THE CONCRETE SECOND AMENDMENT: TRADITIONALIST INTERPRETATION AND THE RIGHT TO KEEP AND BEAR ARMS

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INTRODUCTION

Since its modern affirmation by the U.S. Supreme Court in *District of Columbia v. Heller*,[1] the Second Amendment[2] right to keep and bear arms has been the site of two basic legal disputes. The first has been the theoretical question about the aptness of the originalist methods of interpretation that the Supreme Court deployed in *Heller*, where the Court parsed the Second Amendment as protecting an individual right "to possess and carry weapons," centered on the purpose of self-defense.[3] The second, which has grown steadily in importance and intensity over time, is a question of application; it asks whether the constitutional right recognized in *Heller* has been systematically underenforced in the lower courts. In recent years the underenforcement question has drawn the attention of both Justices[4] and scholars.[5]

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1. 554 U.S. 570 (2008).

2. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II.

3. Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 366–69, 377 (2009) (quoting *Heller*, 554 U.S. at 592).

4. For example, the Court's recent dismissal on mootness grounds of *New York State Rifle & Pistol Ass'n v. City of New York*, involving a former New York City law that forbade registered handgun owners from transporting their handgun out of the city, prompted three Justices to express concern about potentially widespread problems in the lower courts' handling of Second Amendment cases. *See* 140 S. Ct. 1525, 1544 (2020) (Alito, J., joined in full by Gorsuch, J., dissenting) ("The City's public safety arguments were weak on their face, were not substantiated in any way, and were accepted below with no serious probing. . . . We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern."); *accord id.* at 1527 (Kavanaugh, J., concurring) ("I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.").

5. *Compare* Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1410, 1421 (2013) (analyzing over 200 reported federal cases that used the Westlaw "Weapons—Constitutional, Statutory, and Regulatory Provisions" Keycite designation from June 2008 to October 2013, and finding that all votes

An adequate response to these questions begins by noticing that they share a significant, underexamined common feature: each turns in part on the use of *practice* and *tradition* in determining constitutional meaning.[6] Thus, at the "macro" level of interpretive theory, *Heller* actually reflects the influence of tradition-based interpretation in key places. Indeed, I'll argue that the decision is best understood as the product of a fusion of originalist and traditionalist methods.[7] A similar current is palpable on the as-applied front, where an increasing number of jurists are urging that courts should de-emphasize tiered scrutiny "balancing test[s]" (which they believe have failed to produce correct and consistent results in actual Second Amendment controversies),[8] and embrace instead an alternative approach that restricts judicial balancing in order to focus on the more concrete content of "text, history, and *tradition*."[9] Thus, on this view, deciding a Second Amendment case

for merits relief were cast by Republican-appointed judges), *with* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1475, 1507 (2018) (arguing that "[t]he low success rate of Second Amendment claims does not show that the right is being underenforced" and that courts such as the Second Circuit—that have rejected almost all merits relief sought by Second Amendment claimants—are among the courts where "claims have succeeded most frequently").

The latter analysis has been criticized on the ground that it counts as Second Amendment "successes" mere interlocutory orders, such as a denial of a motion to dismiss that still leads to an ultimate loss, rather than focusing on final rulings that actually grant claimants relief on the merits, a more realistic notion of constitutional "enforcement." David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79, 82–86 (2018), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1063&context=dlj_online [https://perma.cc/P3FP-G2W7]. *See generally* Allan Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (concluding that most lower court judges, in practice, analyze Second Amendment challenges using the deferential balancing methods of Justice Breyer's *Heller* dissent, rather than following the lead of the Court's majority opinion in *Heller*).

6. *See infra* Part I.

7. *See infra* Part I.

8. *See, e.g.,* Duncan v. Bonta, 19 F.4th 1087, 1140 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting) (diagnosing the "tiers-of-scrutiny approach" favored by many post-*Heller* lower courts as "nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones," and urging instead the use of "analysis of the text, tradition, and history of the Second Amendment" to decide Second Amendment claims); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen'l of N.J., 910 F.3d 106, 130 (3d Cir. 2018) (Bibas, J., dissenting) (criticizing a panel majority opinion for failing to "apply true intermediate scrutiny" to a Second Amendment claim, instead using a "watered down" version that "construes everything in favor of the government, effectively flipping the burden onto the challengers" and "overlooks tailoring").

9. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added); *accord Duncan*, 19 F.4th at 1140 (Bumatay, J., dissenting); *cf.* Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting) (arguing that lower courts should "apply a test rooted in the Second Amendment's text and history").

may often require asking whether a given restriction or practice falls within a relevant tradition, and how much strength the tradition displays.

The Supreme Court's decision to break the long drought of its Second Amendment docket[10] by hearing *New York State Rifle & Pistol Association v. Bruen*[11] in the October 2021 Term brings these issues to the forefront. *Bruen* is a challenge to the constitutionality of New York's highly restrictive state laws governing the issuance of permits to carry concealed handguns for self-defense.[12] The case accordingly presents a natural opportunity for the Court to clarify the role to be played in Second Amendment law by tradition, especially as embodied in the concrete arms-bearing practices of the American people from the Founding to today. While the litigation in *Heller* dealt directly with home handgun possession—conduct that the Court located at the core of how Americans exercise the Second Amendment right to "keep" arms[13]—*Bruen*, in

10. By the end of October Term 2020, the Supreme Court had not issued a decision on the merits in an argued Second Amendment case since *McDonald v. City of Chicago*. 561 U.S. 742, 791 (2010) (holding that the Second Amendment individual right to keep and bear arms applies fully, via the Fourteenth Amendment, against state and local governments). After rejecting dozens of subsequent petitions, the Court issued a terse per curiam opinion in *Caetano v. Massachusetts*, summarily vacating and remanding an abuse victim's conviction for carrying a stun gun in self-defense. 577 U.S. 411, 411–12 (2016) (per curiam). The Massachusetts Supreme Judicial Court in *Caetano* had erred in an obvious fashion by holding that stun guns were not constitutionally protected "arms" because they were not in common use *in 1791*—directly contradicting the U.S. Supreme Court's Second Amendment analysis in *Heller*, which also extends protection to typical defensive weapons in common use *at the present time*. *See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (characterizing the contrary view later essayed by the Massachusetts court as "bordering on the frivolous").

The Court next granted certiorari in 2019 to evaluate the constitutionality of New York City's extreme transport restrictions on licensed firearms, which barred a lawful gun owner even from bringing a registered gun to a second home or to a shooting range outside the city. However, the City responded to the certiorari grant by amending its transport rule and abandoning its defense of its former rule. A majority of the Court ultimately held that the amendment had rendered the case moot. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526–27 (2020) (per curiam). *But cf. id.* at 1527, 1533 (Alito, J., dissenting) (arguing that the revised rule still left open justiciable questions, and that the Court, by allowing the City's last-minute rule change to procure a mootness dismissal, "permit[ted] [its] docket to be manipulated in a way that should not be countenanced").

11. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843, was argued on November 3, 2021. The named respondent is the Superintendent of the New York State Police. The case was formerly captioned *N.Y. State Rifle & Pistol Ass'n v. Corlett*, and the opinion below is *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99 (2d Cir. 2020).

12. The question presented upon which the Court granted review in the case that became *Bruen* is "[w]hether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." Order Granting Certiorari, N.Y. State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021) (mem.).

13. *See Heller*, 554 U.S. at 628–29 (identifying "the inherent right of self-defense" as "central to the Second Amendment right," and concluding that therefore a ban of handguns,

turn, implicates the archetypal way that Americans understand themselves to exercise the right to "bear" arms. This is by carrying a concealed handgun for self-defense, usually (though not always) pursuant to a state-required license or permit that is issued on a "shall issue" basis—that is, on an objective basis that allows typical citizens a way to carry lawfully if they so choose.[14]

If we prescind from the originalist terms in which the case has understandably[15] been mostly framed, it is natural to see the case as calling on the Court to take stock of an overwhelmingly successful social practice of arms bearing, reflected in a well-articulated, state-level regulatory framework of decades' standing—and to decide whether that practice is entitled to normative value in interpreting the Second Amendment. In other words, should the practice of modern "shall issue" handgun carrying, widely understood by the public to embody constitutional rights, thereby actually serve to define a constitutional baseline against which restrictions on carrying arms must be measured? If the Court takes that view, then New York's restrictive permitting law, an outlier that leaves most persons with no way to carry a handgun outside the home for self-defense, should fall.

By examining *Bruen* from a traditionalist perspective, this Article

"'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,'" must be unconstitutional (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007))).

14. As discussed further in Part IV, forty states today make concealed carry permits available on a "shall issue" basis, to all individuals who meet certain modest training requirements and are not disqualified for a specific reason such as mental illness or a criminal record. While many of these states require the permit to carry concealed handguns lawfully, a significant number of them no longer require the permit but still continue to make permits available, often to allow for interstate reciprocity agreements that let one state's licensed citizens carry in other states. *See Concealed Carry | Right-to-Carry*, NRA-ILA, https://www.nraila.org/get-the-facts/right-to-carry-and-concealed-carry/ [https://perma.cc/882G-SNMA] (noting that forty states and the District of Columbia had enacted "shall issue" statutes by 2019 and that many of these states operate a permit reciprocity system with other states); Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 698–706 (1995) (observing that states including Oregon, Wyoming, and Alaska make "shall issue" permits available to all applicants not disqualified for a limited set of reasons such as mental illness or criminal conviction).

15. *Heller* and *McDonald*'s emphasis on originalist methods counsels giving that perspective careful attention in Second Amendment cases. My emphasis here on a distinct perspective (traditionalism) should not be taken to contradict this. An appropriate originalist analysis, in my judgment, supports the conclusion that New York's restrictive handgun carry permit laws, taken together with its ban of open carry, violate the Second Amendment. *See generally* Brief for Professors of Second Amendment Law et al. as Amici Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 13, 2021) (mounting a mainly originalist case for reversal in *Bruen* in a brief joined by the author of this Article).

aims to shed light on the Second Amendment as well as on traditionalist methods of interpretation in general.

Part I is a *precis* of traditionalist interpretation, drawing upon recent work by Marc DeGirolami. It distinguishes traditionalism, understood as a "bottom up" emphasis on decentralized concrete practices, from originalism and from "top down" methods of interpretation that turn on legal conventionalism. It diagnoses the two basic ways, negative and positive, that a relevant tradition can influence the scope of a constitutional-rights claim. (I will frequently refer to the negative mode of traditionalist argument as *limiting* and the positive mode as *constitutive* in nature.) Part II examines how traditionalist interpretation has played a significant role in the history of the right to keep and bear arms, including in the (officially originalist) *Heller* decision. Next, Part III examines more closely the application of *Heller*'s traditionalist elements in the lower courts. While lower federal courts have been quite receptive to negative arguments that a government practice should be used to *limit* and restrain Second Amendment rights claims, they have had a far more mixed record of receptivity in confronting positive traditionalist arguments that use popular practices as a basis for *constituting* and defining the protections included in the scope of Second Amendment rights. Finally, Part IV examines *Bruen* itself in a traditionalist light. I argue that the case should be understood as opposing a strong and widespread, practice-based positive traditionalist argument for constitutional protection, against a negative traditionalist argument of much lower strength that hinges on the presence of prohibitory laws in a small minority of states.

I. DEFINING TRADITIONALIST INTERPRETATION

A. Traditionalism Looks at Decentralized Practices; How It Differs from Legal Conventionalism

Lawyers who hear appeals to "tradition" in interpretation often think, almost reflexively, of court-focused interpretive conventions such as stare decisis. That familiar idea of sticking to judicial precedent, in turn, leads to the affirmation of a related set of judicial dispositions: go slow, be modest and cautious, and so forth.

The result is that references to "tradition" in professional legal discourse frequently get cashed out simply as bland exhortations to judges to be gradualist: defer to prior interpretations by fellow

courts and other important legal actors, refrain from overruling past judicial decisions lightly, and generally avoid rocking the boat. Regrettably, the prestigious name of Edmund Burke is frequently attached to this outlook,[16] which is more appropriately described as *legal conventionalism*.[17] This approach's key idea is that the legal meaning of a constitutional provision—the meaning that courts should properly enforce—coincides with "the consensus view about [its] meaning in the legal community of today."[18]

This invocation of "the legal community" is worth pausing at, for it tells us something significant about the social and political tendency of the conventionalist approach. Oriented toward prominent institutions, legal conventionalism implies a hierarchy of interpretive sources that is socially "top-down." Legal conventionalism emphasizes concrete interpretive sources (rather than open-ended principles), but the sources it privileges most are distinctively *legal-professional* ones like judicial opinions, while it implicitly orders these sources in a hierarchy that the average lawyer would readily recognize as being socially and institutionally "top-down" in character. All else being equal, for the conventionalist, U.S. Supreme Court precedent has more weight than lower federal courts, which in turn trump the opinions of state

16. *See, e.g.*, Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/8MBG-UWGT] (arguing that originalism departs from "Burkean traditionalism," which "tries to slow the pace of legal innovation," because originalism sometimes leads a court to "break with [its] long-standing precedents"). From here, it is an easy rhetorical hop to claim that one who seeks to revisit bad judicial decisions thereby forfeits his or her conservative credentials. *See* Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), https://blog.harvardlawreview.org/not-conservative/ [https://perma.cc/J969-DFC5] (decrying the Roberts Court as anti-Burkean, and therefore anti-conservative, because it had issued recent decisions limiting or invalidating legislation, thereby imperiling "stable compromises" that arguably deserved to persist).

This is a misreading of Burke but demonstrating so lies beyond the scope of this Article. *See generally* Helen Andrews, *Underburked*, AM. SPECTATOR (Feb. 26, 2014, 12:00 AM), https://spectator.org/underburked/ [https://perma.cc/3DD7-E655] ("The most common American misreading of Burke—namely, that at this point the inheritance we are bound to try to conserve is New Deal liberalism . . . is a misreading because it assumes that the objects of Burke's preservationist impulse must be *government* institutions. In fact, the institutions Burke cared about preserving were just as likely to be cultural.").

17. For an excellent short presentation of the legal conventionalist view, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996). Merrill describes "conventionalism" as an interpretive approach based on judicial deference to past legal interpretations, and argues that this approach offers "a conservative alternative to originalism" that "draws much of its inspiration from the writings of . . . Edmund Burke." *Id.* at 509, 511.

