Dangerous, but not Unusual: Mistakes Commonly Made by Courts in Post-Bruen Litigation

MARK W. SMITH*

TABLE OF CONTENTS

* Mark W. Smith is a Visiting Fellow in Pharmaceutical Public Policy and Law in the Department of Pharmacology, Oxford University and a Distinguished Scholar and Senior Fellow of Law and Public Policy, Ave Maria School of Law. He hosts the Four Boxes Diner YouTube Channel (https://www.youtube.com/@TheFourBoxesDiner), which addresses Second Amendment scholarship, history and issues, and whose educational videos have been viewed over 37 million times. His scholarship has been cited by federal courts and by attorneys before the United States Supreme Court in *NYSRPA* v. *Bruen* and in *United States* v. *Rahimi*. He is also a graduate of the NYU School of Law.

INTRODUCTION

When the U.S. Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*, it provided the lower courts with a detailed roadmap to ensure proper application of the text-first and history-second methodology employed by the Court in the Second Amendment context since *District of Columbia v. Heller*. Yet notwithstanding the Court's explicit directions, many lower courts fail to follow *Bruen* and either take a wrong turn or implement their own shortcuts when deciding constitutional challenges to modern-day firearm restrictions. Some of these cases arose as challenges to gun control laws enacted pre-*Bruen*; other cases are challenges to laws enacted after *Bruen* and in seeming defiance of that decision. This article seeks to clarify some of the confusion that has arisen *post-Bruen*, and to explain how the Supreme Court's clear reasoning and instructions in *Bruen*—and *Heller* before it—provide direct and simple guidance that lower courts are bound to follow in cases implicating the constitutional right to bear arms.

At the outset, the *Bruen* decision marks a dramatic move by the Supreme Court to put Second Amendment jurisprudence back on the right track. Following the *Heller* decision in 2008, which embraced an originalist text-first, history-second interpretive approach, many lower courts declined to follow *Heller*'s originalist methodology. Instead, those courts imported interest balancing tests, such as intermediate scrutiny, from the context of the First Amendment. By balancing the government's asserted interest in "public safety" against the degree that a law infringes on the right to keep and bear arms, it was possible to guarantee that in virtually every case the government would win, and fundamental constitutional rights would be eroded. That happened even though *Heller* expressly rejected interest-balancing.

Fourteen years later, *Bruen* made it clear beyond any doubt that interest balancing cannot be used to decide Second Amendment cases. It instructed that the plain text of the Second Amendment must be faithfully followed, and that the government bears the burden to justify any modern regulations, if it can, using historical analogue laws. In applying *Bruen*, the Court in *United States v. Rahimi* again rejected interest-balancing as an acceptable Second Amendment framework for the lower courts to apply.

Part I of this article identifies the principles and holdings to be followed in all Second Amendment cases faithfully applying *Heller's* and *Bruen's* text-first and history-second methodology. It also describes what the Court meant when it referenced the Second Amendment's "unqualified command."

Part II discusses the burden imposed on the government to justify a modern firearms law once the plain text of the Second Amendment covers an individual's conduct. Some courts pay lip service to the government's burden while others erroneously place the burden on the Second Amendment plaintiff, or improperly elevate historical questions to the textual level of the *Bruen* analysis. But *Bruen* instructs repeatedly that the government bears the burden to prove the existence of a robust regulatory historical tradition justifying its regulation of the right to keep and bear arms.

Part III identifies the constitutional fork in the road that lower courts will encounter as they apply *Bruen's* text-first and history-second methodology. This fork arises *after* a determination is made that the Second Amendment presumptively protects the conduct being regulated by a modern firearms restriction, but *before* a court engages in any of the historical analysis required under *Bruen.* It is at this juncture that the lower courts must ask whether the Supreme Court itself has already done the necessary historical research and analysis, and formulated a specific constitutional test to be applied. If the answer is yes, then the lower court's analysis must be controlled by that specific test. For example, in cases challenging arms-ban laws, the lower courts need only determine whether the government has met its burden under the "in common use" test set forth by the Court in *Heller* that governs such challenges. In cases where the Supreme Court has not already performed the historical spadework and articulated the applicable constitutional test, the government must perform the historical legal work necessary to prove that its modern firearms regulation does not tread on the Second Amendment.

To meet its burden, the government must come forward with a sufficient number of analogous historical firearm regulations. It cannot meet its burden through imaginative historical narratives, or amorphous general understandings about dangerousness or preserving the peace. Nor can it meet its burden by citing commentaries, anecdotes, or newspaper articles about laws that could have been passed but weren't, or by submitting minutes from state ratifying conventions.

Part III summarizes the rules established by *Bruen* that the lower courts must follow when evaluating the quality of historical analogues proffered by the government. This part concludes with a discussion of the proper standard to be applied when evaluating such analogues. Here, the lower courts must decide whether the government's proposed historical analogues should be evaluated under the considerably tougher "distinctly similar" standard or whether reasoning by analogy will be permitted to determine whether proposed historical analogues are "relevantly similar" to a modern gun law.

Part IV of the article summarizes the various types of Second Amendment challenges being litigated post-*Bruen* in the courts, and the constitutional questions they present.

Part V addresses some of the basic errors the lower courts are making after *Bruen*, with an emphasis on arms-ban cases, cases regarding who can possess or carry weapons, and lawsuits over where one can carry.

I. PLAIN TEXT ANALYSIS: THE SECOND AMENDMENT'S UNQUALIFIED TEXTUAL COMMAND

The Constitution's text is the highest legal norm in our system of government; it is the supreme law of the land. And as the Supreme Court put it in *Bruen*, the Second Amendment itself contains an "unqualified command."[1] Thus, the first task in interpreting that command is to examine its plain text. Fortunately, the Supreme Court has already defined (expansively) almost every term found with that amendment's text—thus eliminating the need for lower courts to crack open Founding-era dictionaries.

Bruen requires lower courts to follow the "plain text" of the Second Amendment, which requires being able to answer at least three textual questions:

- whether the plaintiffs are "part of 'the people' whom the Second Amendment protects,"
- whether their proposed course of conduct is encapsulated by the definition of the verbs "keep and bear," and
- whether the implements being kept or borne are "arms," which "extends, prima facie, to all instruments that constitute bearable arms."[2]

The Supreme Court has defined all of the relevant terms in the operative clause of the Second Amendment, except for "infringed."[3] "The people" means, in general, "all Americans."[4] *Heller* approved the following language for who constitutes "the people":

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. . . [and it] refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[5]

---

1. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17.

2. *Bruen*, 597 U.S. at 19, 28 and 32. *See, e.g.,* Antonyuk v. Hochul, 639 F. Supp. 3d 232, 297 (N.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom.*, Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023) (court finds that "the Second Amendment's plain text covers the conduct in question: carrying (or applying for a license to carry) a concealed handgun in public for self-defense"; plaintiff "is part of 'the People' protected by the amendment"; and "the regulated conduct (i.e., bearing a handgun in public for self-defense falls under the phrase 'keep and bear'").

3. Two Courts of Appeals recently defined "infringe" as "to hinder," which encompasses lesser burdens on the right even if those burdens do not destroy the exercise of the right. *See* Frein v. Pa. State Police, 47 F.4th 247, 254 (3d Cir. 2022); Maryland Shall Issue, Inc. v. Moore, 86 F.4th 1038, 1044 n.8 (4th Cir. 2023). This makes sense because commonly used dictionaries relied on by *Heller* defined "to infringe" as meaning "to hinder" or "to destroy." *To Infringe*, SAMUEL JOHNSON, 1 DICTIONARY OF ENGLISH LANGUAGE 1101 (4th ed. 1773); *see also Infringe*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 872 (1828) (defining "infringe" as "[t]o destroy or hinder"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (cited in *District of Columbia v. Heller*, 554 U.S. 570, 612 (2008) (using "infringed" synonymously with "curtailed, or broken in upon[] in the smallest degree")).

4. *See Heller*, 554 U.S. at 581.

5. *Id.* at 580 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

"Arms" include all weapons of offense and defense that "constitute bearable arms, even those that were not in existence at the time of the founding."[6] "To Keep" means to possess, and "to bear" includes to carry.[7]

These definitions make the challengers' role under *Bruen*'s initial inquiry into textual meaning quite simple in virtually all cases. If an American seeks to possess or carry a bearable arm and is hindered from doing so by a governmental restriction, he need only point to the Supreme Court's definition of these phrases to satisfy his burden. Because of its subordinate position in our judicial system, a lower "inferior" court has no discretion to depart from these controlling definitions, so the initial inquiry into text is at an end. Of course, as described below, that does not automatically mean that the challenged restriction is invalid—but it does shift the burden to the government to justify the restriction in the "historical tradition" aspect of *Bruen*'s inquiry.

II. THE BURDEN SHIFTS: ONCE THE TEXT OF THE SECOND AMENDMENT IS IMPLICATED, THE BURDEN SHIFTS TO THE GOVERNMENT

If the plain text of the Second Amendment covers the conduct in question, the conduct is "presumptively protect[ed]" by the Constitution.[8] The burden then shifts to the government to prove that the regulation is constitutional.[9] To satisfy its burden, the government must prove that the challenged regulation is "consistent with the Nation's historical tradition of firearm regulation."[10]

Justice Thomas's *Bruen* opinion reiterated this point again and again:

- "[T]he government must affirmatively prove that its firearms regulation is part of the historical tradition."[11]
- "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[12]
- "[T]he burden falls on respondents [the government] to show that New York's proper-cause requirement is consistent with this Nation's historical

6. *Id*. at 582; see also *United States v*. *Rahimi*, 144 S. Ct. 1889, 1898 (2024) (finding it "mistaken" to "apply[] the protections of the [Second Amendment] right only to muskets and sabers.").

7. *Heller*, 554 U.S. at 582–84 (citation omitted).

8. *Bruen*, 597 U.S. at 17.

9. The Supreme Court's Second Amendment interpretive methodology is sometimes described by the shorthand of "text, history, and tradition." But it is important to understand the role of each element of this description to avoid confusion and error. It is more accurate to describe the Court's methodology as a "text and then historical tradition of regulation" methodology. "Text" is the plain text meaning of the Second Amendment's terms: "arms," "bear," "keep," etc. That is what is relevant to implicating the Second Amendment and shifting the burden to the government. At that point, the government must demonstrate a historical tradition of regulation in existence at ratification to justify a challenged law. Historical events that occur or traditions that develop after ratification cannot narrow the presumptive, plain text scope of the Second Amendment's protection. *See Bruen*, 597 U.S. at 36 (explaining that "to the extent later history contradicts what the text says, the text controls").

10. *Bruen*, 597 U.S. at 17 and 24.

11. *Id*. at 19.

12. *Id*. at 17 and 24.

> tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment . . . does not protect petitioners' proposed course of conduct."[13]
>
> - "[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[14]
> - "[A]nalogical reasoning requires . . . that the government identify a well-established and representative historical analogue. . . ."[15]
> - "[New York has] failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement."[16]
> - "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is [New York States's] burden."[17]

The Supreme Court could not have been clearer: the burden is on the government, and the burden is very real.

If, of course, the constitutional test for a certain class of cases has already been decided by the Supreme Court, such as the "in common use" test, which was recognized in *Heller* for determining *what* kinds of arms are protected, then it is not only unnecessary for a lower court to go through the *Bruen* historical methodology; it is also error. Accordingly, the next Part explains how that works, and why.

III. THE FORK IN THE CONSTITUTIONAL ROAD: HAS THE SUPREME COURT ALREADY SET FORTH THE CONSTITUTIONAL TEST THAT GOVERNS THE MODERN FIREARMS LAW AT ISSUE?

When an individual's conduct is covered by the Second Amendment's text, the Second Amendment is implicated and the burden shifts to the government to prove that the challenged gun law is consistent with an identifiable and longstanding historical tradition of regulating firearms. If no such historical tradition of regulation exists, then the government loses and the challenged gun control law is unconstitutional.

Before engaging in any historical analysis, however, lower courts must first ask whether the Supreme Court has already decided the constitutional test to be applied given the nature of the regulation being challenged. If the answer is yes, then the lower court must directly apply that constitutional test to the case before it. If the answer is no, then the lower court must instead apply *Bruen*'s historical methodology to decide whether the government has proven that the challenged firearms law comports with our national historical tradition of firearm regulation.

---

13. *Id*. at 34.
14. *Id*. at 17.
15. *Id*. at 30 (emphasis omitted).
16. *Id*. at 38-39.
17. *Id*. at 60.

A. Path 1: Cases where the Supreme Court has Already Decided the Governing Constitutional Test

The Supreme Court has issued five significant Second Amendment opinions in the 21st century. These decisions have given rise to clear precedents and constitutional tests that provide binding guidance concerning some of the most important constitutional questions pending today.

For example, cases involving *what* arms are protected or can be banned are directly controlled by *Heller*. For challenges to these types of laws, *Heller* itself conducted the text-first and history-second methodological analysis to develop a specific constitutional test: bearable arms *cannot be banned* if they are in common use today by Americans for lawful purposes. Lower courts may not substitute a constitutional test in arms ban cases different from *Heller*'s "in common use" test. Nothing in *Bruen* opened the door to lower courts deviating from the holdings and rationales set forth in *Heller*. *Bruen* explained that it was simply making "the constitutional standard endorsed in *Heller* more explicit," not prescribing a new standard.[18] And in light of *Bruen*, it is readily apparent how the Court applied that constitutional standard to arrive at the common use test. First, the Court examined the "textual elements" of the Second Amendment and concluded that "they guarantee the individual right to possess and carry *weapons*."[19] There is nothing in the plain text that distinguishes between different types of weapons. As the Court explained, as a "prima facie" matter, the right extends "to all instruments that constitute bearable arms."[20] Second, after completing its textual analysis, the Court turned to historical "limitation[s] on the right to keep and carry arms."[21] One such limitation was "the historical tradition of prohibiting the carrying of 'dangerous and unusual' weapons," which the Court held "fairly supported" the conclusion that "the sorts of weapons protected were those 'in common use at the time.'"[22] Therefore, under *Heller*, only dangerous and unusual weapons can be banned, and it follows that arms that are in common use—which by definition are not unusual—cannot be banned. Because the burden is on the government to prove that a law is consistent with historical tradition, it is the government's burden to prove that any particular arm is dangerous and unusual.

In contexts such as these where the Supreme Court has already applied the text-first and history-second approach and used it to articulate a specific controlling test, it is improper as a matter of *stare decisis* for lower courts to undertake the historical analysis anew. The constitutional tests articulated by the Supreme Court cannot be ignored or revised by the lower courts though, as illustrated below, some lower courts have done just that.

---

18. 597 U.S. at 31.
19. *Heller*, 554 U.S. at 592 (emphasis added).
20. *Id*. at 582.
21. *Id*. at 626-27.
22. *Id*. at 627.

B. Path 2: Cases where the Supreme Court Has Not Yet Decided the Constitutional Test to be Applied

In cases in which the Supreme Court has not yet decided the constitutional test to be applied in a particular type of Second Amendment challenge, the government has some historical work to do. In these sorts of cases, the government must prove that the modern firearms regulation being challenged is "consistent with the Nation's historical tradition of firearm regulation."[23]

To meet its burden, the government must identify historical analogues (enacted laws or binding court decisions) from the proper historical time period, which is the time of America's Founding. To constitute a historical tradition of regulation, the historical analogues proffered by the government must constitute evidence of a longstanding practice at the Founding, be sufficiently "well-established" and "representative," and must have had legal force. This type of work, i.e., the discovery and identification of actual laws on the books enforceable against Americans, is particularly well-suited for lawyers who engage in legal research every day—including by applying that over-200-year-old binding legal document known as the U.S. Constitution. Moreover, reasoning by analogy from older laws to modern legal controversies is the bread and butter of the legal profession.

Bruen identifies, either *directly or indirectly*, a series of rules that the courts must employ when evaluating whether the proposed historical analogues proffered by the government are an appropriate (or inappropriate) basis for historical reasoning. If an analogue flunks any of these rules, courts must disregard it.

