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Essay

RETCONNING *HELLER:* FIVE TAKES ON *NEW YORK RIFLE & PISTOL ASSOCIATION, INC. v. BRUEN*

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Introduction

New York Rifle & Pistol Association, Inc. v. Bruen[1] was the first significant Second Amendment case that the Supreme Court had heard in over a decade since its decision in *District Columbia v. Heller*.[2] It was one of the most highly anticipated case of the 2021-22 Term and serves as the first indication of how the addition of Justices Gorsuch, Kavanaugh, and Barrett might alter the trajectory of the Court's Second Amendment case law.

The outcome itself was fairly unremarkable. *Bruen* held that (1) the Second Amendment's protections radiated beyond the home;[3] and (2) that New York's discretionary licensing laws—which required those seeking a carry permit for self-defense had to show a special need beyond the mere desire to assume primary responsibility for one's safety—violated the Second Amendment.[4] The second outcome was not a surprise, in part because New York's law had, by 2021, become an outlier, which didn't bode well for it, given how Court tends to treat outlier restrictions on constitutional rights.[5] Depending how you define the term, something on the order of forty-five states are now "shall-issue" jurisdictions, meaning that as long as you satisfy statutory criteria you are entitled to a concealed-carry permit.[6] Given those numbers, it was difficult to imagine any interest New York could articulate that couldn't be accommodated within a shall-issue regime. In addition, the Court has tended to frown on placing the exercise of constitutional rights at the mercy of governmental officials exercising unfettered discretion.[7]

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[1] 142 S. Ct. 2111 (2022).
[2] 554 U.S. 570 (2008).
[3] *See infra* text accompanying notes 36-39.
[4] *See infra* text accompanying notes 40-49.
[5] *See generally* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014) (distinguishing among different types of "outlier" actors and the Court's treatment of each).
[6] *Bruen*, 142 S. Ct. at 2162.
[7] Forsyth Co. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (invalidating county permit ordinance for assemblies that vested unfettered discretion in the county to adjust protest license fee upward; "[t]he First

What was surprising and possibly revolutionary about the decision were the methodological changes to Second Amendment analysis announced in Justice Clarence Thomas's 6-3 majority opinion.[8] In it, he swept aside over a dozen years of lower court precedent that applied, sometimes disingenuously, a form of intermediate scrutiny that had emerged as the consensus standard of review among the the courts of appeals.[9] Henceforth, Thomas insisted, courts hearing Second Amendment challenges would be guided by the text of the Second Amendment, aided by inquiries into the history and traditions of firearms regulation in the United States.[10] Once a plaintiff demonstrated that the text of the Second Amendment covered the regulated activity, it would fall to the *government* to prove that history and tradition legitimized its regulatory efforts.[11] Or, if history and tradition were unclear, whether an analogous regulation existed to which the challenged regulation was comparable.[12]

If *Heller* could have been characterized as a "minimalist" opinion at the time of its decision[13] and *McDonald v. Chicago*[14] as an almost overdetermined extension of *Heller* by its application to the states through incorporation,[15] *Bruen* tends towards maximalism,[16] dramatically expanding the scope of the Second Amendment and threatening a variety of gun control laws that lower courts had upheld while the Court stayed its hand.[17] Given that there is now a solid majority (if not a super-majority) willing to support a robust Second Amendment, whatever *Bruen*'s ultimate scope, it is unlikely that the Court will be as quiescent as it was in the decade following *Heller*.

Amendment prohibits the vesting of such unbridled discretion in a government official" (footnote omitted)).

[8] *See infra* Part II.B.

[9] *Id.*

[10] *Id.*.

[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* District of Columbia v. Heller, 60 OHIO ST. L.J. 671, 678 (2008) (observing that the immediate result was fairly limited because D.C.'s law was a national outlier; comparing the case to the outcome in *Griswold v. Connecticut*, 381 U.S. 479 (1965)); Cass R. Sunstein, Second Amendment Minimalism: *Heller* as *Griswold*, 122 HARV. L. REV. 246, 247 (2008) ("*Heller* is more properly characterized as a rerun of the minimalist ruling in *Griswold v. Connecticut.*" (footnote omitted)).

[14] 5612 U.S. 742 (2010).

[15] *See* Brannon P. Denning & Glenn H. Reynolds, Five Takes on *McDonald v. Chicago*, 26 J.L. & POL. 27, 277-85 (2011) (arguing that the outcome in *McDonald* was overdetermined because precedent, the logic of incorporation, the history of the Fourteenth Amendment and popular expectation all pointed in the direction of incorporation).

[16] Mark Joseph Stern, *Clarence Thomas' Maximalist Second Amendment Ruling is a Nightmare for Gun Control*, SLATE.COM, June 23, 2022, available at https://slate.com/news-and-politics/2022/06/supreme-court-new-york-concealed-carry-law-gun-control-bruen.html (last visited Feb. 13, 2023).

[17] *Id.* (*Bruen* "overrules the test used by many courts of appeals in assessing gun restrictions, creating a new, incredibly demanding standard for the government to satisfy.").

This essay follows our familiar "five takes" format,[18] offering some preliminary observations about both the opinion itself, as well as its likely effects, some of which are starting to manifest. After a brief recap of the *Bruen* opinion itself, our first take concerns the question of opinion assignment. The conventional wisdom pre-*Bruen* was that Chief Justice John Roberts was a Second Amendment squish[19] and that because he was not a reliable fifth vote for the right to keep and bear arms, the other, more resolute Justices couldn't risk a cert grant for fear of a loss.[20] If that is true, we speculate why Chief Justice Roberts assigned the opinion to Justice Thomas.

Takes two and three concern Justice Thomas's methodological shift itself—specifically, the substitution of text, history, and tradition for tiered-scrutiny; and his call for courts to adopt analogical reasoning should the former fail to provide answers sufficient to resolve particular cases. In rejecting tiered-scrutiny, Thomas argued that the lower courts had misread the *Heller* decision itself; that *Heller* rejected tiered-scrutiny in favor of a textual, historical, and traditional inquiry. In order to make *Bruen* seem less like an abrupt departure, we argue, Justice Thomas had to "retcon" *Heller*—reading back into the latter decision the analytical framework adopted in *Bruen*.[21] We also question how helpful his explanation of the method for analogizing to other extant gun regulations when history and tradition have run out is likely to be to lower courts who have to rehear cases involving dozens of issues delineating the scope of the Second Amendment settled over the last fifteen years since *Heller*.

Take Four wonders about the status of what we earlier termed "the *Heller* safe harbor"[22]—the list of "presumptively lawful" regulations that the Court said were not called into question by the decision: bans on possession by felons and the mentally ill, regulation of the commercial sale of arms, and the ban on "dangerous and unusual"

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[18] *See* Denning & Reynolds, *supra* note 14; Denning & Reynolds, *supra* note 13; Glenn H. Reynolds & Brannon P. Denning, National Federation of Independent Business v. Sebelius: *Five Takes*, 40 HASTINGS CONST. L.Q. 807 (2013) [hereinafter Reynolds & Denning, *NIFB*]; Glenn H. Reynolds & Brannon P. Denning, *What Hath* Raich *Wrought? Five Takes*, 9 Lewis & Clark L. Rev. 915 (2005).

[19] *See, e.g.*, Cody J. Wisniewski, *Why Did the Roberts Court Punt on Ten Second Amendment Cases?*, NAT'L REV., June 19, 2020, available at https://www.nationalreview.com/2020/06/why-did-the-roberts-court-punt-on-ten-second-amendment-cases/ (last visited Feb. 13, 2023).

[20] *Id*. ("The conclusion we're left with is that Chief Justice Roberts does not want the Court to weigh in on the Second Amendment right now, and neither the four conservative justices nor the four progressive judges were confident enough of his siding with them on the issue to risk granting *certiorari* in any of the ten cases.").

[21] "Retcon" is a portmanteau of "retroactive continuity" and is defined as "a literary device in which the form or content of a previously established narrative is changed." *A Short History of 'Retcon,'* MERRIAM-WEBSTER.COM, available at https://www.merriam-webster.com/words-at-play/retcon-history-and-meaning (last visited Feb. 9, 2023). For more on its origins, see *infra* note 75.

[22] Brannon P. Denning & Glenn H. Reynolds, *Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms, 60 HASTINGS L.J. 1245, 1247-60 (2009).

weapons.[23] Critics at the time questioned whether these could be squared with the self-conscious originalism of the rest of the opinion.[24] This tension is only heighted by a text-history-tradition only approach.

Finally, in keep with our longstanding interest in lower court reception of destabilizing, possibly transformative Supreme Court opinions,[25] we look at the reaction of the lower courts, post-*Bruen*. While approaches differ, a surprising number of these opinions seem to recognize *Bruen* for the sea-change it portends and are attempting to implement it in good faith. Although, as was true with cases like *United States v. Lopez*[26] and *Heller* itself, some courts are also trying to avoid the wider implications of *Bruen* using any available argument, however specious; and we detect in some an "uncivil obedience" intended to raise the Supreme Court's costs of holding the line in *Bruen*. A brief conclusion follows.