18. *Id.* at 511.

courts; a prominent federal agency's approach to disputed language beats a small state agency's or municipality's; pronouncements of the ALI or ABA beat the understandings of small business owners or grassroots groups.[19]

Traditionalism, as used here, diverges in important ways from legal conventionalism in its orientation to sources. This is a key reason why the two stances should not be conflated with one another. Instead, "tradition" should be reserved for something that poses more of a challenge to typical legal discourse: the use of *decentralized* concrete practices to give meaning to constitutional provisions.

That is, traditionalism stresses concrete interpretive sources (like conventionalism), but in hard cases it tends to rank them according to an interpretive hierarchy that departs from conventionalism's top-down orientation, and at times actually appears to be a "bottom-up" ranking—the inverse of the conventionalist's hierarchy. That is, traditionalism gives strong weight to the concurrence of many geographically and temporally disparate sources, including those that are at some distance (literal or figurative) from the conventional centers of political or cultural power. This includes the acts of subnational governments (states and municipalities) and indeed the "non-governmental" acts and practices of individuals.

It is in this more distinct sense of "tradition" that the U.S. Supreme Court has made use of traditionalist interpretation in a series of notable cases involving the Religion Clauses of the First Amendment and in other constitutional fields—including the Second Amendment right to keep and bear arms.

In a series of recent articles,[20] Marc DeGirolami has defined

19. Merrill does acknowledge that "the practice[s] of private citizens" are a source that "might" hold value for conventionalist interpreters—suggesting a measure of overlap between conventionalism and the traditionalism considered in this Article. *Id.* at 511–12. However, Merrill places such sources at the end of a list of sources that is headed by the decisions of federal courts, above all the U.S. Supreme Court. *Id.* This implied hierarchy of interpretative sources that mirrors the conventional legal–professional hierarchy of institutions is characteristic of conventionalist interpretation and one of its key differences from traditionalism.

20. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123 (2020) [hereinafter DeGirolami, *Traditions*]; Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1655 (2020) [hereinafter DeGirolami, *First Am. Traditionalism*]; *see also* Marc O. DeGirolami, *The Unforgettable Fire: Tradition and the Shape of the Law*, LAW & LIBERTY (Aug. 2, 2016), https://lawliberty.org/forum/the-unforgettable-fire-tradition-and-the-shape-of-the-law/ [https://perma.cc/TE8N-ABVA] ("A

traditionalist interpretation by its focus upon the two elements of *practices* and *time.* Traditionalist interpretation, in his formulation, "takes political and cultural practices of long age and duration as constituting the presumptive meaning of the [constitutional] text."[21] This kind of traditionalism treats the practices of both the *political branches* of governments and *citizens* themselves as sources of meaning that courts properly draw upon to define the scope and content of constitutional rights. And it gives more weight to those practices for which a solid line of continuity can be demonstrated over a long period of time.

Because traditionalism focuses on post-ratification developments and continuity over time, it differs from originalism, which focuses more narrowly on sources of meaning that existed at the time when a constitutional provision was ratified. And as we have said, traditionalism differs from legal conventionalism by focusing upon the continuity of popular practices and the acts of the elected branches rather than the continuity of legal–institutional practices such as stare decisis:

> The chief distinguishing feature of traditionalism is its emphasis on political and cultural practices for informing constitutional meaning. *Sometimes the government itself (federal or state) is engaging in the relevant practice* . . . . In these situations, when it interprets traditionally, the Court takes the existence of a particular government practice to be in some measure authoritative for interpreting the meaning of the Constitution.
>
> At other times, the Court focuses on the government's regulation of individuals or groups which themselves engage in specific practices. Such cases include people or groups who distribute pamphlets advocating political causes, organize and control the composition of their religious institutions, make decisions concerning physician-assisted suicide, and so on. In these situations, when the Court interprets traditionally, it takes the existence of these practices as, in some degree, authoritative when evaluating whether the government's attempts to regulate them are constitutional. But in either case—whether for government traditions or government regulation of individual or group traditions—it is concrete practices that furnish the raw material for traditionalism.[22]

Understood in this way, traditionalist interpretation shares with

traditionalist court puts primacy on practices . . . .").

21. DeGirolami, *First Am. Traditionalism*, *supra* note 20, at 1655.

22. DeGirolami, *Traditions*, *supra* note 20, at 1161 (emphasis added) (citation omitted).

conventionalism a relative *concreteness*, a skepticism about methods of interpretation that stress abstract principles or decontextualized textual meanings. Both methods also share a focus on *continuity* over time and overlap in some applications. Nevertheless, the two methods emphasize different sources, leaving each method irreducible to the other.

In particular, traditionalism's social and institutional bottom-up orientation gives it a vastly stronger grounding than conventionalism in the important interest that DeGirolami calls the "democratic-populist justification" for basing legal interpretation on concrete sources.[23] When a court "relies on old and enduring practices," DeGirolami explains, it does so:

> [A]t least in part because of its apprehensions about what constitutional interpretation in the hands of elite actors, perhaps including itself, has done to constitutional law. It looks to concrete practices . . . because interpretation grounded in abstract principle has frequently tended to uproot and displace certain enduring ways of life, and to substitute and entrench a particular set of elite cultural and political preferences.[24]

Applying the Second Amendment's guarantees to gun regulation—a legal arena once famously described as involving "a sort of low-grade [social] war" with strong class overtones[25]—would seem a particularly apt time for judicial elites to take these apprehensions seriously. I analyze in the next subpart the two basic ways that traditionalist argument can shape constitutional rights. The most important way concrete practices can ground post-*Heller* Second Amendment law is through their use to check courts tempted to employ abstract balancing tests to unduly limit the scope of a constitutional right.

23. DeGirolami, *First Am. Traditionalism*, *supra* note 20, at 1666.

24. *Id.* at 1668.

25. B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37, 61 (Fall 1976). Bruce-Briggs saw the American social divide on gun control as raising exactly the risks of elite identification that DeGirolami pinpoints as a reason for judges to resort to traditionalism. The gun issue, Bruce-Briggs wrote, is a conflict between "those who take bourgeois Europe as a model of a civilized society . . . with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation" versus "a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print," who "are 'conservative' in the sense that they cling to America's unique pre-modern tradition—a non-feudal society with a sort of medieval liberty writ large for everyman." *Id.*

B. Tradition Guides Interpretation in Two Ways

The presence of a relevant practice can influence the interpretation of a right in two basic ways. Practices function sometimes as a *negative* indicator, and other times as a *positive* indicator in defining the scope of claims of unconstitutionality. A bit of explanation is in order here, since this distinction turns out to be particularly salient when looking at how traditionalist interpretation has been employed in Second Amendment cases.

1. Negatively: Tradition as a Basis of Rights-Limiting Arguments

First, courts can use traditionalist arguments negatively, to limit constitutional rights claims. A court does this by invoking the existence of a steady practice as a reason to reject a legal challenge to the constitutionality of a government measure reflecting the practice. A limiting traditionalist argument, in short, gives a reason to uphold a challenged measure as constitutional. It seeks to justify judicial non-intervention. This move has particular bite when the constitutional challenge thus rejected might otherwise have had plausible merit under a principle-based doctrinal test of the sort typical of modern constitutional law.

For example, under the First Amendment's Establishment Clause, the Supreme Court has treated the longstanding practices of state and local governments in authorizing particular expressions of religious symbolism as one reason to conclude that such practices do *not* violate the Establishment Clause, even when a court-focused, doctrinal inquiry such as the three-pronged test of *Lemon v. Kurtzman*[26] might point to the opposite conclusion. Thus, in *Town of Greece v. Galloway*,[27] the Court majority looked to the longstanding practice of legislative prayer in opening sessions of state and local governments, and held that its pervasiveness was a sufficient reason to conclude that a municipal government does not violate the Establishment Clause today by holding opening prayers led by local clergy.[28] The Court emphasized that "[a]ny test" it would consider adopting in this area "must acknowledge a practice

26. 403 U.S. 602 (1971) (explaining that a statute does not violate the Establishment Clause when (1) the statute has "a secular legislative purpose," (2) the statute's "primary effect [is] neither [to] advance[] nor [to] inhibit[] religion," and (3) the statute does "not foster 'an excessive government entanglement with religion'" (citations omitted)).

27. 572 U.S. 565 (2014).

28. *See id.* at 584 (noting that "[f]rom the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds").

that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[29]

Another example arose in the context of Fourteenth Amendment due process limits on jurisdiction. In *Burnham v. Superior Court*,[30] a plurality of the Supreme Court took note that the states had traditionally authorized in-person service of process on an individual defendant physically present within the forum state—so-called transient jurisdiction—as a fully adequate basis for personal jurisdiction over that defendant.[31] The plurality rejected the argument that the validity of this traditional, concrete method of obtaining jurisdiction should be dependent on the open-textured doctrinal test of "minimum contacts" that the Court had more recently adopted for out-of-state defendants.[32] To the contrary, concluded the *Burnham* plurality, a court should "conduct[] no independent inquiry into the desirability or fairness of the prevailing in-state service rule . . . ; for our purposes, its validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear."[33]

Burnham's tag ("its validation is its pedigree")[34]—one that is offered to justify turning aside an "independent inquiry" into the constitutionality of a government measure—concisely sums up the negative or limiting form of argument based on tradition. This kind of argument also played a significant role in the Second Amendment context. Since *Heller*, courts have upheld many restrictions on gun possession by drawing upon a passage in *Heller* that suggested that:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial

29. *Id.* at 577.

30. 495 U.S. 604 (1990) (plurality opinion).

31. *See id.* at 612–14 (pointing out that not one state court held or suggested that in-state personal service on an individual was insufficient to confer personal jurisdiction); *id.* at 629 n.1 (Brennan, J., concurring) (applying the term "'transient jurisdiction' to refer to jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State").

32. *See id.* at 621 (plurality opinion) (stating that it is unreasonable to read a later case as "casually obliterating" the traditional distinction between physically present defendants and absent ones).

33. *Id.*

34. *Id.*

sale of arms.[35]

For example, lower courts have accordingly classified as "longstanding," presumptively constitutional measures such as the prohibition of gun possession by felons[36] and by drug abusers,[37] even though direct legislative counterparts to these measures date back only to the early twentieth or late nineteenth century.[38]

2. Positively: Tradition as a Basis of Rights-Constitutive Arguments

Conversely, practices can also be used to make *positive* arguments about rights. Such arguments treat steady practices as implicitly embodying a claim to constitutional protection, and thus as being partially *constitutive* of the enforceable scope of rights. Constitutive traditionalist arguments provide reasons for a court to hold *unconstitutional* government measures that aim to restrict traditional actions. They seek to justify judicial intervention.

The most natural legal territory for such arguments lies in those constitutional guarantees that enumerate rights of persons to do things—such as most of the guarantees found in the First and Second Amendments. These guarantees arise from domains of activity (such as exercising religion, speaking, assembling, petitioning, keeping arms, and bearing arms) that are valuable, yet are also risky, unsettling, or politically threatening enough to make necessary the provision of explicit legal protections for those activities. To apply such protections intelligently, the legal interpreter ought to understand them at least in part through reference to actual practices. For example, in a First Amendment Free Speech Clause case, the Supreme Court has reasoned that the fact that Americans, over a period of generations, have frequently employed anonymous political pamphleteering to promote their

35. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008); *see id.* at 627 n.26 (adding that this list "does not purport to be exhaustive").

36. *See, e.g.*, Binderup v. Att'y Gen., 836 F.3d 336, 348–49 (3d Cir. 2016) (en banc) (plurality opinion) (holding that those convicted of "serious" crimes showing a lack of virtue fall within "the traditional justification for denying some criminal offenders the right to arms" and thus forfeit Second Amendment rights).

37. *See, e.g.*, United States v. Yancey, 621 F.3d 681, 687 (7th Cir. 2010) (per curiam) (finding that Congress was within its constitutional bounds to prohibit illegal drug users from firearm possession).

38. In the 1920s, several states enacted prohibitions on firearms possession by those convicted of serious crimes. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 701–02 (2009).

views meant that this practice formed part of "a respected tradition of anonymity in the advocacy of political causes," and therefore, such pamphleteering activity was itself constitutionally protected.[39]

Accepted, concrete instances of a right's exercise provide anchoring points that can be used to identify and analyze other applications of the same right. The consistent choice of a potential rights-holder to engage in a practice over time, combined with the popular understanding that the practice enacts or embodies a constitutional principle, provides a reason for courts to treat the practice itself as presumptively constitutionally protected against abrogation—and perhaps also to view it as a constitutional floor, a marker of what, at a minimum, constitutional protection should encompass.

Heller also seemed to give considerable encouragement to this type of traditionalist argument. The Supreme Court's central analysis of the constitutionality of handgun bans strongly reflected the constitutive use of decentralized tradition. The fact that "American society," over time, had "overwhelmingly chosen" the handgun for the legitimate purpose of self-defense provided a strong reason to deem handgun ownership constitutionally protected.[40] And this was so despite the fact that a few generations of lower federal court judges (whose perspectives, notice, would have been entitled to great weight under a more legal-conventionalist "traditionalism") had opted to read the *Miller* decision in a way that implied otherwise.[41] However, as will be shown in Part III, post-*Heller* lower courts have been only spottily receptive to constitutive traditionalist arguments.

C. Government Practices Are Usually Used to Make Limiting Traditionalist Arguments, While Popular Practices Function Constitutively

Influenced by DeGirolami's analysis, this Article has proposed that traditionalist interpretation is mainly distinguished by its emphasis on the decentralized practices of two types of actors—subnational governments and the people themselves.[42] We may

39. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342–43 (1995).
40. *Heller*, 554 U.S. 570, 628–29 (2008).
41. *See id.* at 624 n.24 (noting lower courts' "erroneous reliance" on this understanding of *Miller*).
42. *See supra* text accompanying notes 20–22.

next notice that this division between two types of traditionalist actors *overlaps*, to a substantial though not perfect degree, with the distinction we have just made between the limiting and the constitutive uses of tradition in the constitutional argument.

When the relevant practice being considered is a *governmental* one, traditionalist reasoning usually functions as a negative, limiting marker that tends to restrain the scope of claims of unconstitutionality. Thus, the argument is made (for example) that, since state and/or local governments have traditionally engaged in the practice of opening their meetings with legislative prayer, that practice should *not* be interpreted to violate the guarantee of the Establishment Clause. Likewise, because the state governments have traditionally prohibited obscenity, it is appropriate for obscene images or works to receive far less constitutional protection than otherwise similar materials that are not obscene.[43]

When the relevant practice is a *popular* one, in contrast, tradition almost always functions as a positive, constitutive marker for rights. Whatever else the right protects, it must protect either *this* specific practice (in the most concrete version of such traditionalism) or at least it must protect the right to engage in some closely similar practice that can be seen as comparably robust to the benchmark practice. Thus, the fact that over time Americans widely own handguns (Second Amendment) or participate in anonymous political speech (First Amendment) provides a reason to hold that the Constitution *should* be interpreted as protecting those practices.

