

**TWILIGHT-ZONE ORIGINALISM: THE PECULIAR  
REASONING AND UNFORTUNATE CONSEQUENCES OF NEW  
YORK STATE PISTOL & RIFLE ASSOCIATION v. BRUEN**

Albert W. Alschuler\*

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\* Julius Kreeger Professor Emeritus, The University of Chicago Law School. I am grateful to Joseph Blocher, Steven Lubet, Nelson Lund, and W. Bruce Shirk for valuable comments.

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#### INTRODUCTION

In *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>1</sup> the Supreme Court held unconstitutional a New York statute that, as construed by the state courts, allowed

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<sup>1</sup> N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

an individual to carry a firearm outside her home or business for purposes of self-defense only if she could show licensing authorities “a special need for self-protection distinguishable from that of the general community.”<sup>2</sup> By a vote of six-to-three, the Court concluded that this statute violated the right to keep and bear arms guaranteed by the Second Amendment and applied to the states by the Fourteenth Amendment.<sup>3</sup>

The Court announced a general standard for applying the Second Amendment that, in the year following its decision, led lower courts to invalidate dozens of state and federal firearms regulations. Shortly after *Bruen*’s anniversary, on the last day of its 2022–23 Term, the Court agreed to review a Fifth Circuit decision striking down a federal statute barring people subject to domestic violence restraining orders from possessing firearms.<sup>4</sup> The Court also seemed likely to review conflicting rulings by the Third and Eighth Circuits on the validity of a federal law forbidding firearm possession by convicted felons.<sup>5</sup>

#### A. *The Court’s Standard*

Before *Bruen*, in *District of Columbia v. Heller* in 2008, the Court revived the long-moribund Second Amendment, holding that it guarantees a right to possess a handgun in one’s home for purposes of self-defense.<sup>6</sup> The Court observed: “Like most rights, the right secured by the Second Amendment is not unlimited.”<sup>7</sup> It noted, for example, that 19th-century prohibitions of carrying concealed weapons were widespread and generally upheld.<sup>8</sup>

After *Heller*, eleven federal courts of appeals approved a general standard for judging the constitutionality of firearms regulations. This standard required courts to examine the amendment’s text, traditional understandings of its meaning, and the strength of the interests advanced by the challenged regulations.<sup>9</sup> In *Bruen*, Justice Thomas’s opinion for the Court rejected this standard, declaring that it had “one step too many.”<sup>10</sup> A better standard would eliminate any “judge-empowering ‘interest-balancing

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<sup>2</sup> *In re Klenosky*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980). An applicant who sought to carry a firearm in public for hunting, target shooting, or employment could obtain a restricted license without a showing of special need. *See Bruen*, 142 S. Ct. at 2123.

<sup>3</sup> *Bruen*, 142 S. Ct. at 2156.

<sup>4</sup> *See United States v. Rahimi*, 641 F.4th 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

<sup>5</sup> *Compare Range v. Att’y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc) (holding the felon-in-possession statute invalid as applied to a person convicted of lying to obtaining food stamps), *with United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023) (upholding the statute as applied to all offenders).

<sup>6</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>7</sup> *Id.* at 626.

<sup>8</sup> *Id.*; *see infra* text accompanying notes 248–57 (describing the nearly unanimous validation of concealed-carry prohibitions).

<sup>9</sup> *See Bruen*, 142 S. Ct. at 2126–27.

<sup>10</sup> *Id.* at 2127.

inquiry.”<sup>11</sup> It would be “rooted in the Second Amendment’s text, as informed by history”<sup>12</sup> and nothing more.

The Court then declared:

[T]he standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”<sup>13</sup>

This standard has two steps. Step 1 focuses on the Second Amendment’s “plain text,” which says: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>14</sup> Litigation at this initial stage addresses three issues. Is a rights claimant part of “the people”? Does her weapon qualify as an “arm”? And does the activity for which she claims protection amount to “keeping” or “bearing” this weapon? In a few short paragraphs, *Bruen* resolved all three issues in favor of litigants challenging the New York statute.<sup>15</sup>

Analysis at *Bruen*’s initial stage does not consider another issue posed by the amendment’s text. What is “the right” to which the amendment refers when it guarantees “the right of the people to keep and bear Arms”? Some defenders of gun rights—champions more militant than the National Rifle Association—believe that this right is established whenever a claimant shows that she is part of “the people” and is “keeping” or “bearing” an “arm.”<sup>16</sup> They read what the Supreme Court calls the “plain text” plainly, and they see no reason to go beyond Step 1 of *Bruen*’s standard. But, as *Heller* and *Bruen* note, not every limitation of a person’s ability to keep and bear arms violates the historic right the Second Amendment incorporated.<sup>17</sup> Blackstone observed in 1765 that this right was subject to “due restrictions.”<sup>18</sup>

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<sup>11</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

<sup>12</sup> *Id.* at 2127.

<sup>13</sup> *Id.* at 2129–30.

<sup>14</sup> U.S. CONST. amend. II.

<sup>15</sup> *See Bruen*, 142 S. Ct. at 2134–35.

<sup>16</sup> *See No Compromise, A World Where the NRA Is Soft on Guns*, NPR (Sept. 8, 2020), <https://www.npr.org/2020/09/07/910518992/a-world-where-the-nra-is-soft-on-guns> [<https://perma.cc/TPP5-UZ4Z>] (profiling people who maintain that all gun regulations are unconstitutional and that NRA stands, not for National Rifle Association, but for Negotiating Rights Away).

<sup>17</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *see Bruen*, 142 S. Ct. at 2127.

<sup>18</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

Step 2 determines how far the right extends. Even after a claim has survived Step 1, the government can defeat it by showing that the challenged restriction “is consistent with the Nation’s historical tradition of firearm regulation.” This second step has two tiers. The government’s burden is heavier when a firearms regulation “addresses a general societal problem that has persisted since the 18th century” than when a challenged regulation “implicat[es] unprecedented societal concerns or dramatic technological changes.” In the former situation, the government must show a sufficient number of “distinctly similar historical regulation[s].”<sup>19</sup> In the latter, a “more nuanced” sort of analogy suffices.<sup>20</sup> It is probably enough that the current regulation and its historic predecessors “impose a comparable burden on the right of armed self-defense and . . . [the] burden is comparably justified.”<sup>21</sup> Both tiers of Step 2 require “reasoning by analogy,” which the Court called “a commonplace task for any lawyer or judge.”<sup>22</sup> Even at the less “nuanced” tier, the required analogy need not be perfect. The government must identify only “a well-established and representative historical *analogue*, not a historical *twin*.”<sup>23</sup>

Before *Bruen*, the standard approved by every federal appellate court to consider the issue began with an inquiry resembling Step 1 of the *Bruen* standard. The second part of this standard then employed a conventional means-end analysis to determine the scope of the right, subjecting some firearms restrictions to “strict scrutiny” and others to “intermediate” scrutiny.<sup>24</sup>

This Article will show that the appellate courts’ interest-balancing standard came closer to the original understanding of the right to bear arms than the *Bruen* standard. And even the appellate courts’ standard gave greater scope to the right than the Founding generation and subsequent generations thought appropriate. Until “originalist” Supreme Court justices appeared in the 21st century, courts upheld gun restrictions when they were reasonable public safety measures that did not nullify the right to bear arms.<sup>25</sup>

Lawyers and commentators refer to the form of originalism *Bruen* employed as “text, history, and tradition.”<sup>26</sup> A 2011 dissenting opinion in the D.C. Circuit by future Justice Brett Kavanaugh endorsed this style of constitutional construction.<sup>27</sup>

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<sup>19</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>20</sup> *Id.* at 2132.

<sup>21</sup> *Id.* at 2133.

<sup>22</sup> *Id.* at 2132.

<sup>23</sup> *Id.* at 2133.

<sup>24</sup> *United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019); *see* *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195, 198, 205 (5th Cir. 2012).

<sup>25</sup> *See infra* Section I.J.

<sup>26</sup> *See, e.g., Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring); Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 830–35 (2014).

<sup>27</sup> *See Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (considering the validity of D.C. gun laws approved after the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

Both Kavanaugh and *Bruen* attributed their methodology to *Heller*,<sup>28</sup> but others dispute whether *Heller* approved or followed it.<sup>29</sup>

### *B. The Court's Holding*

A reader might reasonably be puzzled about what *Bruen* held. A concurring opinion by Justice Kavanaugh described a two-pronged decision, indicating that the Court not only struck down New York's "special need" requirement but also condemned the breadth of the discretion exercised by New York licensing authorities. As best I can tell, however, the second ruling did not happen. *Bruen*'s substantive holding was unaccompanied by any ruling concerning the flaws of New York's licensing procedure.

Justice Kavanaugh wrote:

The Court's decision addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York. As the Court explains, New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York's regime—the unchanneled discretion for licensing officials and the special-need requirement—in effect deny the right to carry handguns for self-defense to many "ordinary law-abiding citizens."<sup>30</sup>

Early in its opinion, the *Bruen* majority described New York's "may issue" procedures in a way that implied disapproval, but only the tone of its description lent color to Justice Kavanaugh's report of its holding. In a footnote, the Court commented that "shall issue" procedures "appear to contain only 'narrow, objective, and

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<sup>28</sup> *Id.*; see *Bruen*, 142 S. Ct. at 2127–30.

<sup>29</sup> See, e.g., *id.* at 2175–77 (Breyer, J., dissenting); Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL'Y 170, 174–78 (2020); Rostron, *supra* note 26, at 834–35.

<sup>30</sup> *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring); see *id.* at 2170 (Breyer, J., dissenting) ("[The Court] suggests that New York's licensing regime gives licensing officers too much discretion."). Notice that Justice Kavanaugh described New York's "special need" requirement incorrectly. An applicant for a license to carry a handgun wasn't required to show a special need *apart from* self-defense; she was required to show a special need *for* self-defense. See *id.* at 2123 (majority opinion) ("[A]n applicant shows proper cause . . . if he . . . '[demonstrates] a special need for self-protection distinguishable from that of the general community.'"). Justice Kavanaugh misdescribed the requirement twice in a short concurring opinion.

definite standards’ guiding licensing officials.”<sup>31</sup> The Court drew its reference to “narrow, objective, and definite standards” from a First Amendment opinion concerning prior restraints on speech,<sup>32</sup> and that was as close as it came to discussing any procedural issue. Its historical analysis focused entirely on whether New York’s “special need” requirement had adequate historical analogues.<sup>33</sup> I note the absence of any procedural ruling in *Bruen* primarily to keep readers from wondering why this Article does not discuss it. *Bruen* held that the Second Amendment guarantees the right to carry a handgun in public for purposes of self-defense without a showing of special need. That was all it held, and that was plenty.<sup>34</sup>

### *C. How This Article Will Proceed*

This Article consists of two Parts and a conclusion. Part I focuses on the *Bruen* opinion and considers its contradictions, flaws, fallacies, and implications. Part II examines lower-court decisions applying *Bruen* during the first year after that decision. These decisions make *Bruen*’s flaws vivid.

Section I.A focuses on two apparent contradictions between *Bruen*’s holding and other pronouncements of the Supreme Court and of justices who joined the majority opinion. First, *Heller* declared that its opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and people with mental illness. These prohibitions, however, were 20th-century innovations without close pre-20th century analogues. Analyzing them in the way the Court analyzed the statute it struck down in *Bruen* would seem to render them invalid. Without explanation, however, three concurring justices in *Bruen* reiterated *Heller*’s assurances that the validity of these prohibitions was not in doubt.

Second, *Bruen* declared: “Nothing in our analysis should be interpreted to suggest the unconstitutionality of . . . ‘shall-issue’ licensing regimes.” Yet no licensing requirements of any sort existed when the Second Amendment was ratified and for most of a century thereafter. How “shall issue” requirements could be reconciled with “the Nation’s historical tradition of firearm regulation” was unclear,

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<sup>31</sup> *Id.* at 2138 n.9.

<sup>32</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)).

<sup>33</sup> New York’s “special need” requirement doesn’t seem more open-ended than most other legal rules. *Bruen* noted: “[L]iving or working in an area ‘noted for criminal activity’ does not suffice. Rather, New York courts generally require evidence ‘of particular threats, attacks or other extraordinary danger to personal safety.’” *Bruen*, 142 S. Ct. at 2123 (citations omitted).

<sup>34</sup> I don’t suggest that “may issue” licensing schemes can survive *Bruen*. Licensing authorities may not deny permits to people who are constitutionally entitled to them, and *Bruen* holds that nearly everyone is. The Supreme Court held the New York licensing regime unconstitutional, however, not because state officials exercised open-ended or unchanneled discretion, but because they implemented an invalid rule. *See id.* at 2156.

and a concurring justice's suggestion that "fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force" had survived *Bruen* was baffling. Some or all of the justices who joined the majority opinion may not have understood the implications of the standard they approved.

Section I.B notes that *Bruen* turns outcomes on ad hoc blips of historical data and embodies no coherent or comprehensible objective or principal. *Bruen* makes constitutional law a scavenger hunt.

Section I.C observes that *Bruen* endorses a distinctive form of "expected application" originalism. It treats legislative *inaction*—the *failure* of 18th- and 19th-century legislatures to approve firearms regulations—as determinative of constitutional meaning. The failure to regulate a practice, however, provides almost no evidence that regulating it would be unconstitutional or that anyone thought it would be. *Bruen* makes irrelevant evidence decisive.

Section I.D explores a question *Bruen* left open—whether the original understanding of the people who approved the Second Amendment in 1791 or that of the people who approved the Fourteenth Amendment in 1868 determines the scope of the right to bear arms. The Second Amendment initially limited only the federal government, but the Supreme Court held in 2010 that the Fourteenth Amendment requires state governments to honor this right as well. *Bruen* declared that the scope of the right would not vary with which amendment applies. It recognized that the original understanding of one or the other would be abandoned.

The choice the Court posed might not seem important, for people's understanding of the scope of the right to bear arms didn't vary much between 1791 and 1868. But firearms regulations proliferated during the intervening period. If one were to assess, not how Americans actually understood the right, but the meaning the right according to *Bruen*, one would find it greatly altered between the dates of the two amendments. If the Court were to focus only on analogues in place during the regulation-thin Founding era, it would use the Fourteenth Amendment to strike down state laws the ratifiers of that amendment recently had approved, abandoning originalism in the name of originalism.

Section I.E notes that, although *Bruen* makes the dates of the two amendments significant, its standard is not derived from the text or original understanding of either one. No one in 1791 or 1868 maintained that only firearms regulations sufficiently analogous to well-established historic regulations can pass constitutional muster, or that the right to bear arms renders every firearms regulation presumptively unconstitutional, or that the absence of legislative measures has any bearing on the meaning of the right to bear arms.

Section I.F evaluates the Supreme Court's claim that its standard is capable of meeting present and future needs. The Court endorsed two sorts of analogies—one for problems recognized by the Founding generation and another for unanticipated challenges. It placed the challenged New York statute in its first category, declaring



that this statute addressed “a general societal problem that has persisted since the 18th century” and that the lack of a “distinctly similar historical regulation” was fatal. This section observes, however, that nearly all modern firearms regulations fit equally well within the Court’s second category. They “implicat[e both] unprecedented societal concerns [and] dramatic technological changes.”

This section offers a brief history of firearms technology and firearms violence, noting, for example, that no mass shootings had occurred at the time the Fourteenth Amendment was ratified. Under *Bruen*, social and technological change opens the door to a “more nuanced” sort of analogy, but courts still must examine “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.” Any burden a modern legislature imposes apparently must be “comparable” to burdens that existed in the 18th or 19th century.

Section I.G asks: If modern firearms regulations are permissible only when they are sufficiently analogous to historic regulations, what made the historic regulations permissible? No sensible story of the origin of gun rights seems to culminate in a *Bruen* world of normative-free constitutional standards.

Section I.H is a whimsical tangent. It depicts a special lawyer’s broadcast of *Saturday Night Live (or Dead)* in which members of the Founding generation discuss the *Bruen* decision.

Section I.I asks whether a modern legislature could ensure the constitutionality of its firearms regulations by reenacting Founding era regulations. These regulations would pass muster under the Second Amendment as *Bruen* construed it. But might a court hold statutory terms like “wicked,” “alarm,” and “terror” unconstitutionally vague? For a *Bruen*-style originalist, the regulations’ historic credentials would seem to preclude that constitutional challenge and all others based on provisions that were in place at the time the regulations were approved. If extended beyond the Second Amendment, *Bruen*-style originalism would ensure the validity of all Founding era laws and practices not invalidated by subsequent amendments.

Section I.J shows that the understanding of the right to bear arms evidenced by the earliest American decisions bears little resemblance to the understanding attributed to these decisions by *Bruen*. Our forebears permitted legislatures “to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals,” finding constitutional limits only when the regulations “amount[ed] to destruction of the right.” This original understanding was surprisingly uniform, and it became the modern understanding too. It vanished only when Supreme Court justices calling themselves “originalists” appeared in the 21st century.

Section I.K speculates that some justices abandoned the original understanding of the right to bear arms partly because of their determination to keep the Second Amendment from becoming “a second-class right.” It notes the tension between these justices’ professed originalism and their seemingly normative concern with the amendment’s “classiness.” The originalist justices haven’t compared the Second

Amendment right as it was originally understood to other rights as they were originally understood. Instead, they've pointed to standards invented by the Supreme Court after 1960, insisting that Second Amendment rights must be protected as much as these non-originalist standards protect other rights.

Section I.L ends Part I by asking whether, on balance, pre-20th-century precedents support the result the Supreme Court reached in *Bruen*. Although it notes several ways in which the Court oversold its case, it provides no clear answer to that question.

Part II's exploration of post-*Bruen* litigation begins in Section II.A.1 with a description of a federal judge's repeated reappraisal of a central issue posed by *Bruen*: How many pre-20th-century analogues does it take to render a challenged firearms regulation constitutional? When do antique regulations cease being "outliers" and become part of the nation's "tradition" of firearms regulation? Is the correct number a "majority of states"? Or might it be "three"? Apart from the total number of analogues, what matters? A judge certainly should consider the extent to which a supposed analogue resembles a challenged regulation. But *Bruen* may also require judges to consider how long a pre-20th-century regulation endured; the closeness of this regulation in time to 1791 or 1868; the population of the jurisdiction that enacted this regulation; whether the enacting jurisdiction was a state, territory, or municipality; and whether the constitution and courts of this jurisdiction recognized an individual right to armed self-defense. *Bruen* seems to have replaced "judge-empowering interest-balancing inquiries" with judge-empowering inquiries about historical minutiae.

Section II.A.2 describes the burden *Bruen* places on litigants, lawyers, and judges to find and analyze 18th- and 19th-century state and local regulations. It notes that court-appointed and privately retrained expert witnesses may not provide much assistance, especially when court deadlines loom.

Section II.A.3 responds to a judge's complaint that neither he nor the justices of the Supreme Court are "experts in what white, wealthy, and male property owners thought about firearms regulation in 1791." It shows that *Bruen* has little to do with what privileged property owners thought about firearms regulation in 1791 and much to do with what a majority of the Supreme Court thought about firearms regulation in 2022.

Section II.B.1 turns to post-*Bruen* challenges to specific firearms regulations. It describes how federal decisions recognized a constitutional right to bear arms in places of worship 150 years after courts called this idea "ridiculous," "shocking to all sense of propriety," and "full of evil."

Section II.B.2 considers whether the familiar federal regulations barring firearms on airliners and in the secured areas of airports pass muster.

Section II.B.3 describes a decision in which a judge acknowledged that "the usefulness of serial numbers in solving gun crimes" made a challenged federal statute "desirable for our society" but then held this statute unconstitutional.

Section II.B.4 describes decisions holding that manufacturing and selling firearms are unprotected by the Second Amendment because the amendment's "plain text" speaks only of "keeping" and "bearing" arms. Other decisions recognize that the amendment must protect activities (like manufacturing and selling) and materials (like ammunition) that are essential to exercise of the constitutional right. When seemingly reasonable gun regulations lack clear historical analogues and may not survive *Bruen*'s Step 2, judges may be tempted to engage in hyperliteral interpretation at Step 1 to rescue them.

Section II.B.5 examines the conflicting rulings of the Third and Eighth Circuits on the constitutionality of a federal statute prohibiting firearm possession by convicted felons. Despite *Heller*'s declaration that its ruling does not cast doubt on the validity of this statute, this section maintains that faithful adherence to *Bruen*'s holding would invalidate the statute even as applied to violent offenders.

Looking to Step 1 of the *Bruen* standard, the Eighth Circuit, some Third Circuit dissenters, and several federal district courts declare that felons are not among "the people" included in the Second Amendment's declaration of "the right of the people to keep and bear Arms." Their reasons are unconvincing, and *Heller* concluded that the term "the people" warrants "a strong presumption that the Second Amendment right . . . belongs to all Americans."

Judges also look to Step 2 of the *Bruen* standard and treat as analogues of the felon-in-possession statute all government-ordered disarmaments throughout English and American history (including disarmaments of enslaved people, free Black people, Native Americans, and people who refused to take loyalty oaths). They see these disarmaments as evidence that governments may disarm either people regarded as dangerous or people regarded as lacking appropriate civic virtue.

The originalism embraced by these courts differs greatly from *Bruen*'s "expected application" originalism. Even if the Second Amendment was understood to allow the disarmament of people thought to lack civic virtue or people perceived as dangerous, some people were not considered sufficiently dangerous or sufficiently lacking in virtue to disarm, and they included *felons*. *Bruen* asks whether a challenged modern statute was one our ancestors would have accepted. We know the answer to that question because there were felons in their day, and no one disarmed them.

Section II.B.6 focuses on the Fifth Circuit's invalidation of a federal statute barring people subject to domestic violence restraining orders from possessing firearms. Although the court acknowledged that the regulation it held invalid "embodies salutary policy goals meant to protect vulnerable people in our society," it concluded that this regulation was one "our ancestors would never have accepted." The Supreme Court will review this decision during its 2023–24 Term.

A conclusion focuses on one more firearms issue—whether requiring applicants for firearms permits to complete and pay for eighteen hours of firearms training violates the Second Amendment. In discussing this issue, it contrasts the *Bruen* standard with more traditional approaches to constitutional adjudication and defends the legitimacy of interest balancing.

I. *BRUEN*'S ERRORS AND IMPLICATIONSA. *Bruen*'s Contradictions: Did the Court Understand the Implications of Its Standard?1. Abandoning *Heller*

Most of the *Bruen* opinion consisted of reviewing dozens of pre-20th-century enactments restricting the carrying of arms and declaring that few of them were analogous to the New York statute—too few to render its limitation of the right to carry a handgun constitutional. Eight pages of the Court's slip opinion addressed restrictions approved in England between 1285 and American independence.<sup>35</sup> Five pages considered restrictions enacted in Colonial America and the early years of independence.<sup>36</sup> Nine pages examined the "proliferation" of "public-carry restrictions" between the ratification of the Second Amendment in 1791 and the start of the Civil War.<sup>37</sup> Six pages focused on restrictions approved during Reconstruction (the period that encompassed the ratification of the Fourteenth Amendment).<sup>38</sup> And five pages addressed "the slight uptick in gun regulation during the late-19th century—principally in the Western Territories."<sup>39</sup>

The Court declared that legislation enacted after 1900 "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."<sup>40</sup> The Court accordingly declined to address "any of the 20th-century historical evidence brought to bear by respondents or their *amici*."<sup>41</sup> The New York statute itself was enacted in 1911 and amended to its current form in 1913.<sup>42</sup> Too recent to be part of "the Nation's historical tradition of firearm regulation" and lacking sufficient antecedents, it flunked the *Bruen* test. Every other post-1901 firearms regulation also would be unconstitutional unless appropriate analogues were in place before the turn of the century.

By marking 1901 as its turning point, *Bruen* appeared to depart from *Heller*. Justice Scalia's opinion for five justices in that case (including three who later joined the opinion in *Bruen*) declared:

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<sup>35</sup> See *Bruen*, 142 S. Ct. at 2138–42 (slip op. at 30–37). The Supreme Court Reporter takes fewer pages than the Court's slip opinion to present the same material. The slip opinion can be found at: [https://www.supremecourt.gov/opinions/21pdf/20-843diff\\_jgkn.pdf](https://www.supremecourt.gov/opinions/21pdf/20-843diff_jgkn.pdf) [<https://perma.cc/9VZN-PRRU>].

<sup>36</sup> See *Bruen*, 142 S. Ct. at 2142–45 (slip op. at 37–42).

<sup>37</sup> See *id.* at 2145–50 (slip op. at 42–51).

<sup>38</sup> See *id.* at 2153–56 (slip op. at 58–62).

<sup>39</sup> See *id.* at 2153–56 (slip op. at 58–62).

<sup>40</sup> *Id.* at 2154 n.28.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2122; see *id.* at 2169, 2189 (Breyer, J., dissenting).

[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>43</sup>

After retiring from the Supreme Court, Justice Stevens reported that Justice Scalia included this statement at the insistence of Justice Kennedy, without whose vote *Heller* would have been decided differently.<sup>44</sup> In *McDonald v. City of Chicago*,<sup>45</sup> a 2010 decision striking down Chicago’s handgun ban, an opinion by Justice Alito for four members of the five-justice majority responded to litigants’ “doomsday predictions” by noting *Heller*’s list of regulations not in doubt and declaring: “We repeat those assurances here.”<sup>46</sup>

Although laws prohibiting firearm possession in sensitive places antedated the 20th century, the other restrictions noted in Justice Scalia’s statement were all 20th-century innovations.<sup>47</sup> *Bruen* seemed to transform them from “longstanding”—so old that their validity was not in doubt—to fledglings—so new that, unless appropriate analogues could be found, they would be unconstitutional. *Heller* and *McDonald* pointed to no analogues, and no close analogues are evident.<sup>48</sup>

Analyzing prohibitions of gun possession by felons and people with mental illness in the same way the Court analyzed the statute it struck down in *Bruen* would appear to invalidate them. According to the Court, pre-20th-century legislatures could have addressed the “general societal problem” of “handgun violence, primarily in urban areas” by prohibiting the public carry of handguns absent a showing of

<sup>43</sup> District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

<sup>44</sup> See Adam Liptak, “It’s a Long Story”: Justice John Paul Stevens, 98, *Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html> [<https://perma.cc/Z477-DC45>]. Justice Stevens regarded *Heller* as the Supreme Court’s worst decision during his 35 years on the Court. He said that *Citizens United v. FEC*, 558 U.S. 310 (2010), ranked second and *Bush v. Gore*, 531 U.S. 98 (2000), third.

<sup>45</sup> 561 U.S. 742 (2010).

<sup>46</sup> *Id.* at 786.

<sup>47</sup> See Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374–79 (2009); C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698–714 (2009).

<sup>48</sup> The disarmament of racial, religious, and other groups deemed dangerous or lacking in civic virtue has a lengthy history, see *infra* text accompanying notes 296–312 & 489–504, but there appear to be no closer pre-20th-century analogues to disarming felons or people with mental illness. When the Second and Fourteenth Amendments were ratified, members of both groups were permitted to possess and use firearms. Post-*Bruen* rulings on the constitutionality of the federal felon-in-possession statute are discussed *infra* Section II.B.5.

special need. Because few jurisdictions did approve these measures or anything like them, New York's limitation of public carry was invalid. Similarly, early legislatures might have addressed the problem of gun violence by felons and people with mental illness by prohibiting the possession of firearms by these people. They did not do that or approve any "distinctly similar" restriction.

Nevertheless, in a concurring opinion in *Bruen*, Justice Alito said again that the Supreme Court had not "disturbed anything that we said in *Heller*."<sup>49</sup> In another concurring opinion, Justice Kavanaugh, joined by Chief Justice Roberts, reiterated *Heller*'s assurances verbatim.<sup>50</sup> According to these justices, *Bruen*, like *Heller*, did not so much as "call into question" prohibitions on firearm possession by felons and people with mental illness. Neither opinion offered a glance toward history or a hint of how these statements could be reconciled with the Court's holding. The two concurring opinions were especially curious because Justice Breyer's dissenting opinion made a point of the "disconnect."<sup>51</sup> (Although Justice Breyer and the two justices who joined his dissent declared the concurring justices' position on barring felons and people with mental illness from possessing firearms "hard to square" with *Bruen*, they said that they, too, would stick with *Heller*'s dictum.<sup>52</sup> Six members of the Court thus appeared to render an advisory opinion on a case not yet before them, reaffirming an earlier advisory opinion on the same never-argued case despite a revolutionary change in the applicable law.)

Prior to Justice Barrett's appointment to the Supreme Court, as a Seventh Circuit judge, she maintained in a dissenting opinion that the federal felon-in-possession statute was unconstitutional as applied to a nonviolent felon.<sup>53</sup> She noted *Heller*'s assurances but described them as a "passing reference."<sup>54</sup>

Three months after *Bruen*, a federal district court held unconstitutional a federal provision barring anyone under indictment for a felony from receiving a firearm. Declaring that the nation's history of disarming felons "certainly isn't clearly 'longstanding,'" the court concluded that the historical justification for disarming people who have been charged but not convicted was "even more unclear."<sup>55</sup> The court observed that *Heller*'s approval of felon-in-possession laws was "[d]icta . . . [o]r, as Francis Bacon put it, . . . only the 'vapours and fumes of law.'"<sup>56</sup> According

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<sup>49</sup> *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

<sup>50</sup> *Id.* at 2162 (Kavanaugh, J., concurring).

<sup>51</sup> *Id.* at 2189 (Breyer, J., dissenting).

<sup>52</sup> *Id.*

<sup>53</sup> *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>54</sup> *Id.* at 455.

<sup>55</sup> *United States v. Quiroz*, No. 22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329, at \*16 (W.D. Tex. Sept. 29, 2022).

<sup>56</sup> *Id.* at \*12 (quoting Francis Bacon, *The Lord Keeper's Speech in the Exchequer* (1617), in 2 THE WORKS OF FRANCIS BACON 477, 478 (Basil Montagu ed., 1887)). The government has appealed the *Quiroz* ruling; the Fifth Circuit has heard argument; and, after this argument,

to the Supreme Court, dicta “may be followed if sufficiently persuasive but . . . are not controlling.”<sup>57</sup>

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the court has requested supplemental briefing from the Solicitor General. See Brandon Beck, *Judge Higginson and the Role of the Solicitor General in United States v. Quiroz*, DUKE CTR. FOR FIREARMS L. (Feb. 22, 2023), <https://firearmslaw.duke.edu/2023/02/judge-higginson-and-the-role-of-the-solicitor-general-in-united-states-v-quiroz/> [<https://perma.cc/6SEC-RKGN>]. Judge Higginson, noting that the district courts are divided, commented at argument: “In portions of the country, you’re a felon because some judges think history is one thing; in other portions of the country, now you’re not a felon.” *Id.*

In *United States v. Holden*, No. 3:22-CR-30 RLM-MGG, 2022 U.S. Dist. LEXIS 212835 (N.D. Ind. Oct. 31, 2022), a second federal district court held unconstitutional the federal law forbidding a person under indictment for a felony from receiving a firearm. The court “earnest[ly] hope[d] that [it] . . . ha[d] misunderstood *Bruen*,” for, if it hadn’t, “most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional.” *Id.* at \*17. In the court’s view, it would insult the legacy and memory of 18th-century Americans “to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways.” *Id.* at \*18. A third federal district court held the federal statute unconstitutional in *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 U.S. Dist. LEXIS 206016 (W.D. Okla. Nov. 14, 2022).

In *United States v. Kelly*, No. 22-cr-00037, 2022 U.S. Dist. LEXIS 215189 (M.D. Tenn. Nov. 16, 2022), a federal district court upheld the federal statute that *Quiroz*, *Holden*, and *Stambaugh* struck down, but the court said that its confidence in its holding was low. *Id.* at \*19. It saw “no glaring flaws” in the *Quiroz* opinion and “frankly [did] not know” whether the historical record was sufficiently clear to justify the result it reached. *Id.* at \*14. The court doubted *Bruen*’s claim that its “‘historical tradition’ standard would be ‘more administrable’” than the standard that preceded it. *Id.* at \*19.

Other decisions upholding the federal statute after *Bruen* include *United States v. Posada*, No. EP-22-CR-1944(1), 2023 LEXIS 70981 (W.D. Tex. April 20, 2023); *United States v. Jackson*, Crim. No. ELH-22-141, 2023 U.S. Dist. LEXIS 33579 (D. Md. Feb. 27, 2023); *United States v. Stennerson*, No. CR 22-139-BLG-SPW, 2023 LEXIS 31244 (D. Mont. Feb. 24, 2023); *United States v. Bartucci*, No. 1:19-cr-00244-ADA-BAM, 2023 U.S. Dist. LEXIS 30680 (E.D. Cal. Feb. 23, 2023); *United States v. Gore*, No. 2:23-cr-04, 2023 U.S. Dist. LEXIS 28970 (S.D. Ohio Feb. 21, 2023); *United States v. Rowson*, No. 22 Cr. 310 (PAE), 2023 U.S. Dist. LEXIS 13832 (S.D.N.Y. Jan. 26, 2023); and *United States v. Kays*, No. CR-22-40-D, 2022 U.S. Dist. LEXIS 154929 (W.D. Okla. Aug. 29, 2022).

<sup>57</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935). The persuasive power of an unexplained ipse dixit seems close to zero.

*Heller*’s pronouncements on issues not before the Court appear to be paradigmatic examples of “obiter dicta.” A few Courts of Appeals, however—struggling to uphold the firearms regulations *Heller* sought to preserve—have declared that “*Heller*’s list of ‘presumptively lawful’ regulations is not dicta.” See *United States v. Barton*, 633 F.3d 168, 171 (3d Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). The discussion of issues not before a court and of a ruling’s limits sometimes may help to explain the basis for this ruling and may not qualify as dictum. But unexplained pronouncements about extraneous issues certainly do.

Eleven months after *Bruen*, by a vote of 11-to-4, the en banc Third Circuit held the federal felon-in-possession statute unconstitutional as applied to someone who had been convicted twenty-eight years earlier of making a false statement to obtain food stamps.<sup>58</sup> Dissenters declared that the majority opinion “is not cabined in any way and, in fact, rejects all historical support for disarming any felon.”<sup>59</sup> Without marking any line between the food stamp offender and others, however, the majority maintained that its “decision today is a narrow one.”<sup>60</sup>

Four days before the Third Circuit ruling, the Eighth Circuit upheld the felon-in-possession statute as applied to all offenders.<sup>61</sup> The Supreme Court is likely to address the conflict between the Third and Eighth circuits in its next Term. A later section of this Article will describe how lower courts have strained to reconcile *Bruen*’s holding with *Heller*’s dicta.<sup>62</sup>

One day after *Bruen*, in *Dobbs v. Jackson Women’s Health Organization*,<sup>63</sup> the Supreme Court overruled *Roe v. Wade*,<sup>64</sup> a nearly 50-year-old decision recognizing a woman’s right to decide whether to bear a child. The Court’s opinion included a statement resembling the one made in *Heller*: “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>65</sup> Statements in this form are meant to reassure, but a reader should be wary. The Court’s message

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When *Heller* declared the “presumptive” validity of several regulations not before the Court, its evident purpose wasn’t to explain how it reached its decision. It was to offer some assurance about how future cases would be decided. That this assurance fell short of a full guarantee or binding promise didn’t make it holding rather than dictum. And the Court offered only one word of explanation for its “presumptive” rulings on issues not before it. The regulations it expected to uphold were “longstanding.” When *Bruen* then said that a period of 122 years wasn’t “longstanding” enough and three of the justices who made that announcement said they’d stick with *Heller*’s pronouncement anyway, their position was entirely unexplained. The cryptic one-word explanation had evaporated. These justices disregarded the Constitution’s prohibition of advisory opinions as well as basic principles of judicial restraint. See *Muskrat v. United States*, 219 U.S. 346 (1911) (holding that Article III’s case or controversy requirement bars federal courts from issuing advisory opinions); *United States v. Raines*, 362 U.S. 17, 21 (1960) (declaring that courts may “never . . . anticipate a question of constitutional law in advance of the necessity of deciding it” and may “never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”).

<sup>58</sup> *Range v. Att’y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc).

<sup>59</sup> *Id.* at 116 (Shwartz, J., dissenting).

<sup>60</sup> *Id.* at 106 (majority opinion).

<sup>61</sup> *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023). In *United States v. Jackson*, No. 22-2870, 2023 U.S. App. LEXIS 22991 (8th Cir. Aug. 30, 2023), the Eighth Circuit declined to rehear *Jackson* en banc. Four judges dissented and voiced their disagreement with the panel decision.

<sup>62</sup> See *infra* Section II.B.5.

