See supra* Section II.G.

[425] United States v. Rahimi, 602 U.S. 680, 692 (2024).

[426] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . is 'the *central component*' of the Second Amendment right." (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008))); United States v. Miller, 307 U.S. 174, 178 (1939) (noting that "the Second Amendment guarantees the right to keep and bear" arms that "could contribute to the common defense"); Presser v. Illinois, 116 U.S. 252, 265 (1886) (stating that the right to keep and bear arms was to secure "the United States['] . . . rightful resource for maintaining the public security").

[427] 602 U.S. at 684.

[428] *Id.* at 693 (starting with "the earliest days of the common law").

[429] *Id.* at 694.

[430] *Id.* at 695–96.

[431] *Id.* at 703.

discussed in more detail above[432] and so will not be rehashed with particularity here. What is important for these purposes is that the Court extracted from these historical laws the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[433]

The level of generality of this principle is important, for it informs how we should view principles encapsulated in other traditions of firearm regulation.[434] Consider some of the subsidiary principles discussed in Part II. Looking at the tradition of disarmament generally—of which the laws disarming dangerous individuals discussed in *Rahimi* is a part—this Article has argued that the proper principle to draw is that when one is adjudicated to have misused or be clearly likely to misuse weapons against another or take up arms against the nation, they can be disarmed consistent with the Second Amendment during the duration of their threat. As to the misuse of weapons, the principle identified here is nearly a direct overlay to that described in *Rahimi*, so it provides a benchmark for "the right level of generality."[435]

The other principles identified herein are of a similar generality. As to carrying weapons, this Article suggests that the proper subsidiary principle is that firearm regulations should not stop people from bearing arms in a manner and of a type common for self-defense, except in locations in which one's safety is *actually* secured by another force. As to possession, laws should not prohibit people from possessing arms of a type sufficient to resist tyranny or a foreign invasion. These—and the other principles described herein—are extrapolated from their respective traditions at roughly the same level of generality as the principle identified in *Rahimi*, and therefore appear to accurately embody "the tradition [these] laws represent."[436]

*Rahimi* is also helpful for determining when a challenged regulation satisfies the appropriate secondary principle. There, the Court noted that, while § 922(g)(8) was "by no means identical to these founding era regimes . . . . [i]ts prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly with the tradition the surety and going arms laws represent."[437] First, the Court noted that the "why" of § 922(g)(8) was analogous: "to mitigate demonstrated

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[432] *See supra* Section II.E.

[433] *Rahimi*, 602 U.S. at 698.

[434] *See id.* at 740 (Barrett, J., concurring) ("Here . . . the Court settles on just the right level of generality . . . .").

[435] *Id.*; *see id.* at 702 (majority opinion) (rephrasing the principle as "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment").

[436] *Id.* at 698. That *Rahimi* involved a complete ban on possession does refute principles herein involving possession. Our regulatory tradition involves an array of principles that must be balanced in given cases. As discussed in Part II, history provides a principle that possession can be temporarily limited while simultaneously protecting possession of militia-style arms. Both of these are justified by the Second Amendment's fundamental defense principle, and the interplay between the two can be explained by that principle. *See supra* Part II.

[437] *Rahimi*, 602 U.S. at 698.

threats of physical violence."[438] It then reasoned that the burden § 922(g)(8) imposed was similar to the historical laws because both "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon."[439] It also found important that "like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi."[440] Finally, the Court concluded that the penalty imposed was comparable because both § 922(g)(8) and the historical laws ultimately disarmed the offender.[441] Therefore, in considering whether a regulation fits within a particular principle, one must consider the justification for the law, what the burden on the Second Amendment right is, when the burden is triggered, and how long the burden is imposed.

In sum, although the Supreme Court has not always explicitly referred us to the "principles underlying the Second Amendment," its decisions have always incorporated some conception of the Amendment's core defense principle. The community defense cases like *Presser* and *Miller* focused on how this principle applies to collective threats like foreign invasions or domestic tyranny. The individual defense cases comprising *Heller*, *McDonald*, and *Bruen* examined the aspect of this principle involving defense against threats of immediate personal violence. Then *Rahimi* brought clarity to the proper method of identifying and applying subsidiary principles derived from our historical traditions—traditions that implement and embody, at their core, the fundamental defense principle at the center of the Second Amendment.