Each of the various Supreme Court opinions discussed in the preceding sections as examples of traditionalist reasoning fits into this pattern.

There are, however, occasional exceptions to the pattern. For example, under the erstwhile Tenth Amendment framework that held sway for several years after *National League of Cities v. Usery*,[44] Congress's power over interstate commerce could not be used to

43. United States v. Stevens, 559 U.S. 460, 464–85 (2010) (identifying obscenity as a "historic and traditional" category of expression regulated by the state and federal governments and thus constitutionally unprotected); Roth v. United States, 354 U.S. 476, 484 (1957) (noting that all of the states as well as the federal government had legislatively prohibited obscene materials throughout American history because "implicit in the history of the First Amendment is the rejection of obscenity").

44. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

displace state laws that regulated "traditional aspects of state sovereignty" such as employment conditions for state and municipal employees.[45] The *National League of Cities* Court emphasized that a contrary holding would have let Congress "substantially restructure traditional ways in which the local governments have arranged their affairs" in setting hours and wages for their employees[46]—suggesting that the subnational governments' long practice of exercising autonomy in this area provided was a reason to conclude they were constitutionally *entitled* to do so. Contrary to the usual pattern, this is an instance of a government practice supporting what I have called a constitutive type of traditionalist argument. (Even here, though, the constitutional right that the practices of state and local governments helped to "constitute" was not precisely an *individual* right, but rather a constitutional right whose immediate beneficiaries were those subnational governments themselves.)

The distinction between the limiting and the constitutive uses of tradition sheds light on the uses of tradition to interpret the right to keep and bear arms. As the next Part will show, the use of tradition both to constitute and to limit the right to keep and bear arms is nothing new: it is itself traditional.

II. TRADITION AND PRACTICE IN THE HISTORY OF THE RIGHT TO ARMS

A. From the Founding to Heller

Traditionalist methods have been used to define the right to keep and bear arms since the American founding.

The first published American right-to-bear-arms case, an 1822 decision of Kentucky's highest court,[47] struck down a ban on concealed carry, taking the view that the modes of carrying weapons exercised by the citizens at the time of ratification made up the substance of the constitutional right itself and could not be restrained by legislation:

> The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you

45. *Id.* at 849.
46. *Id.*
47. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

> necessarily restrain the right; and such is the diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear them when the constitution was adopted.[48]

In other words, the Kentucky court had recourse to "exist[ing]" practices of "wearing weapons" in order to define the right to bear arms.[49] It even appeared to treat the two as synonymous: a legislature that prohibited the exercise of those constitutive practices *ipso facto* violated the constitutional right.[50]

Likewise, the first academic commentator on the Bill of Rights, federal judge and law professor St. George Tucker, concluded in 1803 that a hypothetical law that presumed that any gathering of armed persons was motivated by criminal intent would violate "the right to bear arms . . . recognized and secured in the constitution itself."[51] Such a presumption, Tucker emphasized, would be untenable because it would stigmatize the commonplace American practice of carrying firearms in public for self-defense: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side."[52] Again, the touchstone of the right's protection was the common practices of the people.

Other prominent authorities showed how popular practices can help constitute the right to *keep* arms, not just the right to bear them. In an often-cited nineteenth century decision, *Andrews v. State*,[53] the Tennessee Supreme Court expressly equated the protections of its state constitution's right to keep and bear arms to the protections of the federal Second Amendment.[54] Then, in elaborating the right to "keep arms," the court looked repeatedly to the "usual" practices, the "habits of our people," in order to define not only the specific rights that make up the right to keep arms, but also the types of weapons whose ownership that guarantee covers:

> [The] right of keeping arms . . . . necessarily involves the right to

48. *Id.* at 92.
49. *Id.*
50. *Id.* at 92–93.
51. 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 19 (1803).
52. *Id.*
53. 50 Tenn. (3 Heisk.) 165 (1871).
54. *Id.* at 177.

> purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted . . . [and are] common to the country. . . . [These are] the usual arms of the citizen of the country, . . . the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, . . . we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater [a military revolver] are such arms; and that under the Constitution the right to *keep* [them] cannot be *infringed* or *forbidden* by the Legislature.[55]

Even the Supreme Court's now-superseded decision in *United States v. Miller*,[56] which seemed to tie the content of the Second Amendment right to the militia purpose mentioned in its preface, took note that the Second Amendment presumed that militiamen would bring their private arms "supplied by themselves and of the kind in common use at the time."[57]

Twentieth century state courts also drew upon similar resources to give content to the right to keep and bear arms. In a 1980 state constitutional decision that in many ways presaged the self-defense-based analysis of the right to keep and bear arms that prevailed in *Heller*, the Oregon Supreme Court concluded that the right protects "arms which are commonly possessed by individuals for defense,"[58] a category that was "not limited to firearms," but could also include other weapons such as a billy club, which is "still used today as a personal weapon [and] commonly carried by the police."[59]

B. Heller*: Tradition-Inflected Originalism*

Heller relied on originalist arguments to define the basic nature of the Second Amendment right. Justice Scalia's opinion for the Court was a self-aware exhibition of the influential "original public meaning" strand of originalist doctrine that has become an

55. *Id.* at 178–79.
56. 307 U.S. 174 (1939).
57. *Id.* at 179.
58. State v. Kessler, 614 P.2d 94, 99 (Or. 1980).
59. *Id.* at 98, 100. The use, in *Kessler* and similar cases, of the arms-bearing practices of state and local police to inform the decision about which arms are constitutionally protected for citizens is arguably an example of a *constitutive* traditionalist constitutional argument that is premised on the practices of governmental agencies. This is a departure from the more common pattern that governmental practices are used to make rights-limiting arguments while citizens' practices are used to make constitutive arguments. *See supra* subpart I.C.

orthodoxy among many conservative and libertarian scholars.[60] Drawing upon a variety of sources from English common law, the Founding era, and post-ratification commentary, the *Heller* Court analyzed the original meaning of "Arms," "keep," "bear," and "people"—each of the semantic components of the constitutional text—then integrated those components to conclude that the Second Amendment protects an individual right "to possess and carry weapons in case of confrontation."[61] Two years later, in the Fourteenth Amendment incorporation case of *McDonald v. City of Chicago*,[62] the Court reiterated this interpretation, noting that it had held in *Heller* that the Second Amendment protects an individual "right to keep and bear arms for the purpose of self-defense."[63]

Yet the *Heller* opinion employed traditionalist tests to elaborate and determine key features of the Second Amendment right.[64] The Court held that the right to keep and bear arms extends to "the sorts of weapons [that are] 'in common use at the time'" of a given legal challenge, for "lawful purposes like self-defense."[65] (The Court later had cause to emphasize that this test does *not* apply in a narrowly originalist fashion—instead, it can also extend to modern weapons that "were not in existence at the time of the founding," such as a stun gun.)[66] And *Heller* sent a strong signal that "common use" ought to be understood and applied in a concrete, practice-based fashion: one reason why a ban on handguns was unconstitutional was the simple fact that Americans acquired them in large numbers and kept them for self-defense: "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly

60. This theory of constitutional interpretation holds that courts should discern and give effect to the reasonable semantic meaning, in context, of the words and phrases of the Constitution as publicly understood at the time when they were enacted. Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 BYU L. REV. 695, 701 (2018); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004).

61. District of Columbia v. Heller, 554 U.S. 570, 579–92 (2008).

62. 561 U.S. 742 (2010).

63. *Id.* at 750; *see also id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) (reiterating that "the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense").

64. *See generally* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 415–16 (2009) (discussing how the *Heller* majority looked to tradition to define the scope of the Second Amendment).

65. *Heller*, 554 U.S. at 624, 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

66. Caetano v. Massachusetts, 570 U.S. 411, 411 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582).

chosen by American society for that lawful purpose."[67]

Indeed, Justice Scalia's majority opinion in *Heller* suggested that popular "reliance" on a traditional understanding of the scope of a constitutional right is entitled to weight even when it conflicts with some judicial decisions. In rejecting prior lower court cases that had taken narrow readings of the Supreme Court's 1939 decision in *Miller*, Justice Scalia emphasized that these judges' "erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms."[68]

On the other hand, *Heller* suggested that tradition could also exert a limiting effect on Second Amendment rights claims. Certain kinds of regulation deemed "longstanding" would be given a degree of presumptive constitutionality:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[69]

These traditionalist moves were echoed by notes of skepticism about open-textured doctrinal tests. As early as the *Heller* oral argument, important voices questioned the wisdom of extending the usual "tiers of scrutiny" to claims under the Second Amendment right to arms. When the Solicitor General urged intermediate scrutiny at oral argument, Chief Justice Roberts responded with skepticism:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing

67. *Heller*, 554 U.S. at 628; *see id.* at 629 (rejecting the argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed"; responding that "[i]t is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon").

68. *Id.* at 624 n.24.

69. *Id.* at 626–27; *see id.* at 627 n.26 (describing these types of regulations as "presumptively lawful regulatory measures").

> right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these—how this restriction and the scope of this right looks in relation to those? . . . [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?[70]

Much of the ensuing scholarly commentary engaged *Heller*'s use of originalism. Some extolled it as "the finest example of . . . 'original public meaning' jurisprudence ever adopted by the Supreme Court,"[71] while others thought *Heller* was bad originalism because it failed to give effect to the Second Amendment's initial clause that refers to the militia.[72]

But another strand of commentary stepped back from *Heller*'s self-presentation as the consequence of a sharply theorized originalism, and instead registered the decision's prominent undercurrent of traditionalism, its emphasis on a variety of popular, post-ratification understandings and practices. These scholars argued, for example, that:

- *Heller*'s recognition of an individual right had major "living Constitution" elements, such that the decision should be understood chiefly as a result of the successful mobilization of post-1970s conservative social and political movements;[73]

or, presenting a similar insight in a fuller and thus more adequate historical context,

- *Heller* reflected a "living constitutionalism," but one whose

70. Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

71. Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J. (June 27, 2008, 12:01 AM), https://www.wsj.com/articles/SB121452412614009067 [https://perma.cc/68X9-2C32].

72. Erwin Chemerinsky, *The* Heller *Decision: Conservative Activism and Its Aftermath*, CATO UNBOUND (July 25, 2008), http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/heller-decision-conservative-activism-its-aftermath [https://perma.cc/R5AK-2ETU]. For a view in between these poles, see Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1343, 1351–52 (2009), arguing that while Justice Scalia's opinion reached "an easily defensible originalist result," it failed at several junctures to explain how the contours of the right it recognized followed from the text and history of the Second Amendment.

73. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–93, 207 (2008).

> historical roots stretched back far beyond the late twentieth century—reaching all the way "[f]rom the Early Republic through the present."[74] On this view, the American public, generation by generation, acting partly through its political choices and partly through individual "micropractices" such as acquiring, carrying, and training with firearms, steadfastly manifested the conviction that it had an individual right to arms for self-defense. It stuck by this view even when (as in the New Deal era) elite legal opinion diverged from the popular consensus;[75]

and on a similar note,

- *Heller* reflected a "Burkean" analysis that drew heavily upon the aggregated weight of post-ratification sources of meaning (especially from an American state court tradition that begins in the nineteenth century) to support an individual right to keep and bear arms for self-defense.[76]

Each of these readings attributed weight to understandings and practices in post-ratification periods, rather than originalism's more restricted focus on semantic legal meaning within the particular period of ratification.

III. POST-*HELLER* DEVELOPMENTS: TRADITIONALISM'S MIXED RECEPTION

A. Balancing Tests and Underenforcement

Over the decade-plus since *Heller* and *McDonald*, lower federal courts have been called upon, in numerous civil and criminal cases, to apply and enforce the Second Amendment to specific types of weapons controls. However, these courts have tended to downplay *Heller*'s signals and proceeded to handle Second Amendment claims using the typical means-ends balancing under one or another post-*Carolene Products* tier of scrutiny—usually a deferential mode of intermediate scrutiny.[77] With this choice made,

74. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 99–100.

75. *Id.* at 99, 125–27.

76. O'Shea, *supra* note 3, at 371–72. I consider this earlier analysis to be broadly continuous with the analysis in this Article, although the earlier analysis, with its greater stress on state judicial decisions, has more affinity with legal conventionalism (as defined in Part I) compared to the present Article, which emphasizes more recent history and non-judicial sources.

77. *See* David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2018*, 7 LINCOLN MEM'L U. L. REV. 20, 20 (2020) ("By the end of 2018, every

courts uphold challenged restrictions as long as they can descry even a modest degree of connection or "fit" between the (compelling, in principle) interest of protecting public safety and the measure at hand.

The results have been a widespread (though not universal) rejection of Second Amendment claims, even very plausible challenges such as the ones unsuccessfully brought against a tax of approximately 100% to possess a used handgun;[78] against a prohibition on transporting one's licensed handgun from one's residence to a second home;[79] against a law requiring all handguns to be locked up if not immediately worn on the person (in a jurisdiction with few legal ways to carry a handgun);[80] against restrictive zoning requirements;[81] and the very claim at issue in *Bruen*: the recognition of an exercisable right to carry a handgun for self-defense outside the home.[82]

Several Justices of the Supreme Court have decried what they consider to be the lower courts' widespread underenforcement of the Second Amendment in the last decade. Justices Thomas and Kavanaugh have concluded that "instead of following the guidance provided" in *Heller*, "these courts . . . [have] minimized that decision's framework,"[83] yet until this year, the Supreme Court refused almost every opportunity to review the lower courts' decisions. The result, in the view of Justices Thomas and Gorsuch, has been "a distressing trend: the treatment of the Second

circuit except for the Eighth ha[d] adopted a Two-Part Test for Second Amendment cases. In Part One, the court determines whether the challenged law burdens the Second Amendment right. If so, the court applies heightened scrutiny in Part Two. Courts in Second Amendment cases almost always apply intermediate scrutiny . . . .").

78. Kwong v. Bloomberg, 723 F.3d 160, 165–69 (2d Cir. 2013) (upholding as constitutional a $340 fee to possess a handgun at home while expressing doubt as to whether such an exaction even substantially burdens the right to keep and bear arms).

79. N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 51–52, 62 (2d Cir. 2018), *vacated as moot*, 140 S. Ct. 1525, 1527 (2020) (per curiam).