I. *Bruen*: A Summary[27]

The subject of the challenge was New York's procedure for obtaining a permit to carry a concealed weapon. New York's law vested broad discretion in county law enforcement officers and judges to grant or deny firearms licenses, including licenses to carry concealed weapons. Theoretically, if you are a state resident, twenty-one years old or above, have no felony convictions, are "of good moral character," and have a reason recognized by the state for wanting to possess or carry a firearm, you are eligible for a license.[28] In practice, however, in some places—New York City, for example—licenses were not granted to persons who wish to carry a weapon for self-defense unless they could point to very specific threats made against them.[29]

Following the incorporation of the Second Amendment in *McDonald*, several plaintiffs unsuccessfully challenged various aspects of New York's concealed-carry

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[23] *Heller*, 554 U.S. at 626–27.
[24] *See, e.g.,* Carlton F.W. Lawson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1372 (2009); Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009)..
[25] *See, e.g.,* Denning & Reynolds, *supra* note 22; Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?* 2000 WIS. L. REV. 369 [hereinafter, Reynolds & Denning, *Revolution*].
[26] 514 U.S. 549 (1995).
[27] This summary of the case draws on ROBERT J. COTTROL & BRANNON P. DENNING, THE ADVANTAGE OF BEING ARMED: THE SECOND AMENDMENT IN AMERICAN POLITICS, CULTURE, AND LAW, Ch. 9 (forthcoming 2023).
[28] *Bruen*, 142 S. Ct. at 2122–123.
[29] *Id.* at 2123.

licensing regime.[30] Because those earlier cases constituted binding precedent, the only hope of the third group of plaintiffs to challenge the licensing laws was that the U.S. Supreme Court would relent and agree to hear the case. And on April 26, 2021, that is precisely what the Court did.[31] In so doing, the Court limited the question presented to the following: "Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."

The Court issued *Bruen* in June 2022. Justice Thomas wrote the opinion for himself, the Chief Justice, and Justices Alito, Barrett, Gorsuch and Kavanaugh. It was notable that early in the opinion, Justice Thomas rejected the tiered scrutiny framework and intermediate scrutiny standards around which—with some variation—all the lower courts had coalesced.[32] The correct standard, Justice Thomas wrote, was as follows: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[33] Only if the government carries its burden will the individual conduct go unprotected by the Second Amendment. Thomas acknowledged that history could only get one so far, but that fidelity to the Second Amendment demanded that courts incorporate technological advances or regulations unknown in the eighteen-century into the case law. In such cases, analogical reasoning would be appropriate.[34] While he declined to provide "an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," he wrote that *Heller* and *McDonald* pointed to two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[35]

Thomas then applied his history-and-tradition approach to New York's law. There is little question, he argued, that the Second Amendment applies in public. The amendment's use of the word "bear," he wrote, "naturally encompasses public carry."[36] *Heller*, moreover, spoke of the right to "'carry weapons in case of confrontation.'"[37] And while self-defense in the home was at the center of the right, "[t]o confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative

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[30] Libertarian Party of Erie Co. v. Cuomo, 970 F.3d 106, 127-29 (2nd Cir. 2020), *cert. denied* 141 S. Ct. 2797 (2021); Kachalsky v. Westchester Co., 701 F.3d 81, 101 (2nd Cir. 2012), *cert. denied sub nom.* Kachalsky v. Cacace, 133 S. Ct. 1806 (2013).
[31] New York State Rifle & Pistol Ass'n, Inc. v. Beach, 818 Fed App'x 99 (2nd Cir. 2020), *cert. granted sub nom.* New York State Rifle & Pistol Ass'n, Inc.v. Corlett, 141 S. Ct. 2566 (2021).
[32] *See* notes 88-107 *infra* and accompanying text.
[33] *Bruen,* 142 S. Ct. at 2126.
[34] *Id.* at 2126.
[35] *Id.* at 2132–33.
[36] *Id.* at 2134.
[37] *Id.* at 2135.

protections."[38] The text, therefore "presumptively" guaranteed the petitioners' right to bear arms in public for self-defense.[39]

Justice Thomas next embarked upon a lengthy examination of the historical materials New York offered in support of its contention that its proper-cause requirement was "consistent with this Nation's historical tradition of firearm regulation."[40] He looked at regulations from "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries. . . ."[41]

As for the English common law and American antebellum laws were concerned, the main point of contention between the petitioners and New York was how to characterize the laws regulating the carrying of weapons. The petitioners claimed, and the Court agreed, that the tradition began in England and transplanted to the colonies, later states, barred the carrying of weapons in public in order to menace others.[42] As Justice Thomas concluded:

> The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes[43] did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.[44]

As for the evidence from Reconstruction and the latter part of the nineteenth century, Justice Thomas conceded that, yes, Texas and West Virginia had something like New York's special purpose requirement but dismissed them as outliers.[45] He likewise dismissed the restrictions placed on public carry in the western territories. They were temporary and covered a very small percentage of the population. In addition, they were never subject to judicial scrutiny, so there is no guarantee that, if challenged, they would have been upheld.[46] He summarized the results of the survey:

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[38] *Id.* at 2134–35.
[39] *Id.* at 2135.
[40] *Id.* at 2135.
[41] *Id.* at 2135–36.
[42] *Id.* at 2138–44.
[43] "Surety laws" required people thought to present a risk of breaching the peace to post bond in order to carry their weapons in public.
[44] *Bruen*, 142 S. Ct. at 2150.
[45] *Id.* at 2152–53.
[46] *Id.* at 2154.

> Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.[47]

New York, he concluded, had not carried its burden of proving that special-need requirements to carry publicly are part of the historical tradition of firearms regulation in the United States.[48] He added for good measure the observation that, "The constitutional right to bear arms in public for self-defense is not 'a second-class right subject to an entirely different body of rules than the other Bill of Rights guarantees.' We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need."[49]

Justice Kavanaugh concurred to emphasize that (1) states were still free to impose various requirements for concealed carry licenses and (2) that nothing in *Bruen* ties a state's hands in passing "a 'variety' of gun regulations . . . ."[50] Justice Barrett's concurrence flagged "two methodological points that the Court does not resolve."[51] First, the Court didn't specify how much weight is to be accorded post-ratification practice in ascertaining original meaning.[52] Scholars have proposed various—sometimes conflicting—approaches. Second, she noted that the Court didn't resolve the question whether 1791 or 1868 is the proper historical baseline for establishing the scope of an individual right.[53]

Justice Breyer wrote the dissent for himself and Justices Sotomayor and Kagan. His opinion opened with an impassioned description of the scope of gun violence in the U.S., from rates of deaths and injuries to mass shootings, the fact that gun violence is on the rise, to the danger posed to police officers and the urban-rural divide regarding guns.[54] In response to Justice Alito, whose concurring opinion took specific issue with this part of the dissent,[55] Justice Breyer defended that section of the opinion, writing that

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[47] *Id.* at 2156.
[48] *Id.* at 2156.
[49] *Id.* at 2156.
[50] *Id.* at 2162 (Kavanaugh, J., concurring) (quoting the *Heller* safe harbor language).
[51] *Id.* at 2162 (Barrett, J., concurring).
[52] *Id.* at 2162 (Barrett, J., concurring).
[53] *Id.* at 2163 (Barrett, J., concurring).
[54] *Id.* at 2163–64 (Breyer, J., dissenting).
[55] *Id.* at 2157–58 (Alito, J., concurring).

the statistics demonstrate that problems associated with guns in the U.S. are "complex [and] should be solved by legislatures rather than courts."[56]

Justice Breyer criticized the majority for not remanding to the lower courts. "The parties," he complained, "have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record."[57] For example, he continued, the majority characterized the New York law as granting too much discretion and offering " 'little recourse if their local licensing officer denies a permit'" but "[w]ithout an evidentiary record, there is no reason to assume that New York courts applying [the arbitrary and capricious] standard fail to provide license applicants with meaningful review."[58] Nor was there information on how the "proper cause" standard was actually applied.[59]

A related critique of the majority was its—in Justice Breyer's opinion—flattening of the differences among the forty-three states that the Court said had adopted "must issue" laws and how they operate in practice. "Because the Court strikes down New York's law without affording the State an opportunity to develop an evidentiary record, we do not know how much discretion licensing officers in New York have in practice or how that discretion is exercised, let alone how the licensing regimes in the other six 'may issue' jurisdictions operate. . . ."[60]

Justice Breyer also objected to the "history-and-tradition" methodology adopted by the Court and predicted that it would cause innumerable problems, especially in the lower courts.[61] We'll discuss more of this portion of Justice Breyer's dissent below.[62]

II. *Bruen:* The Five Takes.

A. Take One: The Curious Case of the Opinion Assignment

If one feared that an emboldened Court with a solid conservative majority would dramatically expand the scope of the right to keep and bear arms, one might have noted that the author of the majority opinion was Justice Thomas with particular alarm.[63] In the years prior to *Bruen*, Justice Thomas dissented regularly from denials of certiorari in several high-profile Second Amendment challenges that foundered in the courts of

[56] *Id.* at 2167 (Breyer, J., dissenting).
[57] *Id.* at 2168 (Breyer, J., dissenting).
[58] *Id.* at 2170 (Breyer, J., dissenting).
[59] *Id.* at 2171 (Breyer, J., dissenting).
[60] *Id.* at 2172 (Breyer, J., dissenting).
[61] *Id.* at 2177 (Breyer, J., dissenting).
[62] *See* text accompanying notes 120-22 *infra*.
[63] *See, e.g.*, Wisniewski, *supra* note 19.

appeal.[64] As noted above, pro-Second Amendment commentators pointed the finger at Chief Justice Roberts for stymying efforts to further expand the right to keep and bear arms.[65] If that's true, and we have no way of knowing at present, then it raises the question why he assigned the opinion to Justice Thomas in the first place.

If the Chief Justice was content with the post-*McDonald* status quo—guarantee of an individual right to keep and bear arms for self-defense, total prohibition of handguns and other long guns off the table as a result, and incorporation of the right through the Fourteenth Amendment, but with lots of regulatory options remaining to the federal and state governments—then why did he select a Justice who was not shy about wanting to expand the right to draft the majority opinion? Why not keep the opinion for himself, and draft a more narrow opinion that employed the intermediate scrutiny construct lower courts had settled on, perhaps with some language making more clear what evidence would satisfy the "important interest" and "substantial relationship" prongs to curb the evasion that lower court critics said was facilitated by a loose application of that test? Or simply announce that strict scrutiny was the proper standard of review?