## IV. APPLYING THESE PRINCIPLES IN THE FUTURE

Now that the "principles that underpin our regulatory tradition"[442] have been identified and harmonized with binding Supreme Court case law, it is time to apply them to particular issues that are likely to come before the courts in the coming years. Of course, given the format of this Article, not every question of law concerning the right to keep and bear arms is analyzed. Instead, the hope is to provide a template for how interpreters should apply the abstract principles identified herein to concrete legal issues.

### *A. Concealed Carry Restrictions*

Consider a state that wants to ban the concealed carry of certain weapons while still allowing the open carry thereof. The proposed law is narrow in the list of arms

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[438] *Id.*

[439] *Id.* at 699.

[440] *Id.*

[441] As the Court noted, "[t]he going armed laws provided for imprisonment," *id.*, as did the surety laws if bond was not posted, *id.* at 695. If an individual is jailed, they are also necessarily disarmed during the duration of their imprisonment. *See id.* at 699.

[442] *Id.* at 692.

it applies to, but its prohibition on carrying those arms concealed is complete. A court examining the constitutionality of this law must consider "whether [it] is consistent with the principles that underpin our regulatory tradition."[443]

As discussed more thoroughly in Part II,[444] a number of states banned the concealed carry of certain arms as early as 1813.[445] Like the hypothetical law at issue here, these historical regulations often specified a handful of weapons.[446] And some were complete bans on the concealed carrying of those arms (while others provided exceptions like while traveling).[447] But knowing this history is not enough—one must dig down into the *principles* that underly it.[448]

This is a particular issue for which the principle's level of generality makes all the difference. Under a strict historical analogue approach, the hypothetical law would likely pass muster. After all, the historical regulations were aimed at preventing certain crimes, which is likely the justification for this law. And the specific burden the laws impose on the Second Amendment right are comparable—both are complete bans on only the concealed carry of certain specified arms. But in *Rahimi*, the Supreme Court explicitly rejected this approach, which would result in "a law trapped in amber."[449] As the Court explained, principles of a higher level of generality are required because of evolving conditions which still receive Second Amendment protections. For example, "the reach of the [Amendment] is not limited only to those arms that were in existence at the founding."[450] Instead of a rigid, line-by-line comparison of the hypothetical concealed carry ban to the historical laws, as discussed already, the right level of generality of a principle covering concealed carry is this: people should not be prohibited from bearing arms in a manner and of a type common for self-defense.

The Court has repeatedly noted that the *types* of arms commonly used for defense, and therefore fully protected by the Second Amendment, can change over time.[451] But it follows that, if the *manner* these arms are typically carried in for defense changes, protections evolve there too. For example, in early America, concealed

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[443] *Id.*

[444] *See supra* Sections II.A, C.

[445] *See, e.g.*, 1813 La. Acts 172; 1813 Ky. Acts 100.

[446] *See, e.g.*, 1813 Ky. Acts 100 (targeting "a pocket pistol, dirk, large knife, or sword in a cane"); 1837 Ark. Acts 280 (banning concealed carry of "any pistol, dirk, butcher or large knife, or a sword in a cane").

[447] *Compare* 1813 La. Acts 172 (a total ban), *with* 1820 Ind. Acts 39 (excluding "travellers" from its restriction).

[448] *Rahimi*, 602 U.S. at 692.

[449] *Id.* at 691.

[450] *Id.*

[451] *Id.*; N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 32 (2022) (highlighting the importance of whether the arm is "'in common use' *today* for self-defense" (emphasis added)); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("[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.").

carry was viewed by many as a dishonorable method of carrying.[452] Open carrying, by contrast, was considered "manly and noble."[453] Today, the situation has much changed. The vast majority of those who carry arms regularly for defense do so concealed.[454] And instead of being shocked if someone is concealed carrying, most people would likely be more affronted by the sight of a gun openly holstered on their neighbor's hip.

With this evolution in mind, it becomes clear that while the hypothetical law closely resembles the historical regulations, it fails to comply with the principle that those regulations stand for.[455] The history supports the principle that people can carry arms in a manner and of a type common for self-defense. The type of arms component of the law may or may not comply with this principle, depending on whether the arms it covers are "in common use today for self-defense."[456] But the prohibition on carrying arms concealed directly infringes on the peoples' ability to carry arms in the manner typical for self-defense today. This hypothetical state law is therefore not "consistent with the principles that underpin our regulatory tradition."[457]

### *B. "Assault Weapons" Bans*

One common challenge percolating through the courts is to a number of states' so-called "assault weapons" bans.[458] These laws typically ban the possession of pervasive semiautomatic rifles such as the AR-15.[459] At the outset, it is important to clarify that these laws are not focused on the versions of arms specifically employed by militaries, such as fully automatic[460] or selective fire rifles. Those are generally covered by other laws, including the National Firearms Act.[461] Instead, these laws typically target AR-15s and other semiautomatic[462] rifles that share certain features like a removable magazine, pistol grip, or telescoping stock.[463]

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[452] *See supra* Section II.A.