<sup>63</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>64</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>65</sup> *Dobbs*, 142 S. Ct. at 2277–78.



may be: “Nothing in *this* opinion should be understood to cast doubt on our precedents or on longstanding legislation, but *just wait for the next one.*”

## 2. Approving Licensing Requirements

*Bruen* brought to an end to “may issue” (discretionary) licensing requirements,<sup>66</sup> but the Court declared: “Nothing in our analysis should be interpreted to suggest the unconstitutionality of . . . ‘shall-issue’ licensing regimes.”<sup>67</sup>

Justice Kavanaugh, joined by Chief Justice Roberts, described these regimes in a concurring opinion. He indicated that many firearms regulations of which James Madison and his contemporaries never dreamed had somehow survived *Bruen*:

[S]hall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. . . . As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible. . . . Going forward, . . . the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so.<sup>68</sup>

Neither the majority opinion nor Justice Kavanaugh’s indicated how licensing requirements of any sort could be “consistent with the Nation’s historical tradition of firearm regulation.” No licensing requirements existed when the Second Amendment was ratified and for most of a century thereafter.

Among the earliest of these requirements was one approved by the City of Sacramento in 1876. This jurisdiction prohibited carrying concealed pistols and other dangerous weapons but qualified its prohibition by providing: “The Police Commissioners of the City of Sacramento may grant written permission to any peaceable person, whose profession or occupation may require him to be out at late hours of the night, to carry concealed deadly weapons for his protection.”<sup>69</sup>

In an appendix to an amicus brief in *Bruen*, historian Patrick Charles set forth the texts of this ordinance and forty-one other licensing requirements approved by

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<sup>66</sup> As explained *supra* note 34, it did so by holding that nearly everyone has a constitutional right to carry a handgun in public, not by holding that New York gave too much discretion to licensing officials.

<sup>67</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>68</sup> *Id.* at 2162 (Kavanaugh, J., concurring).

<sup>69</sup> Ordinance No. 84: Prohibiting the Carrying of Concealed Deadly Weapons, Apr. 24, 1876, *reprinted in* CHARTER AND ORDINANCES OF THE CITY OF SACRAMENTO 173 (R.M. Clarken ed., 1896).

cities, towns, and counties before the end of the 19th century.<sup>70</sup> As Charles observed in later scholarship, however “it is impossible to determine just how many cities and localities maintained armed carriage licensing laws by the close of the nineteenth century. . . . [A]s any professional historian or archivist will attest, the records of local ordinances that have survived . . . are only a tiny fragment of the whole.”<sup>71</sup>

Most of the ordinances Charles listed included a “special need” requirement like Sacramento’s, but some imposed no limit on the discretion of licensing officials. St. Paul, for example, authorized its mayor to grant written permission to carry a handgun to “such persons as he may think proper” and to “revoke any and all such licenses at his pleasure.”<sup>72</sup> Before 1900, more than half the population of California was forbidden to carry a concealed weapon without a license, and permit requirements existed in four of the nation’s largest cities.<sup>73</sup> Despite the resemblance of pre-20th-century permit requirements to the statute struck down in *Bruen*, the Supreme Court mentioned none of them.

In 1906, Massachusetts became the first state to approve a “may issue” licensing regime like those approved by cities, towns, and counties earlier.<sup>74</sup> New York followed in 1911 by enacting the statute held invalid in *Bruen*.<sup>75</sup> The National Conference of Commissioners on Uniform State Laws proposed a uniform “may issue” licensing statute in 1926.<sup>76</sup> By the 1960s, every state except Vermont and New Hampshire had “may issue” statutes, and the constitutionality of these statutes was unchallenged.<sup>77</sup> Among the organizations that promoted “may issue” regimes was the National Rifle Association.<sup>78</sup>

In 1987, however, the NRA successfully lobbied Florida to enact a “shall issue” or “right to carry” licensing law.<sup>79</sup> A few other states had enacted these laws

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<sup>70</sup> Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party app. at 2–45, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), [https://www.supremecourt.gov/DocketPDF/20/20-843/184310/20210719174313263\\_40977%20pdf%20Charles%20app.pdf](https://www.supremecourt.gov/DocketPDF/20/20-843/184310/20210719174313263_40977%20pdf%20Charles%20app.pdf) [<https://perma.cc/R7XN-VSLU>].

<sup>71</sup> Patrick J. Charles, *The Fugazi Second Amendment, Bruen’s Text, History, and Tradition Problem and How to Fix it*, 71 CLEV. ST. L. REV. 623, 664 (2023).

<sup>72</sup> See Ordinance No. 265, An Ordinance to Suppress the Carrying of Concealed Weapons Within the Limits of the City of St. Paul, Jan. 12, 1882, *reprinted in* DAILY GLOBE (Jan. 20, 1882).

<sup>73</sup> See Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. DAVIS L. REV. ONLINE 65, 68 (2021).

<sup>74</sup> See 1906 Mass. Acts 150, ch. 172.

<sup>75</sup> 1911 N.Y. Laws 442, An Act to Amend the Penal Law in Relation to the Sale and Carrying of Dangerous Weapons, ch. 195, § 1.

<sup>76</sup> See UNIF. ACT TO REGULATE THE SALE & POSSESSION OF FIREARMS (2D TENT. DRAFT) (UNIF. L. COMM’N 1926); UNIF. FIREARMS ACT (UNIF. L. COMM’N 1930).

<sup>77</sup> Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party, *supra* note 70, at 16–17.

<sup>78</sup> *Id.* at 14.

<sup>79</sup> *NRA Achieves Historical Milestone as 25 States Recognize Constitutional Carry*,

earlier.<sup>80</sup> “[O]ver the next 15 years NRA successfully worked to establish [shall-issue] laws in 42 states.”<sup>81</sup>

In 2003, the NRA again changed course. It successfully lobbied Alaska to allow most adults to carry a concealed handgun *without* obtaining a permit. In the 20 years since then, 23 other states have abolished their permit requirements.<sup>82</sup> These states joined Vermont, which had never required permits to carry weapons.<sup>83</sup>

“Permitless carry” is commonly called “constitutional carry,” underscoring the contention of many of its proponents that the Constitution forbids licensing the exercise of what they regard as a constitutional right.<sup>84</sup> As the website of the Republican Party of Texas puts it: “Constitutional Carry means simply that we recognize the Constitution as our permit to carry.”<sup>85</sup>

*Bruen* discussed but did not decide whether the scope of the right to bear arms is determined by the general understanding of this right at the time the Second Amendment was ratified (1791) or by the general understanding of this right at the time of the Fourteenth Amendment (1868). A later section of this Article examines this issue.<sup>86</sup> Especially if the determinative date is 1791, as most judges and commentators suppose, the *Bruen* standard makes the constitutional argument for constitutional carry appear to be a winner. Because the Founding generation did not impose preconditions on carrying firearms,<sup>87</sup> modern legislatures may not either. Perhaps,

NRA-ILA (Apr. 1, 2022) [hereinafter *NRA Achieves Historical Milestone*], <https://www.nraila.org/articles/20220401/nra-achieves-historical-milestone-as-25-states-recognize-constitutional-carry> [https://perma.cc/DQM8-VA7P].

<sup>80</sup> *History of Concealed Carry in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/History\\_of\\_concealed\\_carry\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/History_of_concealed_carry_in_the_United_States) [https://perma.cc/2HCR-T6TC] (last visited Oct. 2, 2023).

<sup>81</sup> *NRA Achieves Historical Milestone*, *supra* note 79.

<sup>82</sup> *Id.*

<sup>83</sup> *Bruen* listed nearly all of the 25 states that now have “permitless carry” laws in its count of 43 “shall issue” jurisdictions. *See Bruen*, 142 S. Ct. at 2123 n.1. Lumping states that require licenses with those that don’t makes the Court’s categorization confusing, but nearly all of the “permitless carry” states do make licenses available, even to people who may carry firearms without them. *See Eugene Volokh, 43 States to 6 States, Says the S. Ct. About Concealed-Carry Rules: What’s the Missing State?*, REASON (June 25, 2022, 6:45 PM), <https://reason.com/volokh/2022/06/25/43-states-to-6-states-says-the-s-ct-about-shall-issue-concealed-carry-rules-whats-the-missing-state/> [https://perma.cc/L78T-V3HV].

<sup>84</sup> *See, e.g., Jacob Sullum, Handgun Carry Permits Transform a Right into a Privilege*, REASON (Mar. 30, 2022, 12:01 AM), <https://reason.com/2022/03/30/handgun-carry-permits-transform-a-right-into-a-privilege/> [https://perma.cc/NH5B-D885].

<sup>85</sup> *Constitutional Carry*, REPUBLICAN PARTY OF TEX., <https://texasgop.org/constitutional-carry/> [https://perma.cc/8HFV-HFWB] (last visited Oct. 2, 2023).

<sup>86</sup> *See infra* Section I.D.

<sup>87</sup> Early legislatures often provided that a gun carrier could be required to post a surety or peace bond *after* she’d been shown likely to breach the peace. *See Cornell, supra* note 73, at 86–88 (describing how, after the Civil War, “good cause permit ordinances . . . largely supplanted the common law inspired surety based models of enforcing the peace.”).

then, the *Bruen* majority should revise its dictum on the subject to read: “Nothing in our analysis *except our holding* should be interpreted to suggest the unconstitutionality of . . . ‘shall-issue’ licensing regimes.”<sup>88</sup>

### 3. A Glance Ahead

More than any other decision in Supreme Court history, *Bruen* poses the question whether the Court will follow its holding or its dicta. And the likely answer is *dicta*. Whatever the Court may conclude about nonviolent offenders, it probably will not decide that hired assassins have a constitutional right to bear arms, and it probably will not pivot from its assurances concerning “shall issue” licensing requirements to strike down these common regulations. Instead, the Court may retreat from its holding, either forthrightly or, more probably, through a disingenuous use of history that will leave *Bruen*’s façade standing. This Article’s examination of lower-court rulings since *Bruen* will indicate the intellectual stretching that “saving the dicta” requires.<sup>89</sup>

One wonders how the justices who joined the opinion in *Bruen* could (1) renounce “judge-empowering interest balancing,” (2) announce a standard that considers only text, history, and tradition, and then (3) issue ipse dixits concerning regulations not before them without a glance toward history and apparently without much knowledge of these regulations’ pedigrees. Did these justices understand that they had just claimed to abandon their power to evaluate the reasonableness of results? Were they confident that, whatever the standard, they would be able to justify results they liked? Did they fail to realize how sparse firearms regulations were in 1791 and how radical their new standard might prove to be? Might one or more of these justices (as one commentator suggests) have plotted from the outset to sabotage the standard they endorsed?<sup>90</sup>

#### *B. Welcome to the Twilight Zone*

*Bruen* did not explain why pre-1901 American legislatures were entitled to make any departures from the supposedly “plain text” and “unqualified command”

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<sup>88</sup> When a federal district court upheld a licensing scheme approved by Oregon voters after *Bruen*, it did not suggest that this scheme had any possible historical analogues. Relying entirely on *Bruen*’s “considered dictum” that the Second Amendment allows “shall issue” licensing, it considered only whether the scheme was in fact a “shall issue” regime. *Or. Firearms Fed’n v. Kotek*, No. 22-cv-01815-IM, 2023 U.S. Dist. LEXIS 121299, at \*142–54 (D. Or. July 14, 2023).

<sup>89</sup> See *infra* Section II.B.5.

<sup>90</sup> See Mark Joseph Stern, *Brett Kavanaugh May Have Quietly Sabotaged Clarence Thomas’ Extreme Gun Ruling*, SLATE (Feb. 3, 2023, 3:00 PM), <https://slate.com/news-and-politics/2023/02/brett-kavanaugh-clarence-thomas-bruen-second-amendment.html> [<https://perma.cc/7RJ3-RZXS>] (“I do not think five justices agree with *Bruen*.”).

of the Second Amendment (or its state constitutional analogues)—let alone why legislatures thought themselves free to enact one firearm restriction after another with apparent abandon. It identified no principle separating permissible from impermissible limitations and no prevailing public understanding of the Second Amendment’s text at the time of its enactment. Each legislative restriction appeared as though fired at random—rather like scattershot from a blunderbuss. With some exceptions I will describe, the Court concluded that every scattershot enactment restricted the carrying of weapons less than the challenged New York statute. At the end of a slog through seven centuries of English and American arms-regulation history, the Court struck down this statute.

The dissenting justices rejected many of the Court’s historic evaluations. They insisted that many of the scattershot statutes were fully as restrictive as the New York statute and some even more restrictive.<sup>91</sup> This division on issues of history between the Court’s majority (composed of six “conservative” justices appointed by Republican presidents) and its dissenters (composed of three “liberal” justices appointed by Democratic presidents) was revealing. “Originalism” is said by its proponents to reduce the likelihood that judges will mistake their own policy predilections for the law,<sup>92</sup> yet neither “conservatives” nor “liberals” seem at all surprised when, on issue after issue, they differ about the answers to the questions the originalists pose.

Echoing Aquinas’s insistence that law must be based on reason,<sup>93</sup> Lon Fuller spoke sixty years ago of the “inner morality” of even bad law.<sup>94</sup> A system of *law*, he said, requires general, continuing rules announced in advance, consistent with one another, understandable, and adhered to by the agencies charged with administering them.<sup>95</sup> The *Bruen* majority appeared to regard its refusal to look beyond unexplained and possibly arbitrary historical practice as virtuous. But because its standard articulates no coherent or comprehensible objective or principal and because it turns outcomes on ad hoc blips of data, it does not look much like law as Aquinas and Fuller envisioned it.

*Bruen* makes constitutional law a scavenger hunt. The test of the constitutionality of a firearms regulation is whether its proponents can bring before the judges one or more antique regulations that sufficiently resemble it.

At several points in the *Bruen* Court’s march through history, it seemed the defenders of the New York statute might have won the prize. In 1871, three years

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<sup>91</sup> See *Bruen*, 142 S. Ct. at 2181–90 (Breyer, J., dissenting).

<sup>92</sup> See Neil M. Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [<https://perma.cc/6QTV-PMUQ>].

<sup>93</sup> See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I–II, q. 90 (Fathers of the English Dominican Province trans., 1915) (c. 1271).

<sup>94</sup> See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); LON L. FULLER, *THE MORALITY OF LAW* (1964).

<sup>95</sup> See FULLER, *supra* note 94, at 39.

after ratification of the Fourteenth Amendment, Texas permitted someone to carry a pistol in public only when this person had “reasonable grounds for fearing an unlawful attack on his person.”<sup>96</sup> In both 1871 and 1875, the Texas Supreme Court upheld this statute,<sup>97</sup> and the *Bruen* majority “acknowledge[d] that the Texas cases support New York’s proper-grounds requirement, which one can analogize to Texas’ ‘reasonable grounds’ standard.”<sup>98</sup> In 1887, West Virginia approved a statute like Texas’s, which the West Virginia Supreme Court upheld in 1891.<sup>99</sup>

Territorial legislatures in New Mexico and Arizona enacted similar legislation, allowing only people who reasonably feared unlawful attack to carry pistols in cities, towns, and villages.<sup>100</sup> And in 1875, 1889, and 1890, three territorial legislatures went further. Without any exemption for pistol-packing cowboys or virtuous townsfolk who feared attacks by outlaw gangs, Wyoming and Idaho prohibited carrying firearms of any sort in cities, towns, and villages, and Oklahoma prohibited pistol carrying throughout the territory.<sup>101</sup>

None of this history won a cigar. According to the Court, the Texas and West Virginia statutes were outliers,<sup>102</sup> and so were the territorial laws. Moreover, the territorial laws often were “improvisations” because the territories themselves were “transitional and temporary.” Furthermore, the population of the western territories was “minuscule.” More than ninety-nine percent of Americans lived elsewhere. Whether a 19th-century state or territory’s approval of a firearms regulation offered probative evidence of the original understanding of the Second or Fourteenth Amendment apparently depended in part on how many people lived there.<sup>103</sup>

Although *Bruen* says that twins are not required, it holds that octuplets may not be sufficient. There must be so many analogous regulations that courts cannot call them outliers.<sup>104</sup>

<sup>96</sup> 1871 Tex. Gen. Laws 25.

<sup>97</sup> *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1875).

<sup>98</sup> *Bruen*, 142 S. Ct. at 2153.

<sup>99</sup> *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

<sup>100</sup> *Bruen*, 142 S. Ct. at 2154 n.29 (citing 1869 N.M. Laws ch. 32, §§ 1–2, p. 72; 1889 Ariz. Terr. Sess. Laws no. 13, § 1, p. 16).

<sup>101</sup> *Id.* (citing 1875 Wyo. Terr. Sess. Laws ch. 52, § 1; Idaho Terr. Gen. Laws § 1, p. 23; 1890 Okla. Terr. Stats., art. 47, §§ 1–2, 5, p. 495).

<sup>102</sup> *Id.* at 2153.

<sup>103</sup> *Id.* at 2154–55. One day after deciding *Bruen*, the Supreme Court included 13 U.S. territories in its count of American jurisdictions whose legislatures had criminalized abortion at all stages of pregnancy before 1919. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253, app. B at 2296–300 (2022) (citing and quoting the statutes of these 13 territories); Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. (forthcoming), <https://ssrn.com/abstract=4372185> (noting that the Supreme Court has regularly included U.S. territories when counting jurisdictions to evaluate the nation’s acceptance of a rule or practice and that it has not considered population figures in making its counts).

<sup>104</sup> This Article will consider recent decisions on how many analogies *Bruen* requires *infra* Section II.A.1.

*C. Making Irrelevant Evidence Decisive*

Widespread approval of a particular sort of firearms regulation at the time of the ratification of the Second or the Fourteenth Amendment would provide strong evidence that the amendment was not meant to prohibit regulations of that sort. *Bruen* got that much right. (Whether this original understanding should forever control the application of a constitutional principle set forth in sweeping, general language is a separate question. The most prominent originalist of all, Justice Scalia, acknowledged that, although flogging was a prevalent punishment when the Cruel and Unusual Punishment Clause was ratified, he could not imagine himself upholding a statute that imposed this punishment.<sup>105</sup>)

The “fallacy of the converse” or “affirming the consequent,” however, is a logical error.<sup>106</sup> Sometimes this error is easy to spot: “All cats have tails. That animal has a tail. Therefore, it is a cat.” But the fallacy sometimes may slip by. Consider this example: “Just as the widespread approval of a firearms regulation when the Second Amendment was ratified would indicate that the amendment wasn’t meant to disturb this regulation, the absence of any regulation would indicate that the amendment was meant to safeguard the practice left unregulated.”

Writers about originalism sometimes distinguish between a constitutional provision’s original meaning (or sense) and its originally expected applications (or references).<sup>107</sup> *Bruen*’s demand for analogues appears to be a form of “expected application” originalism.<sup>108</sup> When a firearms regulation “addresses a general societal problem that has persisted since the 18th century,” the Court doesn’t search the past to find general rules, principles, or understandings, and it doesn’t investigate the what the words of the constitutional text meant when they became part of the Constitution. Rather, it seeks “distinctly similar historical regulation[s].”<sup>109</sup> And even when a challenged regulation “implicat[es] unprecedented societal concerns or dramatic technological changes” so that a “more nuanced” sort of analogy is

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The three territorial legislatures were not alone in prohibiting the public carry of handguns altogether. At various points, four states did as well. Three of these states’ prohibitions were held unconstitutional, and one’s was upheld. This Article will consider these states’ statutes as well as the rulings concerning their validity *infra* Section I.L.

<sup>105</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

<sup>106</sup> See *Affirming the Consequent*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Affirming\\_the\\_consequent](https://en.wikipedia.org/wiki/Affirming_the_consequent) [<https://perma.cc/F7X8-UAFB>] (last visited Oct. 2, 2023).

<sup>107</sup> E.g., Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS L.J. 555, 559–60 (2006); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 383 (2013).

<sup>108</sup> See John O. McGinnis, *Bruen’s Originalism*, LAW & LIBERTY (July 21, 2022), <https://lawliberty.org/bruens-originalism/> (“Thomas clearly embraces expected applications.”); Joseph Blocher & Eric Ruben, *Originalism by Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 34), <https://ssrn.com/abstract=4408228> [<https://perma.cc/4CG3-DEKE>] (“Within the terminology of originalism, *Bruen* comes closer to original expected applications originalism.”).

<sup>109</sup> *Bruen*, 142 S. Ct. at 2131.

appropriate, the ultimate issue remains whether the challenged regulation is one our ancestors “would have never accepted.”<sup>110</sup> But *Bruen*’s form of “expected application” originalism is distinctive, for it supposes that every legislative *failure* to regulate firearms was an application or reference of the Second Amendment.

*Bruen* treats legislative *inaction* as determinative of constitutional meaning. The failure of a sufficient number of legislatures (in sufficiently populous jurisdictions) to approve a particular sort of regulation before midnight on New Year’s Eve 1900 dooms this regulation forever.<sup>111</sup>

In fact, the failure to regulate a practice provides almost *no* evidence that regulating this practice would be unconstitutional or that anyone thought it would be. Legislatures frequently fail to enact laws, not because they believe the Constitution forbids them, but simply because they haven’t been persuaded that these laws are desirable. (Indeed, legislatures may fail to approve restrictions even when most legislators consider them desirable and no one doubts their constitutionality. The opponents of a proposed restriction need control of only one legislative off-ramp to block it, and inertia kills legitimate proposals too.) If early American legislatures did not require background checks or outlaw gun possession by people with mental illness, those omissions neither establish nor indicate that these regulations violate the Second Amendment. It is far more likely that legislators simply saw no need for them or saw no way to implement them.

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<sup>110</sup> *Id.* at 2132–33.

<sup>111</sup> See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 3), <https://ssrn.com/abstract=4335545> [<https://perma.cc/9XZU-NY55>] (characterizing *Bruen*: “If the nation’s founding generations declined to act, apparently without regard to their grounds or reasons for inaction, then contemporary lawmakers are shackled.”); Andrew Koppelman, *The Supreme Court Lets Domestic Abusers Have Their Guns*, THE AM. PROSPECT (Feb. 21, 2023), <https://prospect.org/justice/02-20-2023-supreme-court-gun-violence-domestic-abuse/> [<https://perma.cc/P9JP-76KG>] (“This isn’t originalism. It is historical fiction. Congress has never mandated that the Capitol building be painted with big red polka dots. That is not evidence that the Constitution prohibits such a decorative choice.”); Ed Whelan, *Badly Botched “Originalist Case for an Abortion Middle Ground,”* NAT’L REV. (Sept. 21, 2021, 11:48 AM), <https://www.nationalreview.com/bench-memos/badly-botched-originalist-case-for-an-abortion-middle-ground/> [<https://perma.cc/BG58-WKCV>] (“When a state chooses to allow an action, it does not ordinarily imply that it lacks the power to prohibit the action. By contrast, when it chooses to bar an action, it ordinarily conveys its belief that it has the power to do so.”).

By itself, the proposition that the failure to enact a regulation evidences its unconstitutionality is not a logical fallacy. Similarly, the proposition that, because an animal has a tail, it must be a cat is not fallacious. It is difficult, however, to imagine how anything other than fallacious reasoning could lead someone to the view that the failure to approve a firearms regulation evidences its unconstitutionality.

A champion of gun rights might balk at the thought that the widespread approval of a firearms regulation shows its validity while the absence of such a regulation has no significant tendency to indicate the opposite. That proposition might seem one-sided, rather like: “Heads I win, tails you lose.” If this person then concluded that things should go both ways, she would embrace “the fallacy of the converse.”



The Supreme Court’s view of the significance of legislative inaction seemed to change overnight. When it overruled *Roe v. Wade* in *Dobbs*, it declared: “[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean anyone thought the States lacked the authority to do so.”<sup>112</sup> The Court also noted that, even if pre-quickening abortion was “*permissible* at common law,” it would not follow “that abortion was a legal *right*.”<sup>113</sup>

In addition, *Bruen* treats the absence of evidence as evidence of absence. Government lawyers cannot present evidence that has disappeared, and evidence of past firearms regulations—especially municipal regulations, which are likely to have been more demanding than state regulations—often may have vanished.<sup>114</sup> Even when this evidence exists in the public-notice sections of pre-20th-century newspapers and in city hall basements, it is difficult to find. (It is especially difficult to find in accordance with a court’s schedule when a challenger has filed a lawsuit and is pressing for an injunction.) Under *Bruen*, both legislative inaction and the government’s inability to produce proof of legislative action create Second Amendment rights.

#### D. Which Text Counts?

To make all-but-irrelevant historical evidence decisive, *Bruen* turns from history to text. It interprets the Second Amendment to make all firearms restrictions—that is, all laws that survive *Bruen*’s Step 1—presumptively unconstitutional, allowing only well-established (though possibly unprincipled and ad hoc) departures from the “plain text” to overcome this presumption.

Which constitutional text invalidated the New York statute, however, is unclear. In 1791, the Second Amendment proclaimed the right to bear arms. In 1833, however, the Supreme Court held that this amendment, like the rest of the Bill of Rights, limited only the federal government.<sup>115</sup> The Fourteenth Amendment became part of the Constitution in 1868. It forbade any state from abridging the privileges or immunities of United States citizens and from depriving any person of life, liberty, or property without due process of law. In 1875, 1886, and 1894, however, the Supreme Court held that the federal Constitution still did not protect the right to bear arms from state limitation or abrogation.<sup>116</sup>

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<sup>112</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2255 (2022).

<sup>113</sup> *Id.* at 2250 (emphasis in original).

<sup>114</sup> See text accompanying notes 369–85 & note 369 *infra*.

<sup>115</sup> *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247–48 (1833). Some state courts concluded even after *Barron* that the Second Amendment limited state firearm restrictions. See John Forrest Dillon, *The Right to Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259, 296 (1874) (citing these decisions and prophesying correctly that Supreme Court would hold “that every state has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether”).

<sup>116</sup> *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894).

In the 1940s, the Supreme Court held that some actions that would violate the Bill of Rights if taken by the federal government also would violate the Fourteenth Amendment's Due Process Clause if taken by a state. But the Court's decisions usually afforded rights a narrower scope under the Fourteenth Amendment than they had under the Bill of Rights.<sup>117</sup> A 1942 decision declared that action by a state would violate the Due Process Clause only when it amounted to a "denial of fundamental fairness, shocking to the universal sense of justice."<sup>118</sup>

Warren Court decisions in the 1960s took a different view. They declared that a number of Bill of Rights provisions were fully "incorporated" in the Due Process Clause. These provisions were "to be enforced against the States . . . according to the same standards that protect those personal rights against federal encroachment."<sup>119</sup> Judge Henry Friendly remarked: "Whatever one's views about the historical support for Mr. Justice Black's wholesale incorporation theory, it appears undisputed that the selective incorporation theory has none."<sup>120</sup>

Nearly five decades later, in *McDonald v. City of Chicago*, the Supreme Court held that one clause or another of the Fourteenth Amendment made the Second Amendment applicable to the states.<sup>121</sup> The justices in the majority differed, however, about which clause did the job. Concurring Justice Thomas maintained that the Privileges and Immunities Clause as originally understood incorporated the Second Amendment and most other provisions of the Bill of Rights (though not necessarily all of them).<sup>122</sup> Justice Alito's opinion for a four-justice plurality invoked the Due Process Clause.<sup>123</sup>

The plurality opinion claimed no originalist justification for the Court's ruling. It relied entirely on Warren Court precedents and their progeny. A year earlier, one of the justices who joined this opinion, Justice Scalia, called incorporation "a mistake."<sup>124</sup> He had previously written that the Second Amendment, properly understood, "is no

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<sup>117</sup> See *Betts v. Brady*, 316 U.S. 455, 473 (1942); *Wolf v. Colorado*, 338 U.S. 25, 27–28, 33 (1949).

<sup>118</sup> *Betts*, 316 U.S. at 462.

<sup>119</sup> *Malloy v. Hogan*, 378 U.S. 1, 10 (1964); see *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

<sup>120</sup> Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934 (1965).

<sup>121</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

<sup>122</sup> *Id.* at 806 (Thomas, J., concurring). Justice Thomas doubted that the Privileges and Immunities Clause incorporated provisions like the First Amendment's Establishment Clause, which he said were "not readily construed as protecting rights that belong to individuals." *Id.* at 850–51, 851 n.20.

<sup>123</sup> *Id.* at 758 (plurality opinion).

<sup>124</sup> Peter Robinson, *Uncommon Knowledge with Peter Robinson: Law and Justice with Antonin Scalia*, THE HOOVER INST. at 24:28 (Mar. 16, 2009) [hereinafter *Uncommon Knowledge with Peter Robinson*], <https://www.hoover.org/research/law-and-justice-antonin-scalia> [<https://perma.cc/U388-HURH>].

limitation upon arms control by the states.”<sup>125</sup> Concurring in *McDonald*, however, Justice Scalia wrote: “Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s interpretation of certain guarantees in the Bill of Rights.”<sup>126</sup>

Academic writers have taken various views of when originalist judges should defer to precedents that depart from the original understanding,<sup>127</sup> but they have said little about how originalist judges should treat non-originalist precedents once they have concluded that deference is appropriate. Should these judges merely refrain from overruling decisions they consider misguided? Or may they also broaden them? May they pray with St. Augustine: “Lord, make me chaste, but not yet”?<sup>128</sup> Or perhaps join rappers MC Breed and Tupac Shakur in chanting: “Gotta get mine”?<sup>129</sup>

*Bruen* declined to specify which clause (the Due Process Clause or the Privileges and Immunities Clause), which amendment (the Second or the Fourteenth), or which date (1791 or 1868) mattered. It declared that “the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.”<sup>130</sup>

Although *Bruen* did not decide which amendment mattered, it did rule out one possibility—originalism. *Bruen* repeatedly endorsed this statement of the originalist

<sup>125</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION 137 (Princeton Univ. Press 1997).

<sup>126</sup> *McDonald*, 561 U.S. at 791 (Scalia, J., concurring).

<sup>127</sup> See, e.g., Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (2010).

<sup>128</sup> 1 ST. AUGUSTINE’S CONFESSIONS 441 (William Watts trans., 1912) (acknowledging that, as a “wretched young fellow,” Augustine begged: “Give me chastity and continency, but do not give it yet.”).

<sup>129</sup> MC Breed, *Gotta Get Mine (feat. 2Pac)*, YOUTUBE (2011), <https://www.youtube.com/watch?v=2Tr3fM8vkX4> [<https://perma.cc/3PD4-2JR8>]; cf. Albert W. Alschuler & Laurence H. Tribe, *Some Questions for the Alito Five*, VERDICT JUSTIA (June 9, 2022), <https://verdict.justia.com/2022/06/09/some-questions-for-the-alito-five> [<https://perma.cc/DC6U-E7JY>] (asking originalist justices: “Are you ever secretly pleased that some of your predecessors weren’t originalists? In the wee hours of the night, does it sometimes seem fortunate that their decisions allow you to have your cake and eat it too?”).

In 2009, Justice Scalia explained his deference to decisions making Bill of Rights provisions applicable to the states by noting the public’s reliance on these decisions: “It’s too late. It’s been established for half a century. I’m not about to tell the people of New York State that their state government is no longer bound by the First Amendment. There’d be hell to pay.” *Uncommon Knowledge with Peter Robinson*, *supra* note 124, at 24:47. But the principle of letting sleeping dogs lie argued against the decisions in *McDonald* and *Bruen*. The Supreme Court upset the expectations of more than a century when it told the people of New York that their state government no longer had the power to prohibit the public carry of handguns in the absence of special need.

<sup>130</sup> *Bruen*, 142 S. Ct. at 2138.

principle: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>131</sup> A straightforward application of this principle would have looked to the original understanding of the Second Amendment to judge firearms restrictions imposed by the federal government and to the original understanding of the Fourteenth Amendment to judge firearms restrictions imposed by the states. But the *Bruen* Court wrote: “[W]e have made clear that the individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.”<sup>132</sup> When the original understandings of the Second and Fourteenth Amendments differed, the Court would disregard one or the other.

In support of this position, *Bruen* cited a Warren Court decision that called it “incongruous” for one version of a right to apply to actions by the federal government and a different version to apply to actions by a state.<sup>133</sup> But this decision rejected only the claim, supported by the 1940s decisions noted above, that the Fourteenth Amendment itself “applie[d] to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’”<sup>134</sup> *McDonald* and

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<sup>131</sup> *Id.* at 2219, 2136 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)). This statement differs from the central principle of many originalist scholars. *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 35 HARV. J.L. & PUB. POL’Y 65, 69 (2011) (“[O]riginalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment.”); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 116 (2010) (“Originalists assert that the meaning of the Constitution is the original public meaning of the text: in the case of the Constitution of 1789, that means that the meaning of the text is a function of the conventional semantic meaning of the words, phrases, and patterns of usage . . . that prevailed at the time these provisions of the Constitution were framed and ratified.”).

The Supreme Court’s statement, focusing on the “scope” of the right, apparently encompasses the process these scholars call “construction,” which they distinguish from “interpretation” of the text. In their view, “interpretation” addresses only issues of semantics. It concerns the historic *meaning* of the text. “Construction” concerns issues of implementation once the semantic meaning of the text has been determined. All of the issues addressed by Step 2 of the *Bruen* standard appear to be issues of “construction”—that is, until one notices that the word “right” and the words “the right to bear arms” are included in the constitutional text. Investigation of what the word “right” meant in 1791 is a question of semantics, and if “the right to bear arms” was a term of art whose meaning was either greater or less than the sum of its parts, the identification of its historic meaning is a semantic issue too. Dictionaries and rules of grammar are unlikely to give simple or definitive answers to “interpretive” issues of this sort.

Less sophisticated than originalist scholars, dictionaries treat the words “construction” and “interpretation” as synonyms. *See Construction*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/construction> [<https://perma.cc/HLZ2-DL73>] (last visited Oct. 2, 2023) (defining “construction” as “the act or result of construing, interpreting, or explaining”).

<sup>132</sup> *Id.* at 2137.

<sup>133</sup> *See Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964).

<sup>134</sup> *Id.*

*Bruen* presented a different issue—whether to abandon the original meaning of either the Second Amendment or the Fourteenth because adhering to both would be messy. Balancing the relevant interests *sub silentio*, it chose to avoid the incongruity of recognizing two different rights to bear arms.<sup>135</sup>

The Court left unsettled which amendment’s original understanding it would abandon. It might have advanced the claim the *McDonald* plurality didn’t make: that the ratifiers of the Fourteenth Amendment meant to “incorporate” the Second Amendment. Then it might have advanced the even more dubious claim that the ratifiers of the Fourteenth Amendment intended to set aside their own understanding of the right to bear arms and to accept the understanding of the earlier ratifiers.<sup>136</sup> But *Bruen* pointed to another possibility: “reverse incorporation.” It quoted Kurt Lash, an academic booster of back-to-the-future travel: “When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings.”<sup>137</sup>

A concurring opinion by Justice Barrett observed that which amendment’s original meaning to endorse was among the “methodological points that the Court does not resolve.”<sup>138</sup> She joined the other members of the majority in saying there was no need to resolve this issue in *Bruen*.

As this Article will show, Americans’ understanding of the right to bear arms for purposes of self-defense did not vary greatly between 1791 and 1868.<sup>139</sup> But, if

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<sup>135</sup> It is difficult for originalist judges to say out loud that they depart from the original understanding when the consequences of adhering to this understanding would be incongruous. That concession might dissipate the mystique and open the door more than a crack to normative judgment.

<sup>136</sup> See generally Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 2022 HARV. J.L. & PUB. POL’Y PER CURIAM 1.

<sup>137</sup> *Bruen*, 142 S. Ct. at 2138 (quoting K. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* (Jan. 15, 2021) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3766917](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917)) (now published as Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441–42 (2022)). The model for reverse incorporation is *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment’s Due Process Clause applies to the federal government an equal protection principle identical to the one the Fourteenth Amendment’s Equal Protection Clause applies to the states).

<sup>138</sup> *Id.* at 2162 (Barrett, J., concurring).

<sup>139</sup> See *infra* Section I.J. This section assumes that *Heller* correctly interpreted the Second Amendment to guarantee a personal right to armed self-defense, a right that many state constitutional guarantees of the right to bear arms clearly did include. It describes the scope of this right in the states that recognized it and shows that the courts’ understanding of this right did not vary significantly from the Founding through the start of the 21st century. But Section I.J. does not revisit *Heller* or consider *whether* the Second Amendment includes a right to armed self-defense or instead is limited to guaranteeing “a well regulated Militia.” Views of this issue might indeed have shifted between 1791 and 1868. See Andrew Willinger, *What do the Fourteenth Amendment Debates Reveal About the Historical Reference Point*

one were to assess the meaning of the right as *Bruen* does, one would find the right transformed between the dates of the two amendments, for firearms regulations became much more plentiful during the intervening years. Confining the hunt for analogues to the relatively barren fields of the late 18th and early 19th centuries would ensure that many fewer contemporary regulations would survive. As Justice Barrett wrote: “[I]f 1791 is the benchmark, then New York’s appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little).”<sup>140</sup> *Bruen*’s demand for analogues, rather than any actual change in public understanding of the scope of the right to bear arms, makes the identification of a benchmark date significant.