One possibility is that Roberts was no more a fan of the lower court consensus than Justice Thomas. During the oral arguments in *Heller*, as the parties were arguing which of the familiar standards of review—strict or intermediate scrutiny or rational basis—should apply, the Chief Justice broke in to ask whether the Court even ought to answer that issue, noting that those standards of review had no particular constitutional pedigree.[66] A few years later, Justice Thomas dissented in *Whole Woman's Health v.*

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[64] *See, e.g.,* Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari). Peruta v. California, 137 S.Ct. 1995 (2017) (refusing to review Ninth Circuit en banc decision holding that the Second Amendment did not include the right to carry firearms in public for self-defense) (Thomas, J., dissenting from denial of certiorari); Friedman v. Highland Park, 136 S.Ct. 447 (2015) (refusing to review Seventh Circuit decision upholding local ban on semiautomatic "assault weapons") (Thomas, J., dissenting from denial of certiorari); Jackson v. San Francisco, 135 S.Ct. 2799 (2015) (refusing to review Ninth Circuit decision upholding San Francisco's "safe storage" law) (Thomas, J., dissenting from denial of certiorari).

[65] *See, e.g.,* Francis Wilkinson, *Justices Who Favor Gun Rights Fear Roberts Does Not,* BLOOMBERG, June 16, 2020, available at https://www.bloomberg.com/opinion/articles/2020-06-16/justices-who-favor-gun-rights-fear-roberts-does-not?leadSource=uverify%20wall (last visited Jan. 22, 2023); Adam Winkler, *John Roberts May Not Be the Ally Gun-Rights Advocates Hoped For,* THE ATLANTIC, June 16, 2020, available at https://www.theatlantic.com/ideas/archive/2020/06/court-not-ally-gun-rights-advocates-wanted-it-be/613105/ (last visited Jan. 22, 2023).

[66] In response to a question Justice Ginsburg put to Solicitor General Paul Clement regarding the proper standard of review, Chief Justice Roberts interjected:

> 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 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

Hellerstedt[67] decrying the use of decision rules like "undue burden" arguing that in addition to having no constitutional basis, they could be manipulated to produce any given outcome.[68] He might have thought that Justice Thomas was the right Justice to pen an opinion that scrapped that entire approach.

A second possibility is that the Chief Justice was seeking to avoid a redux of the Affordable Care Act case, in which he lost a majority and ended up writing for himself after, allegedly, changing his mind and voting to uphold the individual mandate under Congress's taxing power.[69] According to reports, he feared that the Court would become a political football in the 2012 election if the individual mandate had been struck down.[70]

> all that, and determine how . . . this restriction and the scope of this right looks in relation to those?
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> I'm not sure why we have to articulate some very intricate standard. I mean, these 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?

Transcript of Oral Argument at 41-43, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290)

[67] 136 S. Ct. 2292 (2016).

[68] Complaining about the Court's application of the "undue burden" test, Thomas went on to indict the Court's entire application of tiered scrutiny:

> The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it "rational basis," intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.
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> Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960's did the Court begin in earnest to speak of "strict scrutiny" versus reviewing legislation for mere rationality, and to develop the contours of these tests. . . . In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech, ... then applied strict scrutiny to a purportedly "fundamental" substantive due process right for the first time. . . . Then the tiers of scrutiny proliferated into ever more gradations. . . . *Casey* 's undue-burden test added yet another rights-specific test on the spectrum between rational-basis and strict-scrutiny review.
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> The illegitimacy of using "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" has long been apparent. . . . The Constitution does not prescribe tiers of scrutiny. The three basic tiers—"rational basis," intermediate, and strict scrutiny—"are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." . . . .
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> But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result.

Id. at 2326-27 (Thomas, J., dissenting) (citations omitted)..

[69] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

[70] Reynolds & Denning, *NFIB*, *supra* note 18, at 822-23 (describing contemporary reports that Robert had switched his vote in the case).

Perhaps he had no confidence that he could write a more narrow opinion that would garner at least four of the other five conservative votes, so he decided to give Justice Thomas, the most senior Justice in the majority, his shot. One problem with this scenario, however, is that Justice Kavanaugh's concurring opinion suggests he was open to a more narrow opinion that left considerable room for state regulation.[71] At least, it did not suggest hostility to the tiered-scrutiny approach taken by the lower courts.

There is a third—though we think highly unlikely—possibility: that Chief Justice Roberts has experienced buyer's remorse over *Heller* and he assigned Justice Thomas the opinion that he hoped would produce so much confusion in the lower courts and perhaps within the Court itself, that it would revisit the whole issue and *a la Garcia v. San Antonio Metropolitan Transit Authority*,[72] leave Second Amendment protections to the political process.[73] Like all conspiracy theories, ours depends on so many implausible contingencies occurring in perfect sequence that to describe it as we have is to discount it.

Finally, Thomas's authorship of the majority opinion might be put down to more jejune reasons, such as the way the Chief Justice assigns opinions generally. Roberts is reportedly a stickler for fairness in managing the Justices' workloads and it might be that he felt he had filled his quota and that it would be unfair to gobble up more than his share of prime opinions or vote strategically in order to manipulate opinion assignments the way that, say, Chief Justice Warren Burger is said to have done.[74]

Whatever the ultimate reason for choosing Justice Thomas to pen the majority opinion, the consequences of doing so are potentially momentous.

B. Take Two: Retconning[75] Heller

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[71] 142 S. Ct. at 2162 (Kavanaugh, J. concurring) (quoting the *Heller* safe harbor).

[72] Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 557 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

[73] *Garcia*, 469 U.S. at 556 (holding that although "the States occupy a special and specific position in our constitutional system," the "principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participant in federal government action. The political process ensures that laws that unduly burden the States will be be promulgated.").

[74] *See, e.g.*, Bob Woodward & Scott Armstrong, The Brethren 186-89 (1979) (describing debate over the assignment of *Roe*).

[75] "Retcon" is short for "retroactive continuity," when the author of a series makes changes in the prior history, explicit or assumed, of the series in order to have a freer hand in later episodes. "he act, practice, or result of changing an existing fictional narrative by introducing new information in a later work that recontextualizes previously established events, characters, etc." Merriam Webster, Retcon, available at https://www.merriam-webster.com/dictionary/retcon. Although the term is associated chiefly with the world of comic books and graphic novels, it has achieved wider usage, and an early instance was actually Sir Arthur Conan Doyle's rewrite of Sherlock Holmes' death, so that it turned out he hadn't actually been killed by Professor Moriarty at all, despite being seen falling off a cliff while struggling with his foe. We should note that this is not the first instance of such behavior by the Court – note, for example, the

Heller was notoriously opaque about the standard of review it was applying, which was curious given the amount of time the parties spent sparring over the issue in their briefs and at oral argument.[76] Perhaps anticipating that his opinion would be criticized for not being explicit about the standard of review, Justice Scalia said, in essence, "hey, Rome wasn't built in a day."[77] Early on, a consensus began to emerge, based on Justice Scalia's explicit rejection of some form of rational basis review, the refusal of the Court explicitly to embrace strict scrutiny and the *Heller* safe harbor listing presumptively lawful regulations, that some form of intermediate scrutiny was appropriate.[78] Lower courts then began to apply that test in various forms and upheld all the major regulations that came before them.[79] In just a few paragraphs, however, *Bruen* essentially overruled a decade's worth of Second Amendment jurisprudence and reopened previously-settled questions about the constitutionality of laws ranging from the prohibition of possession by individuals under a protective order to assault weapons bans to bans on high-capacity magazines.

Curiously, Justice Thomas went to great lengths in *Bruen* to portray the lower courts as the ones who got *Heller* wrong from the beginning. His characterization of *Heller*'s analysis as being of a piece with *Bruen*'s text-history-tradition approach is why we argue in this section that Justice Thomas's opinion is an attempt to retcon *Heller*.

In *Bruen*, Justice Thomas acknowledged that lower courts had adopted a "'two-step' framework . . . that combines history with means-ends scrutiny."[80] Then, almost casually, he knocked down the entire doctrinal edifice:

> Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important

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retconning of *Griswold v. Connecticut* from a case about the sacredness of marriage to, by the time of *Eisenstadt v. Baird* just a few years later, being about sexual freedom for all people, married or single.

[76] For an account of the oral argument, see Cottrol & Denning, *supra* note 27, at Ch. 6.

[77] *Heller*, 554 U.S. at 635 ("[S]ince this case represents our first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.").

[78] *See, e.g.*, 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, 1451-52 (2018) ("Courts, advocates, and scholars generally agree that some version of the two-part test predominates throughout the lower courts.") (footnote omitted).

[79] *Id.* at 1498 (noting that out of 1153 challenges to federal or state firearms law brought as of 2016, plaintiffs prevailed in only 69 cases).

[80] *Bruen*, 142 S. Ct. at 2125.

> interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[81]

While approving of the first step, which required the government to prove that the regulated activity fell outside the historical scope of the right, he argued that the second step—which ascertained how proximate the regulation was to the core of the right to keep and bear arms and how severe it burdened it—was "one step too many."[82] Rather, it was up to "the government" to "affirmatively prove that its firearms regulation is part of the historical condition that delimits the outer bounds of the right to keep and bear arms."[83]

Thomas claimed that the text-history-tradition approach was not only compelled by *Heller* but also was consistent with how the Court approached other constitutional rights.