1. Analogues Must Be Government Regulations and Not Generic Historical Narratives or Other Secondary Sources

A proposed historical analogue must be an actual "regulation"; that is, the provision in question must be a law (as evidenced by constitutions, statutes or the common law), it must have had binding effect, and it cannot be a mere discussion, statement of opinion, or a proposal never adopted.[24] The Supreme Court requires the government to prove a historical tradition of "firearm regulation," which means a binding legal obligation that, upon violation, may give rise to a legal penalty.

The exclusive focus of this inquiry should be primary legal sources. One thing that should not be relied on is the biased testimony of so-called modern-day experts on history, including those who purport to opine on so-called "sensitive places" or who raise speculative concerns about collateral damage from firearm usage. When *Bruen* rejected application of the tiers of scrutiny in the Second Amendment context, it put these "experts" out of business; no longer is there a

23. Bruen, 597 U.S. at 24 (emphasis added).

24. Proper analogues under the Heller/Bruen methodology are federal and state constitutions and statutes, plus the common law, which prominent commentators such as William Blackstone and Joseph Story also help to illuminate. Under Bruen's reasoning, judicial decisions can also provide evidence of the contours of the common law.

need to "balance" the effects of competing public policy choices as many lower courts had erroneously done after *Heller*.

Judge Carlton Reeves of the District Court for the Southern District of Mississippi made a name for himself in the summer of 2022 when he complained that *Bruen* required him to "play historian in the name of constitutional adjudication."[25] He ordered the United States Department of Justice to brief him on whether to appoint a historian in a case concerning the federal statute prohibiting felons from possessing firearms. Lawyers for the Justice Department rightly concluded that they didn't need any experts to tackle the historical research required by *Bruen*. The Department stated that "even where a comprehensive application of the Supreme Court's text-and-history standard is necessary" to address a Second Amendment challenge to a gun-related law, the "correct[]" course is for the court to "resolve[]" the case "based on materials compiled by the parties."[26]

Courts routinely decide constitutional questions without testifying experts and there is no reason why a different rule should apply to the Second Amendment. The Supreme Court has resolved all five of the 21st century gun cases without the use of experts.[27] *Bruen* called analogical reasoning "a commonplace task" for any lawyer or judge—historical or other experts need not apply.[28] That is because questions of constitutional law are a combination of legal questions and "legislative facts" rather than facts about the immediate activities of the parties. Legislative facts "have relevance to legal reasoning . . . in the formulation of a legal principle or ruling by a judge or court."[29] It is those facts that matter under *Bruen*'s methodology.

Judge Kathryn Mizelle from the Middle District of Florida recently expressed this concept quite clearly in striking down a federal law criminalizing firearm carriage at a post office. She wrote: "[T]he relevant inquiries are interpretive and . . . the questions at bottom are legal. Nothing differs about constitutional cases—the Supreme Court did not require expert testimony to determine the original meaning of the Confrontation Clause in *Crawford* or the Vesting Clause of Article II in *Seila Law*.[30] After all, it is the judicial function—not that of an expert witness—'to say what the law is.'"[31] And judges are more than capable of identifying older legal

25. United States v. Bullock, 679 F. Supp. 3d 501, 508 (S.D. Miss. 2023). Ariane de Vogue, *Federal judge blasts the Supreme Court for its Second Amendment opinion*, CNN POLITICS (Nov. 1, 2022) - CNNPolitics, https://www.cnn.com/2022/11/01/politics/second-amendment-opinion-supreme-court-judge-carlton-reeves/index.html [https://perma.cc/HL5B-ZVBP].

26. Submission Addressing the Need for a Court-Appointed Historian at 8, United States v. Bullock, No. 3:18-CR-165-CWR-FKB, Doc. 71, (S.D. Miss. Dec. 12, 2022) ("USG Bullock Br.").

27. *Heller*, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 742 (2010); Caetano v. Massachusetts, 577 U.S. 411 (2016); *Bruen*, 597 U.S. 1 (2022); *Rahimi*, 144 S. Ct. 1889 (2024).

28. *Bruen*, 597 U.S. at 28.

29. Fed. R. Evid. 201, Advisory Committee Note.

30. *See* Crawford v. Washington, 541 U.S. 36, 42-43 (2004); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 227 (2020).

31. United States v. Ayala, 2024 WL 132624, at *13 (M.D. Fla. Jan. 12, 2024) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (emphasis omitted).

precedents including older laws and then applying them to present-day cases. It is not an argument to mouth the words "judges are not historians" when judges apply historical legal precedents literally every day of their professional lives, and all government officials swear an oath to the U.S. Constitution, which is the ultimate historical legal document applied every day by lawyers and judges across the land.[32] Indeed, just in June 2024, the Court decided *Rahimi* and upheld a firearms regulation after extensive briefing and argument. Its opinion cited *zero* expert opinions, relied on briefing, research, and argument, and showed that every member of the Court was clearly able to embark on the basic legal enterprise of drawing relevant principles from historical enactments and case law and reasoning therefrom to modern circumstances.[33]

It is also an open question whether so-called "experts" would add any value, as most are left-wing academics who have an agenda of their own. Anyone can examine the public statements of many of the government's "experts" and tell immediately that they are staunchly opposed to Second Amendment rights. They thus offer their "expertise" with a heavy dose of advocacy, so judges should view their submissions critically, and be confident that they can find legislative facts themselves and reason by analogy to reach sound conclusions.[34]

2. Not All History Is Created Equal: Analogues Must Be From the Relevant Time Period

The Supreme Court in *Heller* made clear that the proper time-period for determining the meaning of the Second Amendment is around 1791, when the Bill of Rights was adopted.[35] "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."[36] That is 1791, when the Bill of Rights was ratified. According to *Heller*: the words of the Constitution must be given their "normal and ordinary" meaning, not "secret or technical meanings that would not have been known to ordinary citizens *in the founding*

---

32. *See generally* Hawai'i v. Wilson, 543 P.3d 440, 453 (Haw. 2024) ("Judges are not historians. Excavating 18th and 19th century experiences to figure out how old times control 21st century life is not a judge's forte.").

33. *Rahimi*, 144 S. Ct. at 1899.

34. A strong legal brief making arguments against so-called experts who have a record of supporting gun control can be found in an amicus brief filed in the U.S. Supreme Court in *Rahimi*. See Brief for Professors of Second Amendment Law, The Second Amendment Law Center, And The Independence Institute as Amici Curiae Supporting Respondent And Affirmance, No. 22-915, at 32-35.

35. For a more complete discussion of why the Founding Era is the correct period for searching for any possible historical analogue laws, see two articles by this author. The most detailed article is Mark W. Smith, "*Not All History Is Created* Equal"*: In the Post-Bruen World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868* (Oct. 1, 2022) (working paper) (available at https://ssrn.com/abstract=4248297 or http://dx.doi.org/10.2139/ssrn.4248297 [https://perma.cc/TSZ5-RY2Z]). A condensed version is Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 31 HARV. J.L. & PUB. POL'Y Per Curiam (Fall 2022). The discussion in this section draws on both, but the author recommends consulting the articles themselves for supporting details.

36. *Heller*, 554 U.S. at 634–35.

generation."[37] To shed light on the original meaning of the Second Amendment, therefore, any analogues that are proposed to limit the scope of its plain text, based on an alleged historical tradition, must come from the Founding era.

In *Bruen*, the Court reiterated that the Constitution's "meaning is fixed according to the understandings of those who ratified it. . . ."[38] Noting that the "Constitution can, and must, apply to *circumstances* beyond those *the Founders* specifically anticipated,"[39] *Bruen* quoted from *United States v. Jones*,[40] which concluded that installation of a tracking device on a vehicle was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment *when it was adopted*."[41]

As an aside, Justice Thomas in *Bruen* observed that there is an "ongoing scholarly debate" as to whether 1868, when the Fourteenth Amendment was ratified and thus enabled incorporation of the Bill of Rights against the states, should be viewed as the proper time for determining the Second Amendment's original meaning, rather than 1791. This observation has led some proponents of firearm restrictions to argue for the use of historical analogue laws enacted after the Civil War. However, that position is contrary to Supreme Court precedent interpreting other Bill of Rights provisions, and the Supreme Court has repeatedly cautioned against using analogues too far removed in time from the Founding.[42] Justice Thomas himself wrote in *Bruen* that "As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'"[43] He continued:

> And we made clear in *Gamble* that *Heller*'s interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence "only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions." In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established."[44]

---

37. *Id.* at 576–77 (emphasis added).
38. *Bruen,* 597 U.S. at 28.
39. *Id.* (emphasis added).
40. United States v. Jones, 565 U.S. 400, 405 (2012).
41. *Bruen*, 597 U.S. at 19 (emphasis added).
42. Additionally, such an interpretation would mean that the Second Amendment's meaning changes throughout history. For example, if the key is the public understanding when the right became applicable, then the Second Amendment carries a 1959 meaning for Hawaii and Alaska, and any new state entering the union tomorrow would be subject to 2024 understandings of the Second Amendment. To the extent government parties seek to use 1868 as the key date to analyze for then-contemporary gun control law—on the theory that this was the year the Second Amendment became applicable to the states—then, it is not clear why the answer for later-added states would not then be when they were added, as that is when the Second Amendment became applicable to them.
43. *Bruen*, 597 U.S. at 36-37.
44. *Id.* (citing Gamble v. United States, 139 S. Ct. 1960, 1975–1976 (2019) (majority opinion)).

Bruen itself also concluded that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it *contradicts* earlier evidence."[45] And the Court refused to even entertain any 20th-century evidence proffered by New York and its amici.[46]

Justice Amy Coney Barrett, concurring, was careful to point out the dubious relevance of late 19th-century history, noting that if 1791 is the benchmark:

> New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little). Cf. *Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258–2259 (2020) (a practice that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" informing our understanding of the First Amendment) [parallel citations omitted]. So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving postenactment history more weight than it can rightly bear."[47]

The Court in *United States v. Rahimi* observed once again the academic debate on whether the relevant historical timeframe for analogous laws was 1791 or 1868, finding the resolution of that debate in *Rahimi* "unnecessary to decide the case" and therefore rendering any such resolution mere dictum.[48] But the concurrences of Justice Kavanaugh[49] and Justice Barrett[50] in that case strongly reinforced the notion that 1791 was the appropriate benchmark for the Second Amendment.

In *Espinoza*, a case involving the First Amendment, Chief Justice John Roberts discounted laws from more than 30 states—certainly a widespread practice of regulation—that adopted no-aid provisions for religious schools in the second half of the 19th century. "Such evidence," he concluded "may reinforce an early practice but cannot create one." He went on to say: "The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[51] The same is as true of the Second Amendment as it is of the First Amendment.

---

45. *Bruen*, 597 U.S. at 66 n.28 (emphasis added).
46. *Id.*
47. *Bruen*, 597 U.S. at 82-83 (Barrett, J., concurring).
48. *Rahimi*, 144 S. Ct. at 1898 n.1 (2024).
49. *Id.* at 1913 (Kavanaugh, J., concurring) ("Especially for the original Constitution and the Bill of Rights . . . . the Court pays particular attention to the historical laws and practices in the United States from Independence in 1776 until ratification in 1788 or 1791.").
50. *Id.* at 1925 (Barrett, J., concurring) ("[E]vidence of "tradition" unmoored from original meaning is not binding law . . . 'Original history'—i.e., the generally dispositive kind— plays two roles in the Second Amendment context. It elucidates how contemporaries understood the text—for example, the meaning of the phrase "bear Arms." It also plays the more complicated role of determining the scope of the pre-existing right that the people enshrined in our fundamental law.").
51. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020).

3. Racist or Unconstitutional Laws Cannot Be Analogues

Just after *Bruen*, governments attempting to defend gun control laws with historical analogues realized that there were very few gun control laws throughout most of American history; this is especially true during the time period leading up to and immediately following the Constitution's ratification,[52] a time period ending at or around 1800.[53] Because there is a dearth of analogues to modern day gun control, proponents of such measures have begun citing to laws that are undeniably racist, noxious, and unconstitutional by today's standards. These laws cannot properly form a basis for analogical reasoning seeking to justify modern gun laws.

In *Bruen*, the Court disregarded discriminatory laws, noting that before the Civil War, the Supreme Court and States had wrongfully withheld from free blacks the rights of citizenship (including the right to keep and bear arms).[54] And after the Civil War, *Bruen* explained, "the exercise of this fundamental right by freed slaves was systematically thwarted. This Court has already recounted some of the Southern abuses violating blacks' right to keep and bear arms."[55] The *Bruen* Court did not credit such laws as informing the meaning of the Second Amendment.[56]

These laws have been rightly rejected by courts. Judge Roger Benitez in the U.S. District Court of the Southern District of California reached that conclusion in a case arising from California's ban on semi-automatic rifles. Judge Benitez wrote:

> Incredibly, the State asks this Court to treat as analogues 38 laws on the State's list which applied only to particular disfavored people groups, such as slaves, Blacks, or Mulattos. Those laws are not relevant to the "assault weapon" ban challenged in this case. Even if they were, this Court would give such discriminatory laws little or no weight.[57]

Judge Benitez yet again rejected the use of laws with racist and noxious underpinnings in a case involving California's novel background check system for the purchase of ammunition:

> The State's compilation lists 48 laws which made it a crime to possess a gun and ammunition by Negros, Mulattos, slaves, or persons of color, and two laws that prohibited sales to Indians. For example, the Attorney General lists a

---

52. *See generally* STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? Chapters 4-6 (2021) (describing the American right to bear arms in the late 18th and early 19th centuries).

53. *See Bruen*, 579 U.S. at 46–50 (discussing "the history of the Colonies and the early Republic," ending with "an 1801 Tennessee statute").

54. *Bruen*, 597 U.S. at 60.

55. *Id*. at 60–61.

56. *See id*. at 63 n.26 (disregarding analogue because it violated the Seventh Amendment's right to a jury trial).

57. Miller v. Bonta, 699 F. Supp. 3d 956, 978 (S.D. Cal. 2023).

> 1798 Kentucky law which prohibited any "Negro, mulatto, or Indian" from possessing any gun or ammunition. An 1846 North Carolina law offers another example wherein it was prohibited to sell or deliver firearms to "any slave." This is the third time the Attorney General has cited these laws in support for its laws and restrictions implicating the Second Amendment. These fifty laws identified by the Attorney General constitute a long, embarrassing, disgusting, insidious, reprehensible list of examples of government tyranny towards our own people.[58]

He added that:

> These laws that disarmed slaves and Indians were targeted at groups excluded from the political community—"i.e., written out of 'the people' altogether." At the time these laws existed, neither people of color, nor native Americans were considered citizens of the United States. So, it makes little sense to argue, as the Attorney General implicitly does, that historical restrictions placed on non-citizens, who were not accorded constitutional protections, now justify placing similar modern restrictions on citizens who do enjoy constitutional rights.[59]

It is noteworthy that the U.S. Department of Justice relied on such laws in the Fifth Circuit in the *Rahimi*[60] case but subsequently disavowed any such reliance during oral argument before the Court.[61] It is error for the government and the lower courts to rely on bigoted or discriminatory laws, or laws aimed at enemies of the then-new Republic or persons or groups outside the polity, to justify a modern-day firearms regulation. These types of laws are not considered part of our historical tradition for purposes of *Bruen* because the individuals who were the subject of these laws were not considered part of "the people" who enjoyed *any* constitutional rights. Indeed, as Justice Kavanaugh wrote separately to stress in his *Rahimi* concurrence, "courts must exercise care" to not rely on "the history that the Constitution left behind" through the ratification of either the original Constitution or the Reconstruction Amendments, which "sought to reject the Nation's history of racial discrimination, not to backdoor incorporate racially discriminatory and oppressive historical practices and laws into the Constitution."[62]

---

58. Rhode v. Bonta, 2024 WL 374901, at *12 (S.D. Cal. Jan. 30, 2024).

59. *Id.* Other similar examples of courts rejecting such laws as analogues abound. *See, e.g.*, United States v. Harrison, 654 F. Supp. 3d 1191, 1216–17 (W.D. Okla. Feb. 3, 2023) (rejecting reliance on analogues restricting the ability of slaves and Indians to carry firearms).