Post-*Bruen* decisions concerning age restrictions on the purchase and carry of firearms show what a difference a date makes. In 2018, in the Marjory Stoneman Douglas High School Public Safety Act, Florida barred people under 21 from purchasing firearms.<sup>141</sup> (This act was named for a Florida high school where a 19-year-old recently had murdered seventeen students, teachers, and coaches and injured seventeen more with an AR-15 rifle he had purchased lawfully.<sup>142</sup>) When the Eleventh Circuit upheld this prohibition, Judge Rosenbaum wrote for the court:

[T]he States are “bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second.” And so the understanding of the Second Amendment right that ought to control in this case—where a State law is at issue—is the one shared by the people who adopted “the Fourteenth Amendment, not the Second.”<sup>143</sup>

But the Eleventh Circuit withdrew this opinion when, more than four months after issuing it, the court agreed to review the case en banc.<sup>144</sup> And federal district courts in Minnesota, Texas, and Virginia concluded that the original understanding of the Second Amendment, not the Fourteenth, was determinative. The courts in Minnesota and Texas struck down state statutes that limited the public carry of handguns to

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*for Incorporated Second Amendment Challenges?*, SECOND THOUGHTS BLOG (Apr. 19, 2023), <https://firearmslaw.duke.edu/2023/04/what-do-the-fourteenth-amendment-debates-reveal-about-the-historical-reference-point-for-incorporated-second-amendment-challenges/> [<https://perma.cc/F94K-DLKG>].

<sup>140</sup> See *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring).

<sup>141</sup> FLA. STAT. ANN. § 790.065 (West 2022).

<sup>142</sup> *Stoneman Douglas High School Shooting*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Stoneman\\_Douglas\\_High\\_School\\_shooting](https://en.wikipedia.org/wiki/Stoneman_Douglas_High_School_shooting) [<https://perma.cc/JL3H-S9JA>] (last visited Oct. 2, 2023).

<sup>143</sup> *NRA v. Bondi*, 61 F.4th 1317, 1323 (11th Cir. 2023) (citations omitted) (quoting *Bruen*, 142 S. Ct. at 2137), *vacated pending rehearing en banc*, 2023 U.S. App. LEXIS 17960 (11th Cir. July 14, 2023).

<sup>144</sup> *NRA v. Bondi*, No. 21-12314, 2023 U.S. App. LEXIS 17960 (11th Cir. July 14, 2023).

people over twenty-one.<sup>145</sup> And the court in Virginia held invalid a federal statute barring firearms dealers from selling handguns to people under 21.<sup>146</sup> The now withdrawn opinion of the Eleventh Circuit and the opinions of the three district courts did not differ significantly in their recitations of history.<sup>147</sup>

No laws restricted the purchase or carry of firearms by minors in 1791 when the Second Amendment was ratified, and none appeared in the following half century. Finding “distinctly similar” analogues to modern age restrictions might be impossible if the scavenger hunt were confined to the Founding era.

Of course, the Founding generation failed to regulate the purchase and carry of firearms by 10-year-olds as well as 18-year-olds. Would 10-year-olds have a

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<sup>145</sup> *Worth v. Harrington*, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, at \*9 (D. Minn. Mar. 31, 2023); *Firearms Pol’y Coal. v. McCraw*, 623 F. Supp. 3d 740, 745 (N.D. Tex. 2022). The Attorney General of Texas declined to appeal the *McCraw* ruling. Roxanna Asgarian, *Texas Drops Fight to Prevent 18- to 20-Year-Olds from Carrying Handguns in Public*, TEX. TRIB. (Dec. 21, 2022), <https://www.texastribune.org/2022/12/21/texas-handguns-unconstitutional-public-carry/#:~:text=Texas%20will%20no%20longer%20fight,notice%20that%20it%20would%20appeal> [<https://perma.cc/GU4Q-Z3ZD>].

In Tennessee, the state attorney general approved a “settlement” after a gun-rights group challenged a law that allowed only people over 21 to carry firearms without a permit. This agreement acknowledged that 18-year-olds have the same right as people over 21 to carry without a permit, and it provided that the state would reimburse the challenger’s legal fees. Jake Fogleman, *Tennessee Forced to Allow 18-to-20-Year-Olds to Carry Guns, Pay Gun-Rights Group’s Legal Fees*, THE RELOAD (Jan. 23, 2023, 6:17 PM), <https://thereload.com/tennessee-to-allow-18-to-20-year-olds-to-carry-guns-pay-gun-rights-groups-legal-fees/> [<https://perma.cc/XG85-Z4TE>].

Five months before the Texas ruling, an 18-year-old murdered 19 students and two teachers at a grade school in Uvalde, Texas. He used firearms he had purchased within days of the date it became lawful for him to do so, his 18th birthday. Julia Jacobo & Nadine El-Bawab, *Timeline: How the Shooting at a Texas Elementary School Unfolded*, ABC NEWS (Dec. 12, 2022, 12:00 PM), <https://abcnews.go.com/US/timeline-shooting-texas-elementary-school-unfolded/story?id=84966910> [<https://perma.cc/J5SH-HRC3>]. In a debate between Texas gubernatorial candidates in November, challenger Beto O’Rourke endorsed raising the age for purchasing an assault rifle to 21, but incumbent Greg Abbott, pointing to *Bruen* and “the most recent federal court of appeals decision,” declared: “It’s a false promise to suggest that we can pass a law that will be upheld.” *Transcript: 2022 Texas Governor Candidate Debate Featuring Incumbent Greg Abbott and Candidate Beto O’Rourke*, NOWCASTSA (Nov. 8, 2022, 1:22 PM), <https://nowcastsa.com/news/transcript-2022-texas-governor-candidate-debate-featuring-incumbent-greg-abbott-and-candidate> [<https://perma.cc/4273-JYXB>].

<sup>146</sup> *Fraser v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 3:22-cv-410, 2023 U.S. Dist. LEXIS 82432 (E.D. Va. May 10, 2023).

<sup>147</sup> Concurring in *Bruen*, Justice Alito wrote: “Our decision . . . does not expand the categories of people who may lawfully possess a gun, and federal law generally forbids the possession of a handgun by a person who is under the age of 18 and bars the sale of a handgun to anyone under the age of 21.” *Bruen*, 142 S. Ct. at 2157–58 (Alito, J., concurring). Justice Alito made no effort to reconcile this statement with *Bruen*’s holding or to justify it with a reference to firearms-regulation history. In that respect, it resembles the other reassuring dicta in his and Justice Kavanaugh’s concurring opinions. *See supra* Section I.A.

constitutional right to carry if the government could not show that restricting their carry was “consistent with the Nation’s historical tradition of firearm regulation”? (Even if Bruen’s defenders could find an escape from this conclusion, something seems wrong with a legal standard that forbids interest balancing and appears to answer this question yes.)

Although the absence of Founding-era age restrictions might itself mandate the invalidation of age restrictions after *Bruen*, other evidence of the Founding generation’s understanding does exist. This evidence might convince even old-fashioned originalists—those who seek actual evidence of Founding-era-understandings—to invalidate some age restrictions.

Five months after ratification of the Second Amendment, the First Congress exercised the power granted it by Article I, Section 8, Clause 16 of the Constitution “[t]o provide for organizing, arming, and discipling, the Militia.”<sup>148</sup> It provided:

That each and every free able-bodied white male citizen of the respective states . . . who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . . [And] that every citizen so enrolled and notified shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball . . . .<sup>149</sup>

Before ratification of the Constitution, most colonies and states had set the age for enlistment in their militias at 16.<sup>150</sup> The Founding generation evidently thought that at least some young people (the white male ones) could be trusted with firearms.

The Second Amendment declares that a “well regulated Militia [is] necessary to the security of a free State,” and its authors saw the maintenance of this militia as a means of avoiding the dangers posed by a standing professional army.<sup>151</sup> Weakening the militia by disarming people under 21 might well have been seen as unconstitutional. How far the rights of young militiamen would have extended under state and federal constitutions, however, is anyone’s guess. Even if disarmament or a ban on the buying muskets would have been unconstitutional, perhaps young

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<sup>148</sup> U.S. CONST. art. I, § 8, cl. 16.

<sup>149</sup> Second Militia Act of May 8, 1792, ch. 33 § 1, 1 Stat. 271 (repealed by Act of Feb. 28, 1795, ch. 39, 1 Stat. 424).

<sup>150</sup> *James v. Bonta*, 34 F.4th 704, 718 (9th Cir. 2022), *vacated and remanded on rehearing*, 47 F.4th 1124 (9th Cir. 2022) (mem.) (returning the case to the district court for further proceedings consistent with *Bruen*).

<sup>151</sup> See *infra* Section I.K.3.



militiamen could have been prohibited from carrying handguns in public when not engaged in military activity. We are unlikely to know the answer to that question because it didn't arise. Almost no one, minor or adult, carried handguns in public. Gentlemen kept their dueling pistols at home.<sup>152</sup>

A jump forward to the Reconstruction era and a change of focus to the authority of states to regulate firearms after the approval of the Fourteenth Amendment reveals a different picture. By then, Samuel Colt had invented the revolver;<sup>153</sup> the citizen militias of the Framers' era were essentially a dead letter;<sup>154</sup> and criminal firearm violence by young men under 21 was starting to make headlines.<sup>155</sup> In 1855, Alabama prohibited selling, giving, or lending any bowie knife, air gun, or pistol to any male minor. Two other states approved similar laws before the Civil War. By 1897, the District of Columbia and nineteen of the forty-five U.S. states had laws restricting the sale, gift, or other transfer of handguns to minors, or (rarely) the carry of handguns by minors.<sup>156</sup>

The legislatures that enacted these provisions did not consider them unconstitutional, and neither did the public. Only one of these laws seems to have been challenged, and, when the Tennessee Supreme Court upheld it in 1878, the court remarked: “[W]e regard the acts to prevent the sale, gift, or loan of a pistol or other like dangerous weapon to a minor, not only as constitutional as tending to prevent crime, but wise and salutary in all its provisions.”<sup>157</sup> If someone had told state legislators in 1868 that a vote to ratify the Fourteenth Amendment was a vote to strike down established gun laws and to block them from enacting “wise and salutary” new ones, they might have been as surprised as if someone had informed them that ratifying the amendment would afford women a constitutional right to end their pregnancies.<sup>158</sup>

It was as easy for the Eleventh Circuit to find close analogues to the Marjory Stoneman Douglas High School Public Safety Act in the Reconstruction era as it would have been difficult for a court to do so in the Founding era. By leaving the critical period unsettled, *Bruen* permitted scavenger hunts through the entire 19th century, making its demands appear less severe than they would have been if the Court had had confined litigants' hunts to the Founding era. The Court gave fair warning, however, that the best stocked area of the hunting ground might soon be declared off-limits.

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<sup>152</sup> See generally Mark Anthony Frassetto, *The Myth of Open Carry*, 55 U.C. DAVIS L. REV. 2515 (2022).

<sup>153</sup> See *infra* text accompanying notes 181–84.

<sup>154</sup> See *infra* text accompanying notes 302–07.

<sup>155</sup> See *Bondi*, 61 F.4th at 1319, *vacated*, 72 F.4th 1346 (mem.).

<sup>156</sup> These states' laws are cited and described in an appendix to *id.* at 1333–38.

<sup>157</sup> *State v. Callicutt*, 69 Tenn. 714, 716–17 (1878).

<sup>158</sup> See *Bondi*, 61 F.4th at 1330 (“It would be odd indeed if the people who adopted the Fourteenth Amendment did so with the understanding that it would invalidate widely adopted and widely approved-of gun regulations at the time.”).

*Bruen* in fact left only one way to avoid this restriction, which was to embrace “reverse incorporation.” And the Eleventh Circuit embraced it in the opinion that now has been withdrawn pending en banc review:

As with statutes, when a conflict arises between an earlier version of a constitutional provision (here, the Second Amendment) and a later one (here, the Fourteenth Amendment and the understanding of the right to keep and bear arms that it incorporates), “the later-enacted [provision] controls to the extent it conflicts with the earlier-enacted [provision].”<sup>159</sup>

Although state legislators would have been surprised to learn that a vote to ratify the Fourteenth Amendment was a vote to strike down recently approved firearms regulations, they might have been even more surprised to discover that, by approving the words “due process” and “privileges and immunities” in an amendment that would limit only the states, they were voting to amend the Second Amendment and the rules this amendment would apply to the federal government. But nonsense begets nonsense, and the invention of legal fictions in the pursuit of justice has a noble history.

The federal district court that struck down the federal ban on selling handguns to people under 21 rested its decision on a misreading of *Bruen*. It wrote:

[B]ecause this case concerns federal law, the Court is bound, under *Bruen*, to give the most weight to Founding-era evidence. The Fourteenth Amendment did nothing to affect the meaning of the Second Amendment when adopted. Unlike when considering the constitutionality of state laws, the Court does not need to assess the understanding of the Second Amendment at the time of the passage of the Fourteenth Amendment.<sup>160</sup>

This statement ignored *Bruen*’s declaration that the scope of the right to bear arms under the Second and Fourteenth Amendments is identical<sup>161</sup> and its reservation of the choice between “incorporation” and “reverse incorporation.”<sup>162</sup>

The federal courts in Minnesota and Texas that struck down state statutes limiting the public carry of handguns by people under 21 recognized that *Bruen* left open the possibility that Reconstruction-era understandings might be decisive. These courts did give the Reconstruction-era laws some attention. But they focused

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<sup>159</sup> *Id.* at 1323–24 (quoting *Miccosukee Tribes of Fla. v. U.S. Army Corps of Eng’rs*, 619 F.3d 1289, 1299 (11th Cir. 2010)).

<sup>160</sup> *Fraser*, 2023 U.S. Dist. LEXIS 82432, at \*38 n.21.

<sup>161</sup> *Bruen*, 142 S. Ct. at 2137.

<sup>162</sup> *Id.* at 2138.

primarily on Founding-era understandings because they doubted that the Court meant its reservation seriously.<sup>163</sup> In their view, the Court tipped its hand when it wrote: “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 the original meaning as earlier sources.’”<sup>164</sup> And Justice Barrett seemed to reveal her inclinations when she cautioned: “[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.”<sup>165</sup>

Part II of this Article will examine the lower federal courts’ applications of *Bruen* during the year after that decision. During this period, although gun-law defenders searched all pre-20th-century history for analogues, state and federal gun laws fell like mobsters on St. Valentine’s Day. Narrowing the hunt to the regulation-thin Founding era would make *Bruen*’s standard worse. Courts would invoke the Fourteenth Amendment to strike down firearms regulations the ratifiers of that amendment would have upheld, and one likely casualty would be the age restrictions of the Marjory Stoneman Douglas High School Public Safety Act. The Supreme Court’s purported originalists would have assumed the power to depart from the original meaning in the name of originalism.

#### *E. Or Does Neither Text Matter?*

*Bruen* declares: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>166</sup> But the Court presented no evidence that anyone in either 1791 or 1868 thought that the right to bear arms rendered every firearms regulation presumptively unconstitutional. It offered no evidence that anyone in 1791 or 1868 maintained that only firearms regulations sufficiently analogous to well-established historic limitations could pass constitutional muster. And it presented no evidence that anyone in 1791 or 1868 imagined that, without more, the *absence* of legislative measures had any bearing on the meaning of the right to bear arms. Today’s purportedly originalist justices made up the *Bruen* standard all by themselves.

I will speak later about how people in 1791 and 1868 did understand the right to bear arms and about why *Bruen*’s inversion of the presumption of constitutionality,

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<sup>163</sup> See *Worth v. Harrington*, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, at \*25–31 (D. Minn. Mar. 31, 2023); *Firearms Pol’y Coal. v. McCraw*, 623 F. Supp. 3d 740, 756 (N.D. Tex. 2022).

<sup>164</sup> *Bruen*, 142 S. Ct. at 2137 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

<sup>165</sup> *Id.* at 2163 (Barrett, J., concurring); see also *id.* at 2147 n.22 (majority opinion) (discounting a regulation partly because it was “enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights”); *id.* at 2154 (discounting territorial laws partly because they were “enacted nearly a century after the Second Amendment’s adoption”).

<sup>166</sup> *Id.* at 2219, 2136 (quoting *Heller*, 54 U.S. at 634–35).

repudiation of interest-balancing, and demand for historic analogues all depart radically from the original understanding.<sup>167</sup>

#### *F. Adaptability*

Quoting a classic statement of Chief Justice Marshall in *McCulloch v. Maryland*, *Bruen* observed:

Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.<sup>168</sup>

Contending that its style of originalism would allow legislatures to meet present and future needs, *Bruen* endorsed two sorts of analogies—one for problems recognized by the Founding generation and another for unanticipated challenges.

The Court’s description of the first sort of analogy embraced the logical fallacy that permeates its opinion: “[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”<sup>169</sup> As explained above, legislative inaction has no significant tendency to show a Second Amendment violation. *Bruen* apparently missed the distinction between declining to act and lacking the authority to do so.

The Court declared that “cases implicating unprecedented societal concerns or dramatic technological changes” might require a “more nuanced” sort of analogy.<sup>170</sup>

<sup>167</sup> See *infra* Section I.J.

<sup>168</sup> *Bruen*, 142 S. Ct. at 2132 (citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)). The Court observed: “We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to ‘arms’ does not apply ‘only [to] those arms in existence in the 18th century.’” *Id.* (quoting *Heller*, 554 U.S. at 582). But the fact that the Court’s concept of arms expands to encompass new weapons while its concept of legitimate regulatory authority is tied to the past suggests that the adaptability it approves is one-sided.

<sup>169</sup> *Id.* at 2131. Although this sentence spoke of legislative inaction simply as “relevant evidence,” the Court in fact made legislative inaction determinative. The *Bruen* standard says that, when the Second Amendment’s text covers an individual’s conduct, the government can justify regulating this conduct only by demonstrating that its regulation is “consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2130. And the only way to demonstrate consistency with the nation’s historical tradition is to point to an adequate number of pre-20th-century analogues. With sufficient analogues, the regulation will stand; without them, it will fall. *Bruen* thus makes the absence of pre-20th-century analogues decisive.

<sup>170</sup> *Id.* at 2132.

It identified two inquiries as “central” to analogies of this second type: “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified . . . .”<sup>171</sup>

The Court placed the challenged New York statute in its first category. It declared that this statute addressed “a general societal problem that has persisted since the 18th century”—“‘handgun violence,’ primarily in ‘urban area[s].’”<sup>172</sup> That categorization, the Court said, made “the historical analogies . . . relatively simple to draw,”<sup>173</sup> and the lack of a “distinctly similar historical regulation” was fatal.<sup>174</sup>

The Court, however, might equally have placed the challenged statute in its second category. From the vantage points of 1791 and 1868, virtually *all* current firearms regulations “implicat[e both] unprecedented societal concerns [and] dramatic technological changes.”<sup>175</sup> Like the old gray mare, handgun violence primarily in urban areas ain’t what it used to be.

Gun-control debates today are likely to focus on the most recent mass shooting of schoolchildren, high school students, college students, Bible students, parade goers, baseball players, nightclub goers, movie goers, concert goers, dance-hall patrons, supermarket patrons, shopping-mall patrons, military personnel, worshipers, office workers, or pedestrians.<sup>176</sup> Six hundred forty-eight mass shootings occurred in the United States in 2022.<sup>177</sup> (Mass shootings are defined in this count as incidents in which a shooter killed or injured at least four people other than herself.<sup>178</sup>) Not a week had gone by without one.

Gunfire is currently the leading cause of death of children and adolescents in the United States. This cause surpassed vehicle accidents in 2020.<sup>179</sup> In every other large, prosperous democracy, at least at least four other causes rank higher.<sup>180</sup>

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<sup>171</sup> *Id.* at 2133.

<sup>172</sup> *Id.* at 2131.

<sup>173</sup> *Id.* at 2132.

<sup>174</sup> *Id.* at 2131.

<sup>175</sup> *Id.* at 2132.

<sup>176</sup> See generally Alex Kingsbury, *Gunman in \_\_\_\_\_ Kills \_\_\_\_\_*, N.Y. TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/27/opinion/editorials/american-mass-shootings-texas.html> [<https://perma.cc/M84Z-7G5M>].

<sup>177</sup> *Mass Shootings in 2022*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/reports/mass-shooting?year=2022> [<https://perma.cc/85FD-C2S3>] (last visited Oct. 2, 2023).

<sup>178</sup> *General Methodology*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/methodology> [<https://perma.cc/VD44-88ET>] (last visited Oct. 2, 2023).

<sup>179</sup> Jason E. Goldstick et al., *Current Causes of Death in Children and Adolescents in the United States*, NEW ENG. J. MED. (May 19, 2022), <https://www.nejm.org/doi/full/10.1056/nejmc2201761> [<https://perma.cc/2L7K-Y32V>].

<sup>180</sup> Matt McGough et al., *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, GLOB. HEALTH POL’Y (July 8, 2022), [https://www.kff.org/global-health-policy/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries/?te=1&nl=the-morning&emc=edit\\_nn\\_20221215](https://www.kff.org/global-health-policy/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries/?te=1&nl=the-morning&emc=edit_nn_20221215) [<https://perma.cc/C29Q-4QLL>]. Most Black and Hispanic residents of Chicago have personally seen someone shot. See Charles C. Lanfear et al.,

Before Samuel Colt patented a revolver in 1835,<sup>181</sup> loading a firearm almost invariably required pouring loose powder down a barrel, inserting leather or cloth for wadding, and using a ramrod to seat a projectile on the charge.<sup>182</sup> A well-trained shooter could fire only three times per minute.<sup>183</sup> Mass shootings were unimaginable. The process of loading and firing also made it unlikely children would stumble upon firearms and harm themselves or others. Primitive firearms as well as the absence of automobiles made drive-by shootings difficult, and 18th-century weapons were considerably less efficient than modern ones for killing law-enforcement officers, shooting fleeing suspects, holding up liquor stores, and guarding crack houses.

Revolvers became widely available only after Colt's patent expired in 1857.<sup>184</sup> In 1859, the Texas Supreme Court upheld a statute that declared someone guilty of murder if she used a Bowie knife or dagger to commit a crime that would have been only manslaughter if she'd used a firearm. The court explained why, even on the eve of the Civil War, it regarded the knife as more dangerous than the gun:

The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. . . . The bowie-knife differs . . . in its device and design; it is the instrument of almost certain death. He who carries such a weapon . . . makes himself more dangerous to the rights of others, considering the frailties of human nature, than if he carried a less dangerous weapon.<sup>185</sup>

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*Inequalities in Exposure to Firearm Violence by Race, Sex, and Birth Cohort From Childhood to Age 40 Years, 1995–2021*, JAMA NETWORK (May 8, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2804655> [<https://perma.cc/2H5W-6W72>].

<sup>181</sup> See *Samuel Colt*, HIST. (Mar. 22, 2023), <https://www.history.com/topics/inventions/samuel-colt>; Richard C. Rattenbury, *Colt Revolvers*, TEX. STATE HIST. ASS'N (Oct. 2, 2019), <https://www.tshaonline.org/handbook/entries/colt-revolvers> [<https://perma.cc/UJH3-RABX>]. Colt obtained an English patent in 1835 and a U.S. patent one year later.

<sup>182</sup> See *Firing Muzzleloaders*, TEX. PARKS & WILDLIFE DEP'T, <https://tpwd.texas.gov/education/hunter-education/online-course/primitive-hunting/firing-muzzleloaders> [<https://perma.cc/Z2FX-J8G6>] (last visited Oct. 2, 2023).

<sup>183</sup> See *Firearms*, HIST. (Mar. 27, 2023), <https://www.history.com/topics/inventions/fire-arms> [<https://perma.cc/8TNW-2MRN>] (“A well-trained soldier could generally fire and reload a flintlock weapon three times a minute, whereas the American long rifle required a more tightly loaded bullet and generally took a minute to load and fire a single shot.”).

<sup>184</sup> Brennan Gardner Rivas, *In the Past, Americans Confronted Gun Violence by Taking Action*, WASH. POST (June 3, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/06/03/past-americans-confronted-gun-violence-by-taking-action/> [<https://perma.cc/6JU6-AB2L>]. With the expiration of Colt's patents, competitors including Smith & Wesson began manufacturing revolvers.

<sup>185</sup> *Cockrum v. State*, 24 Tex. 394, 402–03 (1859). It seems that bringing a knife to a gunfight was once a good idea. See *Cassius Marcellus Clay: Kentucky Gladiator*, BOWIE KNIFE FIGHTS, FIGHTERS & FIGHTING TECH. (Mar. 11, 2011), <http://bowieknifefightsfighters.blog>

Long-gun violence in both urban and rural areas ain't what it used to be either. In 2017, sniper fire from the thirty-second floor of a Las Vegas hotel killed 60 concert goers and wounded 413 more.<sup>186</sup> In 2002, Beltway sniper attacks killed ten people and terrorized the D.C. area for three weeks.<sup>187</sup> In the 18th century, the maximum accurate range of a rifle was 125 yards.<sup>188</sup>

No mass shootings by a single shooter had occurred even when the Fourteenth Amendment was ratified. The nation's first occurred in 1891 when someone used a double-barrel shotgun to wound fourteen adults and children at a school exhibit in Liberty, Mississippi.<sup>189</sup> A second mass shooting followed a month later at a Catholic school in New York City. No one was killed in either incident.<sup>190</sup>

There were 1,371 chartered banks in the United States in 1860,<sup>191</sup> but no armed bank robbery had yet occurred. That historic event took place in Malden, Massachusetts in 1863.<sup>192</sup> A robbery of the Clay County Savings Association in Liberty, Missouri in 1866 might have been the second. Frank James was probably one of the robbers, but Jesse James, who was suffering from a recent gunshot wound, probably was not.<sup>193</sup> One thousand three hundred thirty-eight robberies of commercial banks occurred in the United States in 2020.<sup>194</sup>

If the *Bruen* Court had acknowledged that the challenged New York statute regulated “dramatically changed technology” and addressed different “societal concerns” from those known to the Framers, it would have asked whether the statute

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spot.com/2011/03/cassius-marcellus-clay-kentucky.html [https://perma.cc/AM2Q-JY5A] (setting forth slavery opponent Cassius Clay's grisly account of his effective response with a Bowie knife after a would-be assassin shot him in the chest).

<sup>186</sup> 2017 *Las Vegas Shooting*, WIKIPEDIA, https://en.wikipedia.org/wiki/2017\_Las\_Vegas\_shooting [https://perma.cc/9QZ9-5NJ3] (last visited Oct. 2, 2023).

<sup>187</sup> *D.C. Sniper Attacks*, WIKIPEDIA, https://en.wikipedia.org/wiki/D.C.\_sniper\_attacks [https://perma.cc/2FH4-2HK9] (last visited Oct. 2, 2023).

<sup>188</sup> *Historic Weapons Program*, NAT'L PARK SERV., https://www.nps.gov/fone/planyourvisit/historic-weapons-program.htm [https://perma.cc/GWL6-44BE] (last visited Oct. 2, 2023).

<sup>189</sup> Maria Esther Hammack, *A Brief History of Mass Shootings*, BEHIND THE TOWER (2016), http://behindthetower.org/a-brief-history-of-mass-shootings [https://perma.cc/TME5-BN5X].

<sup>190</sup> *Id.*

<sup>191</sup> Warren E. Weber, *Early State Banks in the United States: How Many Were There and When Did They Exist?*, 66 J. ECON. HIST. 433, 449–50 tbl. 2 (2006).

<sup>192</sup> *Bank Robbery*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bank\_robbery#Early\_examples [https://perma.cc/2VNP-ATLN] (last visited Oct. 2, 2023).

<sup>193</sup> See *First Daytime Bank Robbery in U.S. History, Civil War on the Western Border*, KAN. CITY PUB. LIBR., https://civilwaronthewesternborder.org/timeline/first-daytime-bank-robbery-us-history [https://perma.cc/2B7A-UTH2] (last visited Oct. 2, 2023); *The James-Younger Gang: Come Ride With Us: Clay County Savings Association Bank, Liberty, Missouri*, WAYBACK MACH., https://web.archive.org/web/19961222121213/http://www.islandnet.com/~the-gang/clay.htm (last visited Oct. 2, 2023).

<sup>194</sup> Jessica Edgson, *25+ Attention-Stealing Bank Robbery Statistics for 2022*, CAP. COUNS. (Jan. 6, 2023), https://capitalcounselor.com/bank-robbery-statistics/ [https://perma.cc/JJK3-QYW5].

imposed a comparable burden on the right of armed self-defense to those imposed by Founding-era restrictions and whether the burden was comparably justified.<sup>195</sup> For the statute's defenders to show comparable justification would have been easy, but *Bruen* struck down the statute after finding that it imposed a greater burden on the right of armed self-defense than any pre-20th-century legislation (other than those pesky outliers).

What if a state legislature concluded that some aspect of today's gun violence justified *more* burdensome regulations than those imposed in the 18th or 19th century?<sup>196</sup> What if its judgment were reasonable? What if almost everyone agreed? What if there were no reason to suppose that members of the Founding generation would have taken a different view? What if none of our forebears imagined that the restrictions they judged appropriate for their time would cap firearms regulations forever? What if these forebears never meant the Second Amendment to block reasonable public safety measures?

*Bruen* gives a clear answer. A standard that allowed courts to examine whether a legislative regulation unreasonably burdened the exercise of a right would be a "judge-empowering 'interest-balancing inquiry . . .'"<sup>197</sup> If a legislature sought to address current gun-crime problems with greater restrictions than existed in the 18th and 19th centuries, a constitutional amendment would be necessary. So much for adapting the current Second Amendment to the crises of human affairs.<sup>198</sup>

### *G. Do Turtles and History Go All the Way Down?*

#### 1. A Tale Told by a Guru and a Justice

*Bruen* begs a large question: If current firearms regulations are permissible only when they are sufficiently analogous to historic regulations, what made the historic

<sup>195</sup> New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

<sup>196</sup> This question is only temporarily hypothetical. See *infra* Section II.B.2.

<sup>197</sup> *Bruen*, 142 S. Ct. at 2129.

<sup>198</sup> The words of Chief Justice Marshall in *McCulloch v. Maryland* that follow those quoted by the *Bruen* majority are worth recalling:

[The Constitution is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur.

17 U.S. at 415. A later Chief Justice made the same point somewhat less memorably. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) ("The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live.").



regulations permissible? Were these regulations justified because they were analogous to even older regulations, and were the older regulations legitimate because they were analogous to older regulations still?

A familiar story recounted by Justice Scalia in *Rapanos v. United States* may have the answer:

[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies “Ah, after that it is turtles all the way down.”<sup>199</sup>

Does history go all the way down, or was there a big bang sometime?

The “all the way down” tale is not convincing, but the “big bang” tale is not either. The only “big bang” story that culminates in a *Bruen* world of normative-free constitutional standards goes like this: Once upon a time, normativity was allowed, and lawgivers were not required to duplicate historical precedents. They were in fact free to approve whatever arms regulations they considered desirable. But that primordial period came to an end when a super-lawgiver proclaimed: “Let the people bear arms!” At that point, history became a game of musical chairs. All “outlier” regulations were swept aside (whatever they said) while all “representative” regulations were grandfathered (whatever they said). The “representative” regulations were treated as legitimate historic departures from the super-lawgiver’s “unqualified” command. At that point, although new regulations analogous to the “representative” regulations were allowed, all other innovations were forbidden. Why? Because the public at the time of the super-lawgiver’s pronouncement understood the super-lawgiver’s “plain” words to say so.

## 2. The Statute of Northampton

Although the very first limitation on carrying arms could not have been analogous to a historic predecessor, arms regulation goes *almost* all the way down. One split between the majority and dissenting justices in *Bruen* concerned the meaning of the Statute of Northampton, enacted in 1328 during the reign of King Edward III.<sup>200</sup> There were no firearms in Europe in 1328, but there were launcegays and armor.<sup>201</sup> And, once firearms appeared, courts held that the Statute of Northampton covered them too.<sup>202</sup>

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<sup>199</sup> *Rapanos v. United States*, 457 U.S. 715, 754 n.14 (2006) (plurality opinion).

<sup>200</sup> Statute of Northampton, 2 Edw. 3, ch. 3 (1328).

<sup>201</sup> *Bruen*, 142 S. Ct. at 2140. A launcegay is a very long lightweight lance. *Id.*

<sup>202</sup> *Id.* at 2182 (Breyer, J., dissenting).

This statute provided that, with limited exceptions, subjects could not “go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justice or other Minister, nor in no part elsewhere . . . .” If they did, they would “forfeit their Armour to the King, and their Bodies to Prison at the King’s pleasure.” On its face, this statute seemed to limit public carry more than the statute struck down in *Bruen*. Parliament appeared to have used many unnecessary words to forbid going armed in public altogether.

*Bruen*, however, pointed to sources indicating that, after several centuries, judges understood the Statute of Northampton to be less sweeping than it seemed. The Court interpreted these sources to say that the statute barred carrying arms only when doing so was intended or likely to “terrify the King’s subjects.”<sup>203</sup>

The dissenting justices doubted that the majority interpreted these sources correctly. Rather than identify an *element* of the crime, these sources might simply have described the *reason* Parliament forbade public carry.<sup>204</sup>

The Statute of Northampton had staying power. In 1689, the English Bill of Rights included a provision that *Heller* called the “predecessor to our Second Amendment.”<sup>205</sup> This landmark of liberty declared: “[T]he subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.”<sup>206</sup> (The original meaning of the right to bear arms is not in doubt on one point. As originally understood, this right prohibited the disarmament of whatever group proclaimed it but allowed the disarmament of other groups. Noting that King James II had “caused several good subjects being Protestants to be disarmed at the same time when papists were . . . armed,” the English Bill of Rights forbade that indignity. But it did not disturb a statute approved by Parliament in the same regnal year: “An Act for the better securing the Government by disarming Papists and reputed Papists.”<sup>207</sup> In antebellum America, state guarantees of the right to bear arms did not block prohibitions of gun ownership by Black people, whether they were enslaved or free.<sup>208</sup> The constitutions of Arkansas, Florida, and Tennessee declared: “[T]he free white men of this State shall have the right to keep and to bear arms for their common defense.”<sup>209</sup> Courts in other states concluded that free Black people could

<sup>203</sup> *Bruen*, 142 S. Ct. at 2140–42 (majority opinion).

<sup>204</sup> *Id.* at 2183–84 (Breyer, J., dissenting).

<sup>205</sup> *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

<sup>206</sup> Eng. Declaration of Rts. 1689, 1 W. & M. c. 2, § 7.

<sup>207</sup> An Act for the better securing the Government by disarming Papists and reputed Papists 1688, 1 W. & M. c. 15.

<sup>208</sup> See Adam Winkler, *The Right to Bear Arms Has Mostly Been for White People*, WASH. POST (July 15, 2016, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/07/15/the-right-to-bear-arms-has-mostly-been-reserved-for-whites/> [<https://perma.cc/Y5QU-S2QC>].

<sup>209</sup> *State Constitutional Right to Bear Arms*, BRITANNICA PROCON.ORG (May 18, 2015), <https://gun-control.procon.org/state-constitutional-right-to-bear-arms-2/> [<https://perma.cc/6RPR-NR9J>].

be denied arms either because they were not “recognized . . . as citizens”<sup>210</sup> or because they were “a vicious or dangerous population.”<sup>211</sup> In some places and at some times, Native Americans and people who refused to take loyalty oaths were barred from possessing firearms too.<sup>212</sup>)

Because the English Bill of Rights guaranteed the right to bear arms only “as allowed by law,” the Statute of Northampton survived without a scratch. This statute then became the model for many firearms restrictions in colonial and antebellum America.<sup>213</sup> In the hunt for analogues mandated by *Bruen*, determining how members of the Founding generation understood a medieval English statute could well be decisive in judging the validity of current firearms regulations.

#### *H. Is This Originalism?*

Imagine a special lawyer’s broadcast of *Saturday Night Live (or Dead)* in which the cast of *Hamilton* appear as guest hosts.<sup>214</sup> In the opening sketch, they depict members of the Founding generation gathered in heaven over crumpets and angel food to discuss the *Bruen* decision.

GEORGE WASHINGTON: Huzzah! It seems the Supreme Court at last understands that the views of our time must determine the meaning of the Second Amendment. Yet I wonder whether we are in full agreement ourselves. Tell me, Gouverneur Morris, which opinion better captured your understanding of the Statute of Northampton—Justice Thomas’s or Justice Breyer’s?

GOUVERNOUR MORRIS: I see nary a word in the 14th-century statute about terrifying the public. The New York provision was practically a *twin*, and the Supreme Court should have upheld it.

GEORGE WASHINGTON: Alexander Hamilton, do you agree?

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<sup>210</sup> *Cooper v. Savannah*, 4 Ga. 68, 72 (1848).

<sup>211</sup> *Waters v. State*, 1 Gill 302, 309 (Md. App. 1843).

<sup>212</sup> Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1562 (2009). Group disarmaments are discussed further *infra* in text at notes 489–510.

<sup>213</sup> See *The Statute of Northampton and the Second Amend.*, STATUTES AND STORIES (Nov. 7, 2021), [https://www.statutesandstories.com/blog\\_html/the-statute-of-northampton-and-the-second-amendment/](https://www.statutesandstories.com/blog_html/the-statute-of-northampton-and-the-second-amendment/) [<https://perma.cc/XHA5-DFA3>].