In *Heller*, he wrote, "we began with a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language," which analysis yielded the conclusion that the Amendment guaranteed a right to individual arms possession uncoupled from military service.[84] "From there we assessed whether our initial conclusion was 'confirmed by the historical background of the Second Amendment.'"[85] An examination of the historical record confirmed what the text suggested. The historical record also yielded limitations on the right that were incorporated into the opinion, like the ban on wielding dangerous or unusual weapons.[86] The Court then

> assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition. Although we noted that the ban "would fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," we did not engage in means-end scrutiny when resolving the constitutional question. Instead, we focused on the historically unprecedented nature of the District's ban, observing that "[f]ew laws in the history of our Nation have come close to [that] severe restriction."[87]

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[81] *Id*.at 2126.
[82] *Id*.at 2127.
[83] *Id*.at 2127.
[84] *Id*.at 2127.
[85] *Id*.at 2127.
[86] *Id*.at 2128.
[87] *Id*.at 2128.

"*Heller*'s methodology," he argued, "centered on constitutional text and history. . . . It did not invoke any means-end test such as strict or intermediate scrutiny."[88] In fact, Justice Thomas claimed, "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[89] He further claimed that "*Heller* . . . specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt."[90] Justice Thomas then defended the text-history-tradition approach as simply what the Court did when interpreting other constitutional rights, giving the First and Sixth Amendments as examples.[91]

Several facts support our claim that *Bruen*'s characterization of *Heller* would qualify as a retcon. First, it is clear from cases like *American Legion v. American Humanist Association*,[92] *Dobbs v. Jackson Women's Health Organization*,[93] and *Bruen* itself that the text-history-tradition approach to interpretation seems part of a larger project to reorient the way the Court approaches some rights. One suspects many on the Court would embrace the opportunity to bring some methodological coherence to areas of law—substantive due process, for example—that have been widely-acknowledged as plagued by inconsistent reasoning. It would be helpful to Thomas to read backward into *Heller* this approach to give the appearance of continuity and consistency and to rebut the charge that these doctrinal changes were only instantiated after a change in Court personnel.[94]

There is other, persuasive evidence in both *Heller* itself as well as by the behavior of courts charged with implementing it that the opinion invited the application of some form tiered-scrutiny to resolve Second Amendment challenges.

It's certainly true that Justice Scalia didn't apply intermediate scrutiny, but *he didn't have to*. He explicitly rejected the rational basis approach as insufficiently

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[88] *Id.*at 2128–29.
[89] *Id.*at 2129.
[90] *Id.*at 2129.
[91] *Id.*at 2130.
[92] 139 S. Ct. 2067, 2087 (2019) (noting that in recent Establishment Clause cases, the Court has eschewed "a grant unified theory" in favor of "a more modest approach that focuses on the particular issue at hand and looks to history for guidance").
[93] 142 S. Ct. 2228, 2246 (2022) (noting that when the Court is asked to incorporate one of the Bill of Rights or recognize an unenumerated right "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'") (alterations in the original).
[94] *Cf. Dobbs*, 142 S. Ct. at 2349 ("Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.").

protective of an express constitutional right[95] and held that D.C.'s ordinance, under *any* remaining standard of review, would fail.[96] So what would have been the point of engaging the analysis? That's not the same as having rejected any form of tiered-scrutiny in toto. In addition, far from relying on history to provide a source for the limits on the right mentioned in *Heller,* contemporary commentators criticized Scalia for the opinion's safe harbor as being anachronistic and inconsistent with the opinion's otherwise originalist pretentions.[97] Moreover, Justice Scalia could have easily said explicitly that tiered scrutiny had no place in the application of the Amendment; instead he made reference to it even if he declined to adopt a particular tier.

The sheer breadth and depth of the consensus that *Heller* envisioned the application of some sort of familiar standard of review among judges and commentators suggest that Justice Thomas's characterization of *Heller* is disingenuous. There were variations among circuits regarding the standard of review, as well as disagreement about when strict scrutiny was appropriate, but all seemed to agree that the basic methodology was what *Heller* had in mind.[98] It is implausible to maintain, as Justice Thomas does, that *everyone* misread *Heller* so egregiously.

If everyone was getting *Heller* wrong, why did the Court sit on its hands for over ten years and allowed an entire body of Second Amendment doctrine to develop? It would not have necessarily had to reach the merits of any one case, it could have granted cert on the issue of the proper standard of review, reversed one of the circuit courts, and remanded for application of the proper standard of review, as the Court did in *Adarand Constructors, Inc.. v. Pena,*[99] in which it held that strict scrutiny was the appropriate standard of review for minority preference programs instituted by *either* the state or federal government.[100] Either the Court just sat and watched the errors pile up year after year—which would amount to an egregious waste of judicial resources—or Justice's Thomas's reimagining of *Heller* was not the contemporary understanding of it among members of the Court prior to *Bruen*.

Justice Thomas's claim that text-history-tradition is the predominant or primary means of protecting constitutional rights is extremely tendentious. His invocation of the First Amendment is particularly puzzling. It is true that the Court has resorted to history

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[95] *Heller*, 554 U.S. at 628 n.27.
[96] *Id.* ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to keep and use for the protection of one's home and family' . . . would fail constitutional muster.") (citation and footnote omitted).
[97] *See infra* notes 137-47 and accompanying text.
[98] *See* note 78 *supra* and accompanying text.
[99] 515 U.S. 200 (1995).
[100] *Id.* at 2117 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

when inquiring whether particular types of speech enjoy no First Amendment protection at all,[101] but the fundamental distinction in First Amendment doctrine remains that between content-based and content-neutral speech restrictions. The former are subject to strict scrutiny; the latter to intermediate scrutiny.[102] Justice Thomas himself wrote the recent majority opinion in *Reed v. Gilbert*,[103] in which the Court struck down a city sign ordinance that prohibited the placement of outdoor signs without a permit, but excepted twenty-three different categories of sign. The majority found the ordinance to be content-based and held that the city could not satisfy strict scrutiny.[104] Justice Thomas has joined a number of opinions in areas like free exercise[105] and equal protection[106] that employ tiered scrutiny, and has even complained on occasion that the Court failed to apply particular standards of review correctly.[107]

Finally, there is Justice Breyer's dissent in *Bruen*, which argues that it is the *majority* that is misreading *Heller*. Even had the majority adopted strict scrutiny (he seems almost wistful as he contemplates that path not taken), it would still be something that puts judges—lower court judges in particular—on familiar ground. Individual judges and three-judge appeals court panels will now be required under the Court's approach to be amateur historians on a whole range of issues that were settled for well over a decade and will now have to be relitigated.

C. Take Three: History, Tradition, Analogies, and the Underpants Gnomes

Justice Thomas posits that there will be some "fairly straightforward" applications of text and history that will provide relatively easy answers to particular questions.

> For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.

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[101] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 469-70 (2010) (rejecting cost-benefit approach to adding to the categories of unprotected speech; observing that current categories have *historically* been unprotected).
[102] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1., at 976 (5th ed. 2015) (describing as the "very core of the First Amendment" the proposition that "government may not regulate speech based on its content.").
[103] Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015).
[104] *Id.* at 171.
[105] Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2433 (2022) (Thomas, J., concurring).
[106] United States v. Vaello Madero, 142 S. Ct. 1539, 1544 (2022) (Thomas, J., concurring).
[107] Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (Thomas, J., dissenting).

> And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.[108]

Thomas acknowledges, however, that at some point text and history may run out, such as in "cases implicating unprecedented societal concerns or dramatic technological changes . . . ."[109] Those cases "may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[110] In such cases, he argues, the "historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. [D]etermining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"[111]

How is a judge to conduct this analogical inquiry? While disclaiming any attempt to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[112] For example, given that self-defense is at the core of the Second Amendment, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[113]

He explained that "[a]nalogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."[114] On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," but "[o]n the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[115]

Take the restriction on possession of firearms in "sensitive places," which *Heller* included it its list of presumptively lawful regulations. Thomas wrote that "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where

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[108] *Id.*at 2131.
[109] *Id.*at 2132.
[110] *Id.*at 2132.
[111] *Id.*at 2132.
[112] *Id.*at 2132–33.
[113] *Id.*at 2133.
[114] *Id.*at 2133.
[115] *Id.*at 2133.

weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions."[116] The lack of controversy meant it was safe to "assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[117]

He warned that it analogy had its limits. He wrote disapprovingly of New York's argument that sensitive places "where the government may lawfully disarm law-abiding citizens include all 'places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.'"[118] New York "defines the category of 'sensitive places' far too broadly." "[T]here is no historical basis," he observed wryly, "for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[119]

The first thing to note about Justice Thomas's explanation of how the analogical inquiry is supposed to work is that it seems merely to restate the features of tiered scrutiny. "Why" a regulation was put in places maps on to inquires into the strength of the government's interest in regulation; "how" serves as a proxy for the degree of fit. We're unsure how that differs significantly from the means-ends scrutiny that Thomas decries in the lower courts' approaches post-*Heller*.