60. *Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023); See Rahimi v. United States, Suppl. Br. for Appellee the United States, United States v. Rahimi at 23, Doc. No. 109 (2022).

61. Trans. of Oral Argument, United States v. Rahimi, No. 22-915 at 7 (Nov. 7, 2023) ("We haven't invoked those laws at this stage of the proceedings because we think that they speak to a distinct principle and the textual hook at that particular time those categories of people were viewed as being not among the people protected by the Second Amendment in the first instance.").

62. *Rahimi*, 144 S. Ct. at 1915 (Kavanaugh, J., concurring).

When they rely on bigoted laws to justify modern ones, governments impermissibly resurrect prejudices long and firmly rejected by the American people.

4. Analogues must be sufficiently "well-established" and "representative"

A mere handful of purported analogues that existed (a) only for a short time or (b) were not representative of the state of the law in most jurisdictions, also will not suffice. Outliers do not serve to establish our "Nation's historical tradition of firearm regulation."[63]

It is incorrect to say that a historical "tradition" can be based on the existence of one or two historical analogues, even if they are relevantly similar in "how" and "why" they burden Second Amendment rights. *Bruen* makes clear that any analogues must be sufficiently "well-established and representative,"[64] meaning that they must affect substantial swaths of the population during their time in force. This conclusion is bolstered by *Bruen*'s statement that "we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city,"[65] and its skepticism that three historical analogues could evince a tradition.[66] True, *Bruen* did not say whether there is a numerical threshold for analogues to be considered "representative," but the decision is clear that one or two historical regulations are woefully insufficient.

Consider also *Bruen*'s discussion about territorial laws, which used relative population as a probative metric. *Bruen* dismissed territorial restrictions because they were too "localized."[67] In doing so, it discussed the "miniscule territorial populations who would have lived under [these laws]," by analyzing census data from territorial jurisdictions.[68] And the Court concluded that "these western restrictions were irrelevant to more than 99% of the American population," therefore rejecting them as probative of any historical tradition.[69] In short, *Bruen* teaches that local laws enacted by a few cities, towns and villages cannot be considered evidence of a historical analogue because ordinances from a handful of cities are not persuasive of an American tradition.[70]

Bruen further teaches that the 19th century laws of the Western Territories are also not instructive as historical analogues because they are "most unlikely to reflect 'the origins and continuing significance of the Second Amendment.'"[71] *Bruen* instructs that "we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second

63. *Bruen*, 597 U.S. at 17.
64. *Id.* at 30.
65. *Id.* at 67.
66. *Id.* at 46 ("[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation.").
67. *Id.* at 67.
68. *Id.*
69. *Id.*
70. *Id.* at 67-68 (quoting *Heller*, 554 U.S. at 632).
71. *Id.* at 67 (quoting *Heller*, 554 U.S. at 614).

Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence."[72] Territorial laws are also disanalogous because these sorts of laws were rarely subject to judicial scrutiny and were often temporary.[73]

Finally, these territorial restrictions deserve little weight because they were—consistent with the transitory nature of territorial government—short lived. Some were held unconstitutional shortly after passage.[74] Others did not survive a Territory's admission to the Union as a State.[75] "Thus, they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation."[76]

5. The "Why" and the "How" Of A Proposed Analogue and the "Why" and "How" of the Challenged Modern Law Must Match Up

Bruen instructs that before they may be considered, alleged historical analogue laws must be either "distinctly" or "relevantly" similar to a challenged firearms regulation. Whether analogues are evaluated under the "distinctly similar" or "relevantly similar" criteria impacts the degree of fit required between the modern gun law and its alleged historical analogues.

If a modern gun law is meant to address "a general societal problem that has persisted since the 18th century," then "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[77] Here, the level of similarity required as between the modern gun law and any proposed historical analogues is higher than in those situations where a modern gun law addresses "unprecedented societal concerns or dramatic technological changes."[78] In the latter scenario, "a more nuanced approach" may be allowed.[79]

Relying on *Heller* and *McDonald,* the *Bruen* Court identified two metrics to determine whether a purported analogue is relevantly similar to the challenged

---

72. *Id*. (quoting *Heller*, 554 U.S. at 632).

73. *Id*. at 59; *see* Amicus Brief of FPC American Victory Fund, et al. at 25, NYSRPA v. Bruen, No. 20-843 (2022).

74. *See In re* Brickey, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional a law "which prohibits private persons from carrying deadly weapons within the limits or confines of any city, town, or village in Idaho").

75. *See* Law of Jan. 14, 1890, ch. 73, § 96, 1890 Wyo. Terr. Laws (1890 territorial law enacted upon statehood prohibiting public carry only when combined with "intent, or avowed purpose, of injuring [one's] fellow-man").

76. *Bruen*, 597 U.S. at 69.

77. *Id*. at 26. Humans committing violence against each other has been a societal problem going back to the 18th century, and all the way back to at least when Cain killed Abel. Just some of the types of general violence Americans experienced in the 18th century and which continue through the present include: murder, mass violence, riots, rampant street crime, foreign invasions, insurrections, violence against vulnerable places like churches, violence at places where constitutional rights were exercised, and domestic violence.

78. *Id*. at 27.

79. *Id*.

regulation: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[80] Because individual self-defense is the central component 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."[81] It is important to understand that before a proffered historical analogue may be considered, both the "why" and the "how" must line up.

If the "whys" do not line up, then a proposed historical analogue may not be used to prove that a modern gun control law arises from a longstanding tradition of the country's firearms regulation. A good example of such a disanalogous scenario arose in *Heller*, when the District of Columbia sought to justify their handgun ban by citing Founding-era laws limiting the quantity of highly-flammable black powder that could be stored in homes.[82] The Supreme Court rejected that analogue because the "whys" did not line up: specifically, the purpose of that Founding-era black powder storage law was to protect cities against fires burning down large portions of the city, as happened in the Great London Fire of 1666. Black powder storage laws had nothing to do with fighting crime.[83] In short, the "whys" behind these laws were far different.

For the "hows" to line up, the way the proffered historical analogue law was deployed and enforced must be consistent with how the modern-day gun control law is deployed and enforced. For example, if a modern statute imposes a lifelong ban on arms possession for an individual who has threatened others, the "how" would be different from an alleged analogue that did not disarm the individual, but only required a surety bond to be posted.[84] The burden on the right of armed self-defense imposed by a lifetime ban is much different and much greater than the mere posting of a bond.

6. A Lack of Historical Regulations Favors the Second Amendment

Simply put, the government needs an actual historical tradition of legal regulation to establish a historical tradition of regulation. A history of non-regulation cannot establish a historical tradition of regulation, which is what the government needs to demonstrate.

To illustrate how one court concluded that a lack of historical evidence of regulation did not preclude upholding an otherwise unconstitutional gun control law

---

80. *Id.* at 29. Whether the "relevantly similar" or the "distinctly similar" approach applies in a case does not alter the mandate that historical analogues must be supplied by the government in order for the government to justify a modern gun-control law.

81. *Id.*

82. *See Heller*, 554 U.S. at 631-32.

83. *Id.*

84. See, e.g., *Rahimi*, 144 S. Ct. at 1902 (finding significant the temporary nature of disarmaments under the surety laws in holding those laws sufficiently analogous to the temporary disarmaments of those presenting credible threats to the physical safety of others).

one should look to a recent Second Circuit opinion. One major error committed by the Second Circuit in *Antonyuk v. Chiumento* was reasoning that "the *absence* of a distinctly similar historical regulation in the presented record, though undoubtedly relevant, can only prove so much. Legislatures past and present have not generally legislated to their constitutional limits. Reasoning from historical silence is thus risky[.]"[85]

At the threshold, it is important to remember that the Second Amendment codified a pre-existing right, so in the absence of regulation, the right can be exercised consistent with the text. Additionally, the Second Circuit's explanation directly contradicts *Bruen*. As already described, *Bruen*'s methodology compels courts to first look to the plain text and then look to history for exceptions to what the plain text covers.[86] And it is in this context that *Bruen* says: "to the extent later history *contradicts what the text says*, the text controls."[87] Period. This focus on the Second Amendment's text—which *Bruen* called an "unqualified command"[88]—shows why later history cannot overcome Founding-era silence. In other words, historical silence is always to be construed in favor of the Second Amendment. For absent historical regulation, there is no affirmative basis for limiting the textual coverage of the right.

Because governmental inaction, by definition, cannot evince a tradition of regulation to limit the plain-text scope of the Amendment, in the presence of a lack of regulation, the plain text controls. This conclusion is confirmed by *Bruen*'s reasoning about what to do with historical ambiguity. In analyzing the English history New York offered, the *Bruen* Court stated that it was "ambiguous at best."[89] During that discussion, it also referenced *Sir John Knight's Case* from England, which dealt with the Statute of Northampton.[90] And *Bruen* reasoned that in the case of historical ambiguity—such as whether *Sir John Knight's Case* required an evil intent *mens rea* to satisfy the Statute of Northampton—"we will favor the [interpretation] that is more consistent with the Second Amendment's

85. Antonyuk v. Chiumento, 89 F.4th 271, 301 (2d Cir. 2023), cert. granted, judgment vacated sub nom. Antonyuk v. James, ——S. Ct.——, 2024 WL 3259671 (Mem.) July 2, 2024.

86. *Bruen*, 597 U.S. at 24.

87. *Id.* at 36 (emphasis added).

88. *Id.* at 17, 24.

89. *Id.* at 39.

90. *Id.* at 43-44 n.11. Notably, *Bruen* also dismissed the Statute of Northampton as having "little bearing on the Second Amendment adopted in 1791." 597 U.S. at 41. First, the Court explained that it is too old to inform the meaning of the Second Amendment at the Founding. *See id.* Second, the Court noted that its prohibition on going or riding armed centered on large weapons used in combat, not on the smaller medieval weapons (like daggers) most analogous to modern handguns, which were not yet invented. *See id.* at 41–42. Third, the Court reasoned that the Statute of Northampton confirmed and echoed the common law "affray" tradition that individuals cannot go armed with evil intent to terrify others. *See id.* Fourth, *Bruen* held that by the Founding, this statute and American statutes modeled after it were understood to bar carry in fairs, markets, and other public places only when individuals carried arms to terrify others. *See id.* at 49–51.

command."[91] In other words, if the historical record is ambiguous, the tie goes to the Second Amendment and favors the private (textual) individual right to keep and bear arms.

7. Dicta cannot save the government from its burden of supplying actual historical analogue laws

Since the 2008 decision in *Heller*, an oft-repeated argument in favor of upholding modern firearm restrictions is that the Supreme Court has already placed its thumb on the scale in favor of such laws. Some courts and litigants quote as a magic talisman the following language from *Heller*: "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[92] Nothing about this language should be taken as tipping the scales in favor of whatever firearm restrictions may be at issue.

First, this language is clearly dicta, which by definition is not part of the binding holding of the Court.[93] Nothing about this language spoke to the Court's holding or the legal rationale (*ratio decidendi*) undergirding the holding that the District of Columbia could not ban handguns because modern handguns were in common use by Americans for lawful purposes. The Supreme Court itself humorously wrote in a different context about "unnecessary" dicta: "Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?"[94]

Second, at most, this language was only signaling that the *Heller* decision should not be interpreted as deciding questions about who may possess firearms or where a person may be allowed to legally carry a firearm in public. That is all. Third, *Heller* referred to the examples of "longstanding" laws as only "presumptively lawful regulatory measures," meaning that the presumptions are capable of being rebutted.[95] And fourth, it goes without saying that many contemporary firearm restrictions are not "longstanding" but are of recent vintage.

Then-Judge Amy Coney Barrett understood these principles when she wrote that she was "reluctant to place more weight on these passing references than the Court itself did," adding that "because [*Heller*] explicitly deferred analysis of this issue, the scope of its assertion is unclear."[96]

---

91. *Id.* at 44 n.11.
92. *Heller*, 554 U.S. 570, 626–27.
93. Cole Energy Dev. Co. v. Ingersoll-Rand Co., 8 F.3d 607, 609 (7th Cir. 1993).
94. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013).
95. *See Heller*, 554 U.S. at 627 n.26.
96. Kanter v. Barr, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 597 U.S. 1 (2023).

Yet, we have seen multiple mostly pre-*Bruen* courts cite to *Heller*'s dicta as if it resolved the constitutional questions presented in the case pending before them.[97] That is not appropriate. Nothing about *Heller*'s dicta excuses a lower court from engaging in the legal spadework required by *Heller* and *Bruen*.

Bruen made clear that every restriction is subject to the following methodology, and that obviously includes those argued to be longstanding: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[98] In *Bruen*, Justice Kavanaugh, joined by the Chief Justice, repeated the *Heller* dicta about "presumptively lawful" restrictions,[99] but added nothing to suggest that any such restriction was not subject to the history and tradition test.

IV. CONTEMPORARY TYPES OF PENDING SECOND AMENDMENT CHALLENGES AND THE CONSTITUTIONAL QUESTIONS THEY PRESENT

Before discussing common errors committed by courts in specific cases, it is useful to identify the kinds of cases currently being litigated. Each category of cases will often turn on specific Supreme Court precedents (or lack thereof), and thus the errors for cases within the category will often be similar. The major categories of cases, and the essential questions presented for each, are identified below.[100]

A. Arms-Ban Laws

The laws at issue here concern *what* arms are protected by the Second Amendment, and what arms are not. The most common arm-bans are state or local laws prohibiting the sale, transfer, or possession of so-called "assault weapons," which are just ordinary, and very widely possessed, semiautomatic weap

97. *See, e.g.*, United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010).

98. *Bruen*, 597 U.S. at 24.

99. *Id.* at 81 (Kavanaugh, J., concurring).

100. While this article will not dwell on those cases arising from many as applied and facial challenges to the federal gun control statute defining who are "Prohibited Persons" under 18 U.S.C. 922 (g), it bears noting that the Supreme Court unanimously applied *Bruen* and found, 8-1, that the historical tradition of firearms regulation supported temporarily disarming "individuals who pose a credible threat to the physical safety of others." *Rahimi*, 144 S. Ct. at 1898. As Justice Gorsuch, who joined the Court's opinions in both *Bruen* and *Rahimi* explained the latter opinion, "The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*." *Rahimi*, 144 S. Ct. at 1910 (Gorsuch, J., concurring).

ons, mostly rifles, such as AR-15 and AK platform rifles.[101] The phrase "assault weapon" is a political propaganda term with no real meaning.[102] Many of these bans were litigated before *Bruen*, but because the courts almost uniformly applied some form of interest balancing, older decisions upholding these bans are no longer good law. At present, ten states, as well as a handful of local jurisdictions, have such bans.[103] Most states with "assault weapon" bans also prohibit so-called "large capacity" magazines that hold more than a specified number of rounds. Several states ban so-called "large capacity" magazines only, but not "assault weapons."[104]

There are other firearms bans as well, such as states that have adopted a "handgun roster," which allows only certain approved handguns to be sold and bans all others.[105] Non-firearm weapons are also often banned or restricted. These include such items as certain knives, tasers, pepper spray, clubs, batons, metal knuckles, and martial arts weapons such as nunchucks.[106]

The critical thing to understand for all these cases is that *all bans on arms are governed by the "in common use" test under Heller.* Arms that are "in common use" by Americans for lawful purposes today cannot be banned.[107] Phrased somewhat differently, only "those weapons not typically possessed by law-abiding citizens for lawful purposes"[108] have the potential to be considered "dangerous and unusual" and, by extension, have the potential to be unprotected by the Second Amendment. Of course, if a weapon is "in common use" it is by definition not "unusual."