<sup>214</sup> See NBC.COM, *Saturday Night Live*, <https://www.nbc.com/saturday-night-live> [<https://perma.cc/8JMY-JZMF>] (last visited Oct. 2, 2023); *Hamilton Musical*, <https://hamiltonmusical.com/new-york/home/> [<https://perma.cc/XY3U-4A8A>] (last visited Oct. 2, 2023).

ALEXANDER HAMILTON: My friend Morris may not have studied Serjeant Hawkins's excellent treatise of 1716. I myself have studied it, and I agree with its author that, at least by our time, the statute did not restrict "Persons of Quality" who wore "common Weapons . . . for their Ornament or Defence, in such Places, and upon such Occasions, in which it [was] the common Fashion . . . ." <sup>215</sup> I am authorized to say that Aaron Burr agrees with me.

GEORGE WASHINGTON: As I feared, we are not in accord. But, lo, there is among us the father of the Constitution and the principal author of the Second Amendment himself. James Madison, pray tell us your understanding of the Statute of Northampton.

JAMES MADISON: The what?

GEORGE WASHINGTON: I speak of a statute enacted in the second year of the reign of Edward III, an enactment of great and enduring importance. It restricted riding while armed, though the founders gathered here are uncertain how much.

JAMES MADISON: Sorry. I never heard of that one.

BENJAMIN FRANKLIN: Press us no farther, George. Our views matter not. The original *public* meaning of the Second Amendment is what counts. The relevant question is how yeomen farmers, scullery maids, coopers, and blacksmiths' apprentices understood the Statute of Northampton.

ALL EXCEPT WASHINGTON: Yes, George, ask them! And dead from the pearly gates, *IT'S SATURDAY NIGHT!*

*I. Does Historic Practice Offer Modern Legislatures a Safe Harbor? How Would the Bruen Standard Apply to Rights Other Than the Right to Bear Arms?*

Consider a gun-wary legislature that respects the Constitution but seeks to limit the carrying of handguns as much as the Second Amendment allows. This body might consider the expert testimony of historians and then enact regulations it judges analogous to those in place in 1791 or 1868. But a safer strategy might be to approve only limitations *identical* to those in place in 1791 or 1868. By approving

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<sup>215</sup> 1 W. HAWKINS, PLEAS OF THE CROWN 136 (1716).

only *twins* of regulations the Supreme Court has officially recognized as part of the Nation’s historical tradition, a legislature might seek to guarantee the constitutionality of its firearms restrictions. When a legislature has employed this strategy, courts would have no need to assess the closeness of the legislature’s historic analogies. They would be obliged to see the old regulations and their modern echoes as linked—rather like the paired subatomic particles that prompted Albert Einstein to speak of “spooky action at a distance.”<sup>216</sup>

*Bruen*, for example, described several American statutes modeled on the Statute of Northampton that made explicit the limitation of this statute the *Bruen* majority thought implicit earlier. They punished only what might be called “very scary carry.” A 1786 Virginia statute read: “[N]o man, great or small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country . . . .”<sup>217</sup> A 1795 Massachusetts statute commanded the arrest of “such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth.”<sup>218</sup> And an 1801 Tennessee statute required any person who would “publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person” to post a surety or else be punished for breach of the peace.<sup>219</sup>

In addition, *Bruen* pointed to an 1843 decision of the North Carolina Supreme Court. This decision recognized that neither the Statute of Northampton nor any other statute restricting public carry ever had been in effect in North Carolina, but it concluded that the Statute of Northampton codified a preexisting common-law offense.<sup>220</sup> That offense remained punishable, and it was unaffected by the state constitutional guarantee of the right to bear arms. Although the constitution secured “to every man . . . a *right* of which he cannot be deprived,” it did not prevent the state from punishing “abuse of the high privilege with which he has been invested.”<sup>221</sup> *Bruen* quoted part of this passage:

[T]he carrying of a gun, *per se*, constitutes no offense. For any lawful purpose . . . the citizen is at perfect liberty to carry his gun. It is the wicked purpose, and the mischievous result—which essentially constitute the crime. He shall not carry about

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<sup>216</sup> See Calla Cofield, *600-Year-Old Starlight Bolsters Einstein’s ‘Spooky Action at a Distance,’* SPACE.COM (Feb. 13, 2017), <https://www.space.com/35676-einstein-spooky-action-starlight-quantum-entanglement.html> [<https://perma.cc/J4JX-44CB>].

<sup>217</sup> COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA ch. 21, p. 33 (1794) (cited in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2144 (2022)).

<sup>218</sup> 1795 Mass. Acts and Laws ch. 2, p. 436, in LAWS OF THE COMMONWEALTH OF MASS. (cited in *Bruen*, 142 S. Ct. at 2144).

<sup>219</sup> 1801 Tenn. Acts pp. 260–61 (cited in *Bruen*, 142 S. Ct. at 2145).

<sup>220</sup> *State v. Huntly*, 25 N.C. 418, 420 (1843).

<sup>221</sup> *Id.* at 422.

this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people.<sup>222</sup>

The verbatim reenactment of a Court-certified antique (for example, a prohibition of concealed carry coupled with a prohibition of open carry in an alarming or terrifying manner) would appear to pass muster under the Second Amendment as *Bruen* construed it.<sup>223</sup> But words like “wicked,” “mischievous,” “offensively,” “fear,” “alarm,” and “terror” might strike modern lawyers as impermissibly vague. Are “peaceful people” or “good citizens” in 21st-century America likely to be fearful, alarmed, or terrified *whenever* they encounter a stranger openly carrying a handgun on the street?<sup>224</sup> Or when this armed stranger wears a mask (perhaps in accord with federal disease-control guidelines)? Or when this masked, armed stranger follows someone for two or three blocks at night? Or when several armed strangers appear together dressed in leather and riding motorcycles? Or when the members of an armed group on motorcycles are young, male, and dark-skinned? Would a resurrected firearms restriction be seen today as giving “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden?”<sup>225</sup> Would it adequately confine the discretion of police officers, prosecutors, and judges?<sup>226</sup>

A *Bruen*-style originalist could not consistently accept a claim that a resurrected firearms regulation is void for vagueness. Just as the statute’s historic credentials show that the Founding generation did not regard this provision as violating the Second Amendment, they show that our forebears did not regard it as violating the Due Process Clause of the Fifth Amendment or any other constitutional provision then in place. For a *Bruen*-style originalist, a statute resurrecting a *true twin* would preclude every constitutional challenge not based on an amendment ratified after legislative approval of the original doppelganger.

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<sup>222</sup> *Id.* at 442–43 (quoted in *Bruen*, 142 S. Ct. at 2145).

<sup>223</sup> *See* *State v. Roten*, 86 N.C. 701, 704 (1882) (noting that North Carolina punished concealed carry by statute while it punished open carry in an alarming manner as a common law offense).

<sup>224</sup> *See* Brief of J. Michael Luttig et al. as Amici Curiae in Support of Respondents at 13, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (“[I]f petitioners prevail in this case, many Americans who have lived all their lives in states without public-places carry will find themselves in ‘fear’ and ‘terrified.’ Fearful, and many terrified, both by seeing people around them openly carrying loaded guns and by knowing that there is likely a dramatically greater number of persons surrounding them who will be carrying concealed weapons just in case . . . . This specter promises that America and Americans would ‘live on edge’ from now on, wherever they go.”). *But see Bruen*, 142 S. Ct. at 2142 (“Respondents do not offer any evidence that, in the early 18th century or after, the mere public carrying of a handgun would terrify people.”).

<sup>225</sup> *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

<sup>226</sup> *See id.* (declaring a vagrancy ordinance invalid both because it failed to provide adequate notice and because it “encourage[d] arbitrary and erratic arrests and convictions.”).

Justice Thomas, the author of the *Bruen* opinion, has urged reconsideration of the “void for vagueness” doctrine.<sup>227</sup> He maintains that this doctrine, which he says emerged only in the late 19th century,<sup>228</sup> is inconsistent with the original understanding of both of the constitutional mandates said to require it—the Due Process Clause and (in the federal courts) the grant of legislative power only to the legislature. Justice Gorsuch, however, disagrees. He maintains that the “void for vagueness doctrine . . . serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.”<sup>229</sup>

For *Bruen*-style originalists, whether the “principle” of fair notice has ancient antecedents or was recognized as a component of “ordered liberty” hardly matters. Recognizing a constitutional “principle” does not empower judges to determine for themselves how it should be applied. Judges may consider only historical applications, and Justice Thomas played a trump card when he noted: “This Court . . . has used the vagueness doctrine to invalidate antiloitering laws, even though those laws predate the Declaration of Independence.”<sup>230</sup> If officials could use vagrancy laws to arrest and punish whoever displeased them at the time of the Declaration of Independence and ratification of the Bill of Rights, Justice Thomas believes that they should be able to do so today—at least in jurisdictions in which ancient vagrancy laws remain in place or in which legislatures employing a *twins* strategy resurrect them. Justice Gorsuch could not reasonably dissent from that proposition without withdrawing his assent to *Bruen*. For a *Bruen*-style originalist, every law and practice that existed when the Constitution and Bill of Rights were ratified (and was not an “outlier”) is permissible today unless a subsequently ratified constitutional provision says otherwise.

Our 18th- and 19th-century forebears were far more tolerant of linguistic imprecision than we are. A 1715 Maryland statute prohibited anyone “of evil fame, or any vagrant, or dissolute liver” from carrying a gun on land containing a “seated plantation” unless the owner of the plantation had given the dissolute liver permission.<sup>231</sup> In 1900, the Ohio Supreme Court concluded that a prohibition of firearms possession and other activities by “tramps” did not violate the right to bear arms or other provisions of the state constitution. The court did not consider a claim that the statute was unconstitutionally vague because the convicted “tramp” did not make one.<sup>232</sup>

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<sup>227</sup> See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1242–50 (2018) (Thomas, J., dissenting); *Johnson v. United States*, 576 U.S. 591, 612–24 (2015) (Thomas, J., concurring in the judgment).

<sup>228</sup> *Johnson*, 576 U.S. at 616–17 (Thomas, J., concurring in the judgment); *Dimaya*, 138 S. Ct. at 1243–44 (Thomas, J., dissenting).

<sup>229</sup> *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part and concurring in the judgment).

<sup>230</sup> *Id.* at 1244 (Thomas, J., dissenting).

<sup>231</sup> This statute is quoted in *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at \*227 (N.D.N.Y. Nov. 7, 2022), but the court does not cite a source.

<sup>232</sup> See *State v. Hogan*, 58 N.E. 572, 575–76 (Ohio 1900). The statute provided a definition

However highly the ancient Greeks or the Framers regarded the principle of fair notice, neither Justice Gorsuch nor any other justice who joined the *Bruen* opinion could consistently declare statutes like these unconstitutional today.

*J. There Was a Principled Original Understanding—Just Not One the Supreme Court’s Professed Originalists Like Very Much*

Despite the impression *Bruen* may convey, arms restrictions in England and America over the centuries were not arbitrary scatter shots. Normal human beings do not “do law” that way. Every regulation was intended to serve a purpose, and this purpose usually was to make the public safer (although disfavored portions of the public did not always count). Of course, these restrictions limited people’s ability to use weapons for legitimate as well as improper purposes, but their authors did not believe that reasonable regulations imposed to promote public safety violated anyone’s rights.

To modern American lawyers, the English Bill of Rights of 1689 sounds oxymoronic. It guarantees Protestants the right to have arms for their defense only “as allowed by law.”<sup>233</sup> A modern lawyer might wonder: “What kind of right is that? I thought that what made a right a right was its ability to trump every kind of law that’s not a right.”<sup>234</sup>

Shortly before the American Revolution, Blackstone noted that the right to bear arms, although no longer limited to Protestants, remained a right to possess only arms “suitable to [people’s] condition and degree, and such as are allowed by law.”<sup>235</sup> This right, Blackstone commented, was subject to “due restrictions.”<sup>236</sup> In *Heller*,

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of “tramp”: “Whoever, except a female or blind person, not being in the county in which he usually lives or has his home, is found going about begging and asking subsistence by charity, shall be taken and deemed to be a tramp.” *Id.* at 575 (quoting 1880 Ohio Rev. St. 1654, ch. 8 § 6995).

<sup>233</sup> English Bill of Rights (1689), 2 W. & M. Session 2, c. 2.

<sup>234</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 192 (1977) (arguing that rights are trumps and that to balance rights against the public good is to deny them altogether). *But see* Jamal Greene, *The Supreme Court 2017 Term: Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 35 (2018) (declaring that “[p]roportionality analysis is more congenial to the way the lawyers and statesmen of the Founding generation understood rights than the presumptive absolutism that characterizes the modern frame” and that the modern frame is “an artifact of the second half of the twentieth century . . .”); *Hill v. State*, 53 Ga. 472, 477 (1874) (“The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.”).

<sup>235</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*139.

<sup>236</sup> *Id.*



the Supreme Court wrote: “[I]t has always been widely understood that the Second Amendment . . . codified a preexisting right.”<sup>237</sup> Blackstone’s description reveals the highly qualified (if not entirely oxymoronic) right the Framers codified.

When the Second Amendment was drafted and ratified, the “militia” consisted of all able-bodied men capable of bearing arms.<sup>238</sup> The amendment began by declaring that a militia was “necessary to the security of a free State,” and it made clear that this body was to be “well regulated.”

*Heller* held that the amendment’s statement of purpose did not limit its protection to members of the militia. This amendment protects people’s right to keep handguns at their homes for purposes of self-defense.<sup>239</sup> But most state constitutions were understood from the outset to protect an individual right to keep arms for purposes of self-defense. Nine of the constitutions approved in the 18th century or the first two decades of the 19th said so explicitly.<sup>240</sup> Early decisions interpreting these constitutions provide the best available evidence of how the right recognized by *Heller* was understood.<sup>241</sup> The words “right to bear arms” probably did not mean one thing to Founding-generation Americans when they read them in their state constitutions and something else when they read them in the Second Amendment.

The early state decisions interpreted the language the *Bruen* majority calls “plain” differently from the way *Bruen* interprets it. They insisted that this right did not preclude “regulating” the time, place, or manner in which the right could be exercised,<sup>242</sup> did not allow “abuse” of the right,<sup>243</sup> and did not preclude limiting the right to protect “the rights of others” (including their right to things like freedom from fear that modern lawyers might call interests).<sup>244</sup> Our forebears, unlike the *Bruen* majority, did not presume all firearms regulations unconstitutional and did not cast the burden of scavenging historic analogues on the regulations’ defenders. As an

<sup>237</sup> 554 U.S. 570, 592 (2008).

<sup>238</sup> See *United States v. Miller*, 307 U.S. 174, 179 (1939) (“[T]he Militia comprised all males physically capable of acting in concert for the common defense.”).

<sup>239</sup> See *Heller*, 554 U.S. at 592.

<sup>240</sup> *Id.* at 584–85; see *State Constitutional Right to Bear Arms*, BRITANNICA PROCON.ORG (May 18, 2015), <https://gun-control.procon.org/state-constitutional-right-to-bear-arms-2/> [<https://perma.cc/3TWZ-YET8>].

<sup>241</sup> See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 796 n.11 (1998). *Bruen* cautions: “[W]e must . . . guard against giving postenactment history more weight than it can rightly bear.” 142 S. Ct. at 2136. But when the earliest interpretations of a constitutional text occur after its enactment, when they’re largely consistent with one another, and when there’s no reason to suppose the ratifiers of the text took a different view, postenactment history can be very convincing.

<sup>242</sup> See, e.g., *Hill v. State*, 53 Ga. 472, 480–81 (1874); *State v. Buzzard*, 4 Ark. 18, 30 (1842) (opinion of Dickinson, J.).

<sup>243</sup> See, e.g., *Carroll v. State*, 28 Ark. 99, 101 (1872); *State v. Huntly*, 25 N.C. 418, 442 (1843).

<sup>244</sup> See, e.g., *Andrews v. State*, 50 Tenn. 165, 179 (1871).

1846 Georgia decision declared: “The presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies its constitutionality.”<sup>245</sup>

The judge-empowering interest-balancing inquiries *Bruen* repudiates were part of the process, but the courts’ review was highly deferential. After such definitional issues as whether a particular sort of weapon qualified as an “arm” were resolved in favor of someone claiming a right to bear it,<sup>246</sup> courts considered whether a challenged limitation of the right was justified. Despite some variations in language and some departures from the pattern, the courts’ standard was remarkably consistent.

In 1840, the Alabama Supreme Court articulated this common standard. Speaking of the state’s guarantee of the right of every citizen “to bear arms in defence of himself and the state,” it declared:

The terms in which this provision is phrased seems to us, necessarily to leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals. . . . We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. 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. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence . . . does not come in collision with the constitution.<sup>247</sup>

Many of the early state decisions concerned the constitutionality of statutes prohibiting people from carrying concealed weapons. Legislatures were concerned

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<sup>245</sup> *Nunn v. State*, 1 Ga. 243, 246 (1846); see *Dabbs v. State*, 39 Ark. 353, 355 (1882) (“[A]ll doubts upon the subject are to be resolved in favor of the statute.”).

<sup>246</sup> A common standard for determining whether a weapon qualified as an “arm” was the “civilized warfare” test. See, e.g., *Aymette v. State*, 21 Tenn. 154, 158 (1840) (“The legislature . . . have a right to prohibit the wearing, or keeping weapons dangerous to the peace and safety to citizens which are not usual in civilized warfare, or would not contribute to the common defence.”); *Fife v. State*, 31 Ark. 455, 460–61 (1876) (holding that a “pocket revolver” was not an “arm” because it was not “effective as a weapon of war”); *English v. State*, 35 Tex. 473, 475–76 (1872); *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession of [a weapon] has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”). *But see Heller*, 554 U.S. at 581, 624, 627 (holding that the word “arms” encompasses all weapons in common use, including those that are “not employed in a military capacity”).

<sup>247</sup> *State v. Reid*, 1 Ala. 612, 616–17 (1840).

about stealth attacks with hidden firearms even before John Wilkes Booth committed his crime, and some of them banned small or concealable firearms altogether.<sup>248</sup> *Heller* wrote: “[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful.”<sup>249</sup>

By “the majority,” *Heller* evidently meant “all but one.” This sore-thumb outlier, *Bliss v. Commonwealth*, was decided by Kentucky’s highest court, the Court of Appeals, in 1822.<sup>250</sup> It was the first reported American decision interpreting the right to bear arms.<sup>251</sup>

With one judge dissenting, *Bliss* held invalid a statute approved by the Kentucky legislature in 1813 that forbade wearing “a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey.” Sounding more like *Bruen* than any other 19th (or 20th) century decision I know, the court looked to history and wrote: “[W]hatever restrains the full and complete exercise of [the right to bear arms as it was known before the adoption of the constitution] . . . is forbidden by the explicit language of the constitution.”<sup>252</sup>

In 1896, the Supreme Judicial Court of Massachusetts observed that *Bliss* “has not generally been approved,” and it cited decisions from eight other jurisdictions that rejected the Kentucky ruling and endorsed the “almost universally held [position] that the Legislature may regulate and limit the carrying of arms.”<sup>253</sup> The Massachusetts court itself held that the right to bear arms did not entitle a private group to parade in public with firearms, not even with rifles that had been rendered inoperable. “This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the Legislature to regulate. . . .”<sup>254</sup>

In 1891, the West Virginia Supreme Court, noting that *Bliss* was unique, denounced it and another Kentucky decision that it said allowed the use of deadly force in self-defense upon a “mere threat.”<sup>255</sup> The West Virginia court said:

We have but to put these two alleged principles of law together, in order to destroy that security of life and that social order which are absolutely essential to civilization. In the State where

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<sup>248</sup> See *Dabbs v. State*, 39 Ark. 353, 355 (1882).

<sup>249</sup> *Heller*, 554 U.S. at 626.

<sup>250</sup> *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

<sup>251</sup> An online annotation titled “Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons” is updated regularly and now runs more than 100 printed pages. But this annotation still lists only one decision holding any statute or ordinance prohibiting concealed carry invalid. See Tracy Bateman Farrell, Annotation, *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons*, 33 A.L.R.6TH 407, § 7 (2008) (available on LEXIS).

<sup>252</sup> *Bliss*, 12 Ky. at 91–92.

<sup>253</sup> *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896).

<sup>254</sup> *Id.*

<sup>255</sup> *Carico v. Commonwealth*, 70 Ky. 124, 126, 128–29 (1870).

they have been announced, a prolific harvest of murders, street fights, and family feuds has been their natural fruition, to the degradation of and terror of society, and the abasement of justice and civil order.<sup>256</sup>

Kentucky itself repudiated *Bliss* when it adopted a new constitution in 1850. This constitution's declaration of the right to bear arms matched its predecessor's—but with one added clause: “[T]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms.”<sup>257</sup>

Many 19th-century courts distinguished between prohibiting exercise of the right to bear arms and regulating the time, place, or manner of its exercise, and this distinction required judicial line-drawing. The Georgia Supreme Court observed:

If the legislature were to say arms . . . shall only be borne strapped or fastened upon the back, this would be prescribing only the manner, and yet, it would, in effect, be a denial of the right to bear arms altogether. The main clause and the limitation . . . are both to be construed reasonably.<sup>258</sup>

An Arkansas Supreme Court decision in 1882 revealed the extent to which courts deferred to legislatures in drawing the inescapable line.<sup>259</sup> A statute forbade the public carry of all handguns except “army pistols,” and it allowed the carriage of these large handguns only uncovered in one's hands. After declaring that the legislature “may regulate the mode of carrying any arms . . . in a reasonable manner, so as, in effect, not to nullify the [constitutional] right, nor materially embarrass its exercise,”<sup>260</sup> the court said of the requirement that army pistols be carried only in one's hands:

It must be confessed that this is a very inconvenient mode of carrying them . . . . [But t]he inconvenience is a slight matter compared with the danger to the whole community, which would result from the common practice of going about with pistols in a belt, ready to be used on every outbreak of ungovernable passion.

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<sup>256</sup> *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891). The court might not have realized that Kentucky abandoned *Bliss* four decades before 1891. Attributing Kentucky's “prolific harvest” of violence to *Bliss* would not pass current standards of social science research.

<sup>257</sup> *State Constitutional Right to Bear Arms*, BRITANNICA PROCON.ORG (May 18, 2015), <https://gun-control.procon.org/state-constitutional-right-to-bear-arms-2/> [<https://perma.cc/Q25M-NH2Q>].

<sup>258</sup> *Hill v. State*, 53 Ga. 472, 481 (1874).

<sup>259</sup> *See Haile v. State*, 38 Ark. 564 (1882).

<sup>260</sup> *Id.* at 565–66.

It is a police regulation, adjusted as wisely as the Legislature thought possible, with all essential constitutional rights.<sup>261</sup>

As noted above, courts in Texas and West Virginia upheld statutes that *Bruen* acknowledged were analogous to the challenged New York statute. They allowed the public carry of handguns only by someone who had “reasonable grounds for fearing an unlawful attack on his person.”<sup>262</sup> Prohibitions of public carry without any exception were held invalid in Georgia, Arkansas, and Tennessee,<sup>263</sup> but they were upheld in Kansas.<sup>264</sup> (A later section of this Article will consider the significance of these decisions.<sup>265</sup>) Apart from *Bliss*, courts apparently held only complete prohibitions of owning or carrying handguns unconstitutional.

Courts insisted that the right to bear arms, like other individual rights, was circumscribed by the “police power”<sup>266</sup>—the inherent power of the state to protect and promote the public health, safety, morals, and welfare.<sup>267</sup> In 1842, Chief Justice Daniel Ringo of Arkansas declared:

[T]he Legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to injure or endanger the private rights of others, disturb the peace or domestic tranquility, or in any manner endanger the free institutions of this State or the United States.<sup>268</sup>

Noting John Stuart Mill’s declaration that governments “undisputedly” may “take precautions against crime before it is committed,” an 1872 Texas decision observed:

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<sup>261</sup> *Id.* at 566; see *State v. Wilburn*, 66 Tenn. 57, 64 (1872).

<sup>262</sup> *English v. State*, 35 Tex. 473, 477–78 (1872); *State v. Duke*, 42 Tex. 455, 456, 459 (1875); *State v. Workman*, 14 S.E. 9 (W. Va. 1891); see *supra* text accompanying notes 96–99.

<sup>263</sup> *Nunn v. State*, 1 Ga. 244, 251 (1846); *Wilson v. State*, 33 Ark. 557, 560 (1878); *Andrews v. State*, 50 Tenn. 165, 191–92 (1871).

<sup>264</sup> *Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905).

<sup>265</sup> See *infra* Section I.L.

<sup>266</sup> See Saul Cornell, *The Police Power and the Authority to Regulate Firearms in Early America*, BRENNAN CTR. FOR JUST. (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/police-power-and-authority-regulate-firearms-early-america> [<https://perma.cc/66SK-6MMH>].

<sup>267</sup> See *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991). The Illinois Supreme Court observed in a firearms case in 1879:

In matters pertaining to the internal peace and well-being of the State, its police powers are plenary and inalienable. It is a power co-extensive with self-protection . . . . What will endanger the public security must, as a general rule, be left to the wisdom of the legislative department of the government.

*Dunne v. Illinois*, 94 Ill. 120, 141 (1879).

<sup>268</sup> *State v. Buzzard*, 4 Ark. 18, 27 (1842).

“[W]henver [the citizen’s] conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority.”<sup>269</sup> In 1886, the Missouri Supreme Court upheld a prohibition of carrying while intoxicated. The court wrote that this prohibition was “designed to promote personal security, and to check and put down lawlessness, and is thus in perfect harmony with the constitution.”<sup>270</sup>

Unlike state legislatures, Congress has no residual police power.<sup>271</sup> It has only the powers granted to it by the Constitution.<sup>272</sup> James Madison and other Framers doubted the need for a bill of rights because they believed that, even without one, the limited powers granted Congress would not enable it to restrict the right to bear arms or other individual rights.<sup>273</sup>

But Madison might have missed something. Congress does have the same police power as state legislatures when it exercises its power to legislate for the District of Columbia, the territories, and other areas over which the Constitution gives the national government exclusive jurisdiction.<sup>274</sup> Early judicial interpretations of state constitutional provisions show that the right to bear arms was not originally understood to limit Congress’s exercise of the police power substantially.

With the Second Amendment now applicable to the states through the Fourteenth Amendment, federal as well as state courts must determine the extent to which the right to bear arms limits the state police power. The early state court decisions indicate that the answer is “not much.”

These decisions had no occasion to consider whether courts should be as deferential to regulations enacted pursuant to powers granted the federal government like the taxing power, the power to regulate interstate commerce, and the power to organize and discipline the militia.<sup>275</sup> In accordance with today’s common understanding of rights as trumps, *Bruen* indicates that the kind of power used to enact a firearms regulation has no bearing on whether this regulation violates the Second Amendment. Courts now ask about power first and rights second. Unlike their 19th-century predecessors, they do not blend the issues together.<sup>276</sup> *Bruen* in fact treated

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<sup>269</sup> *English v. State*, 35 Tex. 473, 477–78 (1872).

<sup>270</sup> *State v. Shelby*, 90 Mo. 302, 305–06 (1886).

<sup>271</sup> *United States v. Morrison*, 529 U.S. 598, 615, 618 (2000).

<sup>272</sup> U.S. CONST. amend. X.

<sup>273</sup> *The Bill of Rights: How Did it Happen?*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen> [<https://perma.cc/F695-SB3Y>] (last visited Oct. 2, 2023); see Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 271–72 (G. Hunt ed., 1904), [https://www.google.com/books/edition/The\\_Writings\\_of\\_James\\_Madison\\_1787\\_1790/sGGGs3reve0C?hl=en&gbpv=1&dq=Writings+of+James+Madison&printsec=frontcover](https://www.google.com/books/edition/The_Writings_of_James_Madison_1787_1790/sGGGs3reve0C?hl=en&gbpv=1&dq=Writings+of+James+Madison&printsec=frontcover) [<https://perma.cc/4QTT-HKN3>]; THE FEDERALIST NO. 46, 296–97 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

<sup>274</sup> *United States v. Dewitt*, 76 U.S. 41, 45 (1869).

<sup>275</sup> See U.S. CONST. art. 1, § 8, cls. 1, 3, 16.

<sup>276</sup> Moreover, although the Supreme Court still insists that the federal government has no

only pre-20th-century *state* regulations as establishing “this Nation’s historical tradition of firearm regulation.”<sup>277</sup> The Court did not consider federal regulations because, apart from “outliers” enacted by territorial legislatures and the like, there were none.

Consider how the *Bruen* standard might have applied if the state regulations had not existed or if the Court had seen only federal traditions as evidencing the federal constitution’s original meaning. For 143 years following ratification of the Second Amendment, Congress fulfilled the expectation of the Founding generation that it would leave firearms regulation to the states. Then, in 1934, influenced by the gun violence of the Prohibition era, Congress approved the National Firearms Act.<sup>278</sup> In 1939, in *United States v. Miller*, the Supreme Court rejected a claim that a provision of this act “[was] not a revenue measure but an attempt to usurp police power reserved to the States” and also reversed a trial court ruling that this provision offended the Second Amendment.<sup>279</sup>

If *Bruen* had been in place and if state regulations had not been regarded as relevant, the Court might have reached a different result in *Miller*. Indeed, it might have struck down all post-1900 federal firearms regulations without reading them. Because Congress had started too late, none of its regulations had pre-20th-century federal analogues. The Court might have done them all in.

Perhaps the *Bruen* standard could have dispatched all state regulations too. Although the Supreme Court left open the possibility that the original understanding of the Fourteenth Amendment rather than the Second would determine the validity of both state and (surprisingly) federal firearms regulations,<sup>280</sup> it noted: “[W]e have

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residual police power and must rely on its enumerated powers to regulate firearms, commentators have regarded this doctrine as a fiction for more than a century. See Robert Eugene Cushman, *National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 381, 381 (1919) (“Congress in its efforts to protect the national health, morals, and general welfare has been compelled to use a process of indirection and has had to do good not merely by stealth but by subterfuge,” but Congress nevertheless has “exercised a police power that has been real and substantial.”); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATIONS IN NINETEENTH-CENTURY AMERICA* 243 (1996) (“Legal and political developments between 1877 and 1937 made that federal police power—an essential attribute of modern, centralized states—a practical if not a technical reality”); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 33 (2022) (“Today, the scope of federal powers has become all but equivalent to a general police power in substance, despite occasional and largely ineffectual protests to the contrary, and despite very occasional invalidations of statutes of secondary importance.”).

<sup>277</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

<sup>278</sup> 48 Stat. 1236 (1934).

<sup>279</sup> The Court remanded the case for further consideration of that issue. *United States v. Miller*, 307 U.S. 174, 176–77, 183 (1939); see Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 336–39 (2009) (noting *Heller*’s misdescription and misuse of *Miller*).

<sup>280</sup> See *supra* Section I.D.

made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.”<sup>281</sup> Once a long federal tradition of leaving firearms unregulated had established that the Second Amendment banned all firearms regulations, perhaps the Court could have extended the unqualified federal right to keep and bear arms to the states as well.

Although the *Bruen* majority declared the 20th century too recent to shed light on the original understanding of the Second or Fourteenth Amendments, this century and the early years of the 21st century saw few judicial departures from the original understanding of the right to bear arms (the actual original understanding). Courts continued to say things like:

The constitutional guarantee of the right of a citizen to bear arms is subject to reasonable regulation by the state under its police power.<sup>282</sup>

The question in each case [is] whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary.<sup>283</sup>

The only requirement is that the regulation must be reasonable and be related to the achievement of preserving public peace and safety.<sup>284</sup>

In an amicus brief in *Heller* in 2007, two noted scholars, Erwin Chemerinsky and Adam Winkler, advised the Court: “Forty-two states have constitutional protections for a private, individual right to bear arms . . . . Every state, without exception, applies the same standard of review, requiring only that laws be reasonable regulations of the right.”<sup>285</sup> Since the Founding, federal, state, and local governments have enacted thousands of firearms regulations, but, until the 21st century, only twenty or so reported decisions had held any of them unconstitutional.<sup>286</sup> No federal court had struck down even one.<sup>287</sup>

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<sup>281</sup> *Bruen*, 142 S. Ct. at 2137.

<sup>282</sup> *Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. 1984).

<sup>283</sup> *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978).

<sup>284</sup> *State v. Johnson*, 610 S.E.2d 739, 746 (N.C. App. 2005).

<sup>285</sup> Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae in Support of Petitioner at 4–5, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>286</sup> See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 718 (2007); David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1180 & n.12 (1995).

<sup>287</sup> Winkler, *supra* note 286, at 710.



While disclaiming any intent to relitigate *Heller*, Justice Breyer’s dissent in *Bruen* described recent scholarship indicating that, contrary to *Heller*’s principal holding, the Second Amendment was not understood initially to protect an individual right to possess arms for purposes of self-defense.<sup>288</sup> Although *Heller*’s view of history is still contested, most state constitutions clearly did protect an individual right to possess arms for purposes of self-defense. The original understanding of this right was surprisingly clear and remarkably uniform. This understanding endured and became the modern understanding too. The original understanding disappeared only when judges calling themselves “originalists” showed up.

### *K. Is the Second Amendment Second Class?*

#### 1. A Familiar Theme

Perhaps a catchy slogan influenced the originalist judges to abandon the original meaning. In 2015, dissenting from a denial of certiorari, Justice Thomas wrote for himself and Justice Scalia: “I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.”<sup>289</sup> Dissenting from a Court ruling the following year on a statutory issue, Justice Thomas declared that the Court itself had “relegate[ed] the Second Amendment to a second-class right.”<sup>290</sup> A year later, in a dissent from a denial of certiorari joined by Justice Gorsuch, Justice Thomas wrote of the Court’s “distressing trend” to treat “the Second Amendment as a disfavored right.”<sup>291</sup> In 2019, in another dissent from a denial of certiorari, Justice Thomas complained: “The right to keep and bear arms is apparently this Court’s constitutional orphan.”<sup>292</sup>

When soon-to-be Justice Amy Coney Barrett dissented in 2019 from the Seventh Circuit’s refusal to hold the federal felon-in-possession statute unconstitutional as applied to a nonviolent felon, she accused the appeals court majority of “treat[ing] the Second Amendment as a ‘second-class right . . . .’”<sup>293</sup> In remarks to the Federalist Society in 2020, Justice Alito described the amendment as “the ultimate second-class right in the minds of some.”<sup>294</sup>

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<sup>288</sup> *Bruen*, 142 S. Ct. at 2177–79 (Breyer, J., dissenting).

<sup>289</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from a denial of certiorari).

<sup>290</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting).

<sup>291</sup> *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from a denial of certiorari).

<sup>292</sup> *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from a denial of certiorari).

<sup>293</sup> *Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>294</sup> Kalvis Golde, *At Federalist Society Convention, Alito Says Religious Liberty, Gun Ownership Are Under Attack*, SCOTUSBLOG (Nov. 13, 2020, 1:32 PM), <https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/> [https://perma.cc/5MF3-4KRZ].

In *Heller*, Justice Scalia’s majority opinion said of a standard of review proposed in dissent by Justice Breyer: “We know of no other enumerated constitutional right whose core protection has been subjected to a free-standing ‘interest-balancing’ approach.”<sup>295</sup> And in a 2010 opinion for the plurality in *McDonald v. City of Chicago*, Justice Alito wrote that the Second Amendment is not a “second-class right, subject to an entirely different body of rules than other Bill of Rights guarantees . . . .”<sup>296</sup>

More than a dozen of the briefs filed in support of the challengers in *Bruen* insisted that the Second Amendment was not a second-class right.<sup>297</sup> The penultimate paragraph of Justice Thomas’s majority opinion in *Bruen* proclaimed to no one’s surprise: “[T]he constitutional right to bear arms in public for self-defense is not ‘a second-class right . . . .’”<sup>298</sup>

## 2. Partisans or Originalists?

The concern of some Supreme Court justices with the Second Amendment’s “classiness” appears to be in tension with the same justices’ purported originalism. If the Framers of the Constitution meant the Second Amendment to be a second-class right (and if their words succeeded in conveying their meaning), a second-class right it should be. The Constitution does not declare that rights have rights or that all rights are created equal. The determination of some judges to place the Second Amendment in the top tier sounds *normative*—a “personal policy predilection” that should have no place in the law found by umpires.

One apparent goal of these justices’ rhetoric is to imply hostility to the Second Amendment on the part of judges who construe this amendment less expansively than the judges do themselves. In particular, judges use the “second class” trope to suggest anti-gun bias on the part of judges whose less expansive understanding of the Second Amendment comes closer to the original understanding than their accusers’ does.<sup>299</sup>

<sup>295</sup> 554 U.S. 570, 634 (2008).

<sup>296</sup> 561 U.S. 742, 780 (2010) (plurality opinion).

<sup>297</sup> Joseph Blocher & Eric Ruben, *Courts Don’t Treat the Second Amendment as a “Second-Class Right,”* WASH. POST (Nov. 17, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/11/17/no-courts-don-t-treat-second-amendment-second-class-right/> [<https://perma.cc/KBQ3-2A6C>].