The practical problems with falling back on analogical reasoning are myriad. Justice Breyer expressed fervent hope "that future courts will be able to identify historical analogues supporting the validity of regulations that address new technologies," but he feared "that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified."[120] However, he wrote, "[l]aws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems."[121] Further technological developments that "push[] our society ever further beyond the bounds of the Framers' imaginations," he continued, "will likely render "attempts at 'analogical

[116] *Id.*at 2133.
[117] *Id.*at 2133.
[118] *Id.*at 2133.
[119] *Id.*at 2134.
[120] *Id.*at 2181 (Breyer, J., dissenting).
[121] *Id.*at 2181 (Breyer, J., dissenting).

reasoning' will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable."[122]

Justice Thomas's application of his own methodology highlights the importance of the questions he leaves unanswered about it. First, is the problem of the historical baseline. As Justice Barrett pointed out in her concurring opinion, its unclear whether the reference point should be 1791 when the Second Amendment was ratified or 1868, the year the Fourteenth Amendment was ratified. That could make a difference because there were firearms restrictions in place by the 1870s not present at the time the Bill of Rights was ratified.[123]

Then there's the question of what would satisfy the *Bruen* test? Thomas acknowledges that Texas, West Virginia, and the western territories restricted the right to carry,[124] but dismisses those laws on several grounds. First, he characterizes them as outliers, that the nineteenth century are perhaps too late in time to provide insight into the scope of the Second Amendment, that they applied to a small percentage of the population, and were never subjected to judicial review.[125] He concluded:

> At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. . . . Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.[126]

His distinctions leave a lot of questions unanswered. What numerical threshold takes you out of outlier country? Why wouldn't late nineteenth century regulations be relevant, especially because it was during the debates over the Fourteenth Amendment that the

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[122] *Id.*at 2181 (Breyer, J., dissenting).
[123] *Id.*at 2163 (Barrett, J., concurring).
[124] *Id.*at 2153–54.
[125] *Id.*at 2153–56.
[126] *Id.*at 2156.

right to keep and bear arms was firmly associated with individual self-defense.[127] What is the relevance of the percentage of population covered by a proffered example of prior regulation? The comment about those laws not being subject to judicial review is curious because in Thomas's discussion of a ban on carry in sensitive places he gives the lack of legal challenge as a reason to presume such laws *were* part of history and tradition of regulation.[128]

Then there is the discussion of analogies. Why wouldn't this analogy work: in the twentieth and twenty-first centuries majorities in some states chose to make it difficult for persons to carry concealed weapons because that manner of arms carriage was terrifying or menacing to the populace? We're not suggesting that would be an especially strong analogy, but Thomas's opinion provides no definitive reason would not meet his "why" and "how" metrics.

The prescription of analogy to gap-fill when history and tradition "run out" is reminiscent of a famous *South Park* episode involving the business plan of the "underpants gnomes." In the episode, the characters become aware of gnomes who travel the world stealing underwear. Later it is revealed that their collection efforts are part of a business plan. As explained by the gnomes in a slide show, the plan has three phases: (1) Steal underpants; (2) ? ; (3) Profit. Given the number of questions about the analogical process left open in *Bruen*, we think you might (if somewhat uncharitably) say that the three phases of Second Amendment analysis post-*Bruen* are: (1) Consult text, history, tradition; (2) ? ; (3) Decision. Nevertheless, as we discuss below, many lower courts are attempting to follow *Bruen*'s injunction.

D. Take Four: The Fate of the Heller *Safe Harbor*

The Bush Administration caused a stir in *Heller* by filing a brief urging the Court to adopt intermediate scrutiny for analyzing the Second Amendment; pro-Second Amendment advocates were outraged.[129] Apparently, the Justice Department feared that laws like the ban on private ownership of most machine guns might not survive the strict scrutiny advocated by Dick Heller's lawyers.[130] As discussed above, most lower courts and commentators *thought* that's what the Court did, until the *Bruen* majority corrected them.[131]

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[127] *See, e.g.*, *McDonald*, 561 U.S. at 771-77 (reviewing the nineteenth century historical evidence that the right to keep and bear arms was closely associated with individual self-defense).
[128] *See* text accompanying notes 116-17, *supra*.
[129] Brief for the United States as Amicus Curiae, *District of Columbia v. Heller*, 2008 WL 157201, at *8 (2008).
[130] On the controversy surrounding the Solicitor General's participation in *Heller*, see ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 183-86 (2011).
[131] *See* Part I.B., *supra*.

Perhaps to further assuage fears that most gun laws were now vulnerable, Justice Scalia included what we elsewhere labeled the "*Heller* safe harbor."[132] Scalia wrote that the right was "not unlimited" and that "nothing in our opinion should cast doubt on longstanding prohibitions" listing "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 commerce sales of arms."[133] In a footnote, he stressed the list did "not purport to be exhaustive."[134] Scalia also noted that there was a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[135] So, what is to become of the *Heller* safe harbor and the other limiting presumptions in light of *Bruen*?

If Justice Thomas's treatment of the "sensitive places" exception he discussed when illustrating how to use analogies when history and tradition were exhausted is any indication,[136] then he would seem to be willing to retcon the safe harbor provisions as well. While this might work with some of those listed, others cannot so easily be squared with history and tradition.

Following *Heller*, Professor Carlton Larson surveyed the safe harbor exception and concluded that very little historical evidence existed to support them.[137] "The *Heller* exceptions," he wrote, "lack the historical grounding that would normally justify an exception to a constitutional right. Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources."[138] The exception was the exception for sensitive places,[139] which might be why Justice Thomas chose it to illustrate how courts can construct analogies. But bans on prohibitions for felons,[140] the mentally ill,[141] as well as commercial regulation[142] were on much more dubious historical footings.

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[132] Brannon P. Denning & Glenn H. Reynolds, *Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms, 60 HASTINGS L.J. 1245, 1247-60 (2009).
[133] *Heller*, 554 U.S. at 626-27.
[134] *Id.* at 627 n.26.
[135] *Id.* at 627.
[136] *See* text accompanying notes 116-17 *supra*.
[137] Carlton F.W. Lawson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1372 (2009).
[138] *Id.*
[139] *Id.* at 1177 ("The exception for sensitive places is probably the easiest of the exceptions to justify on strict originalist grounds.").
[140] *Id.* at 1376 ("[F]elon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment.")
[141] *Id.* ("One searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership.").
[142] *Id.* at 1378 ("I have been unable to identify any eighteenth-century American laws that specifically regulate commercial aspects of firearm sales.").

Nelson Lund likewise criticized the "presumptively lawful" exception in the safe harbor.[143] He argued that the bans on possession by felons and the mentally ill "lacked historical support" and were inconsistent with the self defense right the Court found at the core of the Second Amendment.[144] He argued that the sensitive places exception had no historical pedigree and was potentially open-ended.[145] Regulation of commercial transactions involving firearms? "Once again, Justice Scalia presents no historical evidence about the nature or even existence of pre-1791 commercial regulations."[146] Bans on dangerous and unusual weapons? "Justice Scalia educes exactly zero historical support for his claim that the original meaning of the Second Amendment covers only those arms that are in common civilian use at any given time."[147]

If Justice Thomas's examination of the sensitive places exception was meant to be an attempt to fold the *Heller* safe harbor into his text-history-tradition mode of analysis by suggesting they were the product of analogical reasoning properly done, it is telling that he chose the one exception that arguably has the strongest grounding in history. As Larson and Lund's critiques suggest, however, others listed in *Heller* will likely be in for rough sailing if Thomas's methodology is faithfully and consistently applied. However, we suspect that there is one constituency that will continue to find the list of exceptions useful: the lower courts. Lower court reactions to *Bruen* are the subject of our final take.

E. Take Five: Bruen *and the Lower Courts*

Justice Thomas concluded the section of *Bruen* with a profession of faith in the lower court judges that will be tasked with implementing the new interpretive paradigm *Bruen* lays out, writing that "[w]e see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims."[148] I suspect that lower court judges will take cold comfort in the majority's expression of confidence that they are up to the task, just as I doubt lower court judges will take comfort in Justice Thomas's disclaimer that no attempt was made in *Bruen* to make an "exhaustive survey" of the ways in which analogies could be made,[149] carrying as it does an implicit suggestion that in future cases all will be revealed. After all, *Heller* contained similar language about limits to the scope of the right to keep

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[143] Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).
[144] *Id.* at 1357.
[145] *Id.* at 1358 ("Were Americans forbidden to carry firearms and government buildings prior to 1791? Justice Scalia does not even pretends to make such a claim.").
[146] *Id.* at 1359.
[147] *Id.* at 1364.
[148] *Bruen*, 142 S. Ct. at 2134.
[149] *Id.*at 2132.

and bear arms.[150] The Court then retired to the clouds for over a decade, leaving the lower courts on their own, only to return in *Bruen* to dismantle all that the courts had erected in its absence.

Based on a sampling of the nearly two hundred cases that the lower courts have decided post-*Bruen*, one can discern several different reactions that range from seeming defiance to good-faith application to what David Pozen and Jessica Bullman-Pozen have termed "uncivil obedience," which one of us identified in an earlier work as a dialogue-forcing tool available to the judiciary as it is to other political actors.

We begin with two observations. First, it is at least dismissive, if not downright disrespectful, to invalidate a decade's worth of work during which the lower courts come to consensus about the appropriate analytical framework given the scant guidance from the Court.[151] As Justice Breyer expressed in his dissent, "[w]e do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade."[152] Especially vexing is the Court's lack of concrete guidance for the lower courts in the application of its new standard. This has produced a variety of reactions from the lower courts.

The second observation, judging from a survey of the post-*Bruen* cases is that the lower courts seem to have gotten the message that *Bruen* mandated a substantial[153]—but not total—break with the past. By contrast very few laws were invalidated after *Heller* and *McDonald*.[154] That the test prescribed by Justice Thomas has been understood as expanding the scope of the right itself might justify its eschewal of the lower courts' decades-long approach.

1. Invoking the Safe Harbor. By far, the lion's share of the post-*Bruen* cases involve felons seeking relief from indictment for or conviction of being in possession of a firearm.[155] Predictably, courts have tended not to oblige them, just as post-*Lopez* courts largely declined to provide relief to criminal defendants whose underlying offenses were

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[150] *Heller*, 554 U.S. at 599.

[151] Whether most of the lower courts applied that standard correctly is another issue; we think that many of them did not. But as noted *supra* text at note 78, the Court could have, at any time, taken a case to clarify how the standard *should* be applied, and should have. On the other hand, in many cases, "dismissiveness" was, to be honest, warranted by the quality of the work.