80. Jackson v. City & County of San Francisco, 746 F.3d 953, 958, 960, 965 (9th Cir. 2014).

81. Texeira v. County of Alameda, 873 F.3d 670, 673, 682, 686–90 (9th Cir. 2017) (en banc) (upholding a zoning restriction that banned commercial gun stores within 500 feet of any residence because it was a "presumptively lawful" regulatory measure that did not burden Second Amendment rights).

82. *E.g.*, Young v. Hawaii, 992 F.3d 765, 773 (9th Cir. 2021) (en banc); Drake v. Filko, 724 F.3d 426, 428–30 (3d Cir. 2013).

83. Rogers v. Grewal, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., joined in relevant part by Kavanaugh, J., dissenting from the denial of certiorari) (arguing that the Court should have granted certiorari to review New Jersey's very restrictive handgun carrying laws and determine the scope of the right to bear arms outside the home).

Amendment as a disfavored right."[84]

Scholars' views of the degree of Second Amendment underenforcement range from a blunt diagnosis of "massive resistance"[85] at one end of the spectrum; passing through "skeptical, bordering on hostile,"[86] to a diagnosis of "narrowing from below" in which lower courts have "refused to follow the best reading of *Heller*" for alleged prudential reasons;[87] and ending with contentions that the lower courts are not systematically underenforcing *Heller*.[88] The overall impression is suggestive of underenforcement. Essentially no one (who believes in an individual right to keep and bear arms at all) argues that lower courts have been systematically over-*aggressive* in sustaining challenges.

It is natural to ask whether there is a connection between the likely phenomenon of underenforcement and lower courts' self-distancing from *Heller*'s elements of traditionalism. As we've seen, many judges now urge that instead of the conventional balancing of means and ends conducted under the various "tiers of scrutiny" derived from *Carolene Products*,[89] courts should shift their approach to use an inquiry based primarily upon "*text, history, and tradition*" to decide whether particular restrictions on arms violate the Second Amendment.[90] Thus, when asking whether a given restriction is valid, a court can look to whether restrictions of that sort have been commonly adopted by state and local governments throughout our history. If a given measure (for example, universal gun registration) *lacks* such a traditional precedent, then the restrictions are probably or certainly unconstitutional.[91] The disillusioning results of balancing-based scrutiny make it

84. Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (same, but involving a challenge to California concealed carry permit laws).

85. Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014).

86. O'Shea, *supra* note 5, at 1424–25.

87. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 962 (2016).

88. *See* Ruben & Blocher, *supra* note 5, at 1507 (stating that "[t]he low success rate of Second Amendment claims" has "more to do the claims being asserted than with judicial hostility to the right" (emphasis omitted)).

89. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

90. *Heller II*, 670 F.3d 1244, 1273, 1291–93 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added); *see also supra* text accompanying note 9.

91. *See Heller II*, 670 F.3d at 1272–73 (Kavanaugh, J., dissenting) (noting that the Supreme Court's own analysis of the handgun ban in *Heller* appeared to follow this pattern).

understandable that many judges may be drawn to consider concrete practices in Second Amendment cases, turning to these alternative sources to mitigate the effects of an untethered doctrinalism.[92]

B. Traditionalism's Mixed Reception in the Lower Courts

A closer look at post-*Heller* lower court case law, however, reveals that *Heller*'s strong traditionalist cues have *not*, in fact, been simply rejected. Rather, they have received a jarringly mixed reception. On one hand, plenty of Second Amendment lower court decisions reflect the *limiting* role of tradition, by upholding types of restrictions that are deemed "longstanding," even when their geographic or temporal reach has been only moderate in extent. On the other hand, the courts' embrace of the rights-*constitutive* role of tradition has been far spottier—particularly in cases involving restrictions on firearms.

1. "Longstanding" Restrictions as a Limiting Argument

Heller's most frequently invoked passage in the lower federal courts has been the brief passage that identifies certain "longstanding" restrictions as presumptively constitutional. Their approach to applying this label has generally been aggressive with respect to time, space, and the types of restrictions to which it is extended.

First, restrictions have not required a Founding-era pedigree, or anything close to it, in order to count as longstanding. Instead, many laws with origins comfortably within the twentieth century have been assigned that status. General prohibitions on gun possession by felons date back only to the 1960s at the federal level,[93] while only a half-dozen states had adopted even limited felon-disarmament statutes (mostly limited to handgun possession) by 1925.[94] Yet this type of measure was explicitly

92. *See, e.g.*, Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1119 (N.D. Ill. 2012) (striking down a municipal prohibition on gun possession by a nonviolent misdemeanant, and employing a text, history, and tradition analysis because "when reviewing the constitutionality of an ordinance under a balancing test, as opposed to under a text, history, and tradition approach, for every study, there can be a credible or convincing rebuttal study").

93. Marshall, *supra* note 38, at 698; *see* 18 U.S.C. § 922(d)(1), (g)(1) (provisions of the Gun Control Act of 1968, as amended, that prohibit firearms possession and transfer by convicted felons).

94. Marshall, *supra* note 38, at 708 (noting that in 1925, no state banned long gun

included in *Heller*'s list of longstanding measures,[95] and has been repeatedly upheld as constitutional, often without even performing a balancing test.[96] Similarly, in a challenge to the District of Columbia's handgun registration law, a majority of the D.C. Circuit held that such laws qualified as "longstanding" and presumptively constitutional,[97] although fewer than eight states had adopted similar laws by 1930.[98]

Second, restrictions whose incidence among the different states falls far short of uniformity, or even majority, have still been treated as widespread enough to qualify for the presumption of validity. In the same case, the D.C. Circuit deemed handgun registration requirements "longstanding" although only seven states maintained firearm registration requirements in 2011 (not all of which even required the registration of all handguns).[99] In a somewhat less dramatic application of the same standard, other lower courts have found "longstanding" the prohibition of firearms possession or acquisition by persons under twenty-one years of age,[100] noting that nineteen states had enacted laws of this type by

possession based on a prior conviction, while only six states banned possession of "concealable weapons" by convicts).

95. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

96. *See, e.g.*, United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (relying on *Heller*'s "longstanding prohibitions" passage to conclude that "felons are categorically different from the individuals who have a fundamental right to bear arms"); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (recognizing the longstanding history of categorical restrictions on felons possessing weapons without performing a balancing test); *In re* United States, 578 F.3d 1195, 1200 (10th Cir. 2009) ("We have already rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to [18 U.S.C.] § 922(g)(1).").

Some courts have allowed individual as-applied challenges to federal felon-in-possession convictions in marginal cases such as nonviolent predicate offenses that were defined as misdemeanors under state law, but qualified as prohibiting offenses under the federal statute, 18 U.S.C. § 922(g)(1). *E.g.*, Binderup v. Att'y Gen., 836 F.3d 336, 343, 346–48 (3d Cir. 2016) (en banc).

97. *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

98. *Id.* at 1253–55. In contrast, in a later case, the same federal court of appeals held that a uniform registration requirement for privately owned *long* guns (rifles and shotguns) was not longstanding, and thus not presumptively constitutional. Heller v. District of Columbia, 801 F.3d 264, 273 (D.C. Cir. 2015).

99. *Heller II*, 670 F.3d at 1292–93 (Kavanaugh, J., dissenting); *cf. id.* at 1254 (majority opinion) (observing that handgun registration laws currently applied to "more than one fourth" of the American population).

100. NRA v. BATFE, 700 F.3d 185, 203, 211 (5th Cir. 2012) (concluding that restricting "the ability of 18–to–20–year–olds to purchase handguns from [commercial dealers] is consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment's protection," while going on to uphold such measures under intermediate scrutiny as an alternate basis of decision); NRA v. Swearingen, No. 4:18-cv-00137-MW-MAF, 2021 WL 2592545, at *38, *47 (N.D. Fla. June 24, 2021) (holding, on

1900,[101] and that the federal government had imposed similar restrictions in 1968.[102]

And finally, lower federal courts have been flexible in using analogy to *extend* the category of longstanding restrictions (and its presumptive constitutional validity) to types of restrictions not explicitly included in *Heller*'s list. Part of the basic judgment involved in traditionalist interpretation is to determine the breadth of a relevant tradition, the level of generality at which a given practice should be recognized. From this point of view, these courts have given considerable breadth to ostensible traditions that function as limiting principles, finding, for example, that restrictions on firearm possession by under-twenty-one-year-olds formed a part of "a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety,"[103] or "a longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public,"[104] or "a longstanding tradition of age- and safety-based restrictions on the ability to access arms."[105]

On the other side of the ledger, the U.S. Court of Appeals for the Fourth Circuit recently struck down, as violative of the Second Amendment, the 1960s-vintage federal prohibition on handgun sales to under-twenty-one-year-olds.[106] The majority interpreted more narrowly the category of longstanding regulations entitled to presumptive validity, concluding that only routine "commercial

similar evidence, that a state law prohibiting firearm sales to under-21-year-olds was "longstanding" under *Heller*, and therefore regulated conduct unprotected by the Second Amendment); *see also* United States v. Rene E., 583 F.3d 8, 15 (1st Cir. 2009) (using the same rationale to uphold a federal prohibition of handgun possession by a juvenile).

101. *NRA*, 700 F.3d at 202; *Swearingen*, 2021 WL 2592545, at *22 (citing David B. Kopel & Joseph G.S. Greenlee, *History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People*, 43 S. ILL. U. L.J. 119, 142 (2018)).

102. *Swearingen*, 2021 WL 2592545, at *23; *see also NRA*, 700 F.3d at 196 ("After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage.").

103. *NRA*, 700 F.3d at 203.

104. *Rene E.*, 583 F.3d at 15.

105. *NRA*, 700 F.3d at 203; *see also, e.g.*, Lara v. Evanchick, 534 F. Supp. 3d 478, 489 (W.D. Pa. 2021) (concluding that "age-based restrictions limiting the rights of 18-20-year-old adults to keep and bear arms fall under the 'longstanding' and 'presumptively lawful' measures recognized by the Supreme Court in *Heller*," and that this renders such laws not only presumptively constitutional, but allows them to "evad[e] Second Amendment scrutiny").

106. Hirschfeld v. BATFE, 5 F.4th 407 (4th Cir. 2021), *vacated*, 14 F.4th 322 (4th Cir. 2021).

conditions" on sales could claim validity through "longstanding" status.[107] It may reflect something about the post-*Heller* climate of limiting-traditionalist reasoning in the lower federal courts that the court's majority downplayed the relevance of post-ratification patterns of regulation as such, arguing that "*Heller*'s historical, textual, and structural analysis counsels against creating a freestanding category of laws exempt from Second Amendment scrutiny based solely on how long similar laws have existed."[108]

Perhaps the most drastic post-*Heller* use of limiting-traditionalist reasoning, and one directly relevant to the issues now before the U.S. Supreme Court in *Bruen*, has been the decision of two federal courts of appeals that virtually prohibitory restrictions on ordinary citizens carrying handguns for self-defense are owed *no* constitutional scrutiny at all, because they form part of a "longstanding" tradition of restrictive regulation of gun carrying.[109] These cases will receive a fuller discussion in Part IV, but we can take note of some key features now. The Third Circuit majority in *Drake v. Filko*[110] declined to "engag[e] in a round of full-blown historical analysis" to determine the intended scope of the right to bear arms under the Second Amendment.[111] Nevertheless, it concluded, after discussing the laws of New Jersey (which had actually *allowed* the general open carry of handguns until 1966) and New York, that New Jersey's stringent modern licensing law, which allows for the issuance of the required permit to carry a handgun only in case of "urgent necessity for self-protection" and "a special danger to the applicant's life,"[112] was a type of longstanding regulation that "regulates conduct falling outside the scope of the Second Amendment[]."[113] And this was so, the court emphasized, even if the Second Amendment right does apply outside the home.[114] As a dissenting judge pointed out, that conclusion depended on defining the relevant limiting tradition "at

107. *Id.* at 417–18 (holding that a total prohibition on acquiring a handgun from a licensed dealer was not a mere commercial "condition on the sale of firearms" to 18-to-20-year-olds, but was instead tantamount to a ban).

108. *Id.* at 418.

109. Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); *accord* Young v. Hawaii, 992 F.3d 765, 826 (9th Cir. 2021) (en banc), *petition for cert. filed*, No. 20-1639 (U.S. May 11, 2021).

110. 724 F.3d 426.

111. *Id.* at 431.

112. N.J. ADMIN. CODE § 13:54-2.4(b), (d)(1).

113. *Drake*, 724 F.3d at 434.

114. *Id.* at 431.

too high a level of generality,"[115] as though the historical existence of mode restrictions (e.g., prohibiting concealed carry while requiring open carry) or time and place restrictions thereby meant that *any* measure restricting handgun carry, even to virtual prohibition as in New Jersey, was thereby shielded from constitutional scrutiny.

The en banc Ninth Circuit in *Young v. Hawaii*[116] attempted a more ambitious historical justification for the same conclusion, relying heavily upon historical "surety law[s]" found in a minority of states.[117] Most of these laws, however, did not restrict carrying at all unless another person could show "reasonable cause to fear an . . . injury" from the carrier, and then required him to post a surety bond to continue carrying a weapon.[118] (As Part IV will discuss, these laws also left virtually no record of their having actually been enforced in practice.) Amalgamating these laws with various time, place, and manner restrictions on gun carrying that had a historical pedigree, the *Young* majority, like the Third Circuit in *Drake*, took them as instances of a limiting tradition it defined with enormous breadth: one by which government "may . . . prohibit, in public places[,] . . . carrying of small arms capable of being concealed, whether they are carried concealed or openly,"[119] and such restrictions do not implicate conduct within "the historical scope of the Second Amendment" at all.[120]

In short, while most post-*Heller* lower courts have not yet adopted a methodology based exclusively on "text, history and tradition," many of them *have* already proven to be receptive (often to an uncritical degree) to one aspect of traditionalist reasoning—the rights-limiting, negative aspect. These lower courts have adopted searchingly broad readings of *Heller*'s limiting-traditionalist elements such as "longstanding regulation," declining to impose demanding barriers (whether temporal, spatial, or conceptual) to the identification and recognition of traditions of

115. *Id.* at 451 (Hardiman, J., dissenting).

116. 922 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. filed*, No. 20-1639 (U.S. May 11, 2021).

117. *Id.* at 797–800.

118. *See id.* at 799 (discussing an 1836 Massachusetts statute with these features and identifying it as "a template for other states").

119. *Id.* at 813.

120. *Id.* at 773–74. In dissent, Judge O'Scannlain objected to the "logical leaps" involved in this over-aggressive determination of a limiting tradition: "It is . . . baffling for the majority to contend that, merely because the lawful *manner* of open public carry has historically been regulated in certain respects, we may conclude that the practice of public carry itself is not entitled to constitutional protection." *Id.* at 850 (O'Scannlain, J., dissenting).

state regulation that act to limit or defeat Second Amendment rights claims.