---

101. See, e.g., Garland v. Cargill, 602 U.S. 406, 429-430 (2024) (Sotomayor, J., dissenting) (recognizing that AR-15 and AR-10 firearms are "commonly available, semiautomatic rifles").

102. Mark W. Smith, *"Assault Weapon" Bans: Unconstitutional Laws for a Made-Up Category of Firearms*, 43 HARV. J.L. & PUB. POL'Y 357, 363 (2020).

103. At the time of this writing, the states with bans on "assault weapons" are California, Connecticut, Delaware, Hawaii (so-called "assault pistols"), Illinois, Maryland, Massachusetts, New Jersey, New York, and Washington, plus the District of Columbia. Rebecca Goldman, *Assault Weapons: What Is Their Legality and Impact?*, LEAGUE OF WOMEN VOTERS (Nov. 9, 2023), https://www.lwv.org/blog/assault-weapons-what-their-legality-and-impact [https://perma.cc/3KG4-BW45].

104. *See id.*

105. States with handgun rosters include California, Maryland, and Massachusetts, plus the District of Columbia. *Design Safety Standards*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/design-safety-standards/ (last visited Feb. 27, 2024) [https://perma.cc/8624-LWZZ]. A handgun is an "arm" within the meaning of the Second Amendment. A so-called "handgun roster", which bans handguns not approved of by the government, is by definition an arms ban. That a roster leaves certain non-banned firearms available to individuals who want to exercise their Second Amendment right does not make that law less of a ban, or save it from unconstitutionality. In *Heller*, the Court found the District of Columbia's handgun ban unconstitutional notwithstanding the fact that the District argued that its residents could still acquire rifles and shotguns under the challenged ban.

106. *See, e.g.*, CAL. PENAL CODE § 22210.

107. *See Heller*, 554 U.S. at 624-25.

108. *Id.*

B. Restrictions Imposed on 18-20 Year Olds

There are laws on the books today that concern *who* can purchase, possess, or carry firearms. They include licensing or permit laws for possession or carry, such as the New York statute struck down in *Bruen*. "Permit to purchase" laws also fall under this rubric. There are federal "disqualifiers" which bar dealers from selling to prohibited persons such as individuals who are felons, who have been involuntarily committed to a mental institution, who are non-resident aliens, who have renounced their U.S. citizenship, or individuals convicted of misdemeanor crimes of domestic violence, and others.[109] Some states have additional restrictions on who may purchase, possess, or carry firearms.[110]

Although *Bruen* speaks to whom may possess and carry firearms, it does not address or resolve all issues concerning the subject. One such type of litigation that has been particularly active are lawsuits involving bans or limitations on the purchase or even possession of certain firearms by individuals who are over age eighteen, the general age of majority, but who have not yet reached their twenty-first birthday. Federal law prohibits licensed dealers from selling handguns to 18-20 year-olds.[111] Because *Bruen* does not address the issues relating to 18-20 year-olds, courts grappling with these prohibitions or limitations must use *Bruen*'s historical analogue methodology in deciding such cases.

C. Government-Mandated Gun Free Zones or Sensitive Places

The places *where* one can or cannot publicly carry firearms are also the subject of current lawsuits. The Supreme Court in *Heller* noted, not as a holding but as an aside, that "[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. . . ."[112] *Bruen* revisited the topic when New York attempted to characterize its "proper cause" requirement for issuance of a public carry license as a "sensitive place" limitation. The Court responded:

> Although we have no occasion to comprehensively define "sensitive places" in this case, we do think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law. In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." . . . It is true that people sometimes congregate in "sensitive places," and it is

109. 18 U.S.C. § 922(g); 27 CFR § 478.21, 478.99.

110. *See State Laws and Published Ordinances - Firearms (35th Edition),* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Nov. 30, 2023), www.atf.gov/firearms/state-laws-and-published-ordinances-firearms-35th-edition [https://perma.cc/9EVA-CNDG].

111. 18 U.S.C. § 922(b)(1).

112. *Heller*, 554 U.S. at 626.

> likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below.[113]

The statement in *Heller* about schools and government buildings says nothing about *which* restrictions on firearms in schools and government buildings may be valid or *which* historical rationales support such restrictions. While *Bruen* adds a bit more with its discussion of legislative assemblies, courthouses, and polling places, it does not identify the historical tradition of regulation that would justify these restrictions nor the principles underlying that tradition. Lower courts must therefore engage in analogical reasoning in cases involving so-called "sensitive places" laws under the standard announced in *Bruen*.

D. Licensing Regulations

Second Amendment challenges to licensing regimes post-*Bruen* tend to address three common issues: (a) the licensing official is granted discretion to decide whether the license should be issued[114]; (b) there are long delays in processing license applications[115]; or (c) the financial cost associated with procuring a license is excessive.[116]

In *Bruen*, the Supreme Court flagged all three of these issues as likely being problematic and unconstitutional. The Court noted that "shall issue" licensing regimes, which "often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[117] They are thus consistent with the Second Amendment, to the extent they "contain only 'narrow, objective, and definite standards' guiding licensing officials" rather than discretionary standards that require the "exercise of judgment" on the part of the licensing officer.[118]

Likewise, the Court also left open the door to constitutional challenges where licensing regimes became overly costly or burdensome.[119] Justice Kavanaugh's

---

113. *Bruen*, 597 U.S. at 30-31.

114. *Antonyuk*, 89 F.4th at 300.

115. See Response to Order to Show Cause at 1, White v. Cox, 1:23-cv-12031 (D. Mass. Dec. 18, 2023).

116. Koons v. Platkin, 673 F. Supp. 3d 515, 579 (D.N.J. 2023), *appeal filed,* No. 23-1900 (3d Cir. June 9, 2023).

117. *Bruen*, 597 U.S. at 38 n.9.

118. *Id.*

119. I discussed both the Supreme Court's and Justice Kavanaugh's concurrence as they pertain to the importance of objective licensing criteria in an earlier article: Mark W. Smith, NYSRPA v. Bruen*: A Supreme Court Victory for the Right to Keep and Bear Arms—and a Strong Rebuke to "Inferior Courts"*, 24 HARV. J.L. PUB. POL'Y PER CURIUM 1, 5 (2022).

concurrence in *Bruen*, which was joined by Chief Justice Roberts, further demonstrates the Court's clear disapproval of the freewheeling inquisitions that states like New York, New Jersey, and California now seek to launch.[120] Justice Kavanaugh doubled down on the majority's rejection of discretionary licensing regimes, writing that New York's regime was "constitutionally problematic because it grants open-ended discretion to licensing officials *and* authorizes licenses only for those applicants who can show some special need apart from self-defense."[121] Justice Kavanaugh deemed problematic—as did the majority opinion in an important footnote[122]—*any* grant of "open-ended discretion to licensing officials," regardless of its connection to a good-cause requirement. Justice Kavanaugh explained that "the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ *objective licensing requirements* like those used by the 43 shall-issue States."[123] He also kept the door wide open to as-applied challenges to state regimes that operate as anything but shall-issue in practice—regardless of how they look on paper. Where excessive costs of time and money are required to be expended by a concealed carry applicant, a shall-issue scheme would be ripe for an as-applied challenge.[124]

E. Gun and Ammunition Tax Challenges

Finally, various jurisdictions have attempted to impose special taxes on the firearms or ammunition a citizen buys. Such taxes are blatantly unconstitutional. The 1983 Supreme Court case *Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue* recognized that you cannot single out fundamental rights for special taxation, no matter how negligible the tax.[125] That decision was consistent with the Supreme Court's 1966 decision in *Harper v. Virginia Board of Elections*, which held a $1.50 poll tax unconstitutional.[126] California recently passed a tax law that is vulnerable to a similar challenge.[127]

---

120. *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). After *Bruen* was handed down, New York passed a new background check law that required applicants to disclose their social media information. N.Y. Penal L. § 400.00(1)(o)(iv).

121. *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring) (emphasis added).

122. *Id.* at 38 n.9.

123. *Id.* at 79 (Kavanaugh, J., concurring) (emphasis added).

124. See also *Bruen* at 597 U.S. at 38 n.9 ("[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.").

125. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581 (1983) (distinguishing between generally applicable sales tax and "special tax that applies only to certain publications protected by the First Amendment[,]" calling it "facially discriminatory" even though it would have been less than the sales tax).

126. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

127. Gun Violence Prevention and School Safety Act, Cal. Assembly B. 28, Stats. 2023, Ch. 231.

V. COMMON MISTAKES MADE BY LOWER COURTS AFTER *HELLER* AND *BRUEN*

A. Common mistakes made in arms ban cases

1. *Heller*'s "in common use" test governs in all arms ban cases and cannot be ignored, changed, or circumvented

Heller remains good law after *Bruen*.[128] The *Bruen* decision merely built upon the historical work done by *Heller* and reaffirmed the basic text-first and history-second methodology applied in that case. As *Bruen* said, "[t]he test that we set forth in *Heller* and *apply today* requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[129]

In Heller, the Court decided whether handguns fell within the scope of the Second Amendment's protection of "arms," and thus could not be banned. To do that, the *Heller* Court applied the same *methodology* later explicitly spelled out in *Bruen* to decide the appropriate constitutional test. In the process, the *Heller* Court expressly addressed *what types* of weapons are protected by the Second Amendment, and what types are not. It relied on its opinion in the 1939 *Miller* case[130] to arrive at the constitutional test:

> We may as well consider at this point (for we will have to consider eventually) *what types of weapons Miller* permits. Read in isolation, Miller's phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected.[131]

The Court rejected that interpretation, stating that:

> *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and *of the kind in common use at the time."* [citing *Miller*, 307 U.S. at 179]. The traditional militia was formed from a pool of men bringing arms *"in common use at the time"* for lawful purposes like self-defense. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." [citation omitted][132]

The methodology in *Heller* started with evaluating the plain text of the Second Amendment, as described in Part I above. As noted, *Heller* defined the terms

---

128. Mark W. Smith, *What Part of" In Common Use" Don't You Understand?: How Courts Have Defied* Heller *in Arms-Ban Cases—Again* 41 HARV. J.L. & PUB. POL'Y PER Curium 1, 4 (2023), journals.law.harvard.edu/jlpp/what-part-of-in-common-use-dont-you-understand-how-courts-have-defied-heller-in-arms-ban-cases-again-mark-w-smith.

129. *Bruen*, 597 U.S. at 26 (emphasis added).

130. United States v. Miller, 307 U.S. 174 (1939).

131. *Heller*, 554 U.S. at 624 (emphasis added).

132. *Id*. at 624–25 (emphasis added).

"right of the people," "keep," "bear," and "arms."[133] The plain text of the Second Amendment is clear—it protects the right of Americans to "keep and bear arms." *Bruen* stated that "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[134] *Heller* phrased the presumption in less general terms when describing what arms can or cannot be banned: "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[135]

The *Heller* Court reviewed the historical record and identified a legal proposition that could fairly support a ban on possession of a type of arm: "the historical tradition prohibiting the carrying of 'dangerous and unusual weapons.'"[136] The *Heller* Court concluded that the government had the power to ban an arm only if it was "dangerous and unusual." That meant, however, that if an arm was "in common use" by Americans for lawful purposes, then it could not be banned;[137] the categories of "dangerous and unusual" and "in common use" are mutually exclusive. *Heller* established the *rule of decision* or test for arms-ban cases: the test is that arms which are "in common use" are protected by the Second Amendment and cannot be banned. Full stop. No further analysis is necessary, and it is improper for lower courts to substitute a test that differs from *Heller*'s "in common use" test.

Thus, speaking of handguns, *Heller* said, "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[138] This is the governing principle or test for all arms ban cases going forward: if an arm is in common use, it cannot be banned without violating the Second Amendment.

Heller did all the historical work required under *Bruen* when it comes to arms ban cases. Legal challenges to modern-day laws banning the possession or sale of particular arms or the components that affect the functionality of arms are directly controlled by *Heller's* "in common use" test. That is the legal test in a challenge to an arms ban law and *there is nothing for the lower courts to do except apply that test* to the facts at issue. It is only in other, non-ban cases, or in cases not governed by *Bruen*'s holdings regarding discretionary licensing, that the historical *methodology* described in *Bruen* must be followed to assess putative historical analogues.

Yet, some courts have refused to apply the "in common use" constitutional test, and instead have formulated their own tests, or revised *Heller*'s test, to determine whether a particular arm or class of arms is protected under the Second Amendment. See Parts A.2 through A.6., *infra*.

---

133. *Id* at 579, 581-86.
134. *Bruen*, 597 U.S. at 24.
135. *Heller*, 554 U.S. at 582.
136. *Id*. at 627.
137. *See id*. at 624–25.
138. *Id*. at 629.

2. The burden is on the government to prove that an arm is unusual and not "in common use"

A party challenging an arms ban is not required to prove that the firearms subject to the ban are in common use by Americans for lawful purposes. There is a presumption that small arms are covered by the Second Amendment. In describing what arms are presumptively protected by that amendment, *Heller* held that the "Second Amendment extends, prima facie, to all instruments that constitute bearable arms. . . ."[139]

Since it is presumed that all bearable arms are protected by the Second Amendment, that presumption stands unless rebutted. It is not the job of the individual defending firearms rights to anticipate what arguments the government might make in rebuttal and introduce evidence as part of its affirmative case to counter the government's rebuttal. Just as a defendant in a criminal case enjoys the legal benefits of the presumption of innocence, so too does a challenge to a gun control law enjoy the presumption of being correct. Thus, if the government wants to rebut the presumption of protection for bearable arms, it has the burden of proof to show that the arms in question are not "in common use." That is, no doubt, why *Heller* stated the test for unprotected weapons in the negative: the "Second Amendment does *not* protect those weapons *not* typically possessed by law-abiding citizens for lawful purposes."[140] If the government wants to take away Second Amendment protection for a bearable arm or a class of bearable arms, it must demonstrate that those weapons are "*not* typically possessed by law-abiding citizens for lawful purposes."[141] In contrast, like a criminal defendant, a Second Amendment plaintiff need only stare out the window at birds flying by while the government works to meet its own burden. If the government fails, the Second Amendment rights are vindicated, the government loses, and the gun control law falls.

If an individual desires to possess a particular arm (such as an AR-platform semi-automatic rifle), he need only show that the arm is presumptively protected because it is an "arm." The burden then shifts to the government to defend its law by demonstrating that the arm or rifle is not "in common use" or, put another way, is in the category of "dangerous and unusual" arms that may be banned (which is comparable to the historical tradition step of *Bruen's* methodology in cases not involving arms bans). If the government fails to show the rifle is both dangerous and unusual – that is a conjunctive and not a disjunctive test – the law banning it is unconstitutional.

Unfortunately, the Supreme Court's clear guidance has not prevented several courts from improperly shifting the burden to the non-governmental party. For example, a federal district court case regarding "assault weapons" found that under *Heller* and *Bruen*, "Plaintiffs have the burden of making the initial showing

139. *Id.* at 582.
140. *Id.* at 625 (emphasis added).
141. *Id.*

that they are seeking to possess or carry firearms that are '"in common use" today for self-defense' and are typically possessed by law-abiding citizens for that purpose."[142] The error with that statement is that neither *Bruen* nor *Heller* placed the burden of proof on the plaintiffs in that regard, and the quoted language states instead that *"Nor does any party dispute* that handguns are weapons 'in common use' today for self-defense."[143] There is nothing at all regarding burden of proof. In fact, the quoted language from *Bruen* proves the point being made here. There, the Court said that because no one disputed that handguns are in common use, it followed that handguns are protected—not presumptively protected as a matter of plain text, but absolutely protected as a matter of text *and history* under the binding test established by *Heller*.