[152] *Bruen*, 142 S. Ct. at 2175.

[153] We haven't attempted a systematic analysis of all the lower court opinions, but hope to in future work, especially as more courts of appeals weigh in.

[154] *See* note 79, *supra*.

[155] *See, e.g.*, United States v. Goins, 2022 WL 17836677, at *10 (E.D. Ky.) (Dec 21, 2022); United States v. Minter, 2022 WL 10662252, at *6 (M.D. Pa.) (Oct. 18, 2022); United States v. Charles, 2022 WL 4913900, at *12 (W.D. Tex. 2022); United States v. Nevens, 2022 WL 17492196, at *3 (Aug. 15, 2022).

grounded in Congress's commerce power.[156] Acutely aware of the relatively recent exclusion of felons from those entitled to keep and bear arms,[157] some of these district courts fall back on the references to the right of "law abiding" citizens to keep and bear arms mentioned in *Heller*[158] and some language in the *Bruen* concurrences[159] as justifications for upholding the ban and refusing to quash indictments or reverse convictions.[160] A Texas district court adopted a slightly different approach; it argued that "the people" to whom the right was guaranteed did not include felons, and held up the disenfranchisement of felons[161] as an analogous restriction.[162] Similarly, a California district court denied a preliminary injunction sought against a state law prohibiting anyone other than a federally-licensed firearms dealer or importer from possessing machinery that is used to manufacture firearms holding that activity wasn't covered by the text of the Second Amendment.[163] "Try as you might," the court wrote, "you will not find a discussion of [self-manufacture of firearms and the right to purchase machinery necessary for self-manufacture] in the 'plain text' of the Second Amendment."[164]

2. Resistance. We use this term in different senses when discussing lower court decisions. One, courts might resist the fact of the *Bruen* decision itself or they might read the decision in a manner that resists adopting the logical conclusions of the decision's methodology. Resistance can also manifest itself in a desultory or bad faith application of *Bruen*. For example, despite not citing a single piece of evidence or engaging in any meaningful analysis, a Texas district court refused to dismiss an indictment brought

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[156] *See* Reynolds & Denning, *Revolution*, *supra* note 25, at 385-99 (discussing cases in which courts rejected Commerce Clause challenges to various federal criminal statutes).

[157] *See* text accompanying notes 137-47 *supra*.

[158] 554 U.S. at 635.

[159] *Bruen*, 142 S. Ct. at 2156 (Alito, J., concurring); *Id.* at 2161 (Kavanaugh, J., concurring); *Id.* at 2162 (Barrett, J., concurring).

[160] *See, e.g.*, *Minter*, 2022 WL 10662252, at *6:

> Where Bruen did not overturn, abrogate, or otherwise suggest that the longstanding prohibitions identified in *Heller*, including the prohibition of possession of firearms by felons, may no longer be lawful, this Court is bound by the Supreme Court's decision in *Heller*, its progeny, and the Third Circuit cases addressing the constitutionality of § 922(g)(1).

See also 2022 WL 17492196, at *2 ("[T]he Supreme Court's earlier decision in *District of Columbia v. Heller* described the core of the Second Amendment as the right of '*law-abiding*, responsible citizens to use arms.' . . . The Court will not part ways with this authority.").

[161]

[162] *Charles*, 2022 WL 4913900, at *11 ("[I]f society can constitutionally exclude certain groups from 'the political community' in other constitutional provisions, why would the Second Amendment be any different? . . . [T]he Court's opinion here is [that] there is a historical basis for excluding felons from constitutional rights.") (footnote omitted).

[163] Defense Distributed v. Bonta, 2022 WL 15524977, at *4 (C.D. Cal.) (Oct. 21, 2022).

[164] *Id. See also* Rigby v. Jennings, 2022 WL 4448220, at *6 (D. Del.) (Sept. 23, 2022) (upholding under the safe harbor prohibition on sale of "untraceable" guns; "the Court finds that these regulations impose conditions on the sale and transfer of arms that do not burden Plaintiffs' Second Amendment rights because they do not bar the sale of any type of weapon or impose onerous regulations on those wishing to distribute unfinished firearm frames and receiver").

under 18 U.S.C. § 922(g)(3), which prohibits gun possession by a user of or one who is addicted to illegal drugs.[165] The judge simply wrote, "[t]his Court, like those before it, finds that the government has satisfied its burden of demonstrating that the regulation is consistent with this Nation's historical tradition of firearm regulation."[166]

Of a similar piece is the "analysis" of an Oklahoma district court which refused to dismiss the indictment of a defendant convicted of being a domestic violence misdemeanant in possession of a firearm.[167] Despite admitting that the government's arguments "do not address a history of firearm possession by domestic violence offenders" and "the paucity of evidence that American traditions reached within the home to interfere with domestic relationships, particularly the marital relationship," the court nevertheless let the indictment stand. The judge reasoned that the "government's reliance on general historical tradition is sufficient to satisfy its burden to justify the firearm regulation § 922(g)(9)."[168] And that "general historical tradition"? The disarmament of felons, whose historical pedigree, as noted above, is far from well-established.[169]

Despite *Bruen*'s clear direction that it is the government's burden to establish that the regulation falls within text-history-tradition,[170] an Oregon district court used the elements for granting a preliminary injunction[171] to flip the standard of review and deny an injunction against a raft of state gun regulations on the ground the plaintiffs had failed to establish a likelihood of success on the merits.[172] An Oregon initiative imposed new regulations that required a permit to purchase firearms and banned the purchase and use of magazines capable of accepting more than ten rounds.[173] Plaintiffs sought a temporary restraining order and a preliminary injunction of the new regulations. The judge conceded that "[t]he Second Amendment covers . . . items 'necessary to use' . . . firearms [and] [l]ike bullets, magazines are often necessary to render certain firearms operable."[174]

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[165] United States v. Sanchez, 2022 WL 17815116, at *3.
[166] *Id.* That was a secondary rationale; the court's main reason for refusing to dismiss the indictment was because "as applied, the language of Section 922(g)(3) limits only persons that are not law-abiding from obtaining firearms and thus does not cover conduct protected by the Second Amendment"); *cf.* text accompanying notes 159-62 *supra*.
[167] 18 U.S.C. § 922(g)(9); United States v. Jackson, 2022 WL 3582504 (W.D. Okla.) (Aug. 19, 2022).
[168] *Id.* at *3.
[169] *See text accompanying* notes 137-47, *supra*.
[170] *See supra* text accompanying note 81.
[171] *See, e.g.,* Winter v. National Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").
[172] Oregon Firearms Federation, Inc. v. Brown, 2022 WL 17454829 (D. Oregon) (Dec. 6, 2022).
[173] *Id.* at *1.
[174] *Id.* at *9. *Cf.* Glenn Harland Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 SO. CAL. L. REV. 247, 251 (2012) ("[P]unitive controls on ammunition, designed to make gun ownership or shooting prohibitively expensive or difficult, would be unlikely to pass constitutional muster.").

But she held that the plaintiffs had not shown "that magazines specifically capable of accepting more than ten rounds of ammunition are necessary to the use of firearms for self-defense."[175] Nor had they shown that "magazines capable of accepting more than ten rounds of ammunition are firearms 'in common use today for self-defense' and thereby covered by the plain text of the Second Amendment."[176] These statements are especially puzzling because most pistols sold in the U.S. are equipped with magazines holding between ten and seventeen rounds.[177] The judge acknowledged courts in other circuits had held otherwise, but noted those were not binding authority.[178] The court held that because such firearms were more akin to military than civilian weapons, their regulation was in keeping with "a historical tradition of regulating private military organizations."[179]

The Ninth Circuit had been stubbornly resistant to the implementation of *Heller*. Anytime a three-judge panel struck down a regulation on Second Amendment grounds, the case would be reheard *en banc* and reversed.[180] No surprise then that its judges' reaction to *Bruen* would be characterized by foot-dragging, if not outright defiance. In challenges to the California assault weapons ban and Hawaii's "may issue" concealed carry law that had been under litigation for over a decade, the Ninth Circuit remanded both to the district courts instead of applying the *Bruen* standard itself.[181] In both cases, a dissenting judge criticized the decision.

In the Hawaii case, Judge O'Scannlain—who was the subject of the en banc reversal in the pre-*Bruen* days[182]--argued the actions of the court were particularly egregious because the Supreme Court had vacated and remanded its decision upholding the state law for reconsideration in light of *Bruen*.[183] After explaining why Hawaii's may issue regime was unconstitutional after *Bruen*,[184] O'Scannlain concluded,

> We are bound, now, by *Bruen*, so there is no good reason why we could not issue a narrow, unanimous opinion in this case. The traditional justifications for

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[175] 2022 WL 17454829, at *9.
[176] *Id.* at 10.
[177] Matthew Larosiere, *Losing Count: The Empty Case for "High Capacity" Magazine Restrictions*, CATO INSTITUTE CENTER FOR CONSTITUTIONAL STUDIES LEGAL POLICY BULLETIN, July 17, 2018, at 3, available at https://www.cato.org/sites/cato.org/files/pubs/pdf/legal-policy-bulletin-3-updated.pdf (last visited Jan. 23, 2023).
[178] *Id.*
[179] *Id.* at 14 (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).
[180] *See, e.g.*, McDougall v. Ventura Co., 23 F.4th 1095 (9th Cir. 2022) (invalidating COVID restrictions that closed gun shops; *held*, order violated the Second Amendment), *vacated by* McDougal v. Ventura Co., 26 F.4th 1016 (9th Cir. 2022) (en banc).
[181] Young v. Hawaii, 45 F.4th 1087 (9th Cir. 2022); Rupp v. Bonta, 2022 WL 2382319 (9th Cir. 2022).
[182] Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc).
[183] *Young*, 45 F.4th at 1090 (O'Scannlain, C.J.., dissenting) ("[T]oday, we decline to give further consideration to the question presented to us and we decline even to deal with it.").
[184] *Id.* at 1090-93 (O'Scannlain, C.J., dissenting).