2. Restricting "Common Use" as a Constitutive Argument

The lower courts have been notably less receptive, however, to the constitutive use of traditional practices in Second Amendment cases. The most prominent tool that *Heller* offered for such argument was its concept that arms in "common use" for self-defense and other legitimate purposes receive the most protection under the Second Amendment.[121] The Court made clear that individual choices and practices play a crucial role in constituting this category of arms—handguns are strongly protected *because* millions of Americans choose to acquire and keep them for purposes such as self-defense.[122] On the other hand, weapons that qualify as "dangerous and unusual," such as sawed-off shotguns or explosive devices, likely do not receive constitutional protection under the Second Amendment.[123]

The application of this criterion in the lower courts seems to have differed depending on whether the cases involve restrictions on firearms or on types of non-firearm weapons. The non-firearm cases have chiefly been decided by state courts, since there are few federal restrictions on non-firearm arms. These courts have tended to hold that nonlethal,[124] impact,[125] and edged[126] weapons

121. District of Columbia v. Heller, 554 U.S. 570, 627–29 (2008); *see supra* text accompanying notes 64–67.

122. *Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and is therefore unconstitutional.); *accord* Friedman v. City of Highland Park, 577 U.S. 1039, 1041 (2015) (Thomas, J., dissenting from the denial of certiorari) ("The right to keep and bear arms[] . . . scope is defined not by what the militia needs, but by what private citizens commonly possess.").

123. *Heller*, 554 U.S. at 627.

124. People v. Yanna, 824 N.W.2d 241, 245–46 (Mich. App. 2012) (striking down a state ban on owning and carrying stun guns as a violation of the Second Amendment, and observing that "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens" in many states).

125. State v. DeCiccio, 105 A.3d 165, 210 (Conn. 2014) (holding that a defendant's conviction for transporting a police baton from one residence to another violated the Second Amendment).

126. *Id.* at 197, 208 (holding that possession and transport of a dirk knife is constitutionally protected); State v. Montalvo, 162 A.3d 270, 284 (N.J. 2017) (holding that the Second Amendment protects a right to possess a machete knife at home for self-defense). *But see* Lacy v. State, 903 N.E.2d 486, 492 (Ind. App. 2009) (holding that switchblade knives differ from knives typically possessed by law-abiding citizens and thus are not Second Amendment "arms").

possessed by private citizens (and in some cases by police)[127] are thereby entitled to constitutional protection. Still, there have been exceptions. In one Massachusetts case (subsequently vacated by the U.S. Supreme Court), the state high court strikingly departed from *Heller*'s reasoning on "common use" in order to hold that an abuse victim's possession of a nonlethal "stun gun" for self-defense was constitutionally unprotected under the Second Amendment.[128]

A similar frank defiance has surfaced in at least one lower federal court decision involving firearms. In turning aside a challenge to a municipal ban on AR-15 rifles and other prominent types of semiautomatic rifles (as well as magazines holding over ten rounds), the Seventh Circuit panel majority in *Friedman v. City of Highland Park*[129] discarded the "common use" criterion that had been developed in *Heller*, stating that "relying on how common a weapon is at the time of litigation" was not acceptable.[130] The panel also denied the relevance of the long history of private ownership of semi-automatic rifles, which extended back over a century.[131] By these moves, any doctrinal tool that might have been the basis of a constitutive, practice-based argument for constitutional protection was sidelined at the start. Instead, the Seventh Circuit panel majority asked (contrary to *Heller*) whether the regulation banned weapons that either "were common *at the time of ratification*"[132] or have a "reasonable relationship to the preservation or efficiency of a well regulated militia."[133] Then, pivoting, it *declined* to recognize militia utility as a basis for constitutional protection, appealing instead to federalism concerns (although the Supreme Court had

127. *See DeCiccio*, 105 A.3d at 200 (noting that batons are widely used by American law enforcement).

128. Commonwealth v. Caetano, 26 N.E.3d 688, 689–90, 693 (Mass. 2015) (holding that stun guns were not protected "arms" because they were not in common use when the Second Amendment was ratified). After this decision was summarily vacated by the U.S. Supreme Court in *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam) (pointing out that *Heller* had already rejected a coverage test limited to the time of ratification), the same state court later affirmed that stun guns did qualify as Second Amendment arms, Ramirez v. Commonwealth, 94 N.E.3d 809, 815 (Mass. 2018).

129. Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 577 U.S. 1039 (2015).

130. *Id.* at 407, 409.

131. *See id.* at 408 (finding no merit in the plaintiff's contention that there was "no 'historical tradition' of banning possession of semi-automatic guns and large-capacity magazines" because the court found that the same logic could be applied to permit ownership of machine guns).

132. *Id.* at 410 (emphasis added).

133. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 622 (2008)).

already held the Second Amendment right to be fully applicable against state and local governments).[134] Finally, the panel majority averred that even if "assault weapons" bans could not be proven empirically to reduce violent crime, they "may increase the public's *sense* of safety," and this feeling would still be a "substantial benefit" potentially justifying such a ban.[135]

The *Friedman* court's analysis was marked by what can be fairly characterized as a restless search for pieces of text or doctrine (even ones disclaimed by the Supreme Court) that could justify upholding the challenged gun ban. The court's pointed rejection of constitutive–traditionalist argument formed one important aspect of this broader orientation—indeed, its overall stance seemed to be that *Heller* lacked any *ratio decidendi* that lower courts were obliged to cognize.[136]

In contrast, the dissenting Seventh Circuit judge treated the constitutive traditionalist argument for constitutional protection as straightforward and central to the case. Millions of ordinary Americans own these rifles, observed the dissent, so they are in "common use" and not unusual under *Heller*; thus, the right to possess such rifles is entitled to a strong degree of constitutional protection.[137] The widespread private ownership of the types of firearms at issue was, in the dissenting judge's view, "the central piece of evidence in this case."[138]

Another federal court of appeals refrained from dismissing

134. *Id.* (acknowledging that the banned weapons had militia utility, but asserting that "states, which are in charge of militias, should be allowed to decide when civilians can possess" such weapons). Thus, in addition to the overarching failure of *Friedman* to follow *Heller* on "common use," this passage departed from the holding of *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the Second Amendment right to keep and bear arms "is fully applicable to the States," *id.* at 750; *see also id.* (noting that "[w]e have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States").

135. *Friedman*, 784 F.3d at 412 (emphasis added). When a certiorari petition reached the Supreme Court, Justice Thomas, joined by Justice Scalia, particularly criticized this last suggestion: "If a broad ban on firearms can be upheld based on conjecture that the public might feel safer . . . then the Second Amendment guarantees nothing." Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari).

136. *See, e.g.*, *Friedman*, 784 F.3d at 409 ("[C]ourts should not read *Heller* like a statute rather than an explanation of the Court's disposition."); *id.* at 410 ("*Heller* . . . . has not told us what other entitlements the Second Amendment creates or what kinds of gun regulations legislatures may enact."). *But see Friedman*, 136 S. Ct. at 448 (Thomas, J., dissenting from the denial of certiorari) ("Instead of adhering to our reasoning in *Heller*, the Seventh Circuit limited *Heller* to its facts . . . .").

137. *Friedman*, 784 F.3d at 415–16 (Manion, J., dissenting).

138. *Id.* at 420.

Heller as a source of guidance, but still went far in rejecting a strong rights-constitutive argument and in generating a reading of the *Heller* opinion that placed the most popular type of rifle in America entirely outside of the scope of the Second Amendment. In *Kolbe v. Hogan*,[139] a majority of the en banc Fourth Circuit held that modern rifles such as the AR-15 were constitutionally unprotected, even if they are in common use, because they are "like" weapons that are "most useful in military service," such as fully automatic "M-16 rifles"[140]—words and phrases that the majority took from the *Heller* opinion.[141] Since *Heller* had implied that fully automatic M-16s could be banned from private ownership, the *Kolbe* majority concluded that the same followed for semiautomatic AR-15s.[142] Thus, it concluded, even if a type of weapon may be "typically possessed by law-abiding citizens for lawful purposes," and even if it is not necessarily "dangerous and unusual," it *still* receives zero Second Amendment protection if a court decides it is "most useful in military service."[143]

When one reviews the relevant passage in *Heller*, it is fair to conclude that the *Kolbe* en banc majority extracted pieces of language from their context in the Supreme Court's opinion and employed them for a purpose that was not the Supreme Court's. *Heller* had discussed weapons "useful in military service" in order to *distinguish* such a hypothetical test for protection (which had been suggested by the 1939 decision in *United States v. Miller*)[144] from the "common use" test that *Heller* actually adopted to help define the Second Amendment's coverage. The Supreme Court's point was that, although the Second Amendment's prefatory clause refers to the militia, contemporary military utility neither *bolsters* a weapon's claim to Second Amendment protection, nor (contrary

139. 849 F.3d 114 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017) (mem.).

140. *Id.* at 135–37.

141. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (reasoning that "weapons that are most useful in military service—M16 rifles and the like—may be banned").

142. *Kolbe*, 849 F.3d. at 135–37.

143. *See id.* at 135–36, 136 n.10 (avoiding use of the "common use" test by deciding that the AR-15 is like the M-16 rifle and most useful in military service). As in the Seventh Circuit's *Friedman* decision, one notes here a strong skepticism about allowing the "common use" concept to provide objective, practice-based, and constitutive arguments for Second Amendment protection of popular firearms.

144. *See* 307 U.S. 174, 178 (1939) (holding that defendant's possession of an unregistered sawed-off shotgun was not protected by the Second Amendment, and reasoning that "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense").

to the *Kolbe* majority) does it *disqualify* it from protection. The common use test just asks a different question, focused on what arms are, in fact, in private hands. Thus, there is no reason to presume that the sets of "arms" picked out by each criterion are identical, but also no reason to think that they are completely disjoint sets. The *Heller* Court made this distinction clear, observing that "[i]t may well be true today" that an effective militia "would require sophisticated arms *that are highly unusual in society at large*," but that ostensible fact did not render those unusual arms constitutionally protected.[145] Rather, arms are protected to the extent that they are *not* "highly unusual in society at large," but instead are commonly kept by Americans for lawful purposes like self-defense.[146]

Kolbe's misuse of *Heller* is even more notable when one recalls that the Supreme Court actually decided a gun-regulation case involving an AR-15 rifle some years ago, and used an analysis suggesting that such rifles are indeed ordinary firearms in widespread use. In the statutory case of *Staples v. United States*,[147] the Supreme Court expressly *distinguished* the defendant's semi-automatic AR-15 from "highly dangerous offensive weapons" such as hand grenades,[148] and held that it was improper to impose strict criminal liability on the owner of a malfunctioning AR-15, in light of the "long tradition of widespread lawful gun ownership" in America.[149]

Finally, another group of lower federal court cases reflects a more subtle form of distancing from constitutive Second

145. *Heller*, 554 U.S. at 627–28 (emphasis added).

146. *See id.* at 626–27 (reinforcing *Miller* insofar that the Second Amendment protects the *sorts* of weapons that were in common use at the time of ratification as opposed to protecting the "sophisticated" weapons that would be effective against modern-day military which would be "highly unusual in society at large").

147. 511 U.S. 600 (1994).

148. *See id.* at 609–10 (noting the long tradition of widespread lawful gun ownership by private citizens and contrasting it with the lack of a similar practice for "highly dangerous offensive weapons" such as grenades).

149. *Id.* at 610. *Staples*'s strong constitutive-traditionalist cue for constitutional protection was turned aside by the Fourth Circuit majority on the questionable basis that *Staples* also referred to the AR-15 as "the civilian version of the military's M-16 rifle." *See* Kolbe v. Hogan, 849 F.3d 114, 124 (4th Cir. 2017) (en banc). Though, as the Second Circuit aptly pointed out in a similar case, "the Supreme Court's very choice of descriptor . . . could instead imply that such guns 'traditionally have been widely accepted as lawful.'" N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 256 (2d Cir. 2015). The latter is by far the more natural reading of the *Staples* passage, particularly in light of the outcome of the case: a reversal of the AR-15 owner's conviction.

Amendment traditionalism. Courts in this group have canvassed the constitutive arguments for protecting modern semi-automatic rifles, and then duly acknowledged that the rifles are in "common use," since millions of them are privately owned by Americans.[150] Yet these courts still declined to hold definitely that the weapons are entitled to Second Amendment protection, asserting that they were unable to tell whether the common rifles are *also* "typically possessed by law-abiding citizens for lawful purposes."[151] Thus, these courts proceeded to apply intermediate constitutional scrutiny to legislative bans on the rifles (and upheld the validity of the bans under that standard), but made clear that they were only proceeding *arguendo* in giving heightened scrutiny to such laws.[152] While this sort of analysis does at least refer to the concepts of the "common use" standard, it is not without some eyebrow-raising implications. Particularly remarkable is the apparent implication that the millions of Americans who hold a widely available, commercially distributed type of weapon might well typically choose to own it for *unlawful* purposes (although that type is far less commonly represented in firearms homicides than is the constitutionally protected handgun),[153] so that a court cannot even proceed to include the type among Second Amendment "arms" without affirmative evidence to rebut the (apparent) presumption of unlawfulness.

What conclusions can be drawn from the case law in this Part? Marc DeGirolami proposes that traditionalist arguments are characteristically presumptive in nature, and thus can potentially be overcome by what are seen as compelling contrary

150. *See, e.g.*, *Cuomo*, 804 F.3d at 255 (acknowledging that both "assault weapons and large-capacity magazines" pass *Heller*'s common use test); *Heller II*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (noting that "semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use'").

151. *See Cuomo*, 804 F.3d at 257, 261 (assuming "for [the] sake of argument" that commonly used semi-automatic rifles and magazines are *also* "typically possessed by law-abiding citizens for lawful purposes"); *Heller II*, 670 F.3d at 1261 ("[W]e cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms.").

152. *Cuomo*, 804 F.3d at 257, 261; *Heller II*, 670 F.3d at 1261.

153. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 27 (2d ed. 2017) (noting that of the 8,124 firearm murders in 2014, 5,562 were committed with handguns and 248 with rifles, with the type of gun unspecified for 2,052 murders).

considerations.[154] Here, we can say that many lower federal courts have displayed a strong aversion to accepting *constitutive* traditionalist arguments in common Second Amendment contexts. While the Supreme Court's decision to foreground practice-based arguments in *Heller* clearly derived in part from the classic traditionalist motive of distrust of the results of open-ended judicial application of principles,[155] these lower courts have rejected the guidance, insistently interposing (particularly through a pointedly un-statistical "dangerous and unusual" inquiry) the very sort of ill-grounded value judgment that traditionalism works to cabin and restrain.