Yet another district court in an arms ban case was similarly confused. Discussing *Bruen*, it stated that "the burden is on the plaintiff, in the first instance, to show that the challenged law implicates conduct covered by the plain text of the Second Amendment."[144] While that may be true in cases employing the *Bruen* methodology and not involving arms bans, it has no applicability in arms ban cases, which are governed by *Heller*. But then the court's discussion of the burden goes seriously off the rails: "To determine whether the conduct at issue is covered by the plain text of the Second Amendment, a court must determine whether the weapon in question is a 'bearable arm' that is 'in common use today for self-defense.'"[145] In other words, the court requires that a plaintiff must show that a weapon is "in common use today for self-defense." That requirement is directly contrary to *Heller*, which creates a presumption of protection for all bearable arms. To defeat that presumption, it is the government's burden to show that the banned arms are *not* "in common use" for lawful purposes, including self-defense.

3. The Test Is Not "In Common Use for Self-Defense"

Even when the "in common use" test is applied, it has still been the subject of other mistakes. Lower courts have engaged in some sleight of hand by redefining "in common use" for all lawful purposes to mean only "in common use for self-defense."

As *Heller* made clear, whether an arm is in common use is determined by whether it is commonly possessed by law-abiding citizens for lawful purposes.[146] But some lower courts have interpreted *Heller's* test to require proof of common use for *self-defense*; in other words, that the type of firearm subject to a

142. Nat'l Ass'n for Gun Rights. v. Lamont, 685 F. Supp. 3d 63, 88 (D. Conn. 2023) (*citing Bruen*, 597 U.S. at 32), *appeal pending*, No. 23-1162 (2d Cir. Aug. 16, 2023).

143. *Bruen*, 597 U.S. at 32 (emphasis added).

144. Oregon Firearms Federation, Inc. v. Kotek, 682 F. Supp. 3d 874, 888 (D. Oregon, 2023), appeal pending, Azzopardi v. Rosenblum, No. 23-35479 (9th Cir. July 17, 2023).

145. *Id*. at 888 (citing *Bruen*, 597 U.S. at 12, 19).

146. *Heller*, 554 U.S. at 625.

challenged ban, for example, semi-automatic rifles, have often *been actually fired in self-defense*.[147] But that is not the test.

National Association for Gun Rights v. Lamont is illustrative.[148] The district court in that case opined, without any supporting citation, that "a weapon must be *both possessed for the purpose of and actually used for self-defense* in order to fall within the Second Amendment's protection, meaning that *if it is either unusual for it to be possessed for self-defense or if it is used in a way that makes it particularly dangerous,* the weapon does not fall within the Second Amendment's purview."[149] Now, how can it be determined if a weapon is "used in such a way that makes it particularly dangerous"? (The court lamented what it viewed as the lack of good statistics about "assault weapon" use, while making such use a centerpiece of its reasoning.)

But the "particularly dangerous" test cannot be squared with the common use test of *Heller*, *Caetano*, or *Bruen*. It was apparently invented by the district court itself, in its rejection of the "dangerous and unusual" test. The district court did not like the Supreme Court's conjunctive "dangerous and unusual" test, believing that it should be disjunctive; that is, "dangerous or unusual." Accordingly, the court "read[] the term 'unusual' as implying that there must be some level of lethality or capacity for injury beyond societally accepted norms that makes it especially dangerous. . . ."[150] The court criticized the district court of Delaware for finding that it was constrained by precedent to apply the terms conjunctively, and noted that the district court relied on only two cases: *Bruen* and Justice Alito's concurrence in *Caetano*.[151] To justify its revision of *Heller*'s "dangerous and unusual" test, the *National Association for Gun Rights* court relied on a district court case from the Northern District of Indiana that concluded that "a weapon can be banned if it is 'uncommon or unusually dangerous.'"[152]

Oregon Firearms Federation v. Kotek[153] was even more emphatic that the burden is on plaintiffs to prove that a firearm or magazine is "in common use for self-defense," in the sense of actually being discharged in numerous self-defense confrontations. That district court opined that, "[u]nder *Bruen*, a court must consider whether a regulated firearm or firearm accessory is 'in common use today for self-defense.'"[154] Accordingly, this court received evidence at trial regarding

147. *See, e.g., Lamont*, 685 F. Supp. 3d at 97. Attempts to rewrite the *Heller* test even made their way into the *Rahimi* oral argument. There, the Solicitor General sought to define the test as "when you're looking at whether a weapon is dangerous and unusual, you should ask is this the kind of weapon that a law-abiding, responsible citizen would need for self-defense." Trans. of Oral Argument at 30:11-17, United States v. Rahimi, No. 22-915 (Nov. 7, 2023).

148. *Lamont*, 685 F. Supp. 3d at 90-91.

149. *Id.*

150. *Id.*

151. *Id.* (citing Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec. ("DSSA"), 664 F. Supp. 3d 584 (D. Del. 2023)).

152. *Id.* (quoting United States v. Reyna, 2022 WL 17714376, at *3 (N.D. Ind. Dec. 15, 2022)).

153. Or. Firearms Fed'n v. Kotek, 682 F. Supp. 3d at 895.

154. *Id.*

the use of LCMs [large-capacity magazines] in self-defense."[155] According to the court, "Plaintiffs offered only limited anecdotal evidence of LCMs actually being used in self-defense," whereas "Defendants presented substantial and highly credible evidence at trial showing that ordinary civilians in self-defense situations rarely fire more than ten rounds."

When *Heller* found that handguns were not just in common use, but rather "the quintessential self-defense weapon"[156] it did not base that conclusion on any evidence about how often handguns were actually fired, brandished, or otherwise deployed in actual, active self-defense events.[157] Rather, it simply listed some of the reasons why Americans "may prefer" handguns.[158] In *Bruen*, the Court picked up where *Heller* left off. The Supreme Court stated that the Second Amendment protects the right to "possess and carry weapons in case of confrontation."[159] The right encompasses the right to be "armed and ready for offensive or defensive action in a case of conflict with another person."[160] The right thus encompasses the right to "'keep' firearms . . . at the ready for self-defense . . . beyond moments of actual confrontation."[161] This means that to be constitutionally protected, it is enough that the arms in question are commonly possessed for any and all lawful purposes *including*, but not limited to, self-defense.

The weapon that rests on your nightstand may never be fired or brandished, but because it is at the ready should the need for self-defense arise, it most certainly is "in use." This is no different than a courtroom bailiff or police officer who "uses" his firearm when he carries it in the holster or a member of the NYPD carrying an AR-style rifle while patrolling New York City's Times Square. The mere possession of an arm is enough to establish its use, and lower courts are wrong to require a party challenging a modern-day firearms restriction to make a statistical showing of how frequently a challenged arm is actually fired in self-defense.

Indeed, many items are considered "in use" or "in common use" even though they are merely ready to be used or otherwise deployed. Fire extinguishers are "in common use" in schools and office buildings, even though they may never

---

155. *Id*. Several courts, citing *Bruen*, state that the test is whether the firearm is "in common use for self-defense." But that is not the test. *Heller*, which set the common use standard, never stated that to be protected a weapon must be in common use "for self-defense." That is why so many courts erroneously rely on the phrase in *Bruen*, at 32, regarding "'in common use' today for self-defense." But *Bruen* was not a case about *what* arms are protected, as *Heller* was, and *Bruen* was not purporting to provide a new standard about what arms are protected. Instead, the quote at 32, after noting that petitioners Koch and Nash are part of "the people," merely observed that "Nor does any party dispute that handguns are weapons "in common use" today for self-defense." Koch and Nash had both stated that they wanted a carry license for purposes of self-defense. *Bruen*, 597 U.S. at 15–16. The Court was simply noting matters in the case that were not disputed. It was not establishing a novel constitutional test.

156. *Heller*, 554 U.S. 629.

157. *Heller* was decided on a motion to dismiss record. See *Heller* 554 U.S. at 576.

158. *Heller,* 554 U.S. at 629.

159. *Id*. at 592.

160. *Id*. at 584.

161. *Bruen,* 597 U.S. at 32.

actually be discharged to put out a fire. A security alarm is "in use" although it may never be triggered. Umbrellas are in common use, even if they are merely carried or possessed when it is not actually raining. Air bags are in common use in automobiles, despite the fact that most are never deployed. So are smoke detectors, even if there is no fire. Life jackets are in common use on ships and boats, even when passengers are not actually required to wear them. Various forms of insurance are in use even if no claim is ever made upon those policies. Likewise, people use seat belts every day in motor vehicles even though they are rarely in auto accidents. Handguns and rifles possessed by Americans—whether in the home or carried in public—are "in common use" despite the fact that they may never be or have never been fired in an act of self-defense.

A firearm is being "used" if it makes a person "ready" for a situation in which they *could need to* fire the gun defensively.[162] Of course, such situations (like most life and death situations) are thankfully rare. Nevertheless, even when a firearm is actually employed in a self-defense situation, over 80% of the time it is not fired at all, but merely displayed or a verbal threat is made that the gun would be used.[163] The Second Amendment's protection is not limited to the right to possess only a firearm that will be absolutely necessary under unusual, life-threatening conditions; it protects the right to possess all bearable arms, including firearms in common use for any and all lawful purposes.[164]

4. The language from *Bruen* regarding technological changes and societal concerns is not a legal test

Some lower courts have attempted to circumvent *Heller's* "in common use" test in arms ban cases by seizing upon a single sentence in *Bruen* that states that "[w]hile the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating *unprecedented societal concerns* or *dramatic technological*

---

162. *Heller* indicated that "self-defense" was but a single example of lawful use of a firearm for purposes of gauging common use, not that it was the only use for that purpose. *See Heller*, 554 U.S. at 624. *See also* Mark W. Smith, "'In Common Use' Encompasses a Broad Range of Lawful Activities Beyond Firing a Gun." AmmoLand Shooting Sports News, Jan. 9, 2024, www.ammoland.com/2024/01/in-common-use-encompasses-a-broad-range-of-lawful-activities-beyond-firing-a-gun-video/#axzz8QvkLZxvR.

163. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 14, (May 13, 2022), https://dx.doi.org/10.2139/ssrn.4109494.

164. In a dissent, Judge Lawrence VanDyke addressed the issue of "rarity" and the Second Amendment when he wrote, "The reality is that essentially everything the Second Amendment is about is rare, for which we all should be very grateful. Government tyranny of the sort to be met by force of arms has been, in the short history of our country, fortunately rare. The actual need for any particular person to use her firearm to defend herself is, again, extremely rare—most of us will thankfully never need to use a gun to defend ourselves during our entire life. And in those rare instances where a firearm is used in self-defense, the amount of ammunition needed is generally very little—oftentimes none at all. It is certainly true that most of us will use exactly zero rounds of ammunition to defend ourselves—ever. So if the Second Amendment protects anything, it is our right to be prepared for dangers that, thankfully, very rarely materialize." Duncan v. Bonta, 19 F.4th 1087, 1167 (9th Cir. 2021) (VanDyke, J., dissenting), *vacated,* 49 F.4th 1228 (Mem.) (9th Cir. 2022).

changes may require a *more nuanced* approach."[165] Gun-control advocates and a number of lower courts have seized on this language to essentially gut the holdings in *Heller* and *Bruen*. It is important to note at the outset, therefore, what this language does and does not say.

First, by its very terms, that statement does not apply to issues covered by *Heller* or *Bruen*. The analogies in those cases were "relatively simple to draw," and the statement applies only to "other cases."[166] More importantly, the historical analogies in those cases have already been examined and decided by the Court in *Heller* and *Bruen*. That work has already been done. The lower courts should not be re-examining historical analogies to come up with some test that is different from what the Supreme Court has already decided.[167] Thus, that statement cannot be used to undermine the "in common use" test in *Heller* for arms ban cases. Nor can the statement be used to undermine the findings in *Bruen* that discretionary licensing systems are unconstitutional, that no "special need" must be shown to obtain a license to own or carry a firearm, that individuals who have only "ordinary" self-defense needs are entitled to own and carry a gun, and that the right to do so extends outside the home. In cases concerning these issues, "unprecedented societal concerns" or "dramatic technological changes" have no role to play whatsoever.

Second, the language from *Bruen* regarding technological changes and societal concerns is not a legal *test* that governs decisions either in arms-ban cases or in non-arms-ban cases. It is part of a description of the *methodology* that *Bruen* lays out for lower courts in deciding "other cases" not governed by *Heller*'s "in common use" test or by *Bruen*'s holdings regarding restrictive, discretionary licensing schemes. This language is irrelevant in arms ban cases because the Supreme Court has already evaluated the historical tradition of regulation and established that the dangerous and unusual test is the test to be applied to determine the constitutionality of arms bans.

Third, invoking the words "unprecedented societal concerns" or "dramatic technological changes" is not a "get out of jail free" card that allows courts to jettison the basic *Bruen* methodology, abandon careful use of historical analogue laws, or engage in "interest balancing" by weighing the perceived benefits of a current law against its effects on the right to keep and bear arms. The Court was simply saying that sometimes analogical reasoning may need to be a little more nuanced when technology and social conditions have changed since the founding. For example, proponents of New York's may-issue regime contended that colonial laws restricting the carrying of dangerous and unusual weapons extended to

165. *Bruen*, 597 U.S. at 27. Much of the discussion in this section can also be found in Mark W. Smith, *What Part Of "In Common Use" Don't You Understand? How Courts Have Defied Heller In Arms-Ban Cases – Again*, HARVARD J.L. & PUB. POL'Y, https://journals.law.harvard.edu/jlpp/what-part-of-in-common-use-dont-you-understand-how-courts-have-defied-heller-in-arms-ban-cases-again-mark-w-smith/ [https://perma.cc/N6HS-CKAS].

166. *Bruen*, 597 U.S. at 27.

167. *See, e.g.*, *Lamont*, 685 F. Supp. 3d at 88.

handguns. Even if that were the case, the Court reasoned, that would not support restricting the carrying of handguns *today* because handguns "are unquestionably in common use today."[168] In every case, straightforward or more nuanced, the *Bruen* methodology requires applying founding principles to modern circumstances; in no instance can the founding principles be disregarded.

Even though this language does not apply in arm ban cases, gun-control proponents claim that improvements in firearms technology, such as the development of semiautomatic weapons, are "dramatic technological changes" or that mass shootings are an example of "unprecedented societal concerns" that did not exist at the Founding. Some lower courts erroneously buy into these arguments, conducting their own analyses to formulate new tests to determine what arms are constitutionally protected and cannot be banned. These courts have found that arms that are "exceptionally dangerous" or "particularly dangerous"—such as so-called "assault weapons"—may be banned,[169] even though they are unquestionably "in common use."[170]

But the Supreme Court has been aware of such contentions throughout the development of its Second Amendment jurisprudence.[171] Briefing in *Heller* pointed out the alleged exceptionally dangerous nature of handguns, the rise of mass shootings, and similar concerns about violence and public safety. Ironically, when *Heller* was briefed in 2008, the District of Columbia and its amici argued that *handguns* were particularly dangerous and lethal, while there were few, if any, mentions of *rifles* such as "assault weapons" being "especially dangerous."[172] In *Heller*, the District argued that its handgun ban "do[es] not disarm the District's citizens, who may still possess operational rifles and shotguns."[173] It further argued that "the [D.C.] Council . . . adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense."[174] Today, gun ban advocates argue that so-called "assault weapons"—in reality, semi-automatic rifles—are unusually dangerous and must be banned.

Arguments about "dramatic technological changes" cannot affect the "in common use" test mandated by *Heller*. The "in common use" test looks at arms that are in common use by Americans *now,* and that necessarily includes any modern

168. *Bruen*, 597 U.S. at 47.

169. *See*, *e.g.*, *DSSA*, 664 F. Supp. 3d at 599; Or. Firearms Fed'n, 682 F. Supp. 3d at 888; Lamont, 685 F. Supp. 3d at 91.

170. *See, e.g.*, Bevis v. City of Naperville, 85 F.4th 1175,1187 (7th Cir. 2023); Capen v. Campbell, 2023 WL 8851005 (D. Mass. Dec. 21, 2023), *appeal pending*, No. 24-1061 (1st Cir. Jan. 17, 2024).