> remand are absent here. The issue before us is purely legal, and not one that requires further factual development. The majority does not explain, nor can it justify, its decision to remand this case to the district court without any guidance. Yet in its terse order and unwritten opinion, the majority seems to reveal a hidden rule in our Circuit: Second Amendment claims are not to be taken seriously. I would prefer to apply the binding decisions of the Supreme Court to the case at hand.[185]

In addition to being unjustified, remand "waste[s] judicial resources by sending the parties back to square one at the district court" and force the plaintiffs who "have waited a decade to resolve this litigation … to wait even longer."[186]

The dissenting judge in the assault weapons challenge likewise complained that "[w]ith a clear legal standard now in hand, we should have ordered supplemental briefing to further this case along" by ascertaining "the parties' position on whether our three-judge panel could have resolved this case based on *Bruen*."[187] Like Judge O'Scannlain, Judge Bumatay complained that remand "may just prolong the inevitable as we will eventually have to decide this case—adding unnecessary delays and expenses for the parties."[188]

3. Good faith Application. Despite the uncertainties and difficulties associated with *Bruen*'s approach, there are a number of judges who seem to be making a good faith attempt to apply *Bruen*. In fact, given our studies of lower court reception of *Lopez* and *Morrison*, then *Heller*, we were pleasantly surprised to see how often—relative to those earlier cases—the courts came down on the side of the Second Amendment. While it is unclear whether these cases will survive appeal, it does suggest that text-history-tradition is not entirely beyond the institutional capacity of the lower courts.

Some courts, for example, seem to be heeding the notion that the plain text of the Second Amendment can answer some questions fairly easily. The Third Circuit recently held that the refusal of police to return a weapon seized from a defendant's parents during an ongoing investigation violated their Second Amendment rights.[189] The plaintiffs' son was convicted of capital murder for shooting two Pennsylvania State Troopers and killing one. The police executed a warrant and seized multiple firearms, none of which was the weapon used in the ambush.[190] Following the son's apprehension, arrest, and conviction,

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[185] *Id.* at 1093-94 (O'Scannlain, C.J., dissenting).
[186] *Id.* at 1094 (O'Scannlain, C.J., dissentinig).
[187] *Rupp*, 2022 WL 2382319, at *1 (Bumatay, C.J., dissenting).
[188] *Id.* (Bumatay, C.J., dissenting).
[189] Frein v. Pennsylvania State Police, 47 F.4th 247 (3d Cir. 2022).
[190] *Id.* at 250.

the police refused to return the weapons and the parents state court motion to have the guns returned was denied.[191] In his opinion, Judge Bibas observed that the use of the word "keep" in the Second Amendment implied a right to retain weapons lawfully owned. "[T]he Second Amendment," he wrote, "prevents the government from hindering citizens' ability to 'keep' their guns. . . . The seizure under a valid warrant immunized the government for the duration of the criminal case. But now that the case is over, the government must either get another warrant or return the property."[192] For good measure, the court noted that the Second Amendment itself was rooted in the Framers' understanding of English history and Charles II's disarming of those deemed "dangerous" and the framers of the Fourteenth Amendment's desire to protect newly freed slaves from being arbitrarily disarmed.[193] The parents had been convicted of no crime and none of the weapons seized had been used in crimes, so no historical exceptions to the right to keep arms was available to the police.[194]

In other cases, a deeper dive into history and tradition has been necessary. Upholding a felon-in-possession conviction, for example, a Kentucky district court judge refused to take the route taken by other courts and define "the People" whose right to keep and bear arms to exclude felons.[195] The court also considered and rejected the argument that because felons were treated so harshly criminally and civilly under English common law, disarming them was justified as a lesser-included penalty. That view, the judge wrote relies "on the faulty premises that the colonies fully adopted these practices."[196] Ultimately, the judge concluded that English common law *did* historically disarm persons who were thought to present a danger to the community.[197] Because the colonies and later states disarmed slaves and Native Americans, he concluded by analogy that the presence of those laws "do represent a historic tradition of disarming groups that the legislature views as 'threaten[ing] the public safety."[198] The defendant's multiple DUIs and his drug crimes satisfied that he fell into that category.[199] While we question whether it is reasonable to equate all "felons" with "persons who threaten the public safety," the court's effort to work with the historical materials and search for traditions

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[191] *Id.*
[192] *Id.* at 254.
[193] *Id.* at 255.
[194] *Id.* at 256.
[195] United States v. Goins, 2022 WL 17836677, at *6 (E.D. Ky.) (Dec. 21, 2022) ("[T]his Court is unconvinced that the preliminary, textual analysis of the phrase 'the people' is the appropriate point to analyze the scope of the Second Amendment. . . . If some people fall entirely outside of the Second Amendment's scope, then no state action would is required to disarm them.").
[196] *Id.* at *9.
[197] *Id.* at *10.
[198] *Id.* at *11.
[199] *Id.* at *13.

and analogies is superior to other courts' efforts to grasp at any argument, no matter how tendentious, to uphold the felon-in-possession convictions.[200]

By contrast, a Texas district court dismissed the indictment of someone for receipt of a firearm while under indictment.[201] It rejected the government's attempt to analogize to the felon-in-possession statute, noting they were essentially of the same vintage; and ban on possession favorably mentioned in *Heller* was dicta.[202] Conducting his own survey of English common law through the 1938 Federal Firearms Act, the judge concluded that "very few states prohibited felons—or any other type of person for that matter—from possessing a firearm."[203] Moreover, the judge continued, "even more unclear—and still unproven—is a historical justification for disarming those indicted, but not yet convicted, of any crime."[204] The ability of a person under a surety bond to retain the weapon in question was of little use as an analogy.[205] The court finally rejected the possibility that exclusion of certain groups of people from "the people" entitled to exercise certain constitutional rights was of little help because "unlike the historical tradition of excluding felons or violent actors from the rights of 'the people,' little evidence supports excluding those under indictment in any context."[206]

It is clear from other early cases that challengers who had previously lost potentially benefit from *Bruen*, such as minors who wish to carry handguns,[207] and that newly minted gun regulations designed to evade *Bruen*, such as New York's attempts to limit the ability to carry on private property or in a "sensitive place,"[208] which the state has chosen to define capaciously, will be met with skepticism from courts aiming for a good faith application of *Bruen*.

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[200] *See supra* notes 155-64 and accompanying text.
[201] 18 U.S.C. § 922(n); United States v. Quiroz, 2022 WL 4352482 (W.D. Tex.) (Sept 19, 2022).
[202] *Quiroz*, 2022 WL 4352482, at *5.
[203] *Id.* at *7.
[204] *Id.*
[205] *Id.* at *8.
[206] *Id.* at *10.
[207] *Compare* National Rifle Ass'n of America, Inc. v. McCraw, 719 F.3d 338, 348-49 (5th Cir. 2013) (ban on concealed carry by minors did not violate the Second Amendment); National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 203 (5th Cir. 2012) (upholding ban on handgun purchase by minors) *with* Firearms Policy Coalition, Inc. v. McCraw, 2022 WL 3656996, at *11 (N.D. Tex.) (Aug. 25, 2022) ("[T]he Court concludes Texas has failed to produce sufficient historical analogues from the Founding Era *and* the Reconstruction Era to support its statutory prohibiton.").
[208] *See, e.g.*, Greg B. Smith, Josefa Velasquez & Reuven Blau, *After* Bruen, *New York Lawmakers Plan to Go 'Right Up to the Line' to Restrict Gun Access, But Do Their Proposals Cross It?,* THE CITY, June 29, 2022, available at https://www.thecity.nyc/2022/6/29/23188987/bruen-new-york-lawmakers-restrict-gun-access-legal (last visited Feb. 3, 2023).

One New York district court judge has already issued a temporary restraining order and a preliminary injunction against portions of New York's post-*Bruen* restrictions that prohibited possession of firearms in houses of worship and that prohibited possession on private property without the express permission of the owner, respectively.[209] In the former case, the judge rejected the argument that there was a "tradition" of barring the carrying of weapons in churches based on four states' laws passed in the late nineteenth century. "The notion of a 'tradition' is the opposite of one-offs, outliers, or novel enactments. Rather, 'tradition,' requires 'continuity.'"[210] It concluded that "a handful of spasmodic enactments involving a small minority of jurisdictions covering a small minority of population" was insufficient to meet the government's burden to justify the regulation.[211] As for the latter, the judge acknowledged that private property owners have had the right to exclude persons from their property, but, he emphasized "that right has always be one *belonging to the private property owner*—not to the State. It is the property owner who must exercise that right—not the State."[212]

4. Uncivil Obedience. In an earlier article, one of us[213] argued that judges can engage in what Jessica Bulman-Pozen and David Pozen termed "uncivil obedience,"[214] which they defined as

> [A] deliberate, normatively motivated act or coordinated set of acts ... that communicates criticism of a law or policy ... with a significant purpose of changing or disrupting that law or policy ... in conformity with all applicable positive law ... in a manner that calls attention to its own formal legality, while departing from prevailing expectations about how the law will be followed or applied.[215]

Uncivilly obedient lower court judges "take the Supreme Court's opinions at face value and pursue the logic of the opinions to their ends. . . . The Court is then faced with the choice of adopting the lower court's reading, possibly confirming the transformative nature of its earlier decision, or trimming its sails and charting a more modest doctrinal course."[216] After digesting *Bruen*, we suspected that as courts grasped the opinion's

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[209] Christian v. Nigrelli, 2022 WL 17100631 (W.D.N.Y.) (Nov. 22, 2022); Hardaway v. Nigrelli, 2022 WL 11669872 (W.D.N.Y.) (Oct. 20, 2022).
[210] *Hardaway*, 2022 WL 11669872, at *15.
[211] *Id.* at *16 (holding plaintiffs were likely to succeed on the merits of their claim); *see also id.* at *16-*17 (finding that plaintiffs met the remaining requirements for injunctive relief).
[212] *Christian*, 2022 WL 17100631, at *9.
[213] Brannon P. Denning, *Can Judges Be Uncivilly Obedient?* 60 WM. & MARY L. REV. 1 (2018).
[214] Jessica Bulman-Pozen & David Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015).
[215] *Id.* at 820.
[216] Denning, *supra* note 213, at 14.

implications, judges who were opposed to an expansion of gun rights would take the opportunity to play the role of uncivil obedient. We were not wrong.