Thus, if a future development is to be taken toward a jurisprudence of "text, history and tradition" in response to the post-*Heller* problem of underenforcement of the Second Amendment, it should be done in light of the experience laid out above. There will be little difficulty in getting lower courts to continue to take *limiting* arguments seriously; in truth, a somewhat more discriminating receptivity seems called for in this area. Rather, what is more specifically needed are clear signals that *constitutive* arguments from popular practice are entitled to real weight in the Second Amendment context—perhaps especially when they stand poised against the kinds of limiting-traditionalist arguments that the lower courts have thus far found appealing.

In the next Part, I will suggest how *Bruen* offers a number of appropriate opportunities for such a clarification.

IV. ANALYZING *BRUEN* IN TRADITIONALIST TERMS

Bruen is the renewal of an earlier constitutional challenge to New York's restrictive "proper cause" handgun carry licensing statute, which conditions the issuance of a concealed carry permit on the applicant's managing to "demonstrate a special need for self-

154. DeGirolami, *Traditions*, *supra* note 20, at 1125 ("The interpretive influence of a tradition is presumptive and may be overcome by other considerations. . . . Very powerful moral or prudential arguments may overcome the presumption in favor of a tradition . . . .").

155. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (rejecting an "interest-balancing" approach to Second Amendment adjudication, and insisting that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all"); McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) (emphasizing that *Heller* "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing").

protection distinguishable from that of the general community or of persons engaged in the same profession,"[156] to the satisfaction of a local official such as a judge or police commissioner.[157] Since New York law entirely bans the open carry of handguns by private citizens,[158] this concealed-carry permitting provision represents the only available means to carry lawfully.

The Second Circuit upheld New York's concealed carry licensing statute against a Second Amendment challenge in *Kachalsky v. County of Westchester*,[159] one of the earlier post-*Heller* right-to-carry cases to reach a federal court of appeals. *Kachalsky* did not offer an extended originalist or traditionalist analysis. Rather, it cited a few sources, concluded that "[h]istory and tradition do not speak with one voice"[160] and drew from *Heller* a premise that the right to arms applies significantly more weakly outside the home than inside it.[161] In the Second Circuit's view, this justified a rather deferential form of intermediate scrutiny of New York's permitting law,[162] under which the fact that New York stopped short of a total ban on handgun carrying for self-defense and "attempted to accommodate certain particularized interests in self[-]defense" by allowing for limited issuance of permits to those who could show an exceptional need for self-defense, reflected an adequate degree of tailoring to satisfy the Second Amendment.[163] The case exemplifies the deferential "judicial interest balancing" that has marked a good deal of post-*Heller* litigation.[164]

156. Kachalsky v. County of Westchester, 701 F.3d 81, 86 (2d Cir. 2012) (quoting Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

157. *Id.* at 87 n.6; *see* N.Y. PENAL § 265.00(10) (Consol. 2021) (defining "licensing officer").

158. N.Y. PENAL §§ 265.01–265.04, 265.20(a)(3); *see also Kachalsky*, 701 F.3d at 86 ("Given that New York bans carrying handguns openly, applicants . . . who desire to carry a handgun outside the home and who do not fit within one of the employment categories must demonstrate proper cause pursuant to section 400.00(2)(f)."); *see id.* at 85 (noting that New York's firearms licensing provision, N.Y. Penal Law section 400.00, is "the exclusive statutory mechanism" for licensed carry of firearms in New York); O'Connor v. Scarpino, 638 N.E.2d 950, 951 (N.Y. 1994) (same).

159. 701 F.3d. 81.

160. *Id.* at 91.

161. *Id.* at 96 ("The historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public.").

162. *See id.* at 97 (concluding that "'substantial deference to the predictive judgments of [the legislature]' is warranted" in scrutinizing restrictions on the right to bear arms outside the home (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997))).

163. *Id.* at 98–99.

164. *See generally* Rostron, *supra* note 5 (presenting the use of such analysis as the most

However, by the time the challenge to New York's law was renewed in the litigation that became *Bruen*, a clear split of authority existed on the constitutionality of restrictive proper-cause statutes like New York's. The D.C. Circuit in *Wrenn v. District of Columbia*[165] had struck down a statute similar to New York's as a violation of the Second Amendment right to bear arms.[166] *Wrenn* employed categorical reasoning, concluding that the right to carry common weapons for self-defense was a basic component of the Second Amendment right to bear arms,[167] and that proper-cause or proper-reason statutes that required a *special* need for self-defense destroyed the ability of the average citizen to exercise that right.[168] This rendered such restrictive "may issue" laws per se unconstitutional—much as *Heller* had held a complete handgun ban to be per se unconstitutional. *Wrenn* embodies the categorical approach to Second Amendment adjudication, well grounded in the *Heller* majority opinion, that has provided a counterweight to the deferential interest-balancing approach prominent in case law such as *Kachalsky*. This often-discussed methodological divide between categoricalism and balancing approaches will certainly play a role in *Bruen*. (Yet it need not be outcome determinative. Even under a moderately demanding level of tiered ends–means scrutiny, it is hard to identify a non-question-begging government interest to which the special-need form of permitting statute is adequately tailored.)[169]

Our focus is upon a different dimension of *Bruen*: the way the case can be understood as a conflict between opposed traditionalist arguments, one constitutive and the other limiting, of differing strengths. This perspective is particularly relevant in light of the recent en banc Ninth Circuit decision in *Young*, which (as previously discussed) sought to shroud the entire field of restrictions on weapons carrying in the blanket of "longstanding

common lower court response to *Heller*).

165. 864 F.3d 650 (D.C. Cir. 2017).

166. *Id.* at 668 (invalidating D.C. CODE § 22-4506).

167. *Id.* at 666–67.

168. *Id.*

169. *See, e.g.*, Woollard v. Sheridan, 863 F. Supp. 2d 462, 474 (D. Md. 2012) (analogizing the poor tailoring of a restrictive proper-cause statute to a hypothetical statute "limiting the issuance of a permit to every tenth applicant"; both are comparably tailored to the ostensible interest in protecting public safety), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Peruta v. County of San Diego, 742 F.3d 1144, 1177 (9th Cir. 2014) (same), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016). More basically, it is difficult to see how "reducing the number of handguns in public" could be a cognizable government interest if carrying handguns in public is part of the right to bear arms.

regulation."

A. The Constitutive Argument: Presumptive Carry, with Concealed Carry as a Mode of Exercise

When *Bruen* is viewed through a traditionalist lens, the most evident feature of the case is the presence of a strong positive or constitutive argument for Second Amendment protection, based on the widely distributed and developed American social practice of permit-based, licensed "shall issue" concealed carry. This argument has an unusual feature: the practice, and thus the rights claim it embodies, is the joint product of *both* subnational governments and individuals. That is, it is based upon the facilitative regulatory frameworks created by the preponderating majority of states that have opted for broad concealed carry laws, and also upon the decisions of millions of individuals to engage in the practice.

The key features of the modern American consensus have been the rise of the shall-issue permit as the basic regulatory gateway for exercise of the right to bear arms, and the switch to concealed carry as the principal (though not exclusive) mode in which law-abiding citizens carry firearms for self-defense.[170] Under a typical shall-issue permitting statute, any citizen who lacks a significant criminal record and is not disqualified for a handful of other reasons (such as mental illness) is entitled to obtain a handgun carry permit after going through a brief training regimen (typically involving a safety class and a short live-fire target qualification), paying a modest fee, and undergoing fingerprint-based background checks. The issuing officials do not have discretion to deny the permit for other reasons outside the enumerated list of grounds for denial: rather, the relevant state agency "shall issue" the permit as long as the requirements are met.

Beginning with Washington state's adoption of shall-issue carry

170. *See, e.g.*, JOHNSON ET AL., *supra* note 153, at 734–35 (noting that "in the early twenty-first century, by far the most common method of defensive gun carrying is concealed carry," and "the modern American norm . . . is for concealed carry to require a license," which the majority of states grant "on a shall-issue basis"); *id.* at 735 (noting, in contrast, that "permitless *open carry* was the norm in . . . the Early Republic"); George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 347 (2021) (identifying Wyoming's post-statehood laws as part of a broader American "Western tradition in which open carry was broadly allowed, while concealed carry was severely restricted"); *id.* at 365 (noting that in 1994 Wyoming became "the twentieth state to require the nondiscretionary issuance of a concealed carry license to anyone meeting a set of basic background and training criteria").

in 1961,[171] and gaining great momentum with Florida's switch to a similar system in 1987,[172] shall-issue concealed carry became the legal regime of a majority of states in the 1990s and the supermajority position in the 2000s.[173] Half a decade ago, it was estimated that over twelve million Americans held state-issued concealed carry permits.[174] Today, the number has risen to close to twenty million permit holders.[175]

These figures bear on the application of the Second Amendment. They indicate that Americans engage in the practice of obtaining a concealed carry permit, as the dominant means of bearing arms for self-defense, on a social scale that is comparable to the numbers of Americans that engage in such basic activities as attending a political rally[176] or contributing to a political campaign[177]—each of

171. 1961 Wash. Sess. Laws 1640. Washington's shall-issue carry law is currently at WASH. REV. CODE § 9.41.070.

172. *See* Cramer & Kopel, *supra* note 14, at 690 ("Florida's 1987 reform law set off the modern wave of carry reform that has now been copied in many other states.").

173. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 598–602 (2012) (discussing rise of shall-issue carry to encompass at least thirty-five states by 2011). Today forty-one states make available concealed carry permits on a shall-issue basis—all except the may-issue/restricted-issue states of California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York, and also excepting Vermont, which allows permitless concealed carry but has no permit system. *See infra* note 179 and sources cited therein. Note that not all of the forty-one shall-issue permitting states require such a permit in order to lawfully carry concealed. *See, e.g.* 21 OKLA. STAT. § 1289.6(A)(7) (allowing handguns to be carried "[f]or lawful self-defense and self-protection" even "without a handgun license [i.e. permit] as authorized by the [state carry permitting law]").

174. *See* JOHN R. LOTT, JR. & RUJUN WANG, CRIME PREVENTION RSCH. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE U.S.: 2020 3 (2020), https://www.semperverus.com/wp-content/uploads/2020/10/SSRN-id3703977.pdf [https://perma.cc/2TQG-8H42] (describing 19.48 million permits as 34% increase since 2016). These numbers appear broadly consistent with an earlier estimate of about 12 million concealed carry permit holders compiled by the U.S. Congressional Research Office in 2012.

175. *Id.* (placing the number at 19.48 million permit holders as of 2020); Paul Bedard, *Women, Minorities Rush to Get Concealed Carry Permits, Up 34%*, WASH. EXAM'R (Oct. 6, 2020, 10:07 AM), https://www.washingtonexaminer.com/washington-secrets/women-minorities-rush-to-get-concealed-carry-permits-up-34?utm_source=msn&utm_medium=referral&utm_campaign=msn_feed [https://perma.cc/N3HW-FHEE].

176. About 11% of Americans reported participating in a political rally or event during a recent year (2018). *Political Engagement, Knowledge and the Midterms*, PEW RSCH. CTR. (Apr. 26, 2018), https://www.pewresearch.org/politics/2018/04/26/10-political-engagement-knowledge-and-the-midterms/ [https://perma.cc/XR57-2ZDP].

177. An average of about 14.3% of Americans reported donating money to a political campaign during each of the last three presidential election years: 12% in 2012, 12% in 2016, and 19% in 2020. *The ANES Guide to Public Opinion and Electoral Behavior*: *Gave Money to Help a Campaign 1952–2020*, AM. NAT'L ELECTION STUD., https://electionstudies.org/resources/anes-guide/top-tables/?id=75 [https://perma.cc/2L5D-C9MY]. Given a 2019 figure of approximately 255 million adult Americans, *see National Population by Characteristics: 2010–2019: Population Estimates By*

which receives substantial constitutional protection under the First Amendment.[178]

Indeed, the number of carry permits has continued to increase in the last decade even as some states have liberalized their handgun carry laws further in a way that lessens the incentives for citizens to pursue the permitting process. Twenty states have repealed the requirement of a permit to carry lawfully, adopting "permitless" or (as some call it) "constitutional carry" regimes where any citizen who can lawfully purchase a firearm may carry it in public without a permit.[179] Most of these states have found it prudent to retain their permit programs in order to foster reciprocity with other

Age (18+), U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html [https://perma.cc/NYV6-DMFH] (hosting an excel sheet that records a total of 255,200,372 residents eighteen years old and older), that would yield about 37 million Americans making political contributions in a given presidential election, no more than twice the current number of concealed carry permit holders, *see supra* notes 174 and 175.

The purpose of citing this data is to indicate that Americans engage in the practice of obtaining a shall-issue concealed carry permit, as the dominant way of bearing arms for the purpose of self-defense, in numbers and on a social scale that turns out to be broadly comparable to such basic First Amendment activities such as attending a political rally or contributing to a political campaign. It would thus be incongruous to treat these practices as irrelevant to the constitutional limits on regulation of handgun carrying under the Second Amendment.

178. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 615, 615 n.4 (1971) (holding that a municipal "disorderly assembly" ordinance violated First Amendment right of assembly); McCutcheon v. FEC, 572 U.S. 185, 192–94 (2014) (holding that First Amendment's Free Speech Clause was violated by federal law imposing an aggregate limit on the total amount of political contributions one individual could make during a two-year period).

179. As discussed further in subpart IV.B, shall-issue, permit-based concealed carry was the dominant legal regime regarding handgun carrying in American states from approximately 1995 to 2020, and today it remains the choice of a plurality of jurisdictions. However, beginning around 2015, a rapid series of adoptions of laws authorizing concealed carry by any lawful gun owner, with no permit required, has brought the number of permitless-carry jurisdictions up to a full twenty states as of July 1, 2021. States with carry permit laws *more* restrictive than shall issue statutes, such as the exceptional-issue New York statute challenged in *Bruen*, are a decided numerical (and population) minority today. *See generally Right to Carry Laws*, NRA-ILA, https://www.nraila.org/gun-laws.aspx [https://perma.cc/6G9B-X4CR] (providing a map of the different right to carry laws in the United States); *accord* http://www.gun-nuttery.com/maps/2021.gif [https://perma.cc/9QGC-X2JL] (popular online "Right-to-Carry" map classifying the fifty states as "[u]nrestricted" (twenty-one), "[s]hall-issue" (twenty-one) and "[m]ay-issue" (eight) as of 2021).