[453] State v. Chandler, 5 La. Ann. 489, 490 (1850).

[454] *Study: 3 Million Americans Carry Loaded Handguns Daily*, *supra* note 134.

[455] Compare this with the situation in *Rahimi*, where § 922(g)(8) did *not* closely resemble the historical regulations, *see* 602 U.S. at 752–53 (Thomas, J., dissenting), but the Court nonetheless found it satisfied the principles behind those laws, *see id.* at 700–01 (majority opinion).

[456] *Bruen*, 597 U.S. at 32 (internal quotations omitted).

[457] *Rahimi*, 602 U.S. at 692.

[458] *See, e.g.*, Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 197 (3d Cir. 2024); Bianchi v. Brown, 11 F.4th 438, 441 (4th Cir. 2024) (en banc).

[459] *See* Michel & Moros, *supra* note 77, at 96 (describing "assault weapons" as AR-15s and similar guns "that are owned by millions of regular citizens across the country").

[460] A fully automatic rifle "fires repeatedly as long as the trigger is held down, until the magazine is exhausted." *Automatic Rifle*, BRITANNICA, https://www.britannica.com/technology/automatic-rifle [https://perma.cc/Q8JL-9ZJZ] (last visited Apr. 17, 2025).

[461] 26 U.S.C. § 5845(b).

[462] In contrast to fully automatic rifles, semiautomatics "fire only one shot at each pull of the trigger." *Automatic Rifle*, *supra* note 460.

[463] *See, e.g.*, CAL. PENAL CODE §§ 30510, 30515; CONN. GEN. STAT. § 53-202a–202b.

Unlike with carry regimes, there is no ingrained historical tradition of banning possession of certain types of arms.[464] This lack of regulation, described in Part II, supports the principle that firearm regulations should not inhibit people from possessing arms of a type sufficient to defend the community against invasion or tyranny.[465] Importantly, although the Founding generation did not generally regulate the mere possession of types of arms *at all*,[466] that principle is not unbounded. The defense principle at the core of the Second Amendment inherently includes certain requirements like proportionality.[467] So the arms included within this principle are those minimally necessary to resist domestic tyranny or a foreign invasion; it would not cover the most extreme weapons of war because resistance to a foreign army does not require such drastic means of destruction.[468]

Semiautomatic rifles, which fall into the scope of most assault weapons bans even if they bear no relation to an arm employed by a military, comfortably fall within this principle. These weapons are not extreme or out of proportion to the threat of governmental force. Indeed, they are under-proportioned when compared to the rifles employed by most militaries, which typically include selective fire capabilities. But of course, semiautomatic rifles would still be useful to resist governmental violence.[469] When it comes to rate of fire, semiautomatic rifles are "nearly identical" to handguns.[470] But those other features that make rifles less suited to daily carrying and personal defense outside the home—longer barrels, heavier but more powerful ammunition, etc.—give them added utility in situations involving more distance or more force. As others have noted, "people do not typically resist a tyrant with small pistols or slow-firing rifles."[471] The bans on so-called "assault weapons" therefore infringe on the subsidiary defense principle that the people should not be prohibited from possessing weapons sufficient to defend the community against threats from invasion or tyranny.[472]

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[464] *See* Kopel & Greenlee, *supra* note 184, at 369 ("From 1607 through 1899, American bans on possession or sale to adults of particular arms were uncommon.").

[465] *See supra* Section II.G.

[466] *See* Kopel & Greenlee, *supra* note 184, at 369 ("From 1607 through 1899, American bans on possession or sale to adults of particular arms were uncommon.").

[467] AQUINAS, *supra* note 35, pt. II-II, q. 64, art. VII (arguing that force employed in self-defense must not be "out of proportion on to the end").

[468] *See* McWilliam, *Classical Legal Interpretation*, *supra* note 51, at 157, 160 (discussing how resistance to a "State's standing army" is possible without "winning a traditional combat victory").