<sup>298</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022); see Kihara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 70 (2022) (commenting that *Bruen* has made the right to bear arms the most protected right in the Constitution); *United States v. Bullock*, No. 3:18-cr-00165-CWR-FKB, 2023 U.S. Dist. LEXIS 112397, at \*76 (S.D. Miss. June 28, 2023) (“The Second Amendment is second class no longer. It is the brightest star in the Constitutional constellation.”).

<sup>299</sup> Dissenting from a Ninth Circuit denial of rehearing en banc, Judge VanDyke wrote: [I]t is apparent that our court just doesn’t like the Second Amendment

The judges who employ “second-class” rhetoric do not appear to be disinterested observers of modern culture wars themselves. At least they are united by political party. Eric Ruben and Joseph Blocher found twenty-one court of appeals and Supreme Court opinions between 2008 and 2019 that invoked “second-class” imagery. They reported that the authors of all but one of these opinions had been appointed to the bench by Republican presidents.<sup>300</sup>

### 3. Might the History of the Second Amendment Make It Second Class?

Although the right to bear arms should be second-tier if the original understanding made it so, there is little evidence that the Founding generation did view this right as inferior. When a standing army in peacetime was regarded as a serious threat to liberty and militias of citizen soldiers were seen as a less dangerous way to protect the public from insurrections, invasions, and other threats to their security, distinguished commentators called the right to bear arms a palladium.<sup>301</sup>

Perhaps, however, the Second Amendment became second class when its *raison d’être* evaporated. Unlike any other provision of the Bill of Rights, this amendment includes a preamble that sets forth its purpose: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>302</sup> *Heller* acknowledged: “[T]he Second Amendment’s prefatory clause acknowledged the purpose for which the right was codified.”<sup>303</sup> The

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very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it . . . . There exists on our court a clear bias—a real prejudice—against the Second Amendment and those appealing to it. That’s wrong. Equal justice should mean equal justice.

*Mai v. United States*, 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., dissenting from a denial of rehearing en banc).

<sup>300</sup> Eric Ruben & Joseph Blocher, “*Second-Class*” *Rhetoric, Ideology, and Doctrinal Change*, 110 *GEO. L.J.* 613, 653 (2022).

<sup>301</sup> See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1890 (1833) (“The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers.”); 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* app. 300 (Philadelphia, Birch & Small 1803) (“This may be considered as the true palladium of liberty.”). Mark Twain remarked: “I do not know what a palladium is, never having seen a palladium, but it is a good thing no doubt . . . .” MARK TWAIN, *ROUGHING IT* 351 (American, 1872). A wooden statue of the goddess Pallas, called the palladium, once was thought to protect the city of Troy. *Palladium*, *ENCYC. BRITANNICA*, <https://www.britannica.com/topic/Palladium-Greek-religion> [<https://perma.cc/3N4E-WFBZ>] (last visited Oct. 2, 2023).

<sup>302</sup> U.S. CONST. amend. II.

<sup>303</sup> 554 U.S. 570, 599 (2008).

Court concluded, however, that this clause “does not suggest that preserving the militia was the only reason Americans valued the ancient right.”<sup>304</sup>

The poor performance of state militias in the War of 1812 and citizens’ resentment and evasion of their militia duties indicated that the Framers had been too idealistic and ambitious.<sup>305</sup> In 1831, states began abolishing the duty of all able-bodied males to serve in the militia.<sup>306</sup> In 1871, the Tennessee Supreme Court commented in a case challenging a firearms regulation:

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, “a well regulated militia,” though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.<sup>307</sup>

The sort of militia the Framers envisioned was a goner 150 years ago, and widespread private ownership today of the kind of weapons that would make a standing army unnecessary might well bring the human race to an end. The interests advanced by the right to bear arms today were secondary to the Framers’ initial aspirations. Does originalism require judges to turn a blind eye to the fact that the palladium no longer stands?

Even in the Second Amendment’s short-lived glory days, the right to bear arms was highly circumscribed. But that did not make the right second-class. The Framers expected and the courts allowed equally substantial regulation of other rights. A recent assessment of the original understanding of the Constitution’s guarantee of the freedom of speech commented: “Although perhaps strange to modern readers, . . . the First Amendment . . . generally permit[ted] the government to restrict speech in the public interest.”<sup>308</sup> It added: “[M]odern speech doctrine . . . bears almost no

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<sup>304</sup> *Id.*

<sup>305</sup> See *A Short History of the Militia in the United States*, THE ANGRY STAFF OFFICER (Mar. 20, 2017), <https://angrystaffofficer.com/2017/03/20/a-short-history-of-the-militia-in-the-united-states/> [<https://perma.cc/JA7X-JSBJ>]; 3 STORY, *supra* note 301, § 1890 (“[I]t cannot be disguised that, among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from the sense of its burthens, to be rid of all regulations . . . . There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protections intended by this clause of our national bill of rights.”).

<sup>306</sup> See Sara Rathod, *A Brief History of Militias in America*, MOTHER JONES (Dec. 2016), <https://www.motherjones.com/politics/2016/10/timeline-history-militias-america/> [<https://perma.cc/PPX5-BZ8J>].

<sup>307</sup> *Andrews v. State*, 50 Tenn. 165, 184 (1871).

<sup>308</sup> Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017).

resemblance to eighteenth-century judicial decisions.”<sup>309</sup> An 1853 decision of the Arkansas Supreme Court concerning the privilege against self-incrimination declared: “[L]ike the right of trial by jury, the right to keep and bear arms, and like every other right reserved to the citizen, [this constitutional privilege] is subject to such legislative regulation as may be demanded by the exigencies of society, as may not essentially invade its true nature.”<sup>310</sup>

Bancroft Prize–winning, Pulitzer Prize–winning, and National Humanities Medal–winning historian Gordon Wood made a related observation:

[F]or many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action, . . . something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution. It was not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity.<sup>311</sup>

In a different context, Wood spoke of the “utter differentness and discontinuity of the past”<sup>312</sup>—an observation that may suggest the difficulty or impossibility of the originalist enterprise. Focusing on the doctrinal history of a single issue without much sense of bygone conceptions of rights and of the roles of institutions like courts and juries can mislead.

#### 4. Compared to What?

Judges who insist that the right to bear arms should not be second-class seem never to have compared that right as it was originally understood to other rights as they were originally understood. Instead, they have compared standards like those employed in the early firearms cases to standards invented by the Supreme Court after 1960.<sup>313</sup> When, for example, the *McDonald* plurality wrote that the Second Amendment is not a “second-class right, subject to an entirely different body of rules than other Bill of Rights guarantees,” it spoke of current rules.<sup>314</sup> And when *Heller* said of the interest-balancing standard proposed by Justice Breyer, “We know of no other

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<sup>309</sup> *Id.* at 263.

<sup>310</sup> *State v. Quarles*, 13 Ark. 307, 309 (1853).

<sup>311</sup> Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 798–99 (1999).

<sup>312</sup> Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, in *THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 16, 46 (James A. Henretta et al., eds., 1991).

<sup>313</sup> See RICHARD H. FALLON, *THE NATURE OF CONSTITUTIONAL RIGHT: THE INVENTION AND LOGIC OF STRICT SCRUTINY* 13–39 (2019).

<sup>314</sup> 561 U.S. at 780 (plurality opinion).

enumerated constitutional right whose core protection has been subjected to a free-standing ‘interest-balancing’ approach,”<sup>315</sup> it referred to modern standards too.

Justice Breyer’s proposed standard was in fact more favorable to claimants of the right to bear arms than the one employed from the Founding through the early years of the 21st century. The interest-balancing he suggested was unaccompanied by a strong presumption of constitutionality or indications that legislatures could regulate exercise of the right to bear arms almost to the vanishing point.

*Heller* illustrates selective originalism in action. Extensive historical investigation led the Court to conclude that the Second Amendment as originally understood protected an individual right to bear arms for purposes of self-defense. Then, with a hand quicker than the eye, the Court invoked modern precedents to dispatch Justice Breyer’s proposed standard of review. Consistent historical investigation would have shown that, from an originalist perspective, Justice Breyer proposed to protect the right to bear arms *too much*.<sup>316</sup>

Efforts to characterize historical views of the Second Amendment as rendering it second-class sometimes are unconvincing even when one takes the Court’s current treatment of other rights as a reference point. Justice Scalia’s declaration in *Heller*—“We know of no other enumerated constitutional right whose core protection has been subjected to a free-standing ‘interest-balancing’ approach”—suggests that he might have overlooked the Fourth Amendment. That amendment prohibits “unreasonable” searches and seizures, and every justice who has decried the possibility of a second-class Second Amendment has balanced interests in Fourth Amendment cases without pronouncing the Fourth Amendment second-class.<sup>317</sup> Adam Winkler

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<sup>315</sup> 554 U.S. at 654.

<sup>316</sup> Joseph Blocher and Eric Ruben note that distinguishing the identification of a right from determining the appropriate standard of review may “reflect[] the interpretation-construction distinction commonly employed in public meaning originalism.” Blocher & Ruben, *supra* note 108 (manuscript at 23). But *Heller*’s and *Bruen*’s concept of the originalist principle includes “construction” or “application,” *see supra* note 131, and, when the phrase “the right to keep and bear arms” is itself a textual term of art with a historic meaning, the distinction between interpretation and construction is not sharp. Certainly, the move from interpretation to construction is never a license for any originalist to do more than implement the original understanding of the text (albeit in ways that may differ from those employed initially). *See Solum, supra* note 131, at 116–17. It would make no sense to say that the Second Amendment’s text allows public safety measures as long as they are reasonable and then declare that all limitations of arms-bearing must advance compelling governmental interests in the least restrictive way.

<sup>317</sup> *See, e.g., Whren v. United States*, 517 U.S. 806, 817 (1996) (Scalia, J.) (“[I]n principle every Fourth Amendment case . . . involves a balancing of all relevant factors.”); *Samson v. California*, 547 U.S. 843, 848 (2006) (Thomas, J.) (“Whether a search is reasonable ‘is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.’”); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (Alito, J.) (The Fourth Amendment “requires a careful balancing of the nature and quality of the intrusion on the

has shown that “strict scrutiny—a standard of review that asks if a challenged law is the least restrictive means of achieving compelling governmental objectives—is actually quite rare in fundamental rights cases.”<sup>318</sup>

But giving the right to bear arms its original meaning would make it less classy than *some* modern rights—for example, the First Amendment right to give unlimited cash to a SuperPAC to support a favored candidate’s election.<sup>319</sup> Five weeks before the Supreme Court’s decision in *Bruen*, it declared in *FEC v. Ted Cruz for Senate* that even a demonstration that contributions purchased influence and changed Congressional votes could not justify any limitation of the right to make them.<sup>320</sup> The Court noted a “critical” distinction between “the direct exchange of money for official acts, which Congress may regulate, [and] simply increased influence and access, which Congress may not.”<sup>321</sup>

The six justices who comprised the majority in *Cruz* were the same six who comprised the majority in *Bruen*. They attributed the protection of what they called “legitimate donor influence” to *Citizens United v. FEC*.<sup>322</sup> The majority in *Citizens United* consisted of three of these justices (the three appointed prior to the presidency of Donald Trump) and two others, Justices Kennedy and Scalia. Although all of the Court’s self-described originalists joined either *Citizens United* or *Cruz*, none of them has ventured an originalist defense of the right to become an oligarch, and neither has any other originalist judge or scholar. Moreover, no one has pointed to any “super precedent” or other non-originalist precedent<sup>323</sup> that might justify what appears to be a flagrant departure from the Founding generation’s understanding. All of the self-described originalists have been *selective*.<sup>324</sup>

The justices and commentators who have insisted on a first-class right to bear arms may not have meant to match it specifically to the right to make unlimited

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individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”).

<sup>318</sup> Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006).

<sup>319</sup> See *McCutcheon v. FEC*, 572 U.S. 185, 193 n.2 (2014) (seemingly approving *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)).

<sup>320</sup> *FEC v. Ted Cruz for Senate*, 142 S. Ct. at 1638, 1653–54 (2022).

<sup>321</sup> *Id.* at 1654.

<sup>322</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>323</sup> See the authorities cited in *supra* note 127.

<sup>324</sup> See Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality* 58 (Feb. 6, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4347334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347334) [<https://perma.cc/DZ7Z-CT5H>] (observing that “selective originalism is dishonest and hypocritical and ought to be abandoned”); Eric Segall, *Professor Fallon on Selective Originalism and Precedent*, DORF ON LAW (Feb. 22, 2023), <http://www.dorfonlaw.org/2023/02/professor-fallon-on-selective.html> [<https://perma.cc/THR8-77J3>]; cf. *Janus v. AFSCME Council*, 138 S. Ct. 2448, 2470 (2018) (majority opinion by Alito, J.) (accusing a labor union of asking “that we apply the Constitution’s supposed original meaning only when it suits them” and declaring: “We will not engage in this halfway originalism.”).

contributions to SuperPACs. Until 2022, however, some champions of a first-class Second Amendment did complain that Supreme Court decisions afforded greater protection to the right to an abortion than to the right to bear arms.<sup>325</sup> One commentator seemed particularly concerned that an *unenumerated* right was more protected than an *enumerated* one.<sup>326</sup> Because the Court previously had approved an “undue burden” standard for judging restrictions of the right to an abortion<sup>327</sup> and had rejected as *insufficiently* protective an “undue burden” standard for judging firearms regulations,<sup>328</sup> the disparity probably ran the other way. If the commentators were correct, however, a question remained—whether to remedy the disparity between the two rights by leveling firearms rights up or by leveling abortion rights down. On June 23 and June 24, 2022, the Court avoided that dilemma by making both of these moves big time.

Treating all rights equally is an awful idea. When a court must decide whether protection of the public justifies a limitation of the right to bear arms (as it certainly must *sometimes*), a presumption of constitutionality is appropriate. Because a legislature is in a better position to evaluate the need for regulation than a court, a court should give it the benefit of the doubt. But when the purpose of a right is to prevent a majority from oppressing a minority, a presumption in favor of the majority is not justified.<sup>329</sup> Judges who recognize actual differences among rights are the faithful agents of lawgivers. Judges who insist a priori that a particular right must not be second-class are not.

Whether a theory of constitutional interpretation or a determination to make the right to bear arms first class drove the *Bruen* decision is not clear.

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<sup>325</sup> See, e.g., Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 227–28 (2014).

<sup>326</sup> William K. Lane III, *Stop Treating the Second Amendment as a Second-Class Right*, NEWSWEEK (Nov. 18, 2021, 7:00 AM), <https://www.newsweek.com/stop-treating-second-amendment-second-class-right-opinion-1649907> [<https://perma.cc/BZ2B-CPP7>].

<sup>327</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion).

<sup>328</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

<sup>329</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). Although the champions of expansive gun rights sometimes portray firearms owners as a minority in need of protection from a majoritarian threat of disarmament, the threat seems fanciful. 32% of U.S. adults report owning guns personally, and 44% report living in a household with one or more guns. Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> [<https://perma.cc/DJR7-9JKZ>]. Moreover, the firearms lobby has punched well above its weight in the political process. See Ronald Brownstein, *The Real Reason America Doesn't Have Gun Control*, THE ATLANTIC (May 25, 2022), <https://www.theatlantic.com/politics/archive/2022/05/senate-state-bias-filibuster-blocking-gun-control-legislation/638425/> [<https://perma.cc/CVS3-B4YS>]; Thomas Gift, *Guns in the US: Why the NRA Is So Successful in Preventing Reform*, THE CONVERSATION (June 1, 2022, 8:17 AM), <https://theconversation.com/guns-in-the-us-why-the-nra-is-so-successful-at-preventing-reform-184180> [<https://perma.cc/259Z-7KUJ>].



*L. The New York Statute in Historical Perspective*

This Article has not said much about the validity of the New York statute challenged in *Bruen*, and it won't. The 19th-century precedents noted by the Supreme Court do not clearly resolve that issue.

The decisions of two states are on point. The supreme courts of Texas and West Virginia upheld statutes that allowed the public carry of a handgun only by someone who had “reasonable grounds for fearing an unlawful attack on his person.”<sup>330</sup> Acknowledging that these statutes were analogous to the New York statute, *Bruen* dismissed them as outliers.<sup>331</sup> Two U.S. territories, New Mexico and Arizona, also approved laws allowing only people who feared an unlawful attack to carry handguns.<sup>332</sup> The Court called their laws outliers too.<sup>333</sup> An 1822 Kentucky decision, *Bliss*,<sup>334</sup> struck down a prohibition of concealed carry in an opinion that read as though it had been written by Justice Thomas, but *Bliss* was even more clearly an outlier than the Texas and West Virginia decisions and the Texas, West Virginia, New Mexico, and Arizona statutes.<sup>335</sup>

Courts in Georgia, Arkansas, and Tennessee struck down statutes allowing no public carry of handguns (or almost none), but these statutes swept more broadly than the New York statute.<sup>336</sup> The Tennessee Supreme Court characterized the statute it held invalid as “an absolute prohibition against keeping [a pistol].” It commented:

Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute.<sup>337</sup>

In contrast to these rulings, the Kansas Supreme Court upheld a prohibition of public carry. Starting in 1881, the state legislature authorized various municipalities to ban public carry,<sup>338</sup> and, in 1905, the Kansas court upheld one of the legislature's

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<sup>330</sup> *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1875); *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

<sup>331</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2153 (2022).

<sup>332</sup> *Id.* at 2154.

<sup>333</sup> *Id.* at 2154–55.

<sup>334</sup> *Bliss v. Commonwealth*, 12 Ky. 90, 90 (1822).

<sup>335</sup> *See supra* text accompanying notes 250–57.

<sup>336</sup> *Nunn v. State*, 1 Ga. 244 (1846); *Wilson v. State*, 33 Ark. 557 (1878); *Andrews v. State*, 50 Tenn. 165 (1871).

<sup>337</sup> *Andrews*, 50 Tenn. at 187.

<sup>338</sup> *See Bruen*, 142 S. Ct. at 2155.

authorizing statutes.<sup>339</sup> *Bruen* called this Kansas decision “clearly erroneous” because it was “based on the rationale that the Second Amendment protects only ‘the right to bear arms as a member of the state militia, or some other military organization provided by law.’”<sup>340</sup> *Heller* had rejected that view in 2008.

The Kansas decision, however, was not based on the view that the Second Amendment confines its protections to members of the militia. It was based on the view that *Section 4 of the Kansas Bill of Rights* confines its protections to members of the militia.<sup>341</sup> The Supreme Court had no power to set aside the Kansas court’s construction of that provision. Moreover, it would have taken an even more amazing power to remove the Kansas decision from “the Nation’s historical tradition of firearm regulation” by declaring it erroneous a century later.<sup>342</sup>

The three decisions indicating there was a right to public carry are significant, but *Bruen* might have made too much of them. It said of the Georgia decision: “The Georgia Supreme Court’s treatment of the State’s general prohibition on the public carriage of handguns indicates that it was considered beyond the constitutional pale in antebellum America to altogether prohibit public carry.”<sup>343</sup> The Georgia General Assembly, however, did not consider prohibiting public carry beyond the constitutional pale, and neither did the other 19th-century legislatures that banned public carry altogether. When the issue is not which branch of government had the last word but how the words “right to bear arms” were generally understood, legislative understandings seem entitled to as much weight as judicial understandings. In cases like *Heller* and *Bruen*, the Court’s stated mission is not following judicial precedents or “doing law” as judges ordinarily do it. It is probing etymological evidence.

Seven American legislatures did prohibit public carry during the 19th century. They included three territorial legislatures whose prohibitions the *Bruen* Court discounted;<sup>344</sup> the legislatures of Georgia, Arkansas, and Tennessee whose prohibitions the supreme courts of those states held invalid; and the Kansas legislature whose prohibition the state supreme court upheld.

Courts agreed that regulation could not be taken to the point of nullifying the constitutional right, but the scope of the right that could not be nullified often was unclear. Although the *Heller* opinion made a strong case that the Second Amendment

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<sup>339</sup> *Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905). The Supreme Court apparently misdescribed this decision, saying that it “upheld a complete ban on public carry enacted by the city of Salina in 1901.” *Bruen*, 142 S. Ct. at 2155. The defendant in *Blaksley* was convicted only of carrying a pistol while intoxicated. Without focusing on his crime, the Kansas court upheld a state statute enacted in 1901 that would have *allowed* the city to ban public carry altogether. See *Blaksley*, 83 P. at 620–21.

<sup>340</sup> *Bruen*, 142 S. Ct. at 2155.

<sup>341</sup> *Blaksley*, 83 P. at 620.

<sup>342</sup> A court that can undo history by pronouncing it erroneous might be able to command the tides as well.

<sup>343</sup> *Bruen*, 142 S. Ct. at 2147.

<sup>344</sup> See *supra* text accompanying notes 100–03.

encompassed an individual right to keep and bear arms for purposes of self-defense, the opinion took a giant step too far when, in a tortured paragraph, it proclaimed that bearing arms in self-defense was “the *central component* of the right.”<sup>345</sup> The Second Amendment’s prefatory clause unmistakably placed the right of a citizen soldier to keep and bear arms for military purposes front and center.

Even on *Heller*’s view of the right, however, the New York statute did not come close to nullifying it. A New Yorker could keep a firearm at her home or business for purposes of self-defense, and, when she could show a special need to do so, she could carry a firearm in public for self-protection as well. The New York legislature could reasonably have concluded that the additional risk to public safety that would arise from allowing almost everyone to carry a handgun in public was not justified.

Notice that reading what 19th-century opinions *say* and attempting to determine how 19th-century courts understood the right to bear arms differs greatly from tallying 19th-century courts’ and legislatures’ bottom lines as data points.

## II. SCAVENGER HUNTS AFTER *BRUEN*

### A. *New Rules*

Eight days after *Bruen* held the challenged New York statute invalid, a special session of the New York legislature approved a replacement—the Concealed Carry Improvement Act (CCIA).<sup>346</sup> Over the next six months, Federal District Judge Glen Suddaby wrote three opinions assessing the constitutionality of this statute—*Antonyuk I*,<sup>347</sup> *Antonyuk II*,<sup>348</sup> and *Antonyuk III*.<sup>349</sup> Further proceedings before Judge Suddaby are likely to give us *Antonyuk IV*.

*Antonyuk I* dismissed a lawsuit challenging provisions of the CCIA because the plaintiff lacked standing.<sup>350</sup> Judge Suddaby nevertheless addressed the merits of the plaintiff’s claims in what he called “judicial dictum.” He said that this dictum would become holding if his decision on standing were reversed.<sup>351</sup> The plaintiff, however, did not seek reversal. Instead, he and five others affected by the CCIA filed a new lawsuit. In *Antonyuk II*, Judge Suddaby issued and explained a temporary restraining order forbidding the enforcement of many CCIA provisions. In *Antonyuk III*, he issued and explained a preliminary injunction barring the enforcement of a revised list of twelve CCIA provisions. Judge Suddaby reconsidered his views of several

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<sup>345</sup> *Heller*, 554 U.S. at 599.

<sup>346</sup> 2022 N.Y. Sess. Laws ch. 371 (McKinney).

<sup>347</sup> *Antonyuk v. Bruen (Antonyuk I)*, 624 F. Supp. 3d 210 (N.D.N.Y. 2022).

<sup>348</sup> *Antonyuk v. Hochul (Antonyuk II)*, 635 F. Supp. 3d 111 (N.D.N.Y. 2022).

<sup>349</sup> *Antonyuk v. Hochul (Antonyuk III)*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022).

<sup>350</sup> *Antonyuk I*, 624 F. Supp. 3d at 244.

<sup>351</sup> *Id.* at 246.

issues from one opinion to the next. The Second Circuit has granted a temporary stay of the *Antonyuk III* injunction (and also of preliminary injunctions issued by another federal district court in New York), leaving the CCIA in effect pending further review.<sup>352</sup> The Supreme Court has refused to vacate the appellate court's stay, but Justices Alito and Thomas wrote separately to criticize the Second Circuit's failure to explain its stay and order expedited briefing.<sup>353</sup>

### 1. Counting Analogues

One of the issues Judge Suddaby reconsidered was central: How many pre-20th-century analogues does it take to render a challenged firearms regulation constitutional? At what point do analogous regulations cease being “outliers” and become part of the nation's “tradition” of firearms regulation?

In *Antonyuk I*, Judge Suddaby commented that, when a “vast majority” of states had failed to enact appropriate analogues, the analogues approved by other states “might represent exceptions to a tradition more than a tradition.”<sup>354</sup> In *Antonyuk II*, however, he rejected a “majority of the states” standard. He announced that he would “generally” require “three or more” historical analogues.<sup>355</sup>

Judge Suddaby noted a decision that apparently required a larger number.<sup>356</sup> In striking down a Texas requirement that a person must be 21 to carry a handgun outside her home for purposes of self-defense, a federal district court observed: “[T]he historical record before the Court establishes (at most) that between 1856 and 1892 approximately twenty jurisdictions (of the then forty-five states) enacted laws that restricted the ability of those under 21 to ‘purchase or use firearms.’”<sup>357</sup> The court emphasized that these supposed analogues appeared long after ratification of the Second Amendment (whose original meaning the court considered more important than the original meaning of the amendment that actually rendered the Texas statute invalid), but it said that it would have found the analogues insufficient even if it had given greater weight to the later period.<sup>358</sup>

Under *Bruen*, a number much smaller than twenty is likely to suffice. The word “outlier” the Court invoked to cast aside some historic analogues refers to “a data point that differs significantly from other observations,”<sup>359</sup> not to anything less than

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<sup>352</sup> Nicholas Jacobson, *Additional Developments to New York's Concealed Carry Improvement Act*, JDSUPRA (Nov. 23, 2022), <https://www.jdsupra.com/legalnews/additional-developments-to-new-york-s-1409613/> [<https://perma.cc/DS9B-CZ7P>].

<sup>353</sup> *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023).

<sup>354</sup> *Antonyuk I*, 624 F. Supp. 3d at 256.

<sup>355</sup> *Antonyuk II*, 635 F. Supp. 3d 111, 131–32 (N.D.N.Y. 2022).

<sup>356</sup> *Id.* at 131.

<sup>357</sup> *Firearms Pol’y Coal. v. McCraw*, 623 F. Supp. 3d 740, 756 (N.D. Tex. 2022); *see supra* text accompanying notes 144–45, 163–65 (describing and discussing *McCraw*).

<sup>358</sup> *Id.*

<sup>359</sup> *Outlier*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Outlier> [<https://perma.cc/VD3E-WFD7>]

fifty percent. But a “majority of states” standard indicates where the fallacy that permeates the *Bruen* opinion could lead. *Bruen* rests on the assumption that, whenever a legislature *allowed* people to use firearms in a certain way, it must have concluded that they had a *constitutional right* to use firearms in that way. If that bizarre premise had been accurate, one state’s approval of an analogous regulation could have been offset by another state’s failure to approve a similar regulation. Approval by fewer than half the states then could have been characterized as departing from a general tradition of *nonregulation*.

In *Antonyuk III*, Judge Suddaby “refined” *Antonyuk II*’s statement concerning the general sufficiency of “three or more” analogues. His earlier statement, he said, did a “disservice to federalism.” It was necessary not merely to count the jurisdictions that had enacted these analogues but also to take account of their differing populations.<sup>360</sup>

Other things mattered too, including the time when an analogue was approved. Judge Suddaby gave limited weight to analogues that appeared in either the 17th century or the last decade of the 19th century.<sup>361</sup> The closer an analogue’s enactment came to the ratification of the Second Amendment or the Fourteenth, the greater its relevance. And the nature of the jurisdiction that created an analogue was significant. Judge Suddaby discounted analogues approved by territorial legislatures for the same reasons the Supreme Court did,<sup>362</sup> and he discounted analogues approved by municipalities for reasons that were not clear.<sup>363</sup> Finally, the length of time an analogue endured was important. Judge Suddaby observed: “[T]he definition of a ‘tradition’ often involves the passing on of a belief or custom from one generation to another.”<sup>364</sup> *Bruen* indicated that restrictions resting on the view that the right to bear arms extends only to militiamen should be discounted because *Heller* repudiated that view.<sup>365</sup> And of course neither Judge Suddaby nor anyone else has ventured an answer to the question of how similar a regulation must be to be counted at all.<sup>366</sup>

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(last visited Oct. 2, 2023). If the issue in *Bruen* had been whether most states had approved regulations analogous to the challenged New York statute before the turn of the 20th century, the Court could have just said no and saved us from its march through the twilight zone.

<sup>360</sup> *Antonyuk III*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at \*15 n.5 (N.D.N.Y. Nov. 7, 2022).

<sup>361</sup> *Id.* at \*127–28.

<sup>362</sup> *Id.* at \*129–30; *see supra* text accompanying notes 102–03.

<sup>363</sup> *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at \*127–29.

<sup>364</sup> *Antonyuk II*, 635 F. Supp. 3d 111, 131 (N.D.N.Y. 2022).

<sup>365</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155 (2022); *see supra* text accompanying notes 339–42.

<sup>366</sup> Darrell Miller and Joseph Blocher observe:

One by one, the majority characterized each of these historical regulations as outliers. Some were too new; some were too old. Some were outliers because they were passed by territorial governments; some were outliers because they were passed by Reconstruction governments.

Specifying a large number of relevant variables without an algorithm for combining them can render almost every case distinguishable from almost every other. In practice, judges may have substantial discretion to reach the results they like. *Bruen* might have replaced “judge-empowering interest-balancing inquiries” with “judge-empowering inquiries about historical minutiae.”

Many paragraphs of *Antonyuk III* resembled those I am about to quote. A CCIA provision forbidding handgun carry at “any gathering of individuals to collectively express their constitutional rights to protest or assemble” passed muster in *Antonyuk II*, when three analogues appeared to be enough.<sup>367</sup> This provision bit the dust, however, in *Antonyuk III*. Judge Suddaby wrote of the statutes the defendants offered as analogues:

[T]o the extent the laws come from territories near the last decade of the 19th century (i.e., the 1889 Arizona law and 1890 Oklahoma law), the Court discounts their weight, because of their diminished ability to shed light on the public understanding of the Second Amendment in 1791 and/or of the Fourteenth Amendment in 1868.

With regard to the remaining four laws (from Tennessee in 1869–70, Georgia in 1870, Texas in 1870, and Missouri in 1883), they appear to have been sufficiently established . . . . However, their proportional populations at the time were as follows, according to the Census of 1870: (1) Tennessee about 3.3 percent (1,258,520 out of 38,558,371); (2) Georgia about 3.1 percent (1,184,109 out of 38,558,371); (3) Texas about 2.1 (818,579 out of 38,558,371); and (4) Missouri about 4.5 percent (1,721,295 out of 38,558,371). Based on this total of about 13.0 percent, the Court finds that these four laws do not appear to be representative of the Nation’s firearm regulations in or around 1868.<sup>368</sup>

## 2. Researching the Past

The *Antonyuk* litigation illustrates the extraordinary burden *Bruen* casts on litigants, lawyers, and judges who must find and analyze 18th- and 19th-century

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Some were outliers because they weren’t adequately enforced; some because they weren’t enforced criminally; some were outliers because they governed a population too small, or too regional.

Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 50 (2022).

<sup>367</sup> *Antonyuk II*, 635 F. Supp. 3d at 143.

<sup>368</sup> *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at \*178, \*217–18 (citing DEPT. OF INTERIOR, COMPENDIUM OF NINTH CENSUS: 1870 (1870)).

state and local regulations—regulations more likely to be discovered mildewed and unindexed in city hall basements than on LEXIS.<sup>369</sup> Secondary sources do not suffice. Judge Suddaby wrote:

[T]he State Defendants appear to also rely on a citation in the footnote of a book to what they call “ordinances from more than two dozen [other] cities, passed between the mid-19th century and early 20th century, requiring a permit to carry firearms in cities across the United States subject to the discretionary determination of an official.” However, they do not adduce copies of those ordinances, as is their burden.<sup>370</sup>

With the aid of a resourceful Second Circuit librarian, Judge Suddaby did what *Bruen* said he was not obliged to do,<sup>371</sup> and supplemented the parties’ efforts. His opinion in *Antonyuk III* ran 184 typescript pages.<sup>372</sup>

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<sup>369</sup> A helpful compilation of English, colonial, and state gun laws, however, is the *Repository of Historical Gun Laws* maintained by the Duke Center for Firearms Law at <https://firearmslaw.duke.edu/repository/search-the-repository/> [<https://perma.cc/8NK8-UR73>]. State statutes are not as difficult to research as local ordinances. But states, recognizing that the need for firearms regulation differs from rural to urban areas and from one city to another, have empowered local governments to enact their own regulations. See Patrick J. Charles, *The Two Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 431 (2016) (noting that, by 1979, 43 of the 50 states permitted cities, towns, and localities to enact more stringent firearms regulations than those contained in state statutes and that many of these authorizations preceded the 20th century). Both the difficulty of collecting local regulations and the tendency of some judges to discount them bias *Bruen* inquiries against the defenders of gun laws. Restrictions in urban areas are likely to be more demanding than those approved for statewide application, and many pre-20th-century local analogues are probably lost to the sands of time. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (“[P]erhaps no characteristic of gun control in the United States is as ‘longstanding’ as the stricter regulation of guns in cities than in rural areas.”); Charles, *supra* note 71, at 664 (“[A]ny professional historian or archivist will attest, the records of local ordinances that have survived . . . are only a tiny fragment of the whole.”).

<sup>370</sup> *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at \*128–29.

<sup>371</sup> See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (declaring that “we follow the principle of party presentation” and that courts are “entitled to decide a case based on the historical record compiled by the parties”); *id.* at 2150 (declaring that “we are not obliged to sift the historical materials” because “that is [the government’s] burden”).

<sup>372</sup> A federal-district-court opinion concerning the constitutionality of the firearms regulations New Jersey approved after *Bruen* ran 235 typescript pages. *Koons v. Platkin*, Civil No. 22-7464, 2023 U.S. Dist. LEXIS 85235 (D.N.J. May 16, 2023). The court observed that the state had failed to present the historical evidence required by *Bruen*, leaving the court to “conduct[] its own exhaustive research into this Nation’s history and tradition of regulating

Rulings applying the *Bruen* standard to strike down firearms regulations may prove unstable. When a diligent researcher finds previously undiscovered analogues, will the stricken regulations spring back to life?<sup>373</sup>

In a post-*Bruen* case challenging the constitutionality of the federal felon-in-possession statute, Federal District Judge Carlton Reeves ordered the parties to offer their views of whether he should appoint a professional historian as an independent expert. He explained that neither he nor the justices of the Supreme Court were “experts in what white, wealthy, and male property owners thought about firearms regulation in 1791.”<sup>374</sup> After hearing argument on the validity of a federal prohibition of firearms possession by drug users, a Fifth Circuit panel issued an order inviting amicus briefs, particularly briefs concerning “historical gun regulations applicable to intoxicated or impaired individuals.”<sup>375</sup> The Fifth Circuit posted this order prominently on its website.<sup>376</sup>

Commentators suggested possible difficulties with the proposed use of court-appointed experts. The pool of professional historians who have examined the history of firearms regulation is small, and most of these scholars have written things the Supreme Court might not appreciate—for example, that *Bruen*’s version of arms-regulation history is “an ideological fantasy.”<sup>377</sup>

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firearms.” *Id.* at \*9. Whether the digging is done by government lawyers, judges, law clerks, court librarians, or court-appointed experts, we taxpayers pay for it as well as 184- and 235-page judicial opinions. Our legal system has become more unworkable and costly than the one Charles Dickens decried, but the Supreme Court continues its pitiless demands for more paper and more procedure.

<sup>373</sup> Bringing newly discovered antiques before the court might be difficult, but a jurisdiction that was not a party to the initial litigation and that sought to defend a regulation similar to the stricken regulation certainly could do so.

<sup>374</sup> Ord. at 3, *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB (S.D. Miss. Oct. 27, 2022), <https://drive.google.com/file/d/1Lhxx8hjmLxItmmOUiPWW1gUp6JRZ6t/view> [<https://perma.cc/Q2GF-7L39>]; Avalon Zoppo, *Judge May Appoint a Historian After Justices’ Turn to New Test in Gun Rights Cases*, LAW.COM (Nov. 1, 2022), <https://www.law.com/national-lawjournal/2022/11/01/judge-may-appoint-a-historian-after-justices-turn-to-new-test-in-gun-rights-cases/> [<https://perma.cc/HG38-769U>]. Similarly, District Judge Kimberly Mueller ordered the parties to a post-*Bruen* challenge “to show cause within thirty days why the court should not appoint its own expert witness to collect and survey evidence of the ‘historical tradition that the delimits the outer bounds of the right to keep and bear arms.’” *Baird v. Bonta*, 2022 U.S. Dist. LEXIS 221461, at \*25 (E.D. Cal. Dec. 8, 2022).

<sup>375</sup> Memorandum to Counsel or Parties, *United States v. Daniels*, No. 22-60596 (5th Cir. June 7, 2023), [https://www.ca5.uscourts.gov/docs/default-source/default-document-library/courtdirectiveamicusbriefs\\_22-60596.pdf?sfvrsn=51dac92d\\_0](https://www.ca5.uscourts.gov/docs/default-source/default-document-library/courtdirectiveamicusbriefs_22-60596.pdf?sfvrsn=51dac92d_0) [<https://perma.cc/NV33-STT9>].