The map just cited categorizes Connecticut as "[s]hall issue," which would imply that forty-two states currently qualify as what this Article calls presumptive carry states (they authorize permitless carry or shall-issue permitted carry). While Connecticut authorities are relatively liberal in issuing permits, making Connecticut similar to a shall-issue state in practice, it seems preferable to classify it as a may-issue state, since that is what state statutes actually provide. *See* CONN. GEN. STAT. § 29-28(b) (providing that a local chief of police or other official "may issue" a permit to carry a handgun). This is the basis for the figure used in this Article identifying forty-one presumptive carry states.

states, or to allow a still broader, "enhanced" ability to carry for those willing to go through the permitting process.[180]

A strong material culture accompanies the prevalence of licensed concealed carry. Federal records reveal that nearly ten million semiautomatic pistols (and almost two million revolver handguns) have been manufactured for commercial sale in the United States, just over the three most recent years for which final data exists.[181] Compact pistols intended for personal carry are the largest drivers in handgun sales.[182] Indeed, the majority of pistols manufactured for commercial sales over the last decade have been chambered in either 9mm or .380 caliber,[183] the ammunition chamberings most common for compact handgun designs intended for concealment.[184]

The twentieth and twenty-first century practice of shall-issue concealed carry also reflects important points of continuity with an earlier, nineteenth century American understanding of the right to bear arms for self-defense—especially in the generations between the enactments of the Second Amendment in 1791 and the Fourteenth Amendment in 1868. As I've documented elsewhere,

180. *See, e.g.*, IDAHO CODE § 18-3302K(4) (making provision for sheriff to issue on a shall-issue basis an "enhanced license to carry a concealed weapon," which requires legal and firearms instruction, in a state that no longer generally requires a permit to carry a concealed handgun).

181. This data is contained in the Bureau of Alcohol, Tobacco, Firearms & Explosive's (BATFE's) *Annual Firearms Manufacturing and Export Report* for 2017, 2018, and 2019. Each report is available on BATFE's website. *Data & Statistics*, U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/resource-center/data-statistics [https://perma.cc/TS5H-A29W]. Together, they indicate that 9,870,808 semiautomatic pistols and 1,908,125 revolver handguns were manufactured for sale in the United States during 2017, 2018, and 2019. These figures already reflect a deduction corresponding to the numbers of U.S.-made pistols and revolvers exported for foreign sale during those years. They do not reflect sales of handguns imported from abroad, which also run into the millions; for example, 2,594,708 handguns were imported into the United States in 2019 alone. U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES, ANNUAL STATISTICAL UPDATE 2020 9 (2020).

182. Tim Barker, *Handgun Sales Today: Signs of Supply 'Normalizing'—But Uncertainty Remains*, SHOOTING INDUS., Oct. 2021, at 31 (reporting that "the compact and subcompact [handgun] markets are maintaining their dominance," and that a retailer commented that "our biggest sellers are carry guns").

183. For the last decade's pistol manufacturing statistics, see the *Annual Firearms Manufacturing and Export Report* for the years 2011 to 2020, available at *Data & Statistics, supra* note 181.

184. Brad Fitzpatrick, *4 Ways to Choose Your First Concealed-Carry Gun*, NRA FAMILY (May 19, 2020), https://www.nrafamily.org/articles/2020/5/19/4-ways-to-choose-your-first-concealed-carry-gun/ [https://perma.cc/3YSX-F6K2] ("[T]he most popular chamberings [for concealed carry], at least in terms of sales, are the .380 ACP and 9mm for semiautos, and the .38 Special for revolvers.").

American state courts and commentators of this period who viewed the right to arms as being grounded in self-defense treated it as implying a coherent bundle of rights and regulations that I've termed *presumptive carry* of handguns and other common personal weapons for self-defense.[185] Its central ideas were that there needs to be a practicable way for most people to carry a handgun in most places and times, in a way that is functionally usable for self-defense. At the same time, the norm of presumptive carry is consistent with the idea that the legislature can regulate this right in certain ways, especially by requiring individuals to stick to a particular *mode* of carry that conforms best to prevalent social norms, while still allowing for the practical exercise of the right.[186] As a state supreme court of the era put it, the legislature could "enact laws in regard to the manner in which arms shall be borne" to the extent consonant with "the safety of the people and the advancement of public morals,"[187] but this was subject to a limitation that the right remain practicable: a measure that "under the pretense of regulating, amount[ed] to a destruction of the right, or which require[d] arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."[188]

In the nineteenth century, and continuing into the first part of the twentieth, this set of commitments typically took the institutional form of restriction (or even prohibition) of concealed carry of handguns, while allowing open carry of handguns without requiring a permit.[189] Today, the cultural norm is concealed carry,

185. *See* O'Shea, *supra* note 173, at 623–41 (surveying state court decisions and thoughts of legal commentators pertaining to the Second Amendment during the relevant period to illustrate the theory of presumptive carry).

186. *Id.* at 595–96, 640; *accord* Peruta v. County of San Diego, 742 F.3d 1144, 1160 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016) (concluding, after historical survey, that "the majority of nineteenth century courts" adhered to "the presumptive-carry view" under which "the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense," while some allowed for "limitations on the manner of carry").

187. State v. Reid, 1 Ala. 612, 616 (1840).

188. *Id.* at 616–17.

189. *See* sources cited *supra* at note 170 (identifying permitless open carry as the norm in early America and in the Western states). State constitutional law in the early-to-middle twentieth century reflected this conception, as many state right-to-arms provisions confined the legislature's power to restrict weapons carrying to concealed carry only. *See, e.g.*, Holland v. Commonwealth, 294 S.W.2d 83, 85 (Ky. 1956) ("[Under the Kentucky Constitution,] the legislature is empowered only to deny to citizens the right to carry concealed weapons. . . . If the gun is worn outside the jacket or shirt in full view, no one may question the wearer's right to do so . . . ."); KY. CONST., § 1, cl. 7 (recognizing individuals' "right to bear arms in

widely legal in a supermajority of states and usually accessed via a shall-issue permit. Indeed, a considerable number of contemporary Americans, particularly in urban areas, view *open* carry as the "manner" of bearing arms that creates tension with "public morals" or perhaps even public safety. The flexible framework of presumptive carry is the common thread linking these distinct concrete expressions in law and practice across the nation's history.

Marc DeGirolami points out that two key variables in assessing the strength of a traditionalist argument are *age* and *continuity* of the relevant practice: that is, how long a time has the practice in question spanned, and how widespread and frequent are instances of the practice during that period of time.[190] DeGirolami provides a metaphor drawn from skiing: to be skiable, a slope must be of adequate length (corresponding to temporal length) and packed with snow (corresponding to instances of the practice) to a sufficient density.[191] How do the dueling traditionalist arguments in *Bruen*—the constitutive argument based on individual Americans' weapons-carrying practices (as also reflected and articulated in permissive state laws), and the limiting argument based on the incidence of various historic restrictions on carrying—stack up along these dimensions?

The tradition that underpins the constitutive traditionalist argument in *Bruen* can be conceived in either a broader or a narrower way. Viewed broadly, the relevant practice is presumptive carry, and it spans nearly the entire stretch of post-ratification history. Conceived narrowly, the question is whether the very successful domestication of concealed carry over the past two generations provides a reason to conclude that this mode of carry forms a part of the scope of the Second Amendment right—that it is not categorically excluded from the right to bear arms, as

defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons").

190. DeGirolami, *Traditions*, *supra* note 20, at 1125.

191. *Id.*

some courts both pre-[192] and post-*Heller*[193] have maintained.

Latter twentieth and twenty-first century Americans have concretely demonstrated that concealed carry can be fully implemented in a modern, more heavily urbanized social context. In short, their practice, ratified by facilitative state regulation, and now reflected in the laws of forty-one states, has demonstrated that concealed carry is also a mode of the right to bear arms. Viewed along DeGirolami's two dimensions of tradition, this practice appears as a smooth and deeply packed slope—whether measured by geographic reach, number of participating individuals, or both. Its length is moderate, reaching back to the 1960s and becoming widespread starting in the 1980s.

An objector who thinks this is too short a stretch of time faces a serious problem stemming from the treatment of practice in *Heller* itself. After all, *Heller* not only recognized *contemporaneous* common use as a basis for constitutional protection,[194] but, as discussed in Part III, it appeared to bless, as "longstanding," modes of regulation that likewise became commonplace only in the 1960s.[195]

A further support for a constitutive–traditionalist argument based on the rise of concealed carry is the modesty of the doctrinal conclusion it would need to support in *Bruen*: that concealed carry is one mode of the right's exercise. That is all that is needed to support the plaintiffs' claim. Since New York bans open carry while

192. *See* State v. Chandler, 5 La. Ann. 489, 489–90 (1850) (upholding a state law that prohibited concealed carry because it "interfered with no man's right to carry arms . . . 'in full open view,' which places men upon an equality. This is the right guaranteed by the Constitution of the United States"). *Chandler* expanded upon this conclusion in language that closely tied the exclusive validity of open carry to a morally freighted assessment of its honorableness: namely, open carry was a mode "calculated to incite men to a manly and noble defence of themselves, if necessary, . . . without any tendency to secret advantages and unmanly assassinations." *Id.* at 490. This preference for open carry, indeed, was so closely bound to exigent norms that it is natural to question whether *Chandler*'s seemingly categorical exclusion of concealed carry was genuinely categorical: one may doubt that it would actually remain unaffected by a clear change in the mores surrounding weapons carry, such as in fact occurred in the United States in the latter twentieth century.

193. *See* Peterson v. Martinez, 707 F.3d 1197, 1212 (10th Cir. 2013) (holding that concealed carry is excluded from the scope of the Second Amendment, and leaving unresolved the question whether the right to bear arms protects open carry).

194. *See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (holding that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

195. *See id.* at 626 (declining to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"); *see also supra* text accompanying notes 93–98.

allowing concealed carry (albeit on a limited basis denied to most citizens), requiring the state to grant concealed carry permits on a shall-issue basis will be a matter of respecting New York's own choice of which mode to privilege.

Some commentators have indeed gone further, arguing from contemporary practice that concealed carry must be *categorically* protected—a legislature must allow it in a practicable form, regardless of whether or not it allows open carry.[196] That position is plausible: Nicholas Griepsma, for example, argues that *Heller*'s common-use test, "[i]f extended to concealed carry," would "construe the word 'bear' to define the categorical scope of the Second Amendment's protection to include *modes of carry* in common use by law-abiding citizens for lawful purposes," and thus to protect a constitutional right to concealed carry, which is the most commonly chosen and socially respectable mode of handgun carrying now in use.[197] But again, the claim in *Bruen* does not require that step in order to prevail. One can hold that, as *Heller* suggested,[198] a ban on concealed carry is potentially valid—a legislature, now as then, can opt instead for presumptive open carry[199]—but concealed carry is the other mode of vindicating the right, and a legislature that bans or heavily restricts one mode must make the other available on a presumptive basis, either through "shall issue" permitting or through permit-less carry.

B. The Limiting Argument: Historical Regulation of Gun Carrying

196. *See, e.g.*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523 (2009) (arguing that "concealed carrying is probably more respectful to one's neighbors, many of whom are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon," and that "if . . . a right to bear arms generally includes the right to carry, then it ought to include the right to carry concealed"). There is at least one judicial determination that the right to carry for self-defense, to be practicable, must specifically protect concealed carry in at least some circumstances. *See* State v. Hamdan, 665 N.W.2d 785, 812 (Wis. 2003) (holding that a law prohibiting the concealed carry of a handgun even in one's own place of business "frustrate[d]" the right to bear arms under Wisconsin's state constitution, and so was invalid in that setting).

197. Nicholas Griepsma, Note, *Concealed Carry Through Common Use: Extending* Heller*'s Constitutional Construction*, 85 GEO. WASH. L. REV. 284, 306 (2017).

198. *See* 554 U.S. at 626 (noting that most American courts historically upheld concealed carry bans); *id.* at 629 (noting that total bans on carrying had been struck down).

199. For example, until 2011, the state of Wisconsin had no concealed carry licensing statute, and the only lawful way to carry a handgun for self-defense was to do so openly. *Compare* WIS. STAT. ANN. § 941.23 (2005) (prohibiting "go[ing] armed with a concealed and dangerous weapon"), *with* WIS. STAT. ANN. § 941.23(2)(d) (2011) (shall-issue licensing statute allowing licensees to carry concealed weapons).

Shows That Handgun Carry Is Not Part of the Right to Bear Arms at All

If the Second Amendment protects bearing a handgun outside the home, then restrictive "special need" permit laws like New York's face a straightforward problem: they leave most Americans with no way to exercise that right. One need not be exclusively committed to categorical methodology in Second Amendment cases in order to believe that categorical invalidation would be logical in this case. As a number of lower court opinions recognized, an individual right to "carry weapons in case of confrontation" (thus *Heller*) that the average person, in principle, may be completely debarred from exercising seems a clear enough example of self-contradiction.[200]

This perspective supplies an evident purpose to the recent effort made by a Ninth Circuit en banc majority in *Young v. Hawaii*[201] to generate a limiting-traditionalist argument that would exclude handgun carrying entirely from the scope of the Second Amendment.[202] There would be no performative contradiction in a typical individual's being unable to engage in conduct that does not implicate the individual right to bear arms at all. The basis for this limiting-traditionalist argument, however, is neither geographically extensive nor strongly instantiated even in jurisdictions where it was manifested. In the terms of the skiing metaphor, it is a slope too sparsely covered to allow for meaningful movement.

Young stressed what it called the "Massachusetts model" of regulation of gun carrying. This was reflected in nineteenth-century surety laws that required a gun carrier to post a surety in certain circumstances in order to continue lawfully carrying for self-defense. The Massachusetts statute provided:

200. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 658, 666 (D.C. Cir. 2017) (embracing *Heller*'s description of the right to carry weapons for self-defense, and reasoning that since "the [proper-cause] law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs," such a law must fail "any judicial test that was appropriately written and applied").

201. 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. filed*, No. 20-1639 (U.S. May 11, 2021).

202. To be precise, *Young* held that open carry of handguns was outside the Second Amendment's scope. *Id.* at 813. An earlier en banc decision of the same court, Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016), *cert. denied sub nom*. Peruta v. California, 137 S. Ct. 1995 (2017), had held that concealed carry was not protected by the Second Amendment. The combined effect of *Young* and *Peruta* was to deny all constitutional protection for handgun carrying.