[469] *See* Michel & Moros, *supra* note 77, at 96 ("[P]eople do not typically resist a tyrant with small pistols or slow-firing hunting rifles, which even governments have acknowledged when faced with invasion and distributing weapons to civilians. Resistors do it with the prevailing common long guns of the day—AR-15s and other similar so-called 'assault weapons' that are owned by millions of regular citizens across the country.").

[470] E. Gregory Wallace, *"Assault Weapon" Myths*, 43 S. ILL. U. L.J. 193, 219 (2018).

[471] Michel & Moros, *supra* note 77, at 96.

[472] *See* Baude & Leider, *supra* note 1, at 1499 ("[C]ourts understood the right to keep and bear arms to include *at least* those arms appropriate for individual militia service.").

On the other hand, this says little about whether the public carrying of AR-15s could be reasonably restricted.[473] Communal threats do not generally arise spontaneously, so arms required for communal defense need not be immediately available. Arms useful for personal defense should be accessible at a moment's notice because threats of personal violence can occur without notice. But AR-15s are not typically commensurate with threats of personal violence. As research shows, "[r]ifles—the category that includes guns sometimes referred to as 'assault weapons'—were involved in [only] 3% of firearm murders."[474] Historical regulations similarly highlight the distinction between possessing type of arms and carrying them publicly.[475] The same regulatory tradition, implementing the same fundamental defense principles, therefore protects possession of so-called "assault weapons" while possibly allowing for the reasonable regulation of publicly carrying those arms.

### *C. Felon-in-Possession Laws*

An issue related to—but distinct from[476]—that presented in *Rahimi* is the constitutionality of § 922(g)(1)'s permanent disarmament of felons.[477] The law specifically applies to anyone convicted of a crime punishable by over a year of imprisonment, regardless of whether the jurisdiction actually labels such crime a "felony."[478] At the Founding, there were a variety of laws disarming both groups and individuals, but § 922(g)(1), as it currently exists, fails to comply with their underlying principles.

This Article has posited a principle of disarmament such that those who are adjudicated to have misused or be likely to misuse weapons against another or take up arms against the nation can be disarmed during the duration of their threat. Obviously, many felony convictions satisfy this principle. If one is convicted of assault with a deadly weapon, they have clearly misused that weapon against the victim. And if one is found guilty of something like attempted murder, they might

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[473] The reasonable qualifier is included because the public carrying of any legal arm should not be restricted to the extent those weapons could not be transported for a lawful purpose, e.g., to the gun range for target practice.

[474] John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Mar. 5, 2025), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/LZ9P-GJ5Y].

[475] *See supra* Sections II.A, C (discussing historical bans on the concealed carry of types of arms).

[476] *See* United States v. Duarte, No. 108 F.4th 786, 787 (9th Cir. 2024) (VanDyke, J., dissenting from the grant of rehearing en banc) (arguing that *Rahimi* does not control the felon-in-possession question).

[477] 18 U.S.C. § 922(g)(1) (making it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess firearms or ammunition).

[478] *Id.*

be deemed so violent that they would be likely to misuse a weapon in the future, even if their underlying crime did not involve the use of an arm. The disarmament of these types of felons comports with the Second Amendment's fundamental defense principle because these are the kinds of crimes for which the victim might reasonably engage in armed self-defense.[479] Disarming those who create situations in which defense is necessary is itself a form of community defense.[480]

On the other hand, there are many felonies within the scope of § 922(g)(1) that do not involve such violent conduct. A now-famous example is Martha Stewart's 2004 conviction for various white-collar crimes.[481] "Although sentenced to only five months in jail . . . she was convicted of a crime punishable by more than a year in prison, [so] federal law bans her from having any gun."[482] It is doubtful that anyone expects Martha Stewart to threaten another with a firearm or take up arms against the government. Similarly, the defendant in the Third Circuit's case *Range v. Attorney General* was convicted of committing welfare fraud in an attempt to feed his family.[483] Although Pennsylvania classified the crime as a misdemeanor, the potential sentence it imposed triggered § 922(g)(1).[484] Making a false statement in order to feed a starving family is hardly the tipping point to committing violent crime.

Section 922(g)(1)'s constitutionality therefore appears to depend on its specific application.[485] When applied to those who have actually committed a violent crime, it would seem to satisfy the principle this Article has extracted from the group and individual disarmament laws.[486] But in the many cases where there is "no history of

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[479] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 323 ("[T]he Second Amendment does not protect [a right to keep and bear arms] for those who have *actually* committed the types of crimes that necessitate violent self-defense in the first place.").