<sup>376</sup> See *United States Court of Appeals for the Fifth Circuit*, WAYBACK MACH., <https://web.archive.org/web/20230628152332/https://www.ca5.uscourts.gov> (last visited Oct. 2, 2023).

<sup>377</sup> Zoppo, *supra* note 374; Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens>



Both parties responded to Judge Reeves’s order by opposing the use of a court-appointed expert. The defendant maintained that appointing such an expert would relieve the government of its burden to establish the pedigree of the challenged statute, and the government declared that “the prohibition against felons possessing firearms is so thoroughly established as not to require detailed exploration of the historical record.”<sup>378</sup> Judge Reeves eventually dismissed the defendant’s indictment for being a felon in possession of a firearm because the government had failed to establish a “historical tradition” supporting his disarmament.<sup>379</sup> The government’s initial brief in response to the defendant’s motion to dismiss was only 3½-pages long.<sup>380</sup> Of the 121 or more rulings on the validity of the federal felon-in-possession statute by federal district courts in the year or so after *Bruen*, only Judge Reeves’ held it unconstitutional.<sup>381</sup>

But the parties to post-*Bruen* gun disputes have retained their own experts. Within months of the *Bruen* decision, Professor Saul Cornell, the scholar who spoke of *Bruen*’s history as an ideological fantasy, had appeared as an expert witness in fifteen federal cases.<sup>382</sup> In an Oregon case, a Berkeley historian battled with a former gun-museum curator about whether a multi-shot air rifle carried by Lewis and Clark

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-originalist-distortions/ [https://perma.cc/WM6L-CWPF]. It is said that “an overwhelming majority of historians” reject *Heller*’s conclusion that the Second Amendment protects an individual right to bear arms. See *United States v. Bullock*, No. 3:18-cr-00165-CWR-FKB, 2023 U.S. Dist. LEXIS 112397, at \*10–11 (S.D. Miss. June 28, 2023) (quoting Patrick J. Charles, *The “Reasonable Regulation” Right to Arms: The Gun-Rights Second Amendment Before the Standard Model*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 168 (Jennifer Tucker et al., eds., 2019)). One federal court said that, although appointing an expert might be helpful, it doubted that the use of experts could “be scaled to the level that would be required by the federal courts’ massive docket of gun prosecutions.” *United States v. Kelly*, 2022 U.S. Dist. LEXIS 215189, at \*9 n.5 (M.D. Tenn. Nov. 16, 2022).

<sup>378</sup> *Bullock*, 2023 U.S. Dist. LEXIS 112397, at \*11–12.

<sup>379</sup> *Id.* at \*75.

<sup>380</sup> *Id.* at \*69.

<sup>381</sup> See *infra* text accompanying notes 445–50. Judge Reeves likens the adjudication of historical issues in *Bruen* and other Second Amendment cases to an inverted pyramid. Ordinarily, issues addressed by the Supreme Court are refined and focused by their prior consideration in numerous lower courts. In gun cases, however, “[t]he trial record can be nonexistent,” and many of the historical claims ultimately advanced by the Supreme Court have not been tested in prior adversarial proceedings. Instead, dozens of amicus briefs have offered these claims, and law clerks and librarians have then done some research on their own. The experts cited have not been qualified in accordance with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and they have not been subject to cross-examination. The briefs allow the justices look over the crowd and pick out their friends. See *Bullock*, 2023 U.S. Dist. LEXIS 112397, at \*41–42 (suggesting the inverted pyramid metaphor); *id.* at \*59 (noting Justice Scalia’s use of Judge Harold Leventhal’s “scan the crowd” imagery).

<sup>382</sup> Shawn Hubler, *In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791*, N.Y. TIMES (Mar. 16, 2023), <https://www.nytimes.com/2023/03/14/us/gun-law-1791-supreme-court.html> [https://perma.cc/9WJR-VMLD].

as they explored the Northwest Territory was anything more than an “expensive curiosity.”<sup>383</sup> In a case challenging the District of Columbia’s ban on carrying firearms on the subway, Professor Zachary Schrag filed an affidavit describing how, as a professional historian, he would go about researching “‘the nation’s historical tradition’ of firearms regulation on mass transit.”<sup>384</sup> The plaintiffs’ motions for a preliminary injunction and summary judgment were pending, however, and to the question of whether a team of historians could adequately conduct this research in sixty days, he wrote: “The answer is no.”<sup>385</sup>

### 3. White, Wealthy, and Male?

A news story accused Judge Reeves of “blasting” the Supreme Court in a “scorching order,”<sup>386</sup> but his order might have been too complimentary to the Court. Judge Reeves assumed that *Bruen* was concerned with discovering “what white, wealthy, and male property owners thought about firearms regulation in 1791.” Consider this hypothetical case to test the accuracy of his assumption:

A state legislature recently approved Regulation A, a law prohibiting the public carriage of more than six loaded, readily accessible handguns on one’s person at the same time. A local prosecutor defending the constitutionality of this statute has discovered three historical analogues, all of them *twins*.

*Twin I* was enacted by a state legislature in 1792, one year after ratification of the Second Amendment. Because this legislature probably wouldn’t have approved a statute it considered unconstitutional, its enactment provides strong evidence that the statute was consistent with the state’s constitutional guarantee of the right to bear arms as this provision was then understood. Moreover, as time passed, the evidence grew stronger. Although *Twin I* was frequently enforced, it never was challenged. Gunslingers charged with violating the statute apparently did not think a challenge likely to succeed.

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<sup>383</sup> *Id.*

<sup>384</sup> Declaration of Zachary Schrag, in Defs.’ List of Exhibits in Support of Plaintiffs’ Application for Preliminary Injunction and Motion for Summary Judgment at 2, *Angelo v. District of Columbia*, No. 1:22-cv-01878 (RDM) (D.D.C. Sept. 16, 2022), Doc. 18-13, <https://michellawyers.com/wp-content/uploads/2022/09/2022-09-16-Defendants-Exhibits-ISO-Opp-to-MPI.pdf> [<https://perma.cc/7VBT-7KPX>].

<sup>385</sup> *Id.*

<sup>386</sup> Ariane de Vogue, *Federal Judge Blasts the Supreme Court for Its Second Amendment Opinion*, WRALNEWS (Nov. 1, 2022), <https://www.wral.com/federal-judge-blasts-the-supreme-court-for-its-second-amendment-opinion/20550467/> [<https://perma.cc/ANY9-3DEQ>].

The evidence that Regulation A was compatible with the right to bear arms (as this right was originally understood) increased when a state legislature enacted *Twin II* a year later. A defendant did challenge this statute. A trial court, however, upheld it, and a unanimous, five-justice state supreme court affirmed the trial court's ruling. The supreme court called *Twin II* a reasonable exercise of the police power and said that, because it didn't come close to rendering the right to keep and bear arms a nullity, it was constitutional.

The evidence of Regulation A's constitutionality became stronger still in 1869, one year after ratification of the Fourteenth Amendment. In that year, a state legislature approved *Twin III*. Again, the statute was challenged, and again a trial judge and a unanimous five-justice state supreme court upheld it. *Twin III*, however, lasted only three years. The legislature repealed it when the Opposition Party gained a majority.

The populations of the states that approved *Twins I, II, and III* were all below the national average. Moreover, no states other than these three enacted any legislation resembling Regulation A. As far as anyone knows, none of these legislatures ever considered the idea.

The issue posed by this hypothetical case is: When strong evidence, including the conclusions of three 18th- and 19th-century legislatures and twelve 18th- and 19th-century judges, indicates that Regulation A is consistent with the right to bear arms as that right was originally understood—and when *no* evidence indicates that it is not—is Regulation A constitutional or unconstitutional? And the correct answer is: *unconstitutional*. The prosecutor has not “demonstrated” that Regulation A “is consistent with the Nation's historical tradition of firearm regulation.” *Twins I, II, and III* are all *outliers*.

That is *Bruen*-style originalism. It seems to have less to do with “what white, wealthy, and male property owners thought about firearms regulation in 1791” than it does with what a majority of the Supreme Court thought about firearms regulation in 2022.

### *B. The Law in Action*

While denouncing “judge-empowering interest-balancing inquiries,” *Bruen* empowered judges. After *Bruen*, judges wield their power in firearms cases far more actively than their interest-balancing predecessors ever did. This section describes and comments on challenges to a number of specific firearms regulations in the first

year after *Bruen*. It begins by discussing an issue addressed by Judge Suddaby in his three *Antonyuk* opinions.

### 1. Places of Worship

In 1871, at the same time the Tennessee Supreme Court struck down a firearms regulation,<sup>387</sup> it observed that the right to bear arms “is limited by the duties and proprieties of social life.” It supplied an illustration: “Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as carrying them to such places is not an appropriate use of them . . . .”<sup>388</sup> The Court noted that, although a horse owner’s title is protected by the Constitution, she has no right to bring her horse to church.<sup>389</sup>

In the same year, the Texas Supreme Court declared: “[I]t appears to us little short of ridiculous that any one would claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church . . . .”<sup>390</sup>

In 1874, the Georgia Supreme Court commented:

The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.<sup>391</sup>

Almost 150 years later, in *Antonyuk III* and *Hardaway v. Nigrelli*,<sup>392</sup> New Yorkers gained the constitutional right to bring their guns to church. A section of the CCIA forbade possessing a firearm at “any place of worship or religious observation,”<sup>393</sup> and, in *Antonyuk II*, Judge Suddaby concluded that this provision was “generally” constitutional.<sup>394</sup> In *Antonyuk III*, however, he reversed this position, concluding that the ban could not be enforced. Four days earlier in *Hardaway*, in

<sup>387</sup> *Andrews v. State*, 50 Tenn. 165, 166 (1871). The court’s ruling is described *supra* text accompanying notes 335–36.

<sup>388</sup> *Id.* at 182.

<sup>389</sup> *Id.* at 185.

<sup>390</sup> *English v. State*, 35 Tex. 473, 479 (1871).

<sup>391</sup> *Hill v. State*, 53 Ga. 472, 475 (1874).

<sup>392</sup> *Hardaway v. Nigrelli*, 2022 U.S. Dist. LEXIS 200813 (W.D.N.Y. Nov. 3, 2022); *Antonyuk III*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at \*221 (N.D.N.Y. Nov. 7, 2022).

<sup>393</sup> N.Y. PENAL LAW § 265.01-e (2)(c) (LexisNexis 2023).

<sup>394</sup> *Antonyuk II*, 635 F. Supp. 3d 111, 139–42 (N.D.N.Y. 2022). Judge Suddaby indicated that the Constitution did require an exception. The statute could not be applied to a person “tasked with the duty to keep the peace at the place of worship.”

another federal district court in New York, Judge John Sinatra had reached the same conclusion.<sup>395</sup>

*Antonyuk III* noted:

The State Defendants argue that this regulation’s historical analogues consist of the following laws, of which they have provided copies: (1) a Georgia statute from 1870 prohibiting deadly weapons in “any place of public worship”; (2) a Texas statute from 1870 prohibiting the carrying of guns into “any church or religious assembly”; (3) a Virginia statute from 1877 prohibiting “carrying any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place”; (4) a Missouri statute from 1883 prohibiting the carrying of “any deadly or dangerous weapon” in “churches”; (5) an Arizona statute from 1889 banning guns in “any church or religious assembly”; and (6) an Oklahoma statute from 1890 prohibiting carrying weapons into any church or religious assembly . . . .<sup>396</sup>

Judge Suddaby concluded that these sextuplets did not make the grade. Two of them came “from territories near the last decade of the 19th century,” and the remaining four came from states containing “only about 12.9 percent of the national population.”<sup>397</sup>

In *Hardaway*, Judge Sinatra described the same six statutes as “a handful of seemingly spasmodic enactments” and declared: “[T]he notion of a ‘tradition’ is the opposite of one-offs, outliers, or novel enactments.”<sup>398</sup> He added: “These enactments are of unknown duration, and the State has not met its burden to show *endurance* (of any sort) *over time*.”<sup>399</sup> The judge referred to “a few additional municipal enactments of similar vintage” but did not cite them.<sup>400</sup> He said they could not alter the result.<sup>401</sup>

Judge Sinatra observed: “These outlier enactments also contrast with colonial-era enactments that, in fact, mandated [carrying firearms] at places of worship.”<sup>402</sup> Most of the “tradition” on which *Bruen* relied was one of legislative inactivity.<sup>403</sup> In

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<sup>395</sup> In both cases, the rulings supported the issuance of preliminary injunctions and so were provisional. *Hardaway*, 2022 U.S. Dist. LEXIS 200813, at \*41.

<sup>396</sup> *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at \*177–78.

<sup>397</sup> *Id.* at \*178–79.

<sup>398</sup> *Hardaway*, 2022 U.S. Dist. LEXIS 200813, at \*39.

<sup>399</sup> *Id.* (emphasis in original).

<sup>400</sup> *Id.* at \*39 n.17.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at \*39–40; see *Antonyuk II*, 635 F. Supp. 3d at 141 n.31.

<sup>403</sup> Just as the “tradition” *Bruen* made crucial rarely rested on legislative *action*, it did not

this statement, however, Judge Sinatra pointed to positive legislative enactments. In 1632, for example, the Virginia General Assembly provided: “ALL men that are fittinge to beare armes, shall bringe their pieces to the church . . . .”<sup>404</sup>

Like *Bruen*’s reliance on legislative inaction, reliance on early gun-carrying mandates illustrates the “fallacy of the converse.”<sup>405</sup> The six state and territorial legislatures that *forbade* gun possession in places of worship before the end of the 19th century probably would not have done so if they thought gun carrying in church was protected by a federal or state guarantee of the right to bear arms. Their actions provide strong evidence of how they understood the constitutional right. But, even if *mandates* of gun possession in church had been approved after ratification of the Second Amendment or the Fourteenth,<sup>406</sup> they would have had little or no tendency to show that possession in church was protected.

A gun mandate, like a gun prohibition, would have shown only that the legislature considered this action *authorized*. And when a legislature is authorized to mandate an activity, it usually is also authorized to forbid it or leave it unregulated. A colonial legislature that ordered citizens to carry weapons at a time when attacks were likely might, without contradiction, forbid carrying weapons at a more peaceful time. The authors of the mandate might be astonished by a claim that their action created or evidenced a “right” of individuals to bring their guns to church.

Judge Sinatra’s opinion in *Hardaway* underscored how *Bruen* works: With the “originalist” invention of a strong, historically unjustifiable presumption of *unconstitutionality*, the absence of historical evidence can defeat probative evidence

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rest at all on the practices or expectations of ordinary people. How many 18th- and 19th-century Americans did bring their guns to church or believed they had a constitutional right to do so? *See generally* Frassetto, *supra* note 152 (showing that, in the 19th century, carrying a handgun in public in the absence of an imminent threat was strongly disapproved of in most of the country); *State v. Huntly*, 25 N.C. 418, 422 (1843) (“No man amongst us carries [a gun] about with him, as one of his every day accoutrements . . . and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.”). *Bruen*, however, said that, rather than defer to the interest-balancing of modern legislatures, it would give “unqualified deference” to the balance “struck by the traditions of the American people.” 142 S. Ct. 2111, 2131 (2022). The Court apparently thought it could discover the traditions of the American people by examining what statutes 19th-century legislatures failed to enact. Rather than defer to the balancing done by modern legislatures when they enacted gun regulations, it would defer the balancing it imagined had been done by old legislatures when they did not.

<sup>404</sup> 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE* 126 (1823).

<sup>405</sup> *See supra* notes 106–11 and accompanying text.

<sup>406</sup> Once state and federal guarantees of religious freedom were in place, they surely precluded governmental mandates to carry firearms in church. Whether these guarantees now preclude prohibitions like the CCIA’s is beyond the scope of this Article. *See generally* *Spencer v. Nigrelli*, No. 22-CV-6486, U.S. Dist. LEXIS 233341 (W.D.N.Y. Dec. 29, 2022) (Sinatra, J.) (tentatively concluding that the CIAA’s prohibition violates both the Free-Exercise and Establishment Clauses of the First Amendment).

almost every time. Judge Sinatra wrote: “The *amicus curiae* argues that a small number of state laws is sufficient so long as there is not overwhelming evidence of an enduring tradition to the contrary. This turns the test and its burden on their heads.”<sup>407</sup>

Someone must truly be an acrobat.

## 2. Airliners

In *Antonyuk II*, Judge Suddaby temporarily restrained the enforcement of a provision of the CCIA barring handguns in “any place, conveyance, or vehicle used for public transportation or public transit, subway cars, train cars, busses, ferries, railroad, omnibus, marine, or aviation transportation.”<sup>408</sup> In *Antonyuk III*, however, he reduced the breadth of this order after concluding that none of the plaintiffs had standing to challenge the ban on firearms in trains, subways, and other places listed in the statute.<sup>409</sup> The preliminary injunction approved by his most recent decision barred enforcement only “with regard to (1) ‘aviation transportation’ and ‘airports’ to the extent the license holder is complying with all federal regulations there, and (2) ‘busses’ and vans.”<sup>410</sup> The judge, however, did not retreat from his view that, if appropriately challenged, none of the CCIA’s prohibition of firearms in transportation conveyances and facilities could survive.<sup>411</sup>

The plaintiff who successfully challenged the CCIA’s “airport” and “aviation transportation” restrictions emphasized that he planned to comply with all *federal* regulations.<sup>412</sup> These familiar regulations forbid carrying firearms on airliners and in the secured areas of airports.<sup>413</sup> Even the National Rifle Association does not appear to oppose these clearly necessary regulations.<sup>414</sup>

After *Bruen*, however, judges may not uphold firearms regulations simply because they are clearly necessary. The determinative issue is whether these regulations have respectable ancestors. And just about everybody’s most frequently resented (as well as most welcome and appreciated) firearms regulations may flunk the *Bruen* test. These regulations, like airplanes, seem to be post-1901 parvenus.

The prospect of finding “distinctly similar” analogs seems bleak. Before the 20th century, no state or municipality appears to have imposed specific limitations on carrying weapons in stagecoaches, paddle wheelers, ferry boats, barges, railroads, horse-cars, sailing ships, steamships, hot-air balloons, or other transportation conveyances.

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<sup>407</sup> *Hardaway*, 2022 U.S. Dist. LEXIS 200813, at \*40 n.21.

<sup>408</sup> *Antonyuk II*, 635 F. Supp. 3d at 143; see N.Y. PENAL LAW § 265.01-e (2)(n) (Lexis-Nexis 2023).

<sup>409</sup> *Antonyuk III*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at \*75–84 (N.D.N.Y. Nov. 7, 2022).

<sup>410</sup> *Id.* at \*203.

<sup>411</sup> *Id.* at \*196–203.

<sup>412</sup> *Id.* at \*81–82.

<sup>413</sup> See 49 C.F.R. § 1540.111 (2006).

<sup>414</sup> See *Firearm Transportation*, NRA-IRA INST. LEGIS. ACTION, <https://www.nraila.org/get-the-facts/firearm-transportation/> [<https://perma.cc/48E6-99TU>] (last visited Oct. 2, 2023).

Indeed, at least nine of the American jurisdictions that prohibited concealed carry during the 19th century exempted “travelers” from this restriction.<sup>415</sup> The lawful carry of deadly weapons while journeying from place to place appears to be an American tradition. The discovery of even a lonely outlier is unlikely.

Current federal air safety regulations, however, probably “implicat[e] unprecedented societal concerns or dramatic technological change[.]”<sup>416</sup> and *Bruen* probably allows a “more nuanced” sort of analogy. If so, the “central” inquiries are “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”<sup>417</sup>

After balancing some interests (ahem), a judge could easily find that the justification for today’s air safety regulations is as strong as, say, the justification for 19th-century bans on carrying firearms at schools and voting places. Moreover, the burdens of a total prohibition are *total* whether this ban applies in voting places or airliners. The mechanisms used to enforce the total prohibition of gun carrying on airliners, however, are unprecedented.

Someone with an appropriate state permit who wishes to travel by air to Monroe, Louisiana, and then carry her handgun for self-protection in that high-crime city<sup>418</sup> must place her unloaded gun in a hard-sided gun case, transport the gun within checked luggage, inform the ticket agent that her luggage contains a firearm, stand in line at a security checkpoint, present a suitable form of identification, remove her coat, remove items from her pockets, submit to an electronic search of her person, submit to an electronic search of her hand luggage, submit (sometimes) to a physical search of her person, submit (sometimes) to a physical search of her hand luggage, and then recover her weapon at the baggage-claim area in Monroe—that is, if no one has sent it along with her toothbrush to O’Hare or La Guardia by mistake.<sup>419</sup> No comparable regime of pre-clearance restrictions and searches accompanied 19th-century prohibitions of carrying firearms in voting places or other sensitive areas.

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<sup>415</sup> See Frassetto, *supra* note 152, at 2529–30 (noting “traveler” exceptions in Kentucky, Arkansas, Tennessee, Wyoming, Arizona, Alabama, California, Indiana, and Boise, Idaho); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 64 (2017) (“Concealed carry laws generally made exceptions for travelers passing through an area while armed.”).

<sup>416</sup> See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

<sup>417</sup> *Id.* at 2132–33; see *supra* notes 170–71, 194–98 and accompanying text.

<sup>418</sup> See generally Samuel Stebbins, *Monroe, LA Is Among the Most Dangerous US Metro Areas*, THE CTR. SQUARE: LA. (Nov. 9, 2021), [https://www.thecentersquare.com/louisiana/monroe-la-is-among-the-most-dangerous-us-metro-areas/article\\_44942618-f6e1-536f-86b5-1fc3974d544c.html](https://www.thecentersquare.com/louisiana/monroe-la-is-among-the-most-dangerous-us-metro-areas/article_44942618-f6e1-536f-86b5-1fc3974d544c.html) [<https://perma.cc/8DZ2-CLRV>].

<sup>419</sup> See *Firearms and Ammunition*, TRANSP. SEC. ADMIN. (Aug. 24, 2022), <https://www.tsa.gov/news/press/factsheets/firearms-and-ammunition> [<https://perma.cc/LMM4-93AX>]; *What to Expect at the Airport*, FLYSAFAIR (2021), <https://flysafair.zendesk.com/hc/en-us/articles/206634089-What-to-Expect-at-the-Airport> [<https://perma.cc/NT2X-LTMU>].



A traveler, however, can avoid modern air-travel restrictions by traveling to Monroe by bus, train, or automobile. Perhaps a court could conclude that the burden on her exercise of the right to bear arms is not any greater than it would have been before Wilbur and Orville Wright invented the airplane. It would have been easier and more convincing to analyze the issue as courts did before the 21st century: The federal regulations are an appropriate (and indeed essential) safety measure, and no evidence suggests that anyone in 1791 or 1868 would have regarded them as inconsistent with the right to keep and bear arms.

### 3. Serial Numbers

A federal statute prohibits possessing a firearm with an altered, obliterated, or removed serial number.<sup>420</sup> In *United States v. Price*,<sup>421</sup> Federal District Judge Joseph Goodwin observed: “Certainly, the usefulness of serial numbers in solving gun crimes makes [this statute] desirable for our society.”<sup>422</sup> He then held it unconstitutional.

Prior to *Bruen*, as Judge Goodwin noted, courts uniformly “found that the requirement that a serial number not be removed was a minimal burden on lawful gun owners compared to the value serial numbers provide to society.”<sup>423</sup> The judge observed, however, that “the Supreme Court no longer permits such an analysis.”<sup>424</sup> After a thorough exposition of the history of gun serial numbers and their regulation, he wrote that the Government failed to “affirmatively prove that its firearms regulation is part of the [or analogous to a] historical tradition that delimits the outer bounds of the right to keep and bear arms.”<sup>425</sup>

### 4. Making and Selling

“Ghost gun” machinery enables buyers to make their own firearms, thereby avoiding background checks and acquiring weapons without serial numbers. In

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<sup>420</sup> 18 U.S.C. § 922(k).

<sup>421</sup> *United States v. Price*, No. 22-CR-97, 2022 U.S. Dist. LEXIS 186571 (S.D.W. Va. Oct. 12, 2022).

<sup>422</sup> *Id.* at \*9–10.

<sup>423</sup> *Id.* at \*9.

<sup>424</sup> *Id.* at \*10.

<sup>425</sup> *Id.* at \*17 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022)). Other district courts have upheld the statute forbidding possession of a firearm with an altered or obliterated serial number, declaring either that such a weapon does not qualify as an “arm” because it is not in common use for a lawful purpose or that colonial gun registers, which were maintained primarily for tax purposes, are sufficient analogues. *See United States v. Bradley*, No. 2:22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at \*8–11 (S.D.W. Va. Mar. 23, 2023); *United States v. Tita*, No. RDB-21-0334, 2022 U.S. Dist. LEXIS 231140 (D. Md. Dec. 22, 2022); *United States v. Reyna*, No. 3:21-cr-41, 2022 U.S. Dist. LEXIS 225896, at \*6–12 (N.D. Ind. Dec. 15, 2022); *United States v. Holton*, No. 3:21-CR-0482-B, 2022 U.S. Dist. LEXIS 200327, at \*5–7 (N.D. Tex. Nov. 3, 2022).

*Defense Distributed v. Bonta*, a distributor of gunmaking machinery sold under the brand name “Ghost Gunner” challenged a state statute that forbade buying or selling this product.<sup>426</sup> The distributor argued that the state law had no historical analogue, but a federal district court found it unnecessary to consider that issue.

The two-step *Bruen* standard requires a hunt for analogues only “when the Second Amendment’s plain text covers an individual’s conduct,”<sup>427</sup> and the Court concluded that the challenged statute had “nothing to do with ‘keeping’ or ‘bearing’ arms.” It restricted only “the self-manufacture of firearms” and “the sale of tools and parts necessary to complete the self-manufacturing process.” “[T]ry as you might,” the court said, “you will not find a discussion of those concerns . . . in the ‘plain text’ of the Second Amendment.”<sup>428</sup>

Another federal district court avoided a scavenger hunt when a licensed gun dealer challenged several statutory restrictions that allegedly had no pre-20th-century analogues. The dealer maintained that these restrictions burdened his customers’ right to keep and bear arms, but the court responded that “the ordinary meaning of ‘keep and bear’ does not include ‘sell or transfer.’”<sup>429</sup> However burdensome or historically unjustified the gun-sale restrictions might be, the court indicated that they could not violate the “plain text” of the Second Amendment.

A third federal district court, however, issued a preliminary injunction against enforcing a Delaware statute that forbade manufacturing ghost guns. The plaintiffs’ challenge survived *Bruen*’s Step 1 because: “[T]he right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm.”<sup>430</sup> And the challenge survived Step 2 because the Delaware Attorney General had failed to show any historic analogues.

Before *Bruen*, courts recognized a Second Amendment right to acquire ammunition because “without bullets, the right to bear arms would be meaningless.”<sup>431</sup> And the Seventh Circuit struck down a prohibition of shooting ranges within the City of Chicago because “[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.”<sup>432</sup>

Efforts to avoid Step 2 of the *Bruen* standard through literalistic readings of the “plain text” are unlikely to appeal to the Court that decided *Bruen*. This Article has mentioned a decision in which the six justices who comprised the majority in that case declared that even a demonstration that campaign contributions changed

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<sup>426</sup> *Def. Distrib. v. Bonta*, No. CV 22-6200-GW-AGR, 2022 U.S. Dist. LEXIS 195839, at \*9–10 (C.D. Cal. Oct. 21, 2022).

<sup>427</sup> *Bruen*, 142 S. Ct. at 2129–30.

<sup>428</sup> *Def. Distrib.*, 2022 U.S. Dist. LEXIS 195839, at \*9–10.

<sup>429</sup> *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, at \*13 (S.D. Cal. Aug. 30, 2022).

<sup>430</sup> *Rigby v. Jennings*, C.A., 630 F. Supp. 3d 602, 615 (D. Del. 2022).

<sup>431</sup> *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

<sup>432</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

Congressional votes would not justify limiting the First Amendment right to make them.<sup>433</sup> The Court explained that a statutory restriction of the funds a campaign organization could use to repay a candidate's loan limited speech and required at least intermediate scrutiny because restricting the ability of donors to make contributions to repay the loan might affect the organization's ability to make repayment, which might affect the candidate's willingness to make the next loan, which might affect the amount of money the next campaign would have, which might affect its ability to engage in political speech.<sup>434</sup>

The Second Amendment ought to protect activities and materials essential to exercising the right it provides. After *Bruen*, however, the temptation to save some regulations through hyperliteral interpretation of the "plain text" appears to be strong.

## 5. Felons

### *a. The State of Play*

As this Article goes to press, two federal courts of appeals have ruled on whether the federal statute forbidding firearm possession by convicted felons<sup>435</sup> survives *Bruen*, and their rulings conflict. On June 2, 2023, a panel of the Eighth Circuit upheld the statute as applied to all offenders.<sup>436</sup> But four days later, the en banc Third Circuit held the statute unconstitutional as applied to an offender convicted of making a false statement to obtain food stamps.<sup>437</sup> Whether the Third Circuit would uphold application of the statute to anyone remained an open question.

At least some of the prisoners convicted of violating the statute in the Third Circuit are now being punished for exercising a constitutional right and are entitled to their freedom, but comparable prisoners convicted in the Eighth Circuit are entitled to no relief. Supreme Court resolution of the conflict seems imperative.

The Court already has agreed to review a decision in which the Fifth Circuit struck down a federal statute forbidding firearm possession by people subject to domestic-violence restraining orders.<sup>438</sup> Although the issues posed by the Fifth Circuit ruling differ from those posed by the felon-in-possession decisions, the cases have much in common. In all of them, the government maintains that wrongdoers

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<sup>433</sup> *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022); *see supra* notes 319–24 and accompanying text.

<sup>434</sup> *Id.* at 1651–52.

<sup>435</sup> 18 U.S.C. § 922(g)(1).

<sup>436</sup> *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023). On August 30, 2023, with four judges dissenting, the Eighth Circuit declined to rehear *Jackson* en banc. *See United States v. Jackson*, No. 22-2870, 2023 U.S. App. LEXIS 22991 (8th Cir. Aug. 30, 2023).

<sup>437</sup> *Range v. Att'y Gen. (Range II)*, 69 F.4th 96 (3d Cir. 2023) (en banc).

<sup>438</sup> *United States v. Rahimi*, 61 F.4th 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

(convicted felons or domestic abusers) are not among “the people” included in the Second Amendment’s declaration of “the right of the people to keep and bear Arms.” The government accordingly contends that their claims fail under Step 1 of the *Bruen* standard. In the alternative, the government contends that the wrongdoers’ claims fail *Bruen*’s Step 2 because the disarmament of racial, religious, and political groups in the 17th, 18th, and 19th centuries is sufficiently analogous to the disarmament of these modern wrongdoers. This Article addresses the government’s contentions primarily in this section, which focuses on the felon-in-possession statute. It considers whether cases of domestic abusers differ significantly in the following section.

As noted earlier in this Article, forceful dicta in *Heller*, *McDonald*, and two concurring opinions in *Bruen* say that none of these rulings “cast doubt” on the prohibition of firearm possession by felons.<sup>439</sup> As also noted, however, taking the *Bruen* standard to mean what it says would cast *abundant* doubt on this prohibition, a 20th-century innovation that appears to lack any close pre-20th-century analogues. Prior to Justice Barrett’s appointment to the Supreme Court, she maintained in a Seventh Circuit dissenting opinion that the federal felon-in-possession statute<sup>440</sup> was unconstitutional as applied to a nonviolent offender.<sup>441</sup>

In fiscal year 2021, 7,454 offenders—13% of all convicted federal defendants—were sentenced for violating the felon-in-possession statute.<sup>442</sup> Lawyers representing defendants charged with violating this statute now are likely to challenge it regardless of whether they see much chance of prevailing. If the Supreme Court someday were to strike down the statute, the absence of earlier challenges could be obstacles to relief from punishment for what the Court had found to be the exercise of Second Amendment rights.<sup>443</sup> In addition, convicted defendants might seek relief on the ground that their lawyers’ defaults had deprived them of the effective assistance of counsel.<sup>444</sup>

Before the Third and Eighth Circuit decisions, federal district courts—at least 120 of them<sup>445</sup>—unanimously rejected post-*Bruen* challenges to the felon-in-possession

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<sup>439</sup> See *supra* Section I.A.1.

<sup>440</sup> 18 U.S.C. § 922(g)(1).

<sup>441</sup> *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); see also *Folajtar v. Att’y Gen.*, 980 F.3d 897, 911 (2020) (Bibas, J., dissenting).

<sup>442</sup> UNITED STATES SENTENCING COMMISSION, QUICK FACTS: FELON IN POSSESSION OF A FIREARM, FISCAL YEAR 2021 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_In\\_Possession\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf) [<https://perma.cc/XK8N-3EUJ>].

<sup>443</sup> The lawyers’ defaults could be excused, however, if their errors “probably resulted in the conviction of one who is actually innocent.” *Bousley v. United States*, 523 U.S. 614, 622, 623 (1998).

<sup>444</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>445</sup> See *United States v. Bullock*, No. 3:18-cr-00165-CWR-FKB, 2023 U.S. Dist. LEXIS 112397, at \*2, \*12 (S.D. Miss. June 28, 2023) (quoting a number supplied by the government). The Justice Department apparently keeps track of “oral bench rulings” as well as written opinions and advises judges of its batting average. See *United States v. Young*, No. 22-CR-54, 2022 U.S. Dist. LEXIS 202743, at \*22 n.2 (W.D. Pa. Nov. 7, 2022).

statute.<sup>446</sup> Shortly after the appeals courts' rulings, however, one district court held the statute invalid as applied, not to a nonviolent offender, but to a defendant who had been convicted of manslaughter and attempting to assault a law enforcement officer.<sup>447</sup> The author of this ruling was Judge Carlton Reeves, whose suggestion of the possibility of using a court-appointed expert to assess historical issues was noted earlier in this Article.<sup>448</sup>

Judge Reeves criticized what he called “the post-*Bruen* consensus,” and his distinctive observations merit the sort of applause given long ago to a youth who dissented from the otherwise unanimous view that the emperor was wearing clothes.<sup>449</sup> But Judge Reeves ultimately concluded only that the government “failed to establish a ‘historical tradition’ supporting lifetime criminalization of [the defendant’s] possession of a firearm.”<sup>450</sup> If prosecutors in the next case were to do a better job of mustering historical evidence, the result might be different.

*b. Dictum as Diktat*

Many of the federal district courts that upheld the felon-in-possession statute were content simply to point to the Supreme Court’s dicta and predict what it would do. They quoted declarations like this one: “‘We routinely afford substantial, if not controlling deference to dicta from the Supreme Court,’ ‘particularly when the supposed dicta is recent and not enfeebled by later statements.’”<sup>451</sup> And: “[W]e cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court.”<sup>452</sup> One judge announced that it was “unnecessary to engage in the historical analysis test articulated in *Bruen*”<sup>453</sup> because (a) “[t]he Court in *Heller* made clear that felon-in-possession laws do not violate the Second Amendment” and

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<sup>446</sup> Although *Heller* said that it did not “cast doubt” on felon-in-possession statutes and declared these statutes “presumptively” valid, it, like *Bruen*, sparked a barrage of constitutional challenges. At least 50 federal court of appeals decisions between 2008 and 2020 addressed these challenges. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 252–53 n.16 (2020) (citing these decisions).

<sup>447</sup> See *Bullock*, 2023 U.S. Dist. LEXIS 112397, at \*5 & n.2.

<sup>448</sup> See *supra* text accompanying notes 373–86.

<sup>449</sup> See HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (Naomi Lewis trans., 1977) (1837); Ruth Marcus, *A U.S. District Judge Calls the Supreme Court’s Bluff on Guns*, WASH. POST (July 7, 2023, 7:04 PM), <https://www.washingtonpost.com/opinions/2023/07/07/originalism-supreme-court-second-amendment-reeves/> [<https://perma.cc/X6CU-TR2S>].

<sup>450</sup> See *Bullock*, 2023 U.S. Dist. LEXIS 112397, at \*75.

<sup>451</sup> *United States v. Price*, No. 22-CR-163, 2022 U.S. Dist. LEXIS 186571, at \*20 (S.D.W. Va. Oct. 12, 2022) (quoting language from both *Hengle v. Treppa*, 19 F.4th 324, 327 (4th Cir. 2021), and *Manning v. Caldwell*, 930 F.3d 264, 281 (4th Cir. 2019) (en banc)).

<sup>452</sup> *McCravy v. Metro Life Ins. Co.*, 690 F.3d 176, 181–82 n.2 (4th Cir. 2012).

<sup>453</sup> *United States v. Finney*, No. 2:23-cr-13, 2023 U.S. Dist. LEXIS 54438, at \*8 (E.D. Va. Mar. 29, 2023).