171. For a fuller discussion, see Mark W. Smith, *What Part Of "In Common Use" Don't You Understand? How Courts Have Defied Heller In Arms-Ban Cases – Again*, 41 HARV. J. L. & PUB. POL'Y (2023), available at https://journals.law.harvard.edu/jlpp/what-part-of-in-common-use-dont-you-understand-how-courts-have-defied-heller-in-arms-ban-cases-again-mark-w-smith/ [https://perma.cc/BS9T-JZNL].

172. Br. of Pet'rs at 5, District of Columbia v. Heller, No. 07-290 (2008).

173. *Id.* at 11.

174. *Id.* at 54.

or new technology, which those firearms use.[175] Even though technology may have changed or improved over time, any form of modern firearm technology that is currently "in common use" is constitutionally protected.[176] Thus, the relative dangerousness of a weapon is irrelevant if it is commonly used for lawful purposes.

Likewise, assertions that mass shootings constitute an "unprecedented societal concern" that did not exist at the Founding are similarly misplaced. Mass killings were commonplace at the Founding, and the Founders response was not to restrict the Second Amendment rights of the law abiding.[177] In fact, where violence was a real risk, the Founders often required the colonists to bring their own weapons.[178]

Post-*Bruen* decisions that seek to circumvent *Heller*'s "in common use" test by ignoring *Heller* and then smuggling in dangerousness arguments have resurrected the discredited "interest balancing tests" rejected in *Heller*, expressly abrogated in *Bruen*, and denied any relevance in *Rahimi*.

5. In arms ban cases, "in common use" is the test and lower courts err when they ignore that test and then engage in the *Bruen* historical methodology anew

Another way in which lower courts have circumvented the "in common use" test is by improperly redoing the full *Bruen* methodology themselves and substituting their own results in lieu of the Supreme Court's "in common use" test

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

176. For arms ban questions, the Second Amendment protects weapons that are in common use today. That necessarily implies that technological changes in arms *between* the Founding *and now*, dramatic or otherwise, cannot be used to justify bans on arms that are now in common use. In common use is the only constitutional test to apply in arms case cases. And the "dramatic technological changes" and "unprecedented societal concerns" language does not even apply to arms ban cases. *Bruen* added that language only for "other cases" where the analogies were not as straightforward as in *Heller* (arms ban case) and *Bruen*.

177. *See*, *e.g.*, the Enoch Brown school house massacre "Enoch Brown Incident." *National Memorial to Fallen Educators*, Mar. 15 2019, available at nthfmemorial.org/enoch-brown-incident [https://perma.cc/VS4M-2VWJ]; see also the Boston Massacre mass shooting (*Boston Massacre*, USHISTORY.ORG, available at. www.ushistory.org/declaration/related/massacre.html [https://perma.cc/8L4A-8KYZ].). Of course the colonial experience with constant Indian attacks was well understood and recognized to the point that the Declaration of Independence referred to their method of mass and brutal attacks as being "merciless" and "savage[]." Mark W. Smith, *Wolves and Grizzlies and Bears, Oh My!: Exploring Historical and Contemporary Contexts for Justice Kennedy's Founding Era Application of the Personal Right to Bear Arms,* 46 S.I.U. LAW R. 467 (2022).

178. See generally Benjamin Boyd, *Take Your Guns to Church: The Second Amendment and Church Autonomy*, 8 LIBERTY UNIV. L. REV. 653, 697–99 (2014) (collecting colonial- and Founding-era historical law for requiring firearms at church services).

reached by *Heller*.[179] Often, they use the "unprecedented societal concerns" and "dramatic technological change" as a gateway.

One particularly clear example of this error is the *Delaware State Sportsmen's Ass'n* case from the District of Delaware.[180] The case considered that state's newly enacted ban on "assault weapons" and "large capacity magazines." The plaintiffs, relying on *Heller* as providing the constitutional rule of decision, correctly argued that "once a weapon is found to be 'in common use' it cannot be regulated, and no historical analysis is necessary."[181] The district court responded:

> I disagree. As the Supreme Court made clear in *Bruen*, "the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[182]

That would be a true statement if a court was analyzing a non-ban firearms regulation *ab initio*. But the Delaware court was not analyzing a Second Amendment question anew. The issue in that litigation was whether so-called "assault weapons" and "large capacity magazines" are protected arms under the Second Amendment. *Heller* had already done the historical analysis to determine what kinds of arms are protected by the Second Amendment and had determined that the test is whether they are "in common use."[183] Lower courts are not permitted to do their own historical analysis, and then come up with a test that is different from the *Heller* test. The only question presented in an arms-ban case is whether the arms in question meet the "in common use" test. The Delaware district court continued:

> If the standard were as Plaintiffs propose, then *Bruen* need not have proceeded beyond the first step of the analysis. Instead, however, after concluding that the Second Amendment's plain text "presumptively guarantee[d]" the plaintiffs a

179. This subject is considered at considerably greater length and detail in two articles by this author. The most detailed is Smith, Mark W., *What Part of 'In Common Use' Don't You Understand?: How Courts Have Defied Heller in Arms-ban Cases — Again* (June 17, 2023), available at SSRN: https://ssrn.com/abstract=4483206 or http://dx.doi.org/10.2139/ssrn.4483206 [https://perma.cc/8WG6-X3VA]. A more condensed version is Mark W. Smith, *What Part of 'In Common Use' Don't You Understand?: How Courts Have Defied Heller in Arms-ban Cases — Again*, 41 HARV. J. L. & PUB. POL'Y (2023), available at https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/09/Smith-In-Common-Use-vf1-MM.pdf [https://perma.cc/7XG3-NUPK]. The discussion in this section draws on the SSRN version.

180. *See, e.g.*, *DSSA*, 664 F. Supp. 3d at 597.

181. *Id.*

182. *Id.* (citation omitted, emphasis added).

183. *See Heller*, 554 U.S. at 627.

> right to bear arms in public for self-defense, the Supreme Court turned to the question of historical tradition. Thus, so do I.[184]

That is simply incorrect. The reason *Bruen* proceeded to examine the historical tradition is because the question in *Bruen* (a) *did not involve an arms ban*, and (b) could not be resolved by applying *Heller*'s rule of decision. The question in *Bruen*, for which it performed a historical review, was whether New York's highly restrictive *licensing* system for the public *carry* of firearms was justified by historical analogues. That and related issues had never been decided by the Supreme Court using the required historical methodology, whereas the question of what arms are protected had already been addressed and settled in *Heller*.

The district court's own analysis, substituted for the test articulated in *Heller*, took the court right back into the interest balancing rejected in *Bruen*. "Defendants argue that the instant regulations implicate 'unprecedented societal concerns' and 'dramatic technological changes.' I agree."[185] The court then adopts defendants' view of the history of semiautomatic technology, arguing that "assault long guns and LCMs represent recent advances in technology," because they didn't come into widespread use until the early part of the twentieth century.[186] The opinion goes on to address "unprecedented societal concerns," allegedly due to the rise in public mass shootings over the past four decades. The district court concluded, "I find that Defendants have sufficiently established that assault long guns and LCMs implicate dramatic technological change and unprecedented societal concerns for public safety."[187] It found that Defendants had demonstrated that "assault rifles and LCMs are exceptionally dangerous."[188]

The kinds of evidence the court cites is a dead giveaway that it is engaged in interest balancing: a study showing the use of "assault weapons" in a quarter of mass shootings; the involvement of LCMs in over half of those shootings (not particularly surprising given that LCMs represent about half of the magazines in circulation); assertions by so-called experts that "assault rifles and LCMs are exceptionally dangerous" and that they have "military" features that allegedly "increase their lethality" such as pistol grips, barrel shrouds, detachable magazines, and "high velocity" rounds.[189] The court also engages in a sensationalistic listing of the purported lethal effects of "assault rifle bullets" that, frankly, strains credulity.[190] The opinion further contends that assault rifles pose a particularly

184. *DSSA*, 664 F. Supp. 3d at 597.
185. *Id.* at 598.
186. *Id.*
187. *Id.* at 599–600.
188. *Id.* at 599.
189. *Id.*
190. *DSSA*, 664 F. Supp. 3d at 599–600.

high risk to law enforcement officers because their body armor cannot withstand these "high velocity" bullets.[191]

These claims are merely interest-balancing arguments smuggled back in and dressed up as "dramatic technological change" and "unprecedented societal concerns." But those changes and concerns were never presented by *Bruen* as forming a separate test or rule of decision, and they provide no excuse for a court to engage in interest balancing instead of employing the *Heller* "in common use" test.[192]

6. Courts are not justified in ignoring or altering the "in common use" test simply because they disagree with it, or in short-circuiting it by importing empirical tests into the "plain text" inquiry

Sometimes the lower courts simply reject the "in common use" test outright. They claim that a court cannot rely on a mere count of the numbers of weapons already possessed to establish common use. Among other things, they claim that the numbers are meaningless because such a test is "circular" and therefore, in a common formulation, "absurd." In the recent decision by the Massachusetts district court in *Capen v. Campbell*, the court stated:

> Plaintiffs contend that if a weapon is popular—that is, if thousands or even millions of copies of that weapon have been sold—then, by definition, it is "in common use" and is protected by the Second Amendment. Put simply, in their view, if a firearm is currently in "common use," its sale and possession are protected and no further analysis is required.[193]

The court then opined:

> Whatever the meaning of "common use," that contention cannot be correct. Such a rule would lead to *a host of absurd results*. Among other things, the constitutionality of the regulation of different firearms would ebb and flow with their sales receipts. Weapons that unquestionably would have been considered within the ambit of the Second Amendment at the time of ratification (such as a smooth-bore, muzzle-loading musket) would lose their protection because of their relative rarity today. Conversely, an entirely novel weapon that achieved rapid popularity could be rendered beyond the reach of regulation if innovation and sales outstripped legislation.[194]

---

191. *Id*. at 600. Supporters of the District of Columbia's handgun ban in *Heller*, summarized above, condemned *handguns* because they can allegedly fire cartridges that can pierce body armor, thereby jeopardizing police officers. *Heller*, Amicus Br. of Violence Policy Center *et al*. at 18.

192. Other cases erroneously conducting a *Bruen*-style historical review, to the exclusion of the in common use test, include *Hartford v. Ferguson*, 676 F. Supp. 3d 897, 903 (W.D. Wash. 2023); *Bevis*, 657 F. Supp. 3d at 1190-91; *Herrera v. Raoul*, 670 F. Supp. 3d 665, 675 (N.D. Ill. 2023).

193. *Capen*, 2023 WL 8851005, at *8 (D. Mass. Dec. 21, 2023).

194. *Id*. (emphasis added).

There are several things to note about this passage. First, there is nothing "absurd" about looking at the numerical prevalence of types of arms to determine if they are in common use.[195] It is the most natural way of answering that question. It was the approach used by the author of *Bruen*, Justice Thomas, in dissenting from the denial of certiorari in *Friedman v. Highland Park*, when he reasoned that "under our precedents" the fact that "roughly five million Americans" owned "AR-style semiautomatic rifles" for overwhelmingly lawful was "all that is needed for citizens to have a right under the Second Amendment to keep such weapons."[196] Furthermore, it is not the case that weapons within the ambit of the Second Amendment at the time of ratification, such as smooth-bore muzzleloaders would lose their protection "because of their relative rarity today."[197] The test is not relative rarity, but absolute numbers. Muzzleloading firearms, whether smooth-bore or rifled, are owned in large numbers in the United States today. Their popularity is attested by the fact that all 50 states have muzzleloader hunting seasons.[198] The concern that "an entirely novel weapon that achieved rapid popularity could be rendered beyond the reach of regulation if innovation and sales outstripped legislation" is itself very telling of the court's mindset.[199] Why run the risk of allowing the American people, through the marketplace, to determine what weapons they find useful or desirable, as opposed to legislatures and courts telling them what they cannot have? Our Founders rightly deferred to the American people to decide what firearms they themselves found valuable for defense and other lawful purposes; they did not trust political elites—wearing black robes or otherwise—to make those choices for them.

In *Heller* itself, Justice Breyer accused the Supreme Court of circularity in adopting the "in common use" test. Justice Breyer wrote:

> On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.[200]

---

195. Another case that approves the term "absurd" for the "in common use" test, and calls it "circular," is *Bevis*, 85 F.4th at 1190 (quoting *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015)).

196. Friedman v. City of Highland Park, Ill., 136 S. Ct. 447, 449 (Thomas, J., and Scalia, J., dissenting from denial of certiorari).

197. *Capen*, 2023 WL 8851005, at *8 (D. Mass. Dec. 21, 2023).

198. Muzzleloader Regulations Chart, MUZZLE-LOADERS.COM (Oct. 14, 2021), https://muzzleloaders.com/blogs/muzzleloader-regulations/muzzleloader-regulations-chart [https://perma.cc/V7ZA-GVQM].

199. *Capen*, 2023 WL 8851005, at *8.

200. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting).

The *Heller* majority rejected the dissent's argument. The Supreme Court affirmatively adopted the "in common use" test despite the argument by Justice Breyer that it was circular. The Court was clearly correct in doing so. Far from a circular inquiry, asking the government to demonstrate that a banned arm is not in common use *today* is an objective inquiry that is also administrable for courts.

7. It is improper to import substantive, empirical tests into the initial threshold "plain text" inquiry

Another circumvention of the "in common use" test is on display in the Seventh Circuit case of *Bevis v. City of Naperville*. The Seventh Circuit treated the "in common use" test as a nullity. It instead invented its own test, holding that the ordinary semiautomatic firearms that Illinois banned, and that Illinois labeled "assault weapons," are "military weapons" that "lie outside the class of Arms to which the individual right applies."[201] The Seventh Circuit did this by importing a substantive, empirical test into step one of the *Bruen* analysis, which should be purely a linguistic analysis as to whether the weapons in question are "arms" as defined in *Heller*.[202] It then used that "military vs. civilian" test to claim that the banned semiautomatic weapons do not qualify for Second Amendment protection because they are "military," rather than applying *Heller*'s "in common use" test.

The error is immediately apparent from the Seventh Circuit's description of its own method of analysis: "We begin by looking at the 'plain text' of the Second Amendment to see whether the assault weapons and large-capacity magazines . . . fall within the scope of the 'Arms' that individual persons *are entitled to keep and bear*."[203] That is wrong out of the box. The plain text (or, more properly in arms ban cases, whether the item is a "bearable arm" and thus prima facie protected) is consulted to see if its terms, as a matter of language, cover the conduct in question; namely possession of the kinds of arms Illinois has banned. It is only *after* deciding whether possession of rifles is covered by the plain text (or, again, whether they are bearable arms), that it might have to be determined whether the arms are of a kind "that individual persons are entitled to keep and bear." In cases of first impression, one might look to historical analogues supplied by the government. But this is not a case of first impression. Whether rifles are protected under the Second Amendment is determined by the "in common use" test of *Heller*, which the Seventh Circuit does not rely on to decide the case, but instead criticizes as "slippery" and (as noted above) "absurd."[204] It prefers to smuggle a substantive test into the plain text analysis.

---

201. *Bevis*, 85 F.4th at 1203.

202. Although *Bevis* was an arms-ban case, and thus should have been analyzed solely under *Heller*, the court apparently believed that it needed to apply the "plain text" threshold textual inquiry under *Bruen*. But whether the initial threshold textual inquiry is "plain text" under *Bruen* or "bearable arms" under *Heller*, the initial threshold inquiry is always linguistic and textual; there is no place at this threshold textual inquiry for introducing substantive tests, empirical facts, or historical analogue laws.

203. *Bevis*, 85 F.4th at 1192 (emphasis added).

204. *Id.* at 1190, 1198.