[480] *Id.* at 323–24.

[481] *See, e.g.*, Marshall, *supra* note 254 (examining why Martha Stewart can't have a gun); *Duarte*, 108 F.4th 786 (noting that § 922(g)(1) "equally applies to felons who have no history of or expected propensity towards violence, like Martha Stewart").

[482] Marshall, *supra* note 254, at 695.

[483] 69 F.4th 96, 109 (Ambro, J., concurring) ("Bryan Range decades ago made a false statement to obtain food stamps to feed his family.").

[484] *Id.*

[485] *Cf.* C. Seth Smitherman, *Rights for Thee but Not for* Mai*: As-Applied Constitutional Challenges to 18 U.S.C. § 922(g)(4)*, 25 TEX. REV. L. & POL. 515, 555–56 (2021).

[486] *See* McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 326 ("By limiting disarmament to those who have actually committed violence—and only that violence against which a citizen could lawfully self-defend—this standard not only fulfills the Second Amendment's principles, but also provides practical protection against discriminatory discretion by judges and lawmakers."); F. Lee Francis, *Defining Dangerousness: When Disarmament Is Appropriate*, 56 TEX. TECH L. REV. 593, 597 (2024) ("I contend that a general showing of dangerousness—the mere perception or allegation that an individual may have committed some unlawful offense absent a conviction for violent conduct, without more is an impermissible burden on an individual's right to bear arms as protected under the Second Amendment."); Greenlee, *supra* note 208, at 81 ("In colonial- and founding-era America, although

or expected propensity towards violence," § 922(g)(1) far exceeds the principle that "legislatures have the power to prohibit dangerous people from possessing guns,"[487] because "the danger feared by those drafting the historical disarmament laws was always physical violence."[488]

These are just a few examples of how the "principles underlying the Second Amendment"[489] should be applied in future cases. No doubt other historical traditions will become relevant to new challenges, and similar principles will have to be drawn from them. But hopefully the examinations herein can provide a template for how to derive and apply those principles.

## CONCLUSION

In *Rahimi*, the Supreme Court explained that firearm regulations must "comport with the principles underlying the Second Amendment" and the subsidiary "principles that underpin our regulatory tradition."[490] The Second Amendment is an implementation of the fundamental principle that it is good to bear arms in defense of self and community. This Nation's tradition of firearm regulation develops secondary principles that are derived from and consistent with that core principle. These secondary principles are diverse but generally act to defend the security of our community. For example, the individual defense aspect of those principles secures the ability of individuals to bear arms of a type and in a manner typical for self-defense, thereby protecting innocent life from spontaneous personal attacks. The community defense aspect ensures that people will always be able to possess weapons sufficient to defend the group against foreign invasions or domestic tyranny. Meanwhile, a related principle allows those who "pose[] a clear threat of physical violence" to others or to the community to be disarmed to ensure that they do not create situations in which it is necessary for others to resort to violent self-defense.[491] At every point, these principles seek to implement the core defense principle in more particularized ways. Therefore, to fully fathom the principles of regulation that comprise our historical tradition, we must first comprehend the defense principle underlying the Amendment itself.

While the Supreme Court only recently explicitly directed us to consider these principles, its entire line of Second Amendment case law, from *Cruikshank* to

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most restrictions on arms possession were discriminatory, every restriction was designed to disarm people who were perceived as posing a danger to the community. Conversely, peaceable persons—including nonviolent criminals and other irresponsible persons—were always permitted, and often required, to keep and bear arms.").

[487] Kanter v. Barr, 919 F.3d 437, 451, 464–65 (7th Cir. 2019) (Barrett, J., dissenting).

[488] McWilliam, *Refining the Dangerousness Standard*, *supra* note 38, at 324.

[489] United States v. Rahimi, 602 U.S. 680, 692 (2024).

[490] *Id.*

[491] *See id.* at 698.

*Rahimi*, engages with them at some level. By implementing these principles as the Court has, the solutions to many modern-day legal issues come into focus. This Article has provided examples of how to implement these principles in cases involving concealed carry regulations, "assault weapons" bans, and felon-in-possession laws, but these underlying principles have the potential to resolve *any* case examining the scope of the Second Amendment. Courts need only return to the core "principles underlying the Second Amendment"[492] to understand its command that "the right of the people to keep and bear Arms, shall not be infringed."[493]

[492] *Id.* at 692.
[493] U.S. CONST. amend. II.