(b) “[t]he Court in *Bruen* specifically stated that it was not overruling or modifying its decision in *Heller*.”<sup>454</sup> This judge quoted the Fourth Circuit: “[W]e cannot ignore the Supreme Court’s explicit guidance simply by labeling it ‘dicta.’”<sup>455</sup>

When a majority of the Supreme Court (consisting of three concurring justices and three dissenters<sup>456</sup>) has announced that *Bruen* does not call into question the validity of the felon-in-possession statute, a district judge may conclude that the game is over and that addressing the statute’s constitutionality herself would be a waste of time. But a judge who takes that view accords the justices of the Supreme Court a power the Constitution says they may not have—the power to govern by issuing unexplained, one-sentence pronouncements concerning issues not argued and not before them.<sup>457</sup> Moreover, litigants are entitled to fair consideration of their arguments, and when the Supreme Court has not resolved an issue and a litigant seeks a resolution of that issue, it seems an abdication of judicial responsibility not to provide one.<sup>458</sup>

*c. An Initial Look at the Rulings of the Third and Eighth Circuits*

The plaintiff who brought a civil action to challenge the felon-in-possession statute in the Third Circuit, Bryan Range, presented an especially appealing case. Twenty-eight years earlier, as he and his wife were raising three young children on \$300 per week, his wife prepared an application for food stamps that understated the couple’s income, and both she and Range signed it. Under Pennsylvania law, their deception constituted a misdemeanor, and Range pleaded guilty to this crime in a state court. His sentence did not include jail time. Since then, Range had been convicted only of minor traffic offenses and of fishing without a license.

The federal statute proscribing firearm possession by felons also disarms many people who aren’t felons. Its terms applied to Range because his crime was a state misdemeanor *punishable* by imprisonment for more than two years.<sup>459</sup> In the first post-*Bruen* decision by a federal appeals court to address the validity of the felon-in-possession statute, a three-judge panel of the Third Circuit upheld this statute and

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<sup>454</sup> *Id.* at \*4.

<sup>455</sup> *Id.* at \*4 n.2 (quoting *Hengle v. Treppa*, 19 F.4th 324, 346 (4th Cir. 2021)); see David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 199–200 n.16 (2017) (citing decisions from every federal court of appeals declaring that Supreme Court dicta are either binding or entitled to great deference).

<sup>456</sup> See *supra* text accompanying notes 51–52.

<sup>457</sup> See *supra* text accompanying notes 53–57 & note 57.

<sup>458</sup> Lower court judges who bow to the diktats of Supreme Court justices are less at fault than the justices who issue them. And the fact that some of these justices portray themselves as champions of judicial restraint makes their free-wheeling disregard of the limits of their power especially unattractive.

<sup>459</sup> See 18 U.S.C. §§ 921(a)(20)(B), 922(g)(1).

concluded that Range had no right to possess a hunting rifle.<sup>460</sup> The Third Circuit then reviewed Range's case en banc and held by a vote of 11-to-4 that he did.<sup>461</sup>

Three members of the Third Circuit majority said in a concurring opinion that they would allow legislatures to disarm people who, unlike Range, “would, if armed, pose a threat to the orderly functioning of society.”<sup>462</sup> The “history and tradition” of disarming these people, they said, was established in England by disarming non-Anglican Protestants and Catholics, and it was established in America by disarming religious dissenters, British loyalists, tramps, and drunks.<sup>463</sup> The concurring judges indicated that felons who'd pose a threat to society “if armed” included some who had not used or threatened the use of firearms and did not seem especially likely to—people convicted of possessing child pornography and of leaking classified national security information.<sup>464</sup> Judicial sentiments seemed likely to play a larger role than history in administering the judges' proposed standard. Felons who “would, if armed, pose a threat to the orderly functioning of society” might be those who sufficiently revolted the judges.

Only one of the three judges who joined this concurring opinion joined Judge Hardiman's majority opinion as well. The eight other judges who joined that opinion did not suggest any distinction between Range and other offenders.<sup>465</sup>

The majority opinion simply rejected the government's arguments for upholding the felon-in-possession statute as applied to Range. It concluded that the Second Amendment's protections are not limited to “law-abiding, responsible people”; that Range is among “the people” protected by that amendment; that disarming Loyalists, Native Americans, Quakers, Catholics, and Black people is not analogous to disarming food-stamp fraudsters; that forfeiting weapons used as instrumentalities

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<sup>460</sup> *Range v. Att'y Gen. (Range I)*, 53 F.4th 262 (3d Cir. 2022), *vacated pending reh'g en banc*, 56 F.4th 992 (3d Cir. 2023).

<sup>461</sup> *Range II*, 69 F.4th 96 (3d Cir. 2023) (en banc). Although I do not believe that the Second Amendment invalidates the felon-in-possession statute in any of its applications, the breadth of today's felon-in-possession statute illustrates our nation's proclivity for over-criminalization. Prison sentences for violating this statute average five years, *see* UNITED STATES SENTENCING COMMISSION, *supra* note 442, and these sentences are significant contributors to mass incarceration. The protection of the public does not require keeping embezzlers and tax cheats who have completed their sentences from going hunting with their friends.

<sup>462</sup> *Id.* at 110 (Ambro, J., concurring).

<sup>463</sup> *Id.* at 111–12.

<sup>464</sup> *Id.*

<sup>465</sup> Note that these eight judges were a slight majority of the 15-judge court. They came closest to distinguishing Range from other offenders when they observed that Congress expanded the felon-in-possession statute to include predicate crimes like his only in 1961, making his crime less “longstanding” than those committed by people who had violated older and more basic provisions of the statute. But Range's crime was not *much* less “longstanding,” for Congress did not impose any restriction on the possession of firearms by felons until 1938. *Id.* at 104 (majority opinion).

of crime is not analogous to a lifetime ban on possessing guns; and that the power to execute felons does not include the lesser power to disarm them.

Two dissenters thought that these majority rulings might leave the felon-in-possession statute without any valid applications. They declared that the majority opinion “is not cabined in any way and, in fact, rejects all historical support for disarming any felon.”<sup>466</sup> But Judge Hardiman ended his opinion by declaring: “Our decision today is a narrow one.”<sup>467</sup> Whether the Third Circuit will treat bank robbers less favorably than food-stamp cheaters and, if so, what line it will draw remain unresolved.

The Eighth Circuit’s ruling in *United States v. Jackson* came four days before the Third Circuit’s en banc ruling in *Range II*.<sup>468</sup> Although the court noted that the Third Circuit vacated the panel opinion in *Range I* when, five months earlier, it agreed to hear *Range*’s case en banc, the Eighth Circuit relied heavily on the withdrawn panel opinion. Echoing that ruling, the court concluded that “history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for the legal norms of society.”<sup>469</sup> It added that, even if past disarmaments reflected concern about violence rather than about disrespect for law, they swept broadly enough that disarming nonviolent convicted felons would not offend the Second Amendment.<sup>470</sup>

Only two members of the Eighth Circuit panel approved the court’s opinion. The third, Chief Judge Smith, declined to consider *Bruen*. In a one-sentence concurring opinion, he said that the felon-in-possession statute was valid because “*Heller* remains the relevant precedent we are bound to apply.”

#### *d. Are Felons People?*

*Bruen* requires a hunt for analogues only when a challenged regulation survives *Bruen*’s Step 1—that is, only “when the Second Amendment’s plain text covers an individual’s conduct.”<sup>471</sup> A number of judges—including those who joined the Eighth Circuit opinion and those who joined the initial Third Circuit opinion—concluded that challenges to the felon-in-possession statute fail the Step 1 inquiry. These judges focus on the words “the people” in the Second Amendment’s declaration of “the right of the people to keep and bear Arms,” and they maintain that these words encompass only “law-abiding, responsible citizens.”<sup>472</sup>

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<sup>466</sup> *Id.* at 116 (Shwartz, J., dissenting).

<sup>467</sup> *Id.* at 106 (majority opinion).

<sup>468</sup> *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023).

<sup>469</sup> *Id.* at 504.

<sup>470</sup> *Id.*

<sup>471</sup> *Bruen*, 142 S. Ct. at 2129–30.

<sup>472</sup> See *Range I*, 53 F.4th 262, 271 (3d Cir. 2022); *Jackson*, 69 F.4th at 504; *Range II*, 69 F.4th 96, 114 (3d Cir. 2023) (Shwartz, J., dissenting); *id.* at 119–28 (Krause, J., dissenting);



The judges rest this conclusion partly on their inference of the principle that, in their view, underlay disarmaments prior to 1901. The officials who ordered these disarmaments did not articulate a justifying principle, and their silence enables post-*Bruen* judges to discern a variety of patterns. (This Article will discuss the battle of inferences when it considers whether the felon-in-possession statute survives *Bruen*'s Step 2.)

Even if past authorities considered themselves entitled to disarm irresponsible lawbreakers,<sup>473</sup> it would not follow that they did so because they excluded these lawbreakers from “the people.” That conclusion would imply the inability of these outcasts to claim several other rights in addition to the right to bear arms. The authorities might have regarded disarming them, not as casting them from their political communities, but simply as a reasonable public safety measure akin to other firearms restrictions.

An apparent linguistic obstacle, however, may lead some judges to dismiss the idea that someone could be disarmed and still be part of “the people.” To say that someone is part of “the people” and therefore has a right to bear arms but may not in fact bear arms sounds like gibberish. Judges may believe that the categories are mutually exclusive. If someone is not part of “the people,” she has no constitutional right to bear arms, and if she is appropriately blocked from bearing arms, she cannot be part of “the people.”

No one, however, may keep and bear arms after entering a polling place, and the fact that someone is barred from exercising a constitutional right while voting does not suggest that she ceases being part of “the people” during that period. A federal statute forbids people subject to domestic-violence restraining orders from possessing firearms, and it would be odd to say that they are excluded from “the people” at the moment the orders are entered but resume being part of “the people” when the orders expire. People who are disarmed until they die or until a president or governor pardons them need not be placed in a different category. The length of their disarmament does not suggest that they must be forbidden to exercise all of the rights the Constitution grants “the people.”

An interpretation of the constitutional term “the people” to mean something different in each of the provisions in which it appears could avoid this implication,

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United States v. Collette, 630 F. Supp. 3d 841 (W.D. Tex. 2022); United States v. Riley, No. 22-CR-163, 2022 U.S. Dist. LEXIS 187709 (E.D. Va. Oct. 13, 2022). *But see* United States v. Coombes, 629 F. Supp. 3d 1149 (N.D. Okla. 2022) (rejecting the argument that felons are not included in “the people” protected by the Second Amendment); United States v. Carrero, 635 F. Supp. 3d 1210 (D. Utah 2022) (same); United States v. Gray, No. 22-CR-00247-CNS, 2022 U.S. Dist. LEXIS 205149 (D. Colo. Nov. 10, 2022) (same); United States v. Bernard, No. 22-CR-03, 2022 U.S. Dist. LEXIS 218378, at \*7 (N.D. Iowa, Dec. 5, 2022) (“The Court rejects the government’s argument that the Second Amendment applies only to law-abiding citizens as a textual matter . . . [The] defendant . . . is a person under the Constitution.”).

<sup>473</sup> See *Range II*, 69 F.4th at 102 (“As for the modifier ‘irresponsible,’ it serves only to undermine the Government’s argument because it renders the category hopelessly vague.”).

but this interpretation would depart from the Constitution's apparent meaning. The Framers could not have meant the composition of "the people" to vary from the Preamble to the First Amendment and then from the Second Amendment to the Fourth. Despite the linguistic paradox, it seems appropriate to conclude: Although people who are not included in "the" people have no constitutional right to bear arms, not everyone who is forbidden to bear arms is excluded from "the people." The tail should not wag the dog, and, although all "the people" have a right to bear arms, this right is only a right to carry weapons when doing so is compatible with protection of the public.

The judges who exclude convicted felons from "the people" bolster their claim with the observation that *Bruen* itself "characterized the holders of Second Amendment rights as 'law abiding' citizens. . . ."<sup>474</sup> The *Bruen* opinion is said to have done so "no fewer than fourteen times."<sup>475</sup> The opinion's first sentence noted in fact that *Heller* and *McDonald* had held "that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."<sup>476</sup> A few similar statements preceded the 20th century. When General D.E. Sickles announced the end of South Carolina's prohibition of gun possession by Black people in 1866, he declared: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed. . . ."<sup>477</sup>

This analysis misreads a phrase chosen for the purpose of setting aside an issue as though it resolved the issue. The words "ordinary law-abiding citizens" appeared on the first line of the first page of the first Supreme Court pleading filed in *Bruen*. The New York State Rifle & Pistol Association's petition for certiorari described the question the case presented as: "Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense."<sup>478</sup>

The reason for this phrasing was evident. It revealed that the petitioner's argument would concern only the rights of "ordinary law-abiding citizens," not those of felons, misdemeanants, people with mental illness, the mentally incompetent,

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<sup>474</sup> *Range I*, 53 F.4th at 271.

<sup>475</sup> *Id.*; *Range II*, 69 F.4th at 114 (Shwartz, J., dissenting); *id.* at 119 (Krause, J., dissenting).

<sup>476</sup> *Bruen*, 142 S. Ct. at 2122.

<sup>477</sup> *Id.* at 2152 (quoting Cong. Globe, 39th Cong., 1st Sess., at 908–09); see *Range I*, 53 F.4th at 272. If you are not familiar with General Sickles, you might find his Wikipedia entry worth reading. It includes gun violence, abundant adultery, and temporary insanity. See *Daniel Sickles*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Daniel\\_Sickles](https://en.wikipedia.org/wiki/Daniel_Sickles) [<https://perma.cc/SA5J-B8Y3>] (last visited Oct. 2, 2023).

<sup>478</sup> Petition for Writ of Certiorari at i, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 141 S. Ct. 2111 (2022) (No. 20-843). When the Supreme Court granted certiorari, it said that it would "limit" its grant to a broader question: "Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (2021).

juveniles, or aliens. Both *Heller* and *McDonald* had said that their rulings did not cast doubt on longstanding prohibitions of the possession of firearms by felons and people with mental illness,<sup>479</sup> and the petitioner might have sought to assure the Court that its argument was unaffected by those dicta.

The Supreme Court then used the phrase “ordinary law-abiding citizens” in the same way as the petitioner. The Court ultimately held that everyone *within the class it considered*—ordinary law-abiding citizens—had a constitutional right to carry a handgun in public without a showing a special need for armed self-defense.

The Court did not make a sly, unexplained ruling that the Second Amendment protects no one else.<sup>480</sup> Grammatically, a statement that the Second Amendment protects “ordinary, law-abiding citizens” or “well-disposed inhabitants” is not a declaration that it protects *only* ordinary, law-abiding citizens or well-disposed inhabitants. The “fallacy of the converse” appears to be the favorite logical error of federal judges.<sup>481</sup>

The judges who emphasize *Bruen*’s references to “law-abiding citizens” say little about *Heller*’s extended discussion of the term “the people.” Justice Scalia’s opinion for the *Heller* majority noted that this term appears in the Constitution seven times. Responding to the claim that Second Amendment rights extend only to members of the militia, Justice Scalia observed: “[I]n all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset . . . . We start therefore with a strong presumption that the Second Amendment right . . . belongs to all Americans.”<sup>482</sup>

Five of the Constitution’s references to “the people” appear in the Bill of Rights. Apart from the Second Amendment’s protection of the right to bear arms, the First Amendment guarantees “the right of the people peaceably to assemble, and the petition the Government for a redress of grievances”;<sup>483</sup> the Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures”;<sup>484</sup> the Ninth Amendment says that “[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people”;<sup>485</sup> and the Tenth

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<sup>479</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

<sup>480</sup> If the Court had said or meant that the Second Amendment protects *only* law-abiding citizens, its *ipse dixit* would have supplied no justification for that proposition.

<sup>481</sup> *See supra* Section I.C (suggesting that the “fallacy of the converse” pervades the opinion in *Bruen*).

<sup>482</sup> *Heller*, 544 U.S. at 580–81; *see Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (describing “the ‘scope of the right’ approach” as “at odds with *Heller*” and noting: “There, the Court interpreted the word ‘people’ as referring to ‘all Americans.’”).

<sup>483</sup> U.S. CONST. amend. I.

<sup>484</sup> U.S. CONST. amend. IV.

<sup>485</sup> U.S. CONST. amend. IX.

Amendment provides that powers not granted to the federal government are retained by “the States” or “the people.”<sup>486</sup> If the transgressions of felons have cast them from our political community, the right to bear arms doesn’t appear to be the only right they have lost. In 1958, the Supreme Court held that withdrawing citizenship following a criminal conviction constitutes cruel and unusual punishment,<sup>487</sup> but some judges may think it is still a good idea.

Reading *Bruen*’s references to “law-abiding citizens” as limiting the scope of the Second Amendment would not affect felons alone. I myself have committed *speeding* and *failure to come to a complete stop*. If *Bruen* truly held that only law-abiding citizens may invoke the Second Amendment, few rights-holders may remain. Despite the rulings in *Heller*, *McDonald*, and *Bruen*, no one could fairly accuse a Court that denied constitutional protection to misdemeanants and traffic offenders of *expanding* gun rights.<sup>488</sup>

*e. Analogues Everywhere*

Hardly anyone wants to strike down the felon-in-possession statute in its entirety, and judges may strain to exclude convicted felons from “the people” because they sense the difficulty of finding sufficient analogues to sustain the felon-in-possession statute under *Bruen*’s Step 2. But some judges argue that analogues abound; they consist of *all* the decrees that deprived people of firearms before the 20th century. Demonstrating their relevance requires three analytic steps.<sup>489</sup>

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<sup>486</sup> U.S. CONST. amend. X.

<sup>487</sup> See *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

<sup>488</sup> The withdrawn panel opinion in *Range* expressed confidence that judges could resolve the difficulties just noted. It declared in a footnote: “[W]e do not address whether individuals convicted of misdemeanors carrying lesser punishments [than felonies] can be disarmed consistent with the Second Amendment,” and it added in another: “By no means do we suggest that legislatures have carte blanche to disarm anyone who commits any crime.” *Range I*, 53 F.4th 262, 267 n.3, 273 n.14 (3d Cir. 2022). The panel apparently assumed that the words “law-abiding, responsible citizens” can mean what judges choose them to mean, enabling these judges to decide which law breakers remain sufficiently law-abiding to retain constitutional protections.

The panel declared in another footnote: “[O]ur reasoning applies solely to the Second Amendment and does not imply any limitation of the rights of individuals convicted of felony and felony-equivalent offense under other provisions of the Constitution.” *Id.* at 284 n.32. It apparently believed that the constitutional term “the people” is a chameleon too. Although it is unlikely the Framers meant this term to be so elastic, the panel might have been prepared to give it a different meaning for each of the seven provisions in which it appears. The judges of the panel might have regarded themselves as legal realists. *Cf.* JEROME FRANK, *LAW AND THE MODERN MIND* 19 (1930) (describing legal rules as the product of fetishism and father fixation). They might be part of the problem to which *Bruen* is a bad solution.

<sup>489</sup> See, e.g., *United States v. Riley*, No. 22-CR-163, 2022 U.S. Dist. LEXIS 187709, at

## i. Step 1: Scavenging

The first step consists of a journey through history, collecting all the occasions a court can find before 1901 when an English or American government disarmed people. Among the groups forbidden to possess firearms before that date were Protestants; Catholics (not only in England but also in Maryland, Virginia, and Pennsylvania); the followers of Anne Hutchinson after her trial and expulsion from the Massachusetts Bay Colony; loyalists who “defamed” resolutions of the Continental Congress; people who refused to swear allegiance to the Commonwealth of Pennsylvania; people who refused to swear fidelity to the Commonwealth of Virginia; indentured servants; enslaved people; free Black people; and Native Americans.<sup>490</sup>

## ii. Step 2: Generalizing

The second step consists of inferring the general principle that guided these disarmaments. Judges have discerned a variety of patterns, including the one endorsed by three of the concurring judges in *Range*—the permissibility of disarming people who “would, if armed, pose a threat to the orderly functioning of society.”<sup>491</sup> But the two principal hypotheses appear to be: (1) Legislatures were free to disarm people they considered dangerous and (2) legislatures were free to disarm people they regarded as lacking civic virtue. In the aftermath of *Heller*, future Justice Amy Coney Barrett endorsed the “danger” hypothesis,<sup>492</sup> but most federal appellate courts took the “virtue” view.<sup>493</sup> They said things like: “[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens.’”<sup>494</sup>

Both hypotheses have their difficulties. The “danger” hypothesis trips over the fact that past authorities disarmed some peaceful people, including Quakers and other religious pacifists.<sup>495</sup> At the same time, as Joseph Greenlee has shown, the

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\*31–36 (E.D. Va. Oct. 13, 2022); *United States v. Hill*, 629 F. Supp. 3d 1027, 1031 (S.D. Cal. 2022). Courts considering the constitutionality of the felon-in-possession statute sometimes took the same three steps before *Bruen*. See, e.g., *Medina v. Whitaker*, 913 F.3d 152, 157–60 (D.C. Cir. 2019).

<sup>490</sup> See *Range II*, 69 F.4th 96, 121–26 (3d Cir. 2023) (Krause, J., dissenting); *Range I*, 53 F.4th at 274–79; Greenlee, *supra* note 446, at 257–72.

<sup>491</sup> See *supra* text accompanying notes 462–64. Recall that this “historic” principle is thought to justify disarming the possessors of child pornography but not food-stamp cheaters.

<sup>492</sup> See *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“[Legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.”); *Folajtar v. Att’y Gen.*, 980 F.3d 897, 912 (2020) (Bibas, J., dissenting) (“The historical touchstone is danger, not virtue.”).

<sup>493</sup> See Greenlee, *supra* note 446, at 278–83 (citing and describing rulings in the First, Third, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits).

<sup>494</sup> *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010).

<sup>495</sup> See *Range II*, 69 F.4th at 121, 125–26 (Krause, J., dissenting).

scholars who endorse the “virtue” hypothesis have offered very little evidence to support it.<sup>496</sup> Furthermore, this hypothesis is linked to a claim that *Heller* rejected—that the right to bear arms is a “political” rather than an “individual” right. Scholars who maintain that the right to bear arms is limited to virtuous citizens generally regard the right as the right to be part of a militia, making this right subject to the same sort of limitations as the right to vote and the right to serve on a jury.<sup>497</sup>

The choice between the competing hypotheses bears on the claim that Second Amendment permits the disarmament only of “dangerous” felons. Embezzlers and other white-collar criminals have maintained that Congress improperly lumped them with John Dillinger and Machine Gun Kelly.<sup>498</sup> Because these criminals are unlikely to shoot people, they say they are entitled to keep and bear arms. Courts that uphold their disarmament respond: All felons may not be likely to use firearms for criminal purposes, but all have exhibited a lack of virtue.<sup>499</sup>

If the issue were the constitutionality of Congress’s disarmament of people with mental illness,<sup>500</sup> the alternate reading of history probably would gain popularity. Mental illness does not suggest a lack of virtue, but some people with mental illness are dangerous.

Courts also have noted that, even if “dangerousness” were the standard, our forebears swept broadly without evaluating individual cases.<sup>501</sup> Perhaps the relevant principle is: Felons lack *sufficient* virtue to justify extended litigation to determine which of them are dangerous.<sup>502</sup> Or perhaps, as Joseph Blocher and Eric Ruben contend, the correct answer is “both of the above”: Legislatures were entitled to disarm whomever they regarded as either dangerous or lacking in virtue.<sup>503</sup> From there, it

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<sup>496</sup> Greenlee, *supra* note 446, at 275–78 (citing and discussing articles by Don B. Kates, Jr., Glen Reynolds, Saul Cornell, Nathan DeDino, and David Yassky); see *Folajtar*, 980 F.3d at 911 (Bibas, J., dissenting) (similarly reviewing the academic literature and noting the lack of evidentiary support for the “civic virtue” hypothesis). See generally Robert H. Churchill, *Rethinking the Second Amendment: Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007) (rejecting both the “dangerousness” and the “civic virtue” hypotheses).

<sup>497</sup> See *Kanter*, 919 F.3d at 462–64 (Barrett, J., dissenting).

<sup>498</sup> It might have been more difficult to complain that Congress had improperly lumped these offenders with Al Capone, for he was convicted only of a nonviolent crime. See Meyer Berger, *Capone Convicted of Dodging Taxes: May Get 17 Years*, N.Y. TIMES, Oct. 18, 1931, at 1, <https://timesmachine.nytimes.com/timesmachine/1931/10/18/96208923.html> [<https://perma.cc/659P-G5VX>].

<sup>499</sup> E.g., *Folajtar*, 980 F.3d at 902.

<sup>500</sup> See 18 U.S.C. § 922(g)(4).

<sup>501</sup> See *Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019).

<sup>502</sup> Cf. Mary Frances Richardson, Comment, *Why the Categorical Approach Should Not Be Used When Determining Whether an Offense Is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(c)*, 67 AM. U. L. REV. 1989, 1991–2024 (2018) (describing extensive federal litigation about the meaning of the statutory terms “violent felony” and “crime of violence”); *Folajtar*, 980 F.3d at 906–07.

<sup>503</sup> Blocher & Ruben, *supra* note 108 (manuscript at 49).

would be a short step to the generalization that might in fact best capture historical practice: Legislatures could disarm whomever they pleased. Only one judicial decision seems to have held any pre-20th-century disarmament invalid. Shortly after the Tennessee Legislature voted to secede from the Union, it ordered the disarmament of the citizens of a pro-Union county. After the South lost the war, the Tennessee Supreme Court concluded that the legislature lacked the authority to do that.<sup>504</sup>

### iii. Step 3: Applying the Generalization

The final analytic step consists of applying the inferred principle to the felon-in-possession statute: Because some (or all) convicted felons are dangerous or lack civic virtue, Congress may disarm them.

Courts that see analogies everywhere apologize for relying on our often disgraceful past. But, lacking anything better, they do it anyway<sup>505</sup>:

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<sup>504</sup> Smith v. Ishenhour, 43 Tenn. 214 (1866).

Three Founding-era sources did offer general formulations of the scope of the right to bear arms. All emerged from the state conventions that considered whether to ratify the Constitution drafted in Philadelphia in 1787. Many delegates voiced concern about this draft's lack of a bill of rights, and, in three states, one or more delegates indicated how they thought a constitutional guarantee of the right to bear arms should be phrased. Their proposals were more restrictive than the "whomever the legislature pleases" or "800-pound gorilla" hypothesis, but the three formulations suggested different answers to whether legislatures could constitutionally disarm convicted felons.

A majority of the New Hampshire convention proposed: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1891). This formulation could reasonably have been construed to the preclude the disarmament of nearly all felons, both violent and nonviolent.

In Massachusetts, Samuel Adams suggested: "And that the said Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675, 681 (1971). This language could reasonably have been construed to allow the disarmament of criminals whose conduct showed they were not "peaceable." In the alternative, however, it could have been construed to allow only the disarmament of people who currently threaten the public peace.

A minority of the Pennsylvania convention proposed:

That the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals.

*Id.* at 662, 665. This proposal could reasonably have been read to allow the disarmament of all felons, both violent and nonviolent, and of misdemeanants too. Of course, none of these proposals made its way into the Constitution.

<sup>505</sup> Jacob Charles offers a perceptive analysis of whether courts should rely on "sordid

Today, we emphatically reject these bigoted and unconstitutional laws . . . I cite them here only to demonstrate the tradition of categorical, status-based disarmaments.<sup>506</sup>

The status-based regulations of this period are repugnant (not to mention unconstitutional), and we categorically reject the notion that distinctions based on race, class, and religion correlate with disrespect for law or dangerousness. We cite these statutes only to demonstrate legislatures had the power and discretion to use status as a basis for disarmament, and to show that status-based bans did not historically distinguish between violent and non-violent members of disarmed groups.<sup>507</sup>

*f. General Principles vs. Bruen*

The analysis just described bears some resemblance to *Bruen*. It rests on a march through history and seeks to discern the “original understanding.” But this style of originalism is inconsistent with *Bruen*’s “expected application” originalism.<sup>508</sup> It upholds a firearms regulation that straightforward application of the *Bruen* standard would strike down.

In fact, the federal felon-in-possession statute more clearly flunks the *Bruen* test than the New York statute at issue in *Bruen* itself. No pre-20th-century analogues of the felon-in-possession statute seem close enough to make the finals—that is, to be acknowledged as “distinctly similar” but then dismissed as outliers.

Whether the Second Amendment was originally understood to allow the disarmament of people thought to lack civic virtue or only of people perceived as dangerous may be debatable. But one historic fact is not debatable. Among the people the Founding generation did not regard as sufficiently dangerous or sufficiently lacking in virtue to disarm were *felons*. Many thousands of Americans were flogged,

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sources,” and he makes a good argument that they should. *See generally* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, <https://review.law.stanford.edu/wp-content/uploads/sites/3/2023/08/Charles-76-Stan.-L.-Rev.-Online-30.pdf> [<https://perma.cc/A39Q-9XUL>].

<sup>506</sup> *Range II*, 69 F.4th 96, 122 n.50 (3d Cir. 2023) (Krause, J., dissenting).

<sup>507</sup> *Range I*, 53 F.4th 262, 276 n.18 (3d Cir. 2022); *see id.* at 277 n.19 (“Again we cite the repugnant, status-based regulations of an earlier period—disarming individuals on the basis of political affiliation or non-affiliation—merely to demonstrate the Nation’s tradition of imposing categorical, status-based bans on firearm possession.”); *id.* at 278 n.22 (“Of course, our social and political awareness has obviously evolved significantly . . . , and by today’s standards, the concept of restricting fundamental rights based on political affiliation would be repugnant to the Constitution, including the First Amendment.”).

<sup>508</sup> *See supra* text accompanying notes 107–11.



branded, fined, or imprisoned for serious crimes between 1607 and 1901,<sup>509</sup> and, once they had been punished, they were allowed to possess and use firearms.<sup>510</sup> Under *Bruen*, the battle about the which generalization better fits the historic evidence does not matter; the bottom line is what counts. Applying a principle the Founding generation approved in a way it did not approve cannot pass the *Bruen* text.

*g. Analogy and the Level of Generalization*

To say that a new regulation is analogous to an old one is to say that these regulations are similar in some respect. As *Bruen* emphasizes, one must determine which similarities matter.<sup>511</sup> The fact that an old regulation and a new one were both approved on a Tuesday or that both begin with the letter “A” is not the sort of similarity that tends to establish the new regulation’s constitutionality. When asked whether two regulations are analogous to one another, one should ask before answering: Why do you want to know?

*Bruen* gives this answer: We look to the past because we want to know whether modern regulations are “consistent with the Nation’s historical tradition of firearm regulation.”<sup>512</sup> More specifically, we want to know whether these regulations are ones “our ancestors would have accepted.”<sup>513</sup>

*Bruen* warns against demanding too precise analogues. It says that the defenders of a modern regulation need identify only “a well-established and representative historical *analogue*, not a historical *twin*.”<sup>514</sup> At the same time, it warns against the opposite error: “[C]ourts should not ‘uphold every modern law that remotely resembles a historical analogue,’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted.’”<sup>515</sup>

Even when “a general societal problem has persisted since the 18th century,” a degree of abstraction is appropriate. A modern legislature might prohibit gun possession by people under 18, something earlier legislatures did not do. But Reconstruction era legislatures might have forbidden selling, giving, loaning or otherwise transferring firearms to people under 18. Despite differences between the old regulations and the new ones, all of these regulations might reflect the judgment that people under 18 cannot be trusted with guns. That might be analogy enough.

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<sup>509</sup> See *infra* Section II.B.5.1 (noting that monarchs, courts, and legislatures have found alternatives to the death penalty in felony cases throughout Anglo-American history).

<sup>510</sup> See *Kanter v. Barr*, 929 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“Founding-era legislatures did not strip felons of their right to bear arms simply because of their status as felons.”); Winkler, *supra* note 212, at 1563 (“The Founding generation had no laws . . . denying the right to people convicted of crimes.”).

<sup>511</sup> See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

<sup>512</sup> *Id.* at 2129–30.

<sup>513</sup> *Id.* at 2133.

<sup>514</sup> *Id.* at 2133.

<sup>515</sup> *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

If a hypothetical Supreme Court were to forbid considering Reconstruction era regulations, discovering regulations analogous to the prohibition of firearm possession by 17-year-olds might be more difficult. But antebellum regulations might have forbidden gun possession by Black people and Native Americans. Moving to a higher level of abstraction, one might declare those regulations analogous too. Black people and Native Americans were thought dangerous then, and 17-year-olds are thought dangerous now. But concluding that antebellum legislatures would have approved disarming 17-year-olds would be unwarranted when 17-year-olds were found everywhere and no one sought to disarm them. In light of *Bruen*'s answer to the question "why do you want to know," a level of abstraction that would analogize disarming 17-year-olds to disarming Native Americans before the Civil War would be inappropriate.

Joseph Blocher and Eric Ruben generally favor high-level abstractions. They write: "Adjusting the level of generality at which the historical inquiry is conducted can mitigate the risk of anachronism. For example, a court evaluating the modern domestic-violence prohibition might recognize a historic tradition of disarming dangerous persons generally, rather than domestic abusers particularly."<sup>516</sup> *Bruen*, however, does not give judges a free hand to adjust the level of generality as they like. When "a general societal problem has persisted since the 18th century," judges must seek "a distinctly similar historical regulation addressing that problem."<sup>517</sup>

The level of abstraction favored by judges who analogize all dangerous people to all other dangerous people seems higher than a straightforward reading of *Bruen* would allow. Yet, for a true originalist, that level of generality might be too low. An old regulation and a new one might both be reasonable public safety measures. The earliest decisions interpreting the right to bear arms declared this degree of similarity sufficient.<sup>518</sup> A bona fide originalist might favor something close to the highest level of abstraction while, in many situations, *Bruen* favors something close to the lowest.

#### *h. Following Bruen Faithfully*

*Bruen* invites a search for analogies because the Supreme Court wants to know whether today's felon-in-possession statute is "consistent with the Nation's historical tradition of firearm regulation,"<sup>519</sup> but asking that question directly might be a good way of discovering the answer. And the answer is *no*. The Founding generation did not disarm felons, not even those who had committed violent crimes. Disarming offenders was not part of that generation's "tradition." Examining analogies

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<sup>516</sup> See Blocher & Ruben, *supra* note 108 (manuscript at 10).

<sup>517</sup> See *Bruen*, 142 S. Ct. at 2131.

<sup>518</sup> See *supra* Section I.J. The analogy was generally implicit rather than explicit. Courts looked to the past to find a general standard and then applied it. They did not mention the regulations that had led courts to approve the general standard.

<sup>519</sup> *Bruen*, 142 S. Ct. at 2130.

can be helpful, but not when one already has the information one hopes to discover.<sup>520</sup> *Bruen* also asks whether the felon-in-possession statute is one our ancestors would have accepted. And, once again, the answer is no. One can be fairly confident of that because, even in their day, there were felons, and no one disarmed them.

Just as the *Bruen* Court viewed “handgun violence, primarily in urban areas” as “a general societal problem that has persisted since the 18th century,” it would almost certainly regard gun violence by convicted criminals as “a general societal problem that has persisted since the 18th century.” Accordingly, *Bruen* would cast the burden of finding “a distinctly similar historical regulation addressing that problem” on defenders of the statute.<sup>521</sup>

Our forebears did not address the problem of gun violence by ex-offenders by disarming them or by doing something “distinctly similar.” Disarming the followers of Anne Hutchinson, enslaved people, and free Black people did not address the same “problem” and was not “distinctly similar.” The Founding generation addressed the problem of gun violence by ex-offenders by doing nothing at all until a convicted criminal committed another crime.

*i. Why Views of Firearms Possession by Former Offenders Changed*

Viewing the 18th-century problem of gun violence by ex-offenders as essentially unchanged does seem obtuse—but no more so than viewing today’s problem of “handgun violence, primarily in urban areas” as nothing particularly new. The nation’s prevailing view of firearm possession by felons changed over time largely because the balance of relevant interests changed.

Most obviously, guns, crimes, and criminals changed. The Framers were unacquainted with the Prohibition-era gun violence that prompted the first state laws limiting gun purchases by felons<sup>522</sup> and the first federal statute (approved by Congress in 1938).<sup>523</sup>

As the case for disarming felons grew stronger, their need to possess firearms diminished. Nearly all gun owners now have access to supermarkets. They do not depend on their guns to put food on the table. Few of them use firearms to defend

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<sup>520</sup> Situations in which direct observation of the phenomenon being investigated make inference from analogies unnecessary seem to underscore the weakness of the *Bruen* standard. Initially, *Bruen*’s core proposition is likely to seem unattractive: “If people didn’t approve a firearms regulation back then, they can’t do it now.” It does not make this proposition much more attractive to say: “If people didn’t approve a firearms regulation *or something very much like it* back then, they can’t do it now.” Probing musty books for analogs, however, may make the process look analytic and scholarly. The strangeness may disappear beneath the surface.

<sup>521</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>522</sup> *E.g.*, 1923 N.H. Laws 138, ch. 118 § 3.