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assualt [sic] or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.[203]

Such statutes were enacted in eight states in the nineteenth century.[204] *Young* characterizes these laws as a type of "good-cause restriction"[205] on handgun carrying, and uses them to support the absence of a "general right to carry arms in the public square for self-defense"[206] under the Second Amendment. However, Robert Leider has pointed out that these laws were not written as general prohibitions on handgun carry, but instead allowed for the imposition of a surety requirement only when the carrier's conduct gave rise to a "reasonable cause" for another to fear an injury or a breach of the peace.[207] More fundamentally, Leider finds almost no evidence that these statutes were actually enforced.[208] The lone case record involving the Massachusetts surety statute involved a *denial* of a surety requirement in a case where the complainant alleged not just that the defendant was carrying a firearm, but that he threatened to harm the complainant.[209]

Leider considers the implication of these scattered laws for the interpretation of the Second Amendment, arguing that it presents a question of "constitutional liquidation"—the settlement of constitutional ambiguities through reasoned post-ratification

203. 1836 Mass. Acts 750, ch. 134, § 16, *quoted in Young*, 992 F.3d at 799.

204. *See Young*, 992 F.3d at 799–800 (identifying similarly worded mid-nineteenth century laws in Massachusetts, Maine, Michigan, Minnesota, Oregon, Virginia, West Virginia, and Wisconsin).

205. 992 F.3d at 799.

206. *Id.* at 813.

207. Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms* 13 (Geo. Mason Legal Stud. Rsch. Paper, LS 21-06, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761 [https://perma.cc/3UWZ-PR3S].

208. *Id.* at 15 (arguing that the lack of "a developed case law" cuts strongly against the position that the Massachusetts-style surety laws crystallized a consensus against a right to carry for self-defense).

209. *Id.* (discussing Grovner v. Bullock, No. 185 (Worcester Cty., Mass. Aug. 13, 1853)). In another case reported in a newspaper, a defendant who peaceably carried a concealed pistol in Boston was convicted by a justice of the peace for violating the Massachusetts surety statute, but then appealed to the municipal court, whereupon the Commonwealth abandoned the prosecution. *See id.* at 16 (discussing the case of Isaac Snowden in 1851).

practice. This perspective, which "relies on the support of the public to settle an issue,"[210] is quite close to the practice-based interpretative perspective explored in this Article, and Leider's conclusions about the liquidation inquiry may also stand for the question of the limiting-traditionalist argument against carry rights. He argues that in the course of the nineteenth century, the Second Amendment right to bear arms "liquidated" against the so-called "Massachusetts model" and in favor of a right of most citizens to bear common arms in most places.[211]

In addition to the surety laws, which required a complainant with standing, the Ninth Circuit in *Young* also discussed nineteenth century statutes that directly regulated the carry of weapons. To find instances of more comprehensive prohibitions, *Young* resorted to territorial prohibitions from Western jurisdictions—but few of these prohibitions survived into statehood, often precisely because the new state considered them incompatible with the right to bear arms.[212] Even currently restrictive states like California and New Jersey allowed the unlicensed open carry of firearms well into the 1960s.[213] The basic *non sequitur* that structures *Young*'s limiting argument is that, because the carrying of handguns for self-defense was regulated in certain ways (which typically reflected the existence of an underlying right and the illegality of prohibition), the very practice of carrying itself is unprotected.

In truth, even a legal conventionalist would have to deem this an unjustifiable stance, since parsing constitutional limits on weapons carrying can in no way be accurately described as something foreign to the American judicial role. To the contrary, reviewing such laws has always been a major occupation of American courts

210. *Id.* at 9.

211. *Id.* at 3, 10. Leider maintains that the "liquidation" inquiry suggests the Second Amendment right to bear arms crystallized as a right to carry *openly* by the end of the nineteenth century. *Id.* at 10. My own argument, however, is that subsequent practice in the latter twentieth and twenty-first centuries brought concealed carry, too, within the scope of the exercise of the right.

212. *See* Mocsary & Person, *supra* note 170, at 355–57 (postulating that the changes in Wyoming's carry laws from pre- to post-statehood may have occurred due to constitutionality concerns).

213. California's Mulford Act prohibited the (loaded) open carry of handguns in 1967; New Jersey prohibited open carry in 1966. *See* A.B. 1591, 1967 Leg., Reg. Sess. (Cal. 1967) (amending CAL. PENAL CODE § 12031 to repeal law that allowed for open carry of loaded firearms); N.J. STAT. ANN. § 2A:151–41 (1966) (instituting novel permit requirement for open carry of handguns); *see also* Drake v. Filko, 724 F.3d 426, 448 (3d Cir. 2013) (Hardiman, J., dissenting) (acknowledging that New Jersey first began requiring permits for both open and concealed carry in 1966).

applying the federal and state constitutional guarantees of the right to keep and bear arms. Restrictions on carrying handguns and other common weapons outside the home appear to have been the type of law *most commonly struck down*, as violative of the right to bear arms, by American courts in both the nineteenth[214] and the twentieth[215] centuries.[216] *Young*'s stance is as if a court surveyed a range of tort law decisions over the decades that duly parsed the existence of proximate cause or a duty of care; noted that courts often found these elements not to be met, while in other situations they were present—and concluded from this survey that there was no cognizable tort law cause of action for negligence. The weakness of this limiting-traditionalist claim contrasts sharply with the vigor of the constitutive argument from practice in *Bruen.*

A final feature of *Young* is significant. Like some of the strongly anti-constitutive-traditionalist opinions discussed in Part III, the Ninth Circuit's opinion includes passages that suggest a basic repugnance to the practices being evaluated (in *Young*, handgun

214. *See, e.g.*, Wilson v. State, 33 Ark. 557, 560 (1878) (reversing as unconstitutional a conviction for carrying an "army pistol," and observing that the legislature could regulate, but not prohibit, such carrying); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177 (1871) (reversing a conviction for handgun carrying as violative of the state's right to bear arms, which the court held identical to the Second Amendment); Nunn v. State, 1 Ga. 243, 251 (1846) (invalidating, as a Second Amendment violation, a handgun carrying statute that prohibited both open and concealed carry); Simpson v. State, 13 Tenn. (5 Yer.) 356, 360 (1833) (reversing the conviction for affray of a defendant who was armed in public, in part on the ground that state's constitutional right to bear arms empowered citizens to carry arms "without any qualification . . . as to their kind or nature"); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90, 94 (1822) (invalidating ban on concealed carry of handguns and edged weapons).

215. *See, e.g.*, State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 144–45 (W. Va. 1988) (invalidating a discretionary permit requirement to carry a handgun because the law frustrated the state constitution's right to bear arms for self-defense); State v. Delgado, 692 P.2d 610, 614 (Or. 1984) (striking down a prohibition on possessing a switchblade knife in public); Schubert v. DeBard, 398 N.E.2d 1339, 1340–41 (Ind. App. 1980) (invalidating a restrictive law requiring a discretionary permit to carry a handgun, and reasoning that the state constitutional right to bear arms gave each law-abiding citizen the right to obtain a permit to carry for the purpose of self-defense); City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (striking down a municipal ban on handgun carrying as unconstitutional); State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (affirming the acquittal, on right-to-bear-arms grounds, of a defendant who violated a municipal ordinance by carrying a pistol for self-defense); State v. Rosenthal, 55 A. 610, 611 (Vt. 1903) (striking down, as a violation of state constitutional right to bear arms, a municipal statute that required a discretionary-issue permit in order to carry a concealed handgun for self-defense); *In re* Brickey, 70 P. 609, 609 (Idaho 1902) (invalidating a statute that prohibited carrying a handgun in a city or town, and holding that both Second Amendment and state constitution guarantee a right to carry handguns, which can be regulated as to mode of carry, but not prohibited).

216. For a fuller analysis of the long American history of state-court judicial review of weapons carrying restrictions, see generally O'Shea, *supra* note 173.

carrying for self-defense), notwithstanding their prevalence in the larger society. In *Young* this takes the form of a remarkable passage opining that:

> Notwithstanding the advances in handgun technology, and their increasing popularity, pistols and revolvers remain among the class of deadly weapons that are easily transported and concealed. That they may be used for defense does not change their threat to the "king's peace." It remains as true today as it was centuries ago, that the mere presence of such weapons presents a terror to the public and that widespread carrying of handguns would strongly suggest that state and local governments have lost control of our public areas.[217]

To this the Ninth Circuit adds that "[t]he king who cannot guarantee the security of his subjects—from threats internal or external—will not likely remain sovereign for long."[218]

Nelson Lund has ably criticized the anachronistic, Hobbesian tone of these political reflections:

> Our governments, the Ninth Circuit tries to teach us, are closely analogous to the king referred to in the last sentence of this quotation. The American people, who might once have thought *they* were the sovereign, should completely trust the government to protect their safety because the alternative is anarchy or civil war. That is Hobbes in a nutshell, and the court's preposterously inapt citations to impressive authorities like Blackstone and Lord Coke cannot conceal the Hobbesian message. It is shocking to see this in an American judicial opinion, and it is appalling to see it appear during a time when many of our local "kings" abdicated their duty to protect the public square.[219]

Young's rhetoric is also relevant to Second Amendment traditionalism because it discloses a judicial sensibility disconnected from commonplace aspects of American experience. The Ninth Circuit itself is not confined to the carry-restrictive states of California and Hawaii. Seven of its nine states broadly authorize concealed carry by ordinary persons, some on a shall-issue permit basis, and this includes Arizona, where open carry of handguns for self-defense has been generally lawful since statehood, and which has a long tradition of open carry as a relatively common

217. Young v. Hawaii, 992 F.3d 765, 821 (9th Cir. 2021).
218. *Id.* at 814.
219. Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 107 (2021).

practice.[220] Similarly, the Ninth Circuit state of Idaho not only has a long tradition of lawful handgun carry, but its state supreme court expressly affirmed in the early twentieth century that the Second Amendment protects a robust constitutional right to carry handguns in both urban and rural areas.[221] Many of these states today boast a low rate of violent crime compared to other states.[222] Yet *Young*'s disconnection from these prosaic facts is so deep, it seems, that it resorts to subjunctive language (the "widespread carrying of handguns would strongly suggest that state and local governments have lost control of our public areas")[223] to address an actually existing, and contrary, reality. This is the kind of cultural-jurisprudential situation in which the claims of constitutive-traditionalist interpretation acquire particular force. Such interpretation offers a chance to reconnect adjudication with social reality, by obliging courts to attend to the facts of American practices in order to faithfully apply American rights.

CONCLUSION: THE NEED FOR CONSTITUTIVE TRADITIONALISM IN SECOND AMENDMENT ADJUDICATION

The survey undertaken in this Article has shown that

220. *See* JOHNSON ET AL., *supra* note 153, at 736 (noting long tradition of open carry in Arizona).

221. *In re* Brickey, 7 P. 609, 609 (Idaho 1902). The Ninth Circuit en banc majority in *Young* misstated the holding of this Idaho case, and of the important Georgia case of *Nunn v. State*, 1 Ga. 243 (1846), by asserting that these courts "stated that the legislature can prohibit concealed carry, but suggested, in dicta, that it cannot prohibit open carry," *Young*, 992 F.3d at 808. That is simply backwards. Each court reversed the defendant's conviction because the statute prohibited both open and concealed carry, and thereby violated the Second Amendment and the Idaho Constitution. *Brickey*, 70 P. at 609 ("We are compelled to hold this statute void."); *Nunn*, 1 Ga. at 251 ("[S]o much of [the statute], as contains a prohibition against bearing arms *openly*, is in conflict with the [Second Amendment], and *void;* and that, as the defendant has been indicted and convicted for carrying a pistol, without charging that it was done in a concealed manner, . . . the judgment of the court below must be reversed . . . ."). Since the carry-banning statutes were deemed unconstitutional and each defendant freed, those were the holdings, and it was the two courts' expression of *approval* of concealed carry restrictions that was *dictum*.

For a wider-ranging criticism of the *Young* majority opinion for omitting significant portions of cited legal and historical sources, see generally David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. ILL. L. REV. ONLINE 172.

222. *See Crime Data Explorer*, FBI, https://crime-data-explorer.app.cloud.gov/pages/home [https://perma.cc/75SQ-J7AG] (providing an interactive database to explore annual crime rates in each state). FBI statistics for 2020 place the Ninth Circuit states of Idaho, Oregon and Washington, all of which follow the presumptive carry norm, as among the twenty states with the lowest per capita violent crime rates. Idaho's rate in 2020 was 242.6 violent crime offenses per 100,000 people; Oregon's rate was 291.9; and Washington's was 293.7, compared to the national average of 387.8 offenses per 100,000. *Id.*

223. *Young*, 992 F.3d at 821.

traditionalist interpretation based on decentralized practice is highly relevant to the application of the Second Amendment—yet in a distinctive way that should be taken into account by the Supreme Court. As we've seen, one of the basic motivations for traditionalist interpretation is what DeGirolami calls the "democratic-populist" rationale. In a typical situation involving, for example, the First Amendment Establishment Clause, this rationale will tend to lead a court to embrace *limiting*-traditionalist reasoning. That is, it will defer to practice as a way of limiting claims of unconstitutionality, because of a fear that applying unmediated, abstract legal principles will be socially destructive, perhaps because it may reflect too one-sidedly the concerns of a judicial elite that can sometimes act as if nothing matters to constitutional law except courts, lawyers, legal sources, and legal concepts.

But the example of the post-*Heller* Second Amendment shows us that there can be other areas of the law where the same rationale will imply a very different approach to traditionalist argumentation. Sometimes it is precisely a particular type of constitutional rights claim, such as the individual right to keep and bear arms, that is favored by populist elements, while legal and other elites rarely sympathize with the practices—even very widespread ones like shall-issue concealed carry or ownership of modern rifles—engaged in by non-elite rights claimants. In this situation the risk is that courts may use not only abstract legal principles (such as the deferential balancing tests favored by many post-*Heller* courts), but also *traditionalist concepts themselves*, such as *Heller*'s "longstanding regulations" concept, to unduly stifle the reach of the rights claim. It is difficult to survey the lower federal courts' use of limiting traditionalism in Part III and avoid the conclusion that this risk is a realistic one in relation to the Second Amendment.

The primary way that traditionalist interpretation can respond to such a risk is by recognizing and furthering, not just "text, history and tradition" in the abstract, but specifically *constitutive* traditionalist arguments. This could include (in a future case, perhaps involving rifles) broad protections of arms factually in common use by Americans, and in *Bruen*, acknowledgment of the late twentieth-century emergence of licensed concealed carry as helping to constitute the scope of the right to bear arms for self-defense.