The Seventh Circuit states, quoting *Heller*, that the term "arms" was "applied, then as now, to weapons that *were not specifically designed for military use and were not employed in a military capacity*."[205] From that, it concludes that only certain "non-military" weapons, not military weapons, are protected by the Second Amendment. Is the Seventh Circuit really contending that *only* weapons not specifically designed for military use, and not so employed, are protected? The quoted statement does not mean that the term "arms" is *limited to* non-military weapons, but rather that the term *includes* non-military weapons as well as military weapons. It would be strange indeed if an amendment designed to help secure a well-regulated militia protected only weapons *not* useful for militia purposes. Indeed, *Heller* explains that the founding-era militia was understood to be "useful in repelling invasions and suppressing insurrections."[206] The notion that such a body could be prevented from accessing arms useful in those very activities is nonsensical.

The *Bevis* court admits that "In discussing whether these assault weapons and large-capacity magazines are Arms protected by the Second Amendment, we have (as instructed by Bruen) confined ourselves to textual considerations."[207] First of all, *Heller*, not *Bruen*, governs in arms-ban cases. Second, the court has not confined itself to textual considerations. It has imported an empirical finding that "assault weapons" are "much more like machineguns and military-grade weaponry than they are like . . . firearms that are used for individual self-defense."[208]

The Seventh Circuit's "military vs. civilian" position is directly contradicted by both *Miller* and *Heller*, which recognized that militia members brought with them their own weapons that they already owned for private purposes, and then used them for military (militia) purposes. In fact, the Seventh Circuit even quoted *Heller* to the effect that "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."[209] In other words, the weapons used by militia members for military purposes, and by citizens for lawful purposes, were one and the same. The court's language about "not specifically designed for military use" and "not employed in a military capacity" has no foundation in fact or history, and is directly refuted by history, *Heller* itself, and elementary logic.

B. Discretionary Licensing Regimes

Another category of litigation that has become muddled by common errors in some lower courts involves the standards that apply to licensing regimes. The distinction between may-issue and shall-issue licensing has become extremely important following *Bruen*, which signaled that licensing schemes may be

205. *Id.* at 1193.
206. *Heller*, 554 U.S. at 597.
207. *Bevis*, 85 F.4th at 1198.
208. *Id.* at 1195.
209. *Id.* at 1194 (quoting *Heller*, 554 U.S. at 624).

constitutional, provided that the application process is neither expensive nor delayed, and the criteria for the permit is objective, i.e., does not permit any discretion by a government agent. While *Bruen* struck down a may-issue licensing regime in New York that used subjective standards to determine whether someone could be issued a permit to own a firearm,[210] states continue to create these regimes in more covert ways. New York passed new licensing laws just after *Bruen* that still gave vast discretion to licensing officials in determining who is worthy of possessing a license.

New York law already contained a "good moral character" requirement,[211] but the State redefined it after *Bruen* to require "having the essential character, temperament and judgment necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others."[212] A number of things could apparently disqualify someone from meeting that requirement, including a negative impression during an in-person meeting between the applicant and the licensing officer. Furthermore, New York required the applicant to submit contact information for the applicant's current spouse or domestic partner, adult children, and four other references for the licensing officer to contact.[213] It also asked for a list of social media accounts the applicant had used in the past three years, and "such other information required by the licensing officer that is reasonably necessary."[214]

The onerous nature of these requirements underscore that some States will do whatever it takes to circumvent the teaching that there is a "general right to publicly carry arms for self-defense."[215] After all, it was New York Governor Kathy Hochul who declared that "I'm prepared to go back to muskets."[216] These subjective licensing criteria are exactly what *Bruen* condemned. Discretionary regimes are so pernicious because their subjective criteria are far too open to bias and interpretation. The meaning of "special need" and "good moral character" can easily be subjectively interpreted against the applicant. Additionally, discretionary licensing regimes may become so restrictive that permits are granted simply on the basis of politics and favoritism.

As historian and scholar Stephen Halbrook has written: "In January 1956, Martin Luther King's house was bombed. Rev. King said he was receiving threats 'continuously' when he sought permission for gun licenses from an Alabama sheriff for himself and two other clergymen helping to protect him and his family.

---

210. *Bruen*, 597 U.S. at 70-71.
211. *Id.* at 11.
212. N. Y. Penal Law § 400.00(1)(b).
213. 2022 N.Y. Sess. Laws ch. 371 (1)(b).
214. *Id.* § 400.00(1)(f).
215. *Bruen*, 597 U.S. at 31, 33.
216. *Video, Audio, and Rush Transcript: Governor Hochul Issues Response to Supreme Court Ruling Striking Down New York's Concealed Carry Restriction* Governor Kathy Hochul, www.governor.ny.gov/news/video-audio-rush-transcript-governor-hochul-issues-response-supreme-court-ruling-striking-down#:~:text=And%20I%27m%20sorry%20this,to%20go%20back%20to%20muskets [https://perma.cc/Q22Z-47ZD].

On page 3B of the February 4, 1956 *Montgomery Advertiser* the headline read, 'Negro Leader Fails to Get Pistol Permit.' Alabama's then-may-issue regime, which gave discretion to officials to issue a license to carry a pistol if the applicant had 'good reason to fear an injury' or 'other proper reason,' left Reverend King defenseless in the face of the innumerable threats against him and his family."[217] In denying the license, King felt like the sheriff was essentially saying that "you are at the disposal of the hoodlums."[218]

Subjective licensing regimes trace their pedigree to racist episodes such as this, and *Bruen* instructed that they are impermissible.[219] Justice Kavanaugh's concurrence (joined by Chief Justice Roberts) drives this point home. Justice Kavanaugh lambasted New York's licensing regime for being "constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense."[220] Just like the majority opinion, Justice Kavanaugh criticized the "open-ended discretion" that is the result of may-issue licensing regimes.[221] Furthermore, he wrote that "the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States."[222] While he allowed the possibility of as-applied challenges to shall-issue licensing regimes, Justice Kavanaugh made clear that subjective licensing criteria were proscribed by the Second Amendment.

Applying similar reasoning to New York City's post-*Bruen* licensing regime, federal district court Judge John Cronan struck it down. He correctly found under *Bruen* that the licensing regime implicates a citizen's right to keep and bear arms.[223] This is obvious, given that a licensing official in New York City can prevent a citizen from owning or carrying a firearm on the flimsiest of grounds. But the City must prove that its licensing criteria have a longstanding tradition in our nation's history. Just like with any may-issue licensing regimes, though, the City fails miserably at this task. Judge Cronan notes that New York City does not seem to "appreciate" that it has a burden to show historical analogues to its discretionary licensing criteria.[224] The City confusedly says that "plaintiff's memorandum is devoid of citations to source material statutes, historical analysis or historical legal precedent to support the assertion that governments did not

217. Mark W. Smith, NYSRPA v. Bruen: *A Supreme Court Victory For The Right To Keep And Bear Arms—And A Strong Rebuke To "Inferior Courts*, HARV. J. OF LAW & PUB. POL'Y PER CURIAM 4–5 (2022).

218. Donald T. Ferron, Notes on MIA Executive Board Meeting (Feb. 2, 1956). https://kinginstitute.stanford.edu/king-papers/documents/notes-mia-executive-board-meeting-donald-t-ferron-1 [https://perma.cc/3D89-8W67].

219. *See Bruen*, 597 U.S. at 60-61. *See also* NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS at 262 (2014).

220. *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring).

221. *Id.*

222. *Id.* at 80.

223. Srour v. New York City, 699 F. Supp. 3d 258, 268 (S.D.N.Y. Oct. 24, 2023).

224. *Id.* at 267 n.6.

require individuals to seek permission to keep and bear arms."[225] Of course, this flips the script. It is *the government's* burden to produce historical analogues.[226] Judge Cronan found New York City's licensing regime to be facially unconstitutional in every application.[227]

Discretionary regimes took another blow in Judge Renée Marie Bumb's opinion in *Koons v. Platkin*, which challenged New Jersey's post-*Bruen* may-issue licensing regime.[228] The judge noted that New Jersey's licensing regime often serves to harass law-abiding gun owners, just as all may-issue licensing regimes do: it "is aimed primarily—not at those who unlawfully possess firearms—but at law-abiding, responsible citizens who satisfy detailed background and training requirements and whom the State seeks to prevent from carrying a firearm in public for self-defense."[229] Judge Bumb goes on forcefully to note that "the State disagrees with Bruen, but it cannot disobey the Supreme Court by declaring most of New Jersey off limits for law-abiding citizens who have the constitutional right to armed self-defense."[230]

The proliferation of may-issue regimes since *Bruen* are less than transparent attempts to flout the decision. As a result, Judge Bumb took aim at the requirement that applicants for a permit in New Jersey must interview in-person.[231] In-person interviews introduce an unlawful amount of discretion in the permitting process, and there is little historical evidence showing that they form part of the tradition of firearm regulation. Judge Bumb remarked that the in-person interview was "unduly burdensome" and reasoned that "[t]he State has not justified this requirement or explained how, after receiving the endorsers' certifications, interviewing them in-person (or even how that is achieved in a nonburdensome way) will aid the licensing authority's review of a Carry Permit application."[232] An interview will not provide a licensing authority any more information regarding whether a person can possess a firearm, but it could give rise to arbitrary (or discriminatory) reasons to deny them.

All this goes to show that discretionary licensing regimes are expressly forbidden by *Bruen*: whether it's an in-person interview, social media information, or something similar, such factors cannot be part of an application process. The Second Amendment is not a benefit for a few "virtuous" or supposedly morally superior individuals, but rather a right that belongs to all Americans.[233]

---

225. *Id.*

226. *Bruen*, 597 U.S. at 24; *see also* Part II, *infra*, (collecting statements in *Bruen* about burden on government to provide historical analogues).

227. *Srour*, 699 F. Supp. 3d at 258.

228. *See Koons*, 673 F. Supp. 3d at 543.

229. *Id.*

230. *Id.* at 544.

231. *Id.* at 573–74.

232. *Id.* at 574.

233. The Court in *Rahimi* soundly and unanimously rejected the Government's argument that Mr. Rahimi could "be disarmed simply because he is not responsible," noting that such a qualification was "vague," that its effect was "unclear," and that its provenance was unmoored from the precedents

C. Mistakes in Cases Challenging Gun Restrictions Imposed on Young Adults

Courts adjudicating whether 18-20-year-olds have a right to firearms also commit several common errors.[234] The first is quite basic. When the Framers wanted to put age limits in the Constitution, they knew how to do so. For example, Article II, Section 1, Clause 5 decrees that individuals running for President must be at least 35 years old.[235] The Second Amendment contains no similar age limitation. There can thus be no doubt that the plain text of the Second Amendment includes and protects 18-to-20-year-olds.

Another particularly pernicious error is holding that 19th century Reconstruction-era evidence is more probative than Founding-era evidence. The Eleventh Circuit made this mistake in its now-vacated opinion in *National Rifle Association v. Bondi*.[236] Other courts to address the issue have reached the correct conclusion, which is that any historical tradition of firearms regulation must be grounded in the Founding era.[237] As the District of Minnesota held in *Worth v. Harrington*, "*Bondi* declined to follow rather clear signs that the Supreme Court favors 1791 as the date for determining the historical snapshot of 'the people' whose understanding of the Second Amendment matters."[238] For all the reasons discussed elsewhere in this article, 1791 should control the 18-to-20-year-old issue as well.

One of the most common errors is assuming that 18-to-20-year-olds were categorically entitled to no Second Amendment rights.[239] For starters, this is manifestly false. When males aged 18 to 45 were required to serve in the militia at the Founding, they were also required to acquire guns, and there were zero age-based restrictions specifically directed toward their right to acquire firearms or what they could do with those guns.[240] Regardless, even if we assume that 18-to-20-year-olds did not have Second Amendment rights at the Founding because of their minority status for certain purposes, that would not support such regulation today because 18-to-20-year-olds are now considered adults.[241]

Another common error is holding that *Heller*'s use of the phrase "political community" to describe people who have Second Amendment rights means that

---

that *Heller* and *Bruen* both drew on and established. *Rahimi*, 44 S. Ct. at 1903; see also *id.* at 1930 (Thomas, J., dissenting).

234. *See, e.g.*, Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317 (11th Cir. 2023), *reh'g en banc granted, op. vacated*, 72 F.4th 1346 (11th Cir. 2023).

235. U.S. CONST., art. II, cl. 5.

236. *Bondi*, 61 F.4th at 1322.

237. *See, e.g.*, Worth v. Harrington, 666 F. Supp. 3d 902, 914 (D. Minn. 2023).

238. *Worth*, 666 F. Supp. 3d at 919.

239. *See, e.g.*, Br. of Appellant in *Reese v. BATFE,* No. 23-30033 (5th Cir. Jan. 30, 2024).

240. Milita Act of 1792, Art. I (May 8, 1792), CONSTITUTION.ORG, https://www.constitution.org/1-Activism/mil/mil_act_1792.htm [https://perma.cc/D4DQ-UUM3].

241. Although the age of majority was 21 at the founding, that does not mean that those under 21 lacked all legal rights. "While the full age of majority was 21, that only mattered for specific activities," and "constitutional rights were not generally tied to an age of majority, as the First and Fourth Amendments applied to minors at the Founding as they do today." Hirschfeld v. Bureau of Alcohol, Tobacco & Explosives, 5 F.4th 407, 435 (4th Cir. 2021), *vacated as moot* 14 F.4th 322 (4th Cir. 2022).

"the people" is restricted to voters.[242] This cannot be correct because *Heller* used "national community" and "Americans" as synonyms.[243] All these terms refer to the *polity*—i.e., the people that make up the nation, and that includes all Americans. Because it is undisputed that 18-to-20-year-olds are Americans, not to mention that they have a right to vote under the 26th Amendment, they are within "the people" whom the Second Amendment protects.

The Third Circuit did not fall into any of these traps when it recently held that 18-to-20-year-olds are fully protected by the Second Amendment.[244] It focused on the correct historical period and then held that the Second Amendment's reference to "the people" covers all adult Americans, which includes 18-to-20-year-olds today.[245] The Third Circuit persuasively reasoned that 18-to-20-year-olds are among "the people" for numerous other constitutional rights, such as the right to vote, the right to speak freely, and the right to be free from unreasonable government searches and seizures.[246] Thus, they are also within the ambit of the Second Amendment's protection.

D. Government-Mandated Gun Free Zones a/k/a "Sensitive Places"

Although the Supreme Court has not provided definitive guidance on "sensitive places," the following framework should assist in considering this issue. At the outset, the phrase "sensitive place" is simply a euphemism for a government-mandated "gun free zone", i.e., a geographic area where government deprives by law its citizens the right and ability to defend themselves with arms. In reality, merely slapping a label on a geographic location does not make it "sensitive" – whatever that vague word might mean.[247]

To determine the appropriate limits on those places that the government can mandate to be gun free, we must identify the *essential characteristics* of a "sensitive place"—as that concept was used by the Supreme Court in *Bruen*. This

242. Vincent v. Garland, 80 F.4th 1197, 1203 (10th Cir. 2023), *cert. granted*, *judgment vacated*, ——S. Ct.——, 2024 WL 3259668 (Mem.) (July 2, 2024).

243. *See Heller*, 554 U.S. at 580–81.

244. *See* Lara v. Comm'r Pa. State Police, 91 F.4th 122, 132 (3d Cir. 2024).

245. *Id.* at 127.

246. *Id.* at 131.