<sup>523</sup> Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 11250–51 (1938); *see supra* Section I.F (describing some of the ways firearms violence has changed since 1791).

against attacks by wild animals or indigenous people they have displaced. Few regard their personal weapons as necessary to fulfill their duty (and *privilege* and *right*) to defend their states and nation. (Some still do, and the rest of us need to watch out for them.<sup>524</sup>) Disarming Alexander Hamilton and Aaron Burr in 1804 might have been a good idea, but denying guns to ex-offenders living on the frontier would have been unthinkable.<sup>525</sup>

Politics and communications technology changed along with “the problem.” In 1796, candidates for office stayed home.<sup>526</sup> Then someone invented television, and ominous thirty second appeals to people’s fear of crime seemed a promising way to win elections. The pre-television felon-in-possession statutes applied only to felons convicted of a specific list of violent crimes, and they forbade only the possession of handguns. But the Gun Control Act of 1968 expanded the federal prohibition to almost all felons and all firearms.<sup>527</sup> A dissenting opinion by Judge Bibas shows that, in general, ex-offenders are more ostracized today and face greater barriers to reentry than they did in colonial America.<sup>528</sup>

*j. Does the Supreme Court Care How Much Views and Circumstances Have Changed?*

In cases in which a legislature has addressed a general societal problem that has persisted since the 18th century, *Bruen* makes changed circumstances like those just recited officially irrelevant. One suspects, however, that those circumstances matter even to the majority justices in *Bruen*.

If the Supreme Court were to hold that embezzlers have a constitutional right to bear arms, the fallout might be minimal. But for the Court to strike down the felon-in-possession statute altogether and hold that bank robbers and other violent criminals have a constitutional right to bear arms would be an “astonisher.”<sup>529</sup> Amazement would grow as the Court explained: Bank robbers have a constitutional right to carry arms because people who lived before any armed bank robbery had

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<sup>524</sup> See Ryan Lucas & Carrie Johnson, *Oath Keepers Founder Stewart Rhodes Convicted of Seditious Conspiracy in Jan. 6 Trial*, NPR (Nov. 29, 2022, 7:11 PM), <https://www.npr.org/2022/11/29/1139454126/oath-keepers-stewart-rhodes-seditious-conspiracy-verdict-trial> [<https://perma.cc/H3PV-8XLP>].

<sup>525</sup> See *Bruen*, 142 S. Ct. at 2161 (Alito, J., concurring) (“In 1791, when the Second Amendment was adopted, there were no police departments, and many families lived alone on isolated farms or on the frontiers. If these people were attacked, they were on their own.”).

<sup>526</sup> See Richard J. Ellis & Mark Dedrick, *The Presidential Candidate, Then and Now*, 26 PERSPECTIVES ON POL. SCI. 208, 208 (2010).

<sup>527</sup> See 18 U.S.C. § 922(g). See generally Act of Oct. 22, 1968, Pub. L. No. 90-618.

<sup>528</sup> *Folajtar v. Att’y Gen.*, 980 F.3d 897, 923–24 (3d Cir. 2020) (Bibas, J., dissenting).

<sup>529</sup> Abraham Lincoln called the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), an “astonisher.” Abraham Lincoln, *Speech at Chicago, Illinois* (July 10, 1858), in 2 ABRAHAM LINCOLN, COLLECTED WORKS 485, 495 (Roy P. Basler ed., 1953).

occurred did not disarm the felons of their day. And when the Court explained that its prior assurances of the statute’s constitutionality were *dicta*, were never firm promises, and should not be taken too seriously, it might need to re-erect the barricades around its building.<sup>530</sup> Proposals for expanding the size of the Court might gain additional support.

Of course, it is unlikely to happen. As predicted earlier in this Article,<sup>531</sup> the Court is likely to follow its *dicta* rather than its holding. The federal prohibition of firearm possession by armed robbers, rapists, and murderers is probably safe, but *Bruen* might not be. Even on the assumption that the composition of the Supreme Court will stay as it is, *Bruen* has spawned such strangeness that the Court might retreat, either above the table or below it.

#### *k. Forfeiting the Instrumentalities of Crime*

Judges sometimes include on their lists of analogues to the felon-in-possession statute pre-20th-century laws that required offenders (mostly poachers) to forfeit the firearms they used to commit their crimes.<sup>532</sup> After surrendering these weapons, however, the offenders could go home to pick up others. They were not *disarmed*.<sup>533</sup>

#### *l. Dead Felons Can’t Shoot*

A dissenting opinion in *Range II* declared:

At the Founding, a conviction of serious crime resulted in the permanent loss of the offender’s ability to keep and bear arms. Those who committed grave felonies—both violent and nonviolent—were executed. A fortiori, the ubiquity of the death penalty suggests that the Founding generation would have had no objection to imposing on felons the comparatively lenient penalty of disarmament.<sup>534</sup>

A Seventh Circuit dissent by future justice Amy Coney Barrett showed that capital punishment at the Founding was less ubiquitous than this passage suggests.<sup>535</sup>

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<sup>530</sup> See Lawrence Hurley, *As Abortion Ruling Nears, U.S. Supreme Court Erects Barricades to the Public*, REUTERS (June 17, 2022, 10:10 AM), <https://www.reuters.com/legal/government/abortion-ruling-nears-us-supreme-court-erects-barricades-public-2022-06-17/> [<https://perma.cc/ZC7E-2FC5>].

<sup>531</sup> See *supra* text accompanying notes 88–89.

<sup>532</sup> See, e.g., *Range I*, 53 F.4th 262, 281 (3d Cir. 2022).

<sup>533</sup> See *Range II*, 69 F.4th 96, 105 (3d Cir. 2023) (“The Government has not cited a single [Founding-era] case or statute that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime.”).

<sup>534</sup> *Id.* at 126–27 (Krause, J., dissenting).

<sup>535</sup> *Kanter v. Barr*, 919 F.3d 437, 458–62 (7th Cir. 2019) (Barrett, J., dissenting).

She noted that capital offenses were fewer in America than in England and fewer at the Founding than they had been earlier. Yet Barrett's focus on the punishments prescribed by law for specific offenses omitted a significant part of the story. For centuries, two legal devices saved many felons from execution.

One of these devices was benefit of clergy, which began in the 12th century as a privilege of clerics but became a privilege of every first offender who could pass a literacy test. Passing that test was not difficult. Illiterates could save their necks by memorizing the Bible verse courts almost always asked claimants of the privilege to read.<sup>536</sup> By 1576, defendants pleaded benefit of clergy after conviction rather than before trial, and courts could sentence them to imprisonment for up to one year.<sup>537</sup> In 1706, Parliament abandoned the literacy requirement and authorized courts to sentence claimants of the privilege to hard labor for six to twelve months.<sup>538</sup> In 1718, Parliament also authorized sentences of transportation to North America.<sup>539</sup> In some U.S. states, benefit of clergy survived until the mid-19th century.<sup>540</sup>

The second device was executive clemency. From the medieval period onward, a judge who presided at a convicted felon's trial could recommend a pardon with assurance it would be granted,<sup>541</sup> and a convicted felon who failed to obtain a favorable recommendation from the judge could seek a pardon on her own. Pardons could be conditional, effectively imposing alternate punishments. When wars began, for example, medieval kings routinely pardoned murderers and other felons on the condition they serve as soldiers for a year without pay.<sup>542</sup> (These felons were *sentenced* to bear arms.) The practice was common enough that some scholars believe it produced a noticeable increase in crime.<sup>543</sup>

More relevant to the Founding generation's experience were pardons conditioned on transportation to the North American colonies for terms of seven years (or, in serious cases, fourteen). These pardons began to appear in the first half of the 17th century not long after settlement of the first English colonies. In 1718, Parliament authorized judges to impose sentences of transportation directly. It is estimated that, before the American Revolution, between 50,000 and 120,000 people were punished by being sent to places like Maryland and Virginia.<sup>544</sup>

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<sup>536</sup> See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF LEGAL INSTITUTIONS* 618–21 (2009).

<sup>537</sup> *Id.* at 619.

<sup>538</sup> *Benefit of Clergy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Benefit\\_of\\_clergy](https://en.wikipedia.org/wiki/Benefit_of_clergy) [<https://perma.cc/TQ8S-K23J>] (last visited Oct. 2, 2023).

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> HELEN LACEY, *THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH CENTURY ENGLAND* 19–22 (2009); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 60–61, 324–25 (2003) (describing the persistence of this practice in the 18th century).

<sup>542</sup> 1 LUKE OWEN PIKE, *A HISTORY OF CRIME IN ENGLAND* 294 (1873).

<sup>543</sup> LACEY, *supra* note 541, at 86–87, 100–06, 186.

<sup>544</sup> See *Penal Transportation*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Penal\\_transportation](https://en.wikipedia.org/wiki/Penal_transportation) [<https://perma.cc/4ZW8-5FQC>] (last visited Oct. 2, 2023); Ashley T. Rubin, *The Unintended*

The Founding generation must have included a significant number of felons whose punishment had ended, and none of them appear to have been prohibited from keeping firearms. The fact that other felons were executed does not suggest “a fortiori” that the Founding generation would have approved of subjecting those who were not dispatched to the “comparatively lenient penalty of disarmament.” Many penalties are more lenient than hanging, including sterilization and compulsory church attendance.

*m. A Visitor from Outer Space Wants to Know About Bruen*

Here is an imaginary dialogue between an American judge and a visiting lawyer from beyond the Milky Way:

VISITING LAWYER: Why is disarming felons consistent with the constitutional right to bear arms? Is it because the prohibition furthers the compelling interest in public safety?

JUDGE: No, it’s because our ancestors disarmed Catholics and Black people.

VISITING LAWYER: Really? That sounds terrible.

JUDGE: Oh, it was. Nearly all of us agree that what our ancestors did was terrible, horrible, no good, and very bad. But, by doing it, our ancestors established a tradition of categorical, status-based disarmaments.

VISITING LAWYER: Are you saying that, if your ancestors hadn’t done the ugly things they did, convicted rapists and bank robbers would be free to roam among you with guns, but, because your ancestors did those bad things, they aren’t?

JUDGE: You could look at it that way.

VISITING LAWYER: Why do you regard Catholics and Black people as more nearly analogous to today’s felons than the felons your ancestors *didn’t* disarm?

JUDGE: Because Catholics and Black people were considered dangerous then and felons are considered dangerous now.

VISITING LAWYER: Does it matter whether Catholics and Black people were dangerous in fact or whether the felons you disarm are dangerous now?

JUDGE: That question isn't for judges to decide. We don't consider whether our tradition or our current practice is wise or reasonable. We examine only whether our historic tradition and our practices look alike. Our tradition was one of disarming groups *considered* dangerous. You extraterrestrials had better act right and watch your tongues, for you look dangerous too.

VISITING LAWYER: Is that truly how you earthlings determine the meaning of your parchment, or are you pulling my gills?

## 6. Domestic Abusers

In 1874, the North Carolina Supreme Court affirmed the assault and battery conviction and \$10 fine of Richard Oliver after he came home drunk, criticized the bacon and coffee, cut two four-foot switches, whipped his wife, and “inflicted bruises on her arm, which remained for two weeks, but did not disable her from work.”<sup>545</sup> Although others who were present convinced Oliver to end the beating after four or five “licks” that were delivered “as hard as he could,” Oliver remarked that he would have “worn her out” if the others had not been there.<sup>546</sup>

The court wrote: “We may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not the law in North Carolina.”<sup>547</sup> It added, however: “If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forgive and forget.”<sup>548</sup>

In the later part of the 20th century, police officers, prosecutors, legislators, and judges became less inclined to draw the curtain. Two federal statutes, approved by large bipartisan majorities of both houses of Congress in 1994 and 1996, mandate the disarmament of domestic abusers whom the felon-in-possession statute does not reach.<sup>549</sup> These statutes prohibit possession of a firearm (1) by any person “who is

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<sup>545</sup> State v. Oliver, 70 N.C. 60, 61 (1874).

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> *Id.* at 61–62. The court concluded that Oliver must have had “malice and cruelty in his heart” when he laid “rude and violent hands” on his wife. His \$10 fine was the equivalent of a \$250 fine today.

<sup>549</sup> See Violence Against Women Act of 1993, S. 11, 103rd Cong. (1993).



subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person”<sup>550</sup> and (2) by any person convicted of “a misdemeanor crime of domestic violence.”<sup>551</sup> A reauthorization of the first provision in 2022 included an intergovernmental reporting requirement designed to improve its enforcement.<sup>552</sup> Another 2022 statute expanded the second provision’s definition of “misdemeanor crime of domestic violence,”<sup>553</sup> shrinking what critics called “the boyfriend loophole.”<sup>554</sup>

Until *Bruen*, courts upheld both federal statutes against Second Amendment challenges.<sup>555</sup> After *Bruen*, however, in *United States v. Rahimi*, the Fifth Circuit held unconstitutional the statute forbidding gun possession by domestic abusers subject to retraining orders.<sup>556</sup> The Supreme Court will review the *Rahimi* decision during its 2023–24 Term.<sup>557</sup>

The facts of *Rahimi* are as good a poster for gun control as those of *Range* are for gun rights.<sup>558</sup> After assaulting his girlfriend in a parking lot and firing a shot to intimidate a bystander, Zackey Rahimi telephoned the girlfriend and threatened to shoot her if she told anyone about the incident. His conduct led to a court order that barred him from approaching the girlfriend and from possessing a firearm.

But *Rahimi* demonstrated spectacularly that he still had a gun. When he threatened someone else with a firearm, Texas charged him with aggravated assault. After that, according to the government’s petition for certiorari:

[A]fter someone who brought drugs from [Rahimi] “started talking ‘trash’” on social media, he went to the man’s home and

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<sup>550</sup> 18 U.S.C. § 922(g)(8).

<sup>551</sup> *Id.* § 922(g)(9).

<sup>552</sup> See *President Biden Signs Violence Against Women Act Reauthorization Act Into Law*, EVERYTOWN FOR GUN SAFETY (Mar. 15, 2022), <https://www.everytown.org/press/president-biden-signs-violence-against-women-act-reauthorization-act-into-law/> [<https://perma.cc/GE8-92NM>].

<sup>553</sup> Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1332–33 (2022).

<sup>554</sup> *Boyfriend Loophole*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Boyfriend\\_loophole](https://en.wikipedia.org/wiki/Boyfriend_loophole) [<https://perma.cc/3G95-4ZDK>] (last visited Oct. 2, 2023).

<sup>555</sup> See, e.g., *United States v. McGinnis*, 956 F.3d 747, 751 (5th Cir. 2020); *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1129–30 (9th Cir. 2013); *United States v. Mahin*, 668 F.3d 119, 120 (4th Cir. 2012); *United States v. Baer*, 235 F.3d 561, 562 (10th Cir. 2000).

<sup>556</sup> *United States v. Rahimi*, 641 F.4th 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

<sup>557</sup> *United States v. Rahimi*, 143 S. Ct. 2688 (2023).

<sup>558</sup> See *Range II*, 69 F.4th 96 (3d Cir. 2023) (en banc) (holding the federal felon-in-possession statute unconstitutional as applied to a person convicted of lying to obtain food stamps).

fired bullets into it using an AR-15 rifle. The next day, after colliding with another vehicle, he alighted from his car, shot at the other driver, fled, returned to the scene, fired more shots at the car, and fled again. Three days later, Rahmi fired a gun in the air in a residential neighborhood in the presence of young children. A few weeks after that, a truck flashed its headlights at Rahimi when he sped past it on a highway; in response, Rahimi slammed his brakes, cut across the highway, followed the truck off an exit, and fired multiple shots at another car that had been traveling behind the truck. [Later,] . . . Rahimi pulled out a gun and fired multiple shots in the air after a friend's credit card was declined at a fast-food restaurant.<sup>559</sup>

Before *Bruen*, Rahimi pleaded guilty to possessing a firearm while subject to a domestic violence restraining order. After *Bruen*, he renewed his Second Amendment objection to the statute criminalizing his conduct, and the Fifth Circuit held the statute unconstitutional in all of its applications.

The government maintained that *Heller* and *Bruen* limited the protection of the Second Amendment to “law-abiding responsible citizens” and that Rahimi was not law-abiding or responsible. The Fifth Circuit replied that the Supreme Court used the phrase “law-abiding responsible citizens” more narrowly: “*Heller* simply uses ‘law-abiding, responsible citizens’ as shorthand in explaining that its holding . . . should not ‘be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .’”<sup>560</sup> According to the court, *Heller* and *Bruen* endorsed a proposition that later was articulated by the panel opinion in *Range*: “[T]he people’ categorically excludes those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses.”<sup>561</sup> Rahimi, who was subject only to a civil restraining order, was not part of any group “whose disarmament the Founders ‘presumptively’ tolerated or would have tolerated.”<sup>562</sup> Accordingly, *Heller*’s “strong presumption that the Second Amendment right belongs to all Americans” still applied.<sup>563</sup>

Wrongdoers like Rahimi should not be excluded from “the people,”<sup>564</sup> but the Fifth Circuit’s analysis was bizarre. No evidence indicates that “the Founders ‘presumptively’ tolerated or would have tolerated” the disarmament of felons and

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<sup>559</sup> Petition for Writ of Certiorari at 3, *United States v. Rahimi*, 641 F.4th 443 (2023) (No. 22-915).

<sup>560</sup> *Id.* at 452 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)).

<sup>561</sup> *Id.* (quoting *Range I*, 53 F.4th 262, 266 (3d Cir. 2022)).

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*; see *id.* at 451 (quoting *Heller*, 554 U.S. at 581).

<sup>564</sup> See *supra* Section II.B.5.d.

people with mental illness, and no Supreme Court decision said they had. By calling the disarmament of these groups “longstanding,” *Heller* referred only to the fact that the disarmament of felons went back nearly a century and the disarmament of people with mental illness nearly fifty years. *Heller* and *Bruen* spoke of “responsible, law-abiding citizens” because only the rights of these citizens were at issue in those cases. The Court’s statements were not a shorthand way of declaring that “the people” categorically excludes those who have demonstrated disregard for the rule of law through the commission of felon[ies].” Although *Heller* indicated that felons and people with mental illness could be disarmed, it did not say they were excluded from “the people.” And *Bruen* never considered the meaning of that constitutional term. In essence, the Fifth Circuit seemed to rule that, because Rahimi was not included in *Heller*’s dictum, his claim survived *Bruen*’s Step 1.

After declaring Rahimi part of the people, the Fifth Circuit concluded that none of the government’s asserted analogues showed that the challenged statute was consistent with the nation’s tradition of firearms regulation. The Court acknowledged that this statute “embodies salutary policy goals meant to protect vulnerable people in our society,” but it concluded that the statute was one “our ancestors would never have accepted.”<sup>565</sup>

A concurring opinion by Judge Ho reported that domestic-violence restraining orders are often misused.<sup>566</sup> Plaintiffs seek these orders to gain advantages in divorce and custody proceedings. They exaggerate facts and commit perjury, yet judges fearful of adverse publicity almost never turn them down.

Judge Ho did not reveal how these alleged abuses bore on any issue in *Rahimi*. Did they indicate that Rahimi was part of the people? Or that the statute he challenged was inconsistent with the nation’s historical tradition of firearms regulation? Perhaps the judge’s goal was not to address relevant issues but simply to reassure the public. His message might have been: Just as some music is not as bad as it sounds, this ruling is not as terrible as it looks.

The federal statute forbidding gun possession by people subject to domestic-violence restraining orders differs from the felon-in-possession statute. It imposes no lifetime ban. The prohibition expires when the order does. The predicate for the prohibition is a civil judgment rather than a criminal conviction. Whether and how these differences bear on the textual and historic issues posed by *Bruen* is unclear. The truly significant difference may be that *Heller*’s dictum did not mention domestic abusers. Lower court judges are less likely to believe they have received marching orders to save the statute somehow.

Rahimi was forbidden to possess a firearm by both a federal statute and a state restraining order. Does the Fifth Circuit decision striking down the statute indicate that the judicial order was invalid as well? *Bruen*’s standard seems applicable to

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<sup>565</sup> *Id.* at 461.

<sup>566</sup> *Id.* at 465–67 (Ho, J., concurring).

deprivations of Second Amendment rights by judges as well as legislatures. Although an individual determination by a judge may make the case for disarmament appear better founded, what matters under *Bruen* is whether the order restricting firearm possession is “consistent with the Nation’s historical tradition of firearm regulation.” Absent proof of comparable restraining orders before 1901, the order appears to fall with the statute.

After announcing the *Bruen* standard, the Supreme Court declared: “This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment . . . .”<sup>567</sup> Consider, then, whether a First Amendment standard modeled on *Bruen* would invalidate another provision of the restraining order—the one prohibiting Rahimi from speaking to his victim. Because the First Amendment’s “plain text” protects speaking, the restriction might fall unless the government could show that judges before 1901 issued comparable restraining orders.

The Founding generation did not disarm felons, and thoughts of disarming domestic abusers might have been even further from their minds. A federal district court said this when it struck down the same statute the Fifth Circuit did in *Rahimi*: “Domestic abusers are not new. But until the mid-1970s, government intervention—much less removing an individual’s firearms—because of domestic violence practically did not exist.” The court observed that, although the “historical tradition” of disregarding domestic violence was “likely unthinkable today,” *Bruen* made this tradition decisive.<sup>568</sup>

As noted at the outset of this Article, *Bruen* rejected a standard of review approved by eleven federal courts of appeals (every federal appellate court to address the issue).<sup>569</sup> This standard would have allowed courts to take account of the interest of domestic-violence victims in not being shot. The Supreme Court, however, forbade consideration of this interest along with all others, dismissing “judge-empowering ‘interest-balancing’” as “one step too many.”<sup>570</sup> Unlike any other court, the Supreme Court construed the Second Amendment to demand adherence to a long “tradition” of legislative *inaction*, however shameful this tradition and however determined to end it the people’s elected representatives eventually became.

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<sup>567</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

<sup>568</sup> United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516, at \*5 (W.D. Tex. Nov. 10, 2022); see United States v. Combs, No. 5:22-136-DCR, 2023 WL 2144150, at \*2 (E.D. Ky. Feb. 21, 2023) (similar). *But see* United States v. Kays, No. CR-22-40-D, 2022 U.S. Dist. LEXIS 154929, at \*7–8 (W.D. Okla. Aug. 29, 2022) (holding that people subject to domestic-violence restraining orders are “relevantly similar” to felons whose disarmament *Heller* said was supported by longstanding tradition).

<sup>569</sup> See *supra* text accompanying notes 9, 24.

<sup>570</sup> *Bruen*, 142 S. Ct. at 2127, 2129. As this point, the irony of calling an interest-balancing standard “judge empowering” should be apparent. When compared to the *Bruen* standard, the deferential interest balancing that preceded it plainly empowered legislatures, not courts.

## CONCLUSION

INTEREST BALANCING: THE LESSER EVIL *SOMETIMES*<sup>571</sup>

A provision of the New York CCIA (the statute enacted to replace the one struck down in *Bruen*) requires an applicant for a firearms license to complete eighteen hours of training—sixteen hours of classroom instruction and two hours of live-fire range training.<sup>572</sup> In *Antonyuk III*, Judge Suddaby tentatively upheld this provision. Firearms training was a regular occurrence at militia musters in the 18th century, and that analogue was close enough.<sup>573</sup>

Although many state licensing schemes now include a training requirement, New York requires more hours of training than nearly every other state.<sup>574</sup> New York's requirement significantly burdens applicants' bank accounts as well as their time and attention. One *Antonyuk* plaintiff declared that "some facilities are charging upwards of \$700 for the [required] class" and that, with ammunition costs and license fees added, the cost of obtaining a New York license "could easily exceed \$1000." (Judge Suddaby called this allegation too vague to justify interim relief, but he noted that the plaintiff might develop it with greater specificity in later proceedings.<sup>575</sup>) New York's training requirement could make it difficult or impossible for people living on the state's minimum wage and many others to exercise what *Bruen* held to be a constitutional right.

The constitutional issue posed by the CCIA's training requirement is challenging, and this Article ends by comparing several ways a court might approach it. Along the way, I reprise some of this Article's central themes.

*A. Scavenging for Analogues*

Contrary to Judge Suddaby's conclusion, mandatory military training in 1791 provides little evidence that the Second Amendment as originally understood allows New York to require civilian applicants for gun permits to complete eighteen hours of firearms training (or any). America still requires its military personnel to gain proficiency in the use of firearms, but our generation's insistence on military training doesn't reveal our view of the constitutionality of the New York CCIA. The training of 18th-century militiamen does not reveal the Founding generation's view either.

Government-mandated training programs for civilians apparently did not exist before the 20th century. Although analogizing civilian training to military training

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<sup>571</sup> Compare Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>572</sup> N.Y. PENAL LAW § 400.19 (LexisNexis 2023).

<sup>573</sup> *Antonyuk III*, No. 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at \*159–60 (N.D.N.Y. Nov. 7, 2022).

<sup>574</sup> See *Permit Training Requirements by State*, CONCEALED CARRY.COM, <https://www.concealedcarry.com/concealed-carry-laws-in-the-united-states/permit-training-requirements-by-state/> [<https://perma.cc/EFL2-X2VB>] (last visited Oct. 2, 2023).

<sup>575</sup> *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at \*159.

would be a stretch, refusing to make this stretch would require post-*Bruen* courts to strike down not only New York's high-end training requirement but all other training requirements as well.

The failure of the Founding generation to require firearms training for civilians suggests that our forebears saw less need for it than New Yorkers do today. In 1791, firearms were simpler and less dangerous; legal regulations were fewer and perhaps better known; and training within families might have been more reliable. But the inaction of early legislatures doesn't imply that anyone regarded training requirements as *unconstitutional*. No legislator is known to have maintained that firearms training would contravene natural law or that it would be so grave a violation of human rights that future governments should not be allowed to insist on it however much firearms technology and society might change. Perhaps the central theme of this Article has been that *Bruen* makes nearly irrelevant evidence of constitutional meaning decisive.<sup>576</sup>

### *B. Comparing Other Rights*

Requiring eighteen hours of government-approved training as a prerequisite to exercise of the First Amendment right to speak would be unconstitutional. So would requiring eighteen hours of training as a prerequisite to the exercise most other constitutional rights.<sup>577</sup> Upholding New York's firearms-training requirement would therefore give critics an opportunity to accuse judges of anti-gun bias and of making the Second Amendment second-class. But, unlike training about gun mechanics, training about vocal-chord mechanics would not promote public safety. A priori demands for the equal treatment of constitutional rights may have rhetorical appeal, but, as this Article has maintained, they are often unfortunate guides to construing the Constitution.<sup>578</sup>

### *C. Balancing Interests*

The Framers of the Constitution did not speak clearly about the permissibility of the CCIA's training requirement. Judges must make sense of the few words they did say as best the judges can. *Bruen*'s effort to purge judges' predilections from this process is not likely to succeed. Moreover, to the extent it does succeed, it is certain to distort the Constitution.

Whatever a judge's predilections, she is bound to follow the law. A statute requiring an applicant for a gun permit to complete ten weeks of full-time boot camp

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<sup>576</sup> See *supra* Section I.C.

<sup>577</sup> But see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1992) (plurality opinion) (upholding government-mandated counseling and a waiting period prior to exercise of the then-constitutional right to terminate a pregnancy).

<sup>578</sup> See *supra* Section I.K.

training would be unconstitutional. Both the evident purpose and the clearly predictable effect of that requirement would be to discourage the exercise of a right rather than to promote safe exercise of the right. A judge ought to strike down that statute even if she personally hates guns, James Madison, and the Second Amendment.

But if a training requirement were more moderate, the balance might tip in favor of upholding it. Between, say, twenty-four hours of required training and zero, making the call might be difficult. A judge ought to hear evidence and consider carefully what the mandated instruction would be likely to accomplish and how burdensome it would be.<sup>579</sup>

Different judges might draw the line at different places, and their “predilections” might influence their choices. Their differences wouldn’t warrant a conclusion that any of them had sought to aggrandize their power or that any had substituted their policy preferences for “the law.” Despite their disagreements, all of the judges might have been the faithful agents of the lawgivers who ratified the Second Amendment. Filling gaps as best a judge can is not usurpation. As Justice Holmes remarked, judges legislate “interstitially.”<sup>580</sup>

Even if *Bruen*’s demanding burden of proof and its insistence on historic analogues could reduce the role of judicial preferences, they would do a poor job of filling the Constitution’s gaps. Blips of historical data rather than reason or principle would determine outcomes, and a brutal default rule would strike down regulations the Framers of the Constitution never meant to block. An overly demanding burden of proof can eliminate uncertainties only by resolving all of them in favor of one side.

*Bruen* makes intermediate line-drawing difficult or impossible. An opinion saying that 18th-century militia training was analogous to six hours of civilian training but not to eighteen hours would not be convincing.

One wonders whether the *Bruen* Court would apply its standard to deprivations of Second Amendment rights by executive officers rather than legislatures. The

<sup>579</sup> Shortly after *Heller*, Nelson Lund wrote:

New regulations do not violate the Constitution just because they are new. In order to faithfully apply the Second Amendment to contemporary circumstances, the courts must . . . evaluate restrictions on the right to arms in light of the purpose of the constitutional provision . . . . And contrary to the position Justice Scalia tried to take in *Heller*, that cannot be done without comparing the burdens of a challenged regulation on the individual’s right to self-defense with the regulation’s public safety benefits. This balancing of burdens and benefits can be done overtly or covertly, but it cannot be avoided.

Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1374 (2009). *But see* United States v. Harrison, No. CR-22-00328, 2023 U.S. Dist. LEXIS 18397, at \*7 (W.D. Okla. Feb. 3, 2023) (Wyrick, J.) (describing interest balancing as “‘end-justifies-the-means’ rationalizations,” declaring that it “should generally be understood as antithetical to the rule of law,” and observing that “*Bruen* now leaves no doubt that such rationalizations have no place in our Second Amendment jurisprudence”).

<sup>580</sup> S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

Court noted that, because “any permitting scheme can be put to abusive ends,”<sup>581</sup> it would consider claims that “lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.”<sup>582</sup> The Court did not specify how it would resolve those claims. Would it strike down all license fees and wait times unless the government could prove that similar wait times and fees were common in 1791? Or would it balance interests? (In fact, there were no wait times, licensing officials, licensing fees, or licenses in 1791. As explained earlier,<sup>583</sup> if the Court were to adhere to its holding rather than its dicta, it would declare all wait times, licensing fees, and licensing requirements unconstitutional.)

Again: Judicial interest balancing can be lawless. Just as the text of the Constitution leaves no room for balancing when it declares that the president must be 35 years old,<sup>584</sup> it makes some individual rights absolute. For example, the Fifth Amendment declares: “No person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>585</sup> Chief Justice Burger might not have read this provision carefully when he wrote for the Supreme Court in 1971: “Tension between the State’s demand for disclosures and the protection of the right against self-incrimination . . . must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other.”<sup>586</sup>

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<sup>581</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>582</sup> *Id.*

<sup>583</sup> *See supra* Section I.A.2.

<sup>584</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>585</sup> U.S. CONST. amend. V.

<sup>586</sup> *California v. Byers*, 402 U.S. 424, 427 (1971). The Chief Justice’s formulation illustrates the tendency of modern lawyers to assume that interest balancing is the “go to” method for resolving most constitutional questions. Many lawyers leap directly to the question of which interest-balancing standard applies—“strict” scrutiny, “intermediate” scrutiny, or “rational basis.” *See* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 530–32 (1986). Although the Supreme Court had not invented these tiers of review in the 19th century, a rush to interest-balancing sometimes was evident then as well. *See State v. Quarles*, 13 Ark. 307, 308–09 (1853) (quoted *supra* text accompanying note 310) (listing the privilege against self-incrimination as one of the constitutional rights “subject to such legislative regulation as may be demanded by the exigencies of society”). *But see Braswell v. United States*, 487 U.S. 99, 128 (1988) (Kennedy, J., dissenting) (“[T]he privilege against self-incrimination does not permit balancing the convenience of the Government against the rights of a witness.”); *Kastigar v. United States*, 406 U.S. 441, 467 (1972) (Marshall, J., dissenting) (“The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him.”).

Although the Constitution makes the right to be free of compulsion to incriminate oneself absolute, the scope of the right itself is not clear. The word “compulsion” is open to construction, and the Fifth Amendment privilege poses other challenging issues as well. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625–32 (1996); Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 849, 850–51 (2017).



The Second Amendment, unlike the Fifth Amendment, does not make the right it protects absolute. It does not say: “Every person regardless of age, race, gender, religion, status, conduct, or character shall be entitled to purchase and possess any arms she likes, carry them wherever she chooses, brandish them for any reason that strikes her fancy, and use them to kill, injure, or terrify whomever she pleases.” As *Heller* and *Bruen* both noted: “[T]he right secured by the Second Amendment is not unlimited.”<sup>587</sup>

Saying so may sound Clintonesque, but the Second Amendment’s use of the word “the” may be significant. When the Framers spoke of “*the* right to keep and bear arms,” they referred to a preexisting right.<sup>588</sup> They seemed to say (as they did with a number of other rights including *the* freedom of speech): “This right has been around a long time. We will refer to it without trying to spell everything out.” They might have recognized that the right to bear arms had too many twists, turns, wrinkles, qualifications, gaps, and uncertainties to be fully set forth in a ringing one-sentence proclamation of principle.

By the time the Second Amendment was ratified, some limitations of the right to bear arms were “historic”—as old or older than the Statute of Northampton in 1328. None of them, however, began as historic. They were all the product of judgment—or, if you prefer, interest balancing. The stack of turtles did not reach the bottom, and the legitimacy of the “historic” limitations did not depend on their resemblance to limitations even older than they were.

The Second Amendment was not meant to stop the music. Until the self-styled “originalists” appeared, few legislatures or courts thought that new firearms regulations were impermissible unless they looked a lot like old ones.

A little more than two decades after ratification of the Second Amendment, “concealed carry” prohibitions made their appearance. These laws were unknown to the Framers. They had no “distinctly similar” antecedents. But legislatures across the United States enacted concealed carry laws, and, with one notable exception,<sup>589</sup> courts across the United States upheld them. These courts looked to precedent and tradition to provide assurance that reasonable time, place, and manner regulations were allowed, but they saw no need to engage in scavenger hunts. Before the end of the 20th century, courts invoking the “police power” had upheld hundreds of similarly innovative firearms regulations.

Justice Scalia’s opinion in *Heller* cited the early 19th-century concealed-carry laws as its principal illustration of the fact that the Second Amendment right was “not unlimited.” But when Justice Breyer, in dissent, proposed to judge firearms regulations under an “undue burden” or “interest balancing” standard resembling the standards that had created and sustained those laws, the Court balked. Justice Scalia wrote:

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<sup>587</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

<sup>588</sup> See *Heller*, 554 U.S. at 592; *Bruen*, 142 S. Ct. at 2127.

<sup>589</sup> See *Bliss v. Commonwealth*, 12 Ky. 90 (1822) (discussed *supra* text accompanying notes 249–57).

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>590</sup>

Justice Scalia’s rhetoric would have constituted an excellent rejoinder to Chief Justice Burger’s proposal to balance the privilege against compelled self-incrimination against the public need for information. Similarly, if the Constitution had included an unqualified right to bear arms (like the monster version suggested above) and if Justice Breyer had proposed the same interest-balancing standard, Justice Scalia’s rhetoric might have hit the mark. But, magnificent though this denunciation of interest-balancing was, it defamed Justice Breyer and nearly all the other judges who have considered the constitutionality of firearms regulations.

When these judges upheld prohibitions of carrying firearms while intoxicated, did they reassess the usefulness of the Second Amendment? When, balancing interests, they upheld bans on carrying firearms in polling places, did they decide an issue that the very enumeration of the right was meant to take from their hands? When, taking account of police safety, they decided that law enforcement officers could lawfully disarm arrested suspects before transporting them to a lockup, did they conclude that the right to bear arms wasn’t worth insisting upon? Or did these judges do their best to determine the scope of a right that, as Blackstone said, was understood from the outset to be subject to “due restrictions”?<sup>591</sup>

Before accusing judges of deciding for themselves whether to honor a constitutional right, one ought to identify the right they are thought to have dishonored. Justice Scalia wrote as though every limitation of a person’s ability to own, possess, carry, or use a firearm was a restriction of the “right” to keep and bear arms, but, as he and every other justice of the Supreme Court have recognized, that was not the right the Second Amendment provided.

*Bruen* sounded *Heller*’s theme: “The Second Amendment ‘is the very product of an interest balancing by the people,’ and it ‘surely elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense.”<sup>592</sup> Like most other constitutional provisions, the Second Amendment does reflect interest-balancing, but it would be a mistake to assume that this balancing resolved

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<sup>590</sup> *Heller*, 554 U.S. at 634–35.

<sup>591</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

<sup>592</sup> *Bruen*, 142 S. Ct. at 2118 (quoting *Heller*, 554 U.S. at 635).

*every* Second Amendment issue. A judge's duty is to determine how much balancing the Framers of a constitutional provision did themselves and how much they left unresolved. And if the Second Amendment clearly elevates the right to use arms for self-defense above all other interests, why *isn't* that right absolute? Why, for example, is the Supreme Court allowed to disarm spectators before permitting them to attend proceedings in its courtroom?

Even before *Bruen*, I thought originalism was weird, but I never dreamed it was *this* weird.