One Mississippi district judge noted the disagreement among historians about the fidelity of the Supreme Court's decisions to the historical record.[217] "In reviewing the briefing and the authorities presented in this case, and after conducting its own research, this Court discovered a serious disconnect between the legal and historical communities."[218] He complained of a lack of institutional competence to implement *Bruen* and threw shade at the institutional competence of the Supreme Court as well.

> This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform. . . . And we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication.[219]

The judge's solution? "Not wanting itself to cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter."[220] Suggesting that the current information available might be tainted,[221] he concluded that "[a]n expert may help the Court identify and sift through authoritative sources on founding-era firearms restrictions."[222]

This strikes us as a rather stiff-necked response that implies dissatisfaction with *Bruen* (and *Heller* as well). [Should we mention Bellesiles here as evidence that "professional historians" may be a questionable source of wisdom?] Other judges seem to have found a way to decide cases without appointing expert historians to testify. While Rule 706[223] provides court-appointed expert witnesses, in an area as hotly contested as gun regulation, color us skeptical that a neutral historian would be available.[224]

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[217] United States v. Bullock, 2022 WL 16649175, at *2 (S.D. Miss.) (Oct. 27, 2022).
[218] *Id.*
[219] *Id.* at *1.
[220] *Id.* at *3.
[221] *Id.* ("This Court is acquainted with the historical record only as it is filtered through decisions of the Supreme Court and the Courts of Appeals.").
[222] *Id.*
[223] Fed. R. Evid. 706.
[224] *See* Thomas M. Crowley, *Help Me Mr. Wizard! Can We Really Have "Neutral" Rule 706 Experts?* 1998 DET. C. L. MICH. ST. U. L. REV. 927.

One Indiana district court left no doubt that it was engaged in uncivil obedience in its opinion dismissing the indictment of a defendant who falsely stated he wasn't under felony indictment when purchasing a gun.[225] The defendant argued that 18 U.S.C. § 922(n)—which prohibits receipt of a firearm by one under indictment—was unconstitutional.[226] The judge agreed that it was, noting that the government could show that criminalization of receipt of a firearm by someone under indictment dated back only to 1938.[227] It rejected the government's argument that just as surety laws were intended to provide some check on potentially dangerous persons, banning receipt during the "volatile period" of indictment served a similar function. First, surety laws didn't require surrender of a weapon; and second, an person under indictment isn't barred from *possessing* a firearm if she acquired it prior to indictment.[228] "Under the new Second Amendment standard," the judge concluded, "§ 922(n) is unconstitutional."[229] Because of that fact, moreover, the defendant could not be convicted of lying about his being under indictment because § 922(n)'s unconstitutionality rendered "his false statement . . . immaterial."[230]

The judge concluded, however, with this extraordinary statement, which is worth quoting at length.

> This opinion was drafted with an earnest hope that its author has misunderstood [*Bruen*]. If not, most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional. For one constitutional reason or another, a similar fate has befallen several other laws that Congress adopted with beneficent purposes. But unlike those instances, the decimation of the nation's gun laws would arise from an assumption that our leaders and ratifying legislators in the late 1700s didn't foresee that their descendants might need a different relationship than the founders had between the federal government and the right to bear arms. Yet a glance at the Constitution they were amending shows that they could foresee the growth in population that would change the number of representatives to be elected, that future members of Congress might need higher pay, and that future states might aspire to join the union.

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[225] 18 U.S.C. § 922(a)(6); United States v. Holden, 2022 WL 17103509 (N.D. Ind.) (Oct. 31, 2022).
[226] *Holden*, 2022 WL 17103509, at *2.
[227] *Id.* at *3 ("That Congress limited firearm use by persons under indictment as far back as 1938 doesn't show that § 922(n) is constitutional. . . . From 1791 to 1938 is wide enough a gulf that the Federal Firearms Act of 1938 doesn't shed much light on the original public meaning of the Second Amendment.").
[228] *Id.* at *4.
[229] *Id.*
[230] *Id.* at *7.

> The United States Constitution, as amended and as imperfect as it was, is the legacy of those eighteenth-century Americans; it insults both that legacy and their memory to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways.
>
> The role of a United States District Court is to apply the law as understood by the United States Supreme Court; today's ruling recognizes that role. But the author of this opinion retains hope that he hasn't accurately grasped the Supreme Court's understanding of the Second Amendment.

It's difficult to imagine a judicial statement that more clearly reflects the four criteria—conscientiousness, communicativeness, reformist intent, legality, and legal provocation—Bulman-Pozen and Pozen use to identify uncivil obedience. It is *conscientious* in that the judge's conclusion is "rooted in genuine belief about right and wrong . . . deployed to achieve lasting reform."[231] It definitely is *communicative* in the sense that it "disapprove[s] of a law or policy."[232] It displays *reformist intent* in its quite explicit aspiration to see the law develop in a direction other then where he thinks *Bruen* compels courts.[233] The *legality* is likewise obvious: the judge made it clear his decision was compelled by the law as it stands after *Bruen*.[234] It's also *legally provocative* because the result—potentially dangerous people under indictment can go out and purchase weapons—likely strikes "others as jarring or subversive at least in part *because of its very attentiveness to law*."[235]

In his earlier article, Denning speculated that because "[u]ncivil obedience permits dissent from within the law's four corners and allows parties who engage in it to overcome asymmetries in power," those features "might make uncivil obedience especially tempting to lower court judges operating in a hierarchical judicial system."[236] That article looked at courts of appeals, but Denning speculated that it might be a technique available to district courts, though because of the possibility of reversal by the courts of appeals, any impact on the Supreme Court would be more indirect or mediated.[237] We suspect that we are likely to see more uncivil obedience from lower courts—both district courts and courts of appeals—in the future. In fact, if district courts

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[231] Bulman-Pozen & Pozen, *supra* note, at 821.
[232] *Id.* at 822.
[233] *Id.*
[234] *Id.* at 824 ("This criterion requires that authoritative directives be followed rather than flouted, obeyed rather than disobeyed.").
[235] *Id.* at 825.
[236] Denning, *supra* note 213, at 39.
[237] *Id.*

are in the vanguard, it might encourage courts of appeals to follow suit.[238] If they do, that will be one more reminder that the lower courts are not without tools to engage in dialogue with the U.S. Supreme Court and that our federal judicial system is not as rigidly hierarchical as the formal structure would suggest.

Conclusion

How much less hierarchical? Perhaps a lot less so. In *Bruen* the Supreme Court largely reversed a decade of lower court jurisprudence. But, as noted, it took rather a long time to get around to doing so. (It's hard to fault the author of the *Bruen* majority opinion, Clarence Thomas, for this, given that he repeatedly chided his colleagues for denying *certiorari* in second amendment cases, but fair to fault the Court as a whole.) In the *Lopez* line of cases, the Supreme Court never did bring the lower courts into line with the principles it announced in *Lopez* and its follow-up case of *United States v. Morrison.* It's partly a function of numbers. As Reynolds wrote nearly twenty years ago:

> Although the Court is stronger in relation to the other branches than it was when *Marbury* was decided, it is probably less important in the grand scheme of things, which makes *Marbury* less important as well. Lower courts were few in the *Marbury* era, but now they are plentiful.
>
> The Supreme Court's caseload continues to fall, with the Court producing 76 signed opinions last year, down from 129 thirty years before. And this drop has occurred despite a dramatic growth in the number of opinions issued by lower federal courts and state supreme courts. In the twelve months ending September 30, 2002, the regional Courts of Appeals decided 27,758 cases on the merits, compared to a mere 777 for the year ending March 31, 1973. The result is that, as a percentage of the whole, virtually no lower-court opinions are reviewed by the Supreme Court. A given opinion in a trial court, in fact, is probably less likely to see Supreme Court review than the trial judge issuing it is to be struck by lightning.[239]

That mismatch has not improved. Though the Court can, as it has in *Bruen*, issue instructions to the lower courts, its ability to supervise their work product is sharply

[238] *Id.* at 57-58 (suggesting institutional reasons why uncivil obedience is not more common among courts of appeals).
[239] Glenn Harlan Reynolds, *Marbury's Mixed Messages,* 71 TENN. L. REV. 303, 305-06 (2004) (citations omitted).

limited.[240] In practice, lower courts have considerable ability to resist the Supreme Court's priorities and directions, should they so desire.

Will they do so in this case? Stay tuned for the results of our follow-up study of lower-court behavior post-*Bruen.* But to echo a theme that both of us have sounded, both separately and together, the lower court response may be as important as the Supreme Court action itself, yet likely to receive much less attention.

[240] Granted, the Court has tools other than full-length written opinions – summary reversals, for example – but even there the burden upon justices' time and attention is substantial.