247. Take, for example, when Times Square was labelled a "sensitive place." Aaron Katersky, New York City's Times Square Officially Becomes Gun-free Zone, ABC NEWS (Oct. 11, 2022), abcnews.go.com/US/york-citys-times-square-officially-gun-free-zone/story?id=91332223 [https://perma.cc/45K4-VRCU]. So, too was the New York City subway system with its 472 stations spread along 665 miles of track. *See Matt Katz, New York City rolls out new gun-free zones*, NPR (Sep. 2, 2022), https://www.npr.org/2022/09/02/1120692933/new-york-city-rolls-out-new-gun-free-zones [https://perma.cc/ZVW7-W34Z]; *Riding the subway*, MTA (Apr. 3, 2024), https://new.mta.info/guides/riding-the-subway [https://perma.cc/82D6-9U8V]. That legislative declaration that the New York City subway system was a "gun free zone" worked out so poorly that New York's governor Kathy Hochul had to deploy the National Guard to the subways in an attempt to thwart violent crime. Anthony Izaguirre, *New York will send National Guard to subways after a string of violent crimes*, AP NEWS (Mar. 6, 2024), https://apnews.com/article/new-york-city-subway-national-guard-crime-f046ecaac79601f6113efa8a0c8f25c7 [https://perma.cc/GR37-4JFS].

requires understanding historically what made "legislative assemblies, polling places, and courthouses" sensitive at the Founding.[248]

Recently, some have defined sensitive places as those where "core government functions" take place.[249] This principle, presumably, was drawn from the list of places that *Bruen* itself gave: polling places, courthouses, and legislatures. However, the principle is nothing more than blind guesswork, and has no relation to the purposes of the Second Amendment.

There are two problems with the "core government functions" principle. First, it is far too manipulable and far too subjective. The government will have little to no trouble defining every public space, whether big or small, as "sensitive" because of supposed "core government functions" that occur there. Churches, for example, are places people go to practice their First Amendment rights: therefore they must be sensitive.[250] Post offices could be considered sensitive because delivering the mail could be a core government function given that elected officials use the mail to communicate with constituents and to raise campaign donations.[251] Parks might provide a core government function because citizens stay healthier when they can exercise in the parks and, thus, they are less likely to become ill as often, which saves government-paid health care costs. When it comes to interpreting constitutional rights, we must grant the government as little latitude as possible in doing so; this test grants too much.

On the other hand, the "core government functions" test is underinclusive. The case of airports demonstrates this well: there are no discernible government activities that take place at airports. At the same time, however, no one would claim that firearms should be permitted in the sterile areas of airports past the area where security screening takes place, or carried onto commercial airplanes. The "core government function" theory fails to explain why firearms are not permitted in such areas.[252]

Another argument being advanced to justify designating an area as a "sensitive place" is the "collateral damage" test. The thinking here is that it is constitutionally permissible to designate as "gun free zones" locations where the misuse of a firearm could cause death or injury to a significant number of innocent civilians. While airports would arguably pass muster under the collateral damage test, it leaves too much to the discretion of the courts, which is what Bruen forbids. It also fails to explain why courthouses, legislative assemblies and polling places

248. *Bruen,* 597 U.S. at 30.

249. Trans. of Oral Argument at 62-63 in Koons v. Platkin, 23-1900 (3rd Cir. Feb. 5, 2024).

250. Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 467 (2019), available at https://scholarship.law.wm.edu/wmborj/vol28/iss2/9 [https://perma.cc/4YGH-N7YV].

251. *Id.* at 461.

252. Airports were not considered sensitive places where firearms could be banned until a series of hijackings led the government to set up metal detectors there to protect travelers. *See generally* Stephen P. Halbrook, *Firearms, the Fourth Amendment, and Air Carrier Security*, 52 J. OF AIR LAW & COMMERCE 585 (1987).

are sensitive places and not other areas where the public congregates and innocents could be harmed.

Another rationale that has been offered in support of sensitive place laws, and drawn from *Heller*'s dictum that schools are a sensitive place, is that of "vulnerable people." In the school example, the argument goes that because children are a population particularly vulnerable to violent attacks, armed individuals should be kept as far away from them as possible. The Second Circuit endorsed this rationale when it recognized what it called "this Nation's tradition of firearm regulation in locations where vulnerable populations are present," which includes "the tradition of prohibiting firearms in places frequented by children."[253] However, such logic is perverse and should be rejected because it puts the people the Second Amendment was supposed to protect directly in harm's way. Where vulnerable people are present, the presence of law-abiding citizens with firearms is even more necessary to protect them from threats.

Another justification that has been offered in favor of sensitive place laws is that places where people exercise their constitutional rights need to be free of firearms so that people can exercise their rights without fear. This justification has no limiting principle, however—constitutional rights are exercised practically everywhere one goes. Whether it's in their home, on the sidewalk, or on public transit, citizens are exercising their enumerated and unenumerated rights everywhere. Declaring an area sensitive on such a basis would lead to an entire jurisdiction being sensitive. Take Manhattan, for example—there is nowhere in Manhattan that constitutional rights aren't being exercised. Yet, as *Bruen* told us, "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place.'"[254] This rationale, then, must be rejected as being far too broad and untethered from the text of the Second Amendment.

None of these proffered tests suffice to explain the commonality that historically united polling places, legislatures, and courthouses in Early America. The answer is the presence of government-provided, comprehensive and armed security.[255] It is only when the government ensures with arms and more the safety of those it requires to be disarmed can a venue or location be deemed a "sensitive place." If there is no such security and the government can make no such guarantee, then it has no constitutional authority to declare a sensitive place and, by extensive, take away Americans' right to bear arms for self-defense.

Invoking this principle for the Second Amendment has several benefits. First, it is an objective test that is easy for courts to administer. Second, it is the most historically-grounded test. Third, it not only comports with history, but also with the self-defense interests protected by the Second Amendment. Comprehensive

253. *Antonyuk*, 89 F.4th at 363 (2d Cir. 2023).

254. *Bruen,* 597 U.S. at 31.

255. *See* Amicus Br. of The Ctr. for Human Liberty at 8–17, Antonyuk v. Hochul, No. 22-2972, Doc. 313 (2d Cir. Feb. 9, 2023) (collecting Colonial and Founding-era laws providing for and funding security at polling places, legislatures, and courthouses).

security is consonant with self-defense, and the need for armed self-defense is lessened when the government has taken on the physical and legal obligation of security and ensured that there will be no criminals with firearms in a particular location. And the prohibition of firearms in a location without comprehensive security is actually perverse, as it is only the law-abiding who will obey government dictates on the possession of firearms. Those bent on committing horrific atrocities are incentivized to seek out gun free zones over places where they might face armed resistance.

Our Founders were aware that any attempts to restrict the rights of citizens to bear arms will only harm law-abiding citizens, not criminals. They learned this lesson from Cesare Beccaria, the Italian criminologist, who, as I have written elsewhere, "found arms prohibitions to be not just useless—in that they criminalize the perfectly orderly act of carrying a gun for self-protection—but actively harmful."[256] Beccaria wrote in his work *On Crimes and Punishments:*

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary [laws], which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? *Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man*.[257]

Beccaria realized that to "forbid the carrying of arms" effectively means to disarm the law-abiding citizen while letting the criminal run riot. Criminals have never respected restricted carry laws, and never will: both Beccaria and our Founders understood this important truth.

We have learned this lesson too many times in the modern era, when psychopathic mass shooters target gun-free zones in order to shoot as many unarmed people as possible. Thus, they choose Virginia Tech, Stoneman Douglas High School, and Robb Elementary School as their targets. These so-called "sensitive

256. Mark W. Smith, *Enlightenment Thinker Cesare Beccaria and His Influence on the Founders: Understanding the Meaning and Purpose of the Second Amendment's Right to Keep and Bear Arms*, 2020 PEPP. L. REV. 71, 83 (2020). This was cited in *May v. Bonta*, 2023 WL 8946212 at *18 (C.D. Cal., Dec. 23, 2023).

257. Smith, *Enlightenment Thinker Cesare Beccaria and His Influence on the Founders* at 83 (emphasis added).

places" are nothing more than sitting ducks in the eyes of potential mass shooters. Take the following incidents:

- In 2023, a shooting in a Texas mall left multiple people dead. The mall said that "no weapons" were allowed within its premises, but that didn't stop the perpetrator who was potentially a Mexican gang member.[258]
- A former employee shot up the Old National Bank in Louisville, KY, despite the bank prohibiting both customers and employees from carrying handguns inside the building.[259]
- Three people were shot at the Christiana Mall in Delaware, and as you might expect, it did not allow firearms within the premises.[260]
- The Nashville Covenant School, like most schools, was also a gun-free zone when the radical transgender activist committed a shooting there.[261]
- An Atlanta hospital that operates as a gun-free zone was attacked in 2023.[262]
- The shooting at Umpqua Community College occurred in a gun free zone.[263]

There are endless examples of such shootings taking place in so-called "sensitive places," but how often do you hear of such a shooting taking place at an armed police station, at the White House or at an airport beyond the TSA checkpoint? Comprehensive, armed security prevents the latter from occurring while a lack of such allows violent psychopaths to prey upon the innocent with deadly effect.

Finally, our Founding Fathers were so insistent on the need to carry arms that they often required people to carry them to places that would be considered

---

258. *UPDATE: Texas Mall Shooting in yet ANOTHER Gun-free Zone, Though Not All Parts of the Mall Might Have Been Properly Posted.* Crime Prevention Research Center, May 6, 2023, crimeresearch.org/2023/05/texas-mall-shooting-in-yet-another-gun-free-zone [https://perma.cc/5QZT-XU7Y].

259. *Old National Bank Shooting in Louisville Was in yet ANOTHER Gun-free Zone, the Murderer Was Another Left-winger*. Crime Prevention Research Center, 11 April 2023, crimeresearch.org/2023/04/old-national-bank-shooting-in-louisville-was-in-yet-another-gun-free-zone [https://perma.cc/3N5H-TZJB].

260. *Three People Were Shot at the Christiana Mall in Delaware, yet Another Gun-free Zone*. Crime Prevention Research Center, 8 Apr. 2023, crimeresearch.org/2023/04/three-people-were-shot-at-the-christiana-mall-in-delaware-yet-another-gun-free-zone [https://perma.cc/Q9NJ-3XBM].

261. *Nashville Covenant School Shooting Was in yet Another Gun-free Zone*. Crime Prevention Research Center, 27 Mar. 2023, crimeresearch.org/2023/03/nashville-covenant-school-shooting-was-in-yet-another-gun-free-zone [https://perma.cc/RN9D-CWVV].

262. *Active Shooter Attack in Atlanta Hospital Occurred in yet Another Gun-free Zone*. Crime Prevention Research Center, May 3 2023, crimeresearch.org/2023/05/active-shooter-attack-in-atlanta-hospital-occurred-in-yet-another-gun-free-zone [https://perma.cc/NA2T-UU8G].

263. *UPDATED: Umpqua Community College Is yet Another Mass Public Shooting in a Gun-free Zone*. Crime Prevention Research Center, 5 Apr. 2023, crimeresearch.org/2023/04/umpqua-community-college-is-yet-another-gun-free-zone [https://perma.cc/4HM3-EDEA].

sensitive today, such as town meetings or churches. One Virginia statute said that "ALL men that are fittinge to beare armes, shall bringe their peices to the church."[264] Rhode Island required that "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.''[265] Georgia even handed out fines to militiamen who attended church unarmed.[266] These examples show that the historical tradition in America is not to disarm sensitive places, but to be *armed* in them.[267]

An important feature of the armed, comprehensive security test is that it is objective and less subject to manipulation. By way of analogy, in *Heller* the Court posited several reasons why citizens may prefer handguns for self-defense, but ultimately said that whatever the reason the key point was that citizens did choose them and therefore they were in common use.[268] In the sensitive places context, there may be a multitude of reasons why a place might be considered sensitive - democratic deliberations taking place, high-value targets, vulnerable people, high likelihood of collateral damage, etc. - but whatever the reason, the irreducible minimum feature of a sensitive place is comprehensive government security. In other words, the question presented to a court is how does government actually treat the supposed "sensitive place" versus has the government merely slapped a "sensitive place" label on a particular location proclaiming it to be "gun free." Does the government put their money where their mouth is by virtue of their actions? If not, the government may not disarm Americans and leave the defenseless against predators, all in violation of their Second Amendment rights.

Comprehensive security entails, at a minimum, the presence of armed guards, limited points of entry, and metal detectors. Founding-era practice illustrates that sheriffs, constables, sergeant-at-arms, and others were provided by government at "sensitive places" to secure the area. For instance, there are several examples of state legislatures providing security:[269]

---

264. 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 174 (1808) (enacted 1631).

265. 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 94 (John Russell Bartlett ed., 1856) (enacted 1639).

266. Vol. 19, Part 1 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40 (Allen D. Candler ed., 1911) (enacted 1770).

267. See also Benjamin Boyd, *Take Your Guns to Church: The Second Amendment and Church Autonomy*, 8 LIBERTY UNIV. L. REV. 653, 697–99 (2014) (collecting colonial- and Founding-era historical law for requiring firearms at church services); NICHOLAS JOHNSON ET AL., FIREARMS LAW & THE SECOND AMENDMENT 183–85 (2d ed. 2017) (summarizing laws from Virginia in 1619, 1632, and 1665; Connecticut in 1643 and 1644; Massachusetts Bay in 1637 and 1643; Rhode Island in 1639; Maryland in 1642; South Carolina in 1740 and 1743; and Georgia in 1770).

268. *See Heller*, 554 U.S. at 629.

269. Historian Angus Kirk McClellan filed a comprehensive amicus brief providing considerable historical support for this theory in a pending legal challenge to government-mandated gun free zones, i.e., sensitive places. The Founding Era statutes set forth in this section were first identified by Dr. McClellan and these laws can also be found in his brief. *See* Amicus Br. for Angus Kirk McClellan et al., Wolford v. Lopez, No. 23-16164 (9th Cir. Nov. 9, 2023).

- In Rhode Island, sheriffs, town sergeants, and constables were paid for attending the General Assembly. ("The Sheriffs," "Town Sergeants, and Constables" "shall be allowed" fees "[f]or attending the General Assembly").[270]
- Delaware provided for public payment of fees to the legislature's sergeant-at-arms and door-keepers. ("[T]he fees belonging to the Sergeant at Arms shall be as follow . . . Taking any person into custody, Thirty-three Cents," "Fees to the Door-keepers of the respective Houses—For every day's attendance, One Dollar").[271]
- Pennsylvania appropriated funds for the assembly's sergeant-at-arms and door-keepers in 1781: "The sergeant-at-arms, for every day's attendance, the sum of ten shillings. The door-keeper of the council and the door-keeper of the house of assembly, each the sum of ten shillings for every day's attendance."[272]
- South Carolina provided for the payment of door-keepers in 1787. ("Two Door-keepers £50 each *per annum*").[273]
- New York legislated that "there shall also be allowed and paid to the serjeant at arms and the door keepers of the senate and assembly, each the sum of two dollars for every day they shall attend the legislature."[274]
- Georgia appropriated funds for the legislature's door-keepers in 1808: "[T]o the messenger and door-keeper of the Senate, and messenger and door-keeper of the House of Representatives, three dollars each per day."[275]
- New Jersey provided for payment "[t]o the door keeper, the sum of five shillings per diem, for each day that he hath or shall attend this Congress."[276]
- Virginia provided for "allowances" for the sergeant-at-arms and door-keepers' "services" to the General Assembly in 1783.[277]
- Vermont compensated sheriffs and constables "[f]or attendance on the general assembly" in 1798.[278]

---

270. The Public Laws Of The State Of Rhode-Island 220, 222 (1798).

271. 2 Laws of the State of Delaware, From the Fourteenth Day of October, One Thousand Seven Hundred, to the Eighteenth Day of August, One Thousand Seven Hundred and Ninety-Seven, pp. 1100, 1118 (1797).

272. 10 The Statutes at Large of Pennsylvania From 1682 to 1801, pp. 376, 378 (1779–1781).

273. The Public Laws of the State of South-Carolina, pp. 426, 427 (1790).

274. An Act for the Support of Government, in 1 Laws of the State of New York, p. 532 (2nd ed. 1807).

275. A Compilation of the Laws of the State of Georgia, Passed by the Legislature Since the Political Year 1800, to the Year 1810, Inclusive, pp. 372–73 (1812).

276. Provincial Congress, Journal of the Votes and Proceedings of the Provincial Congress of New Jersey: Held at Trenton in the Month of October 1775, pp. 239, 240 (1835).

277. Virginia, Journal of the House of Delegates of the Commonwealth of Virginia, p.77 (Printed by Thomas W. White, 1828).

278. The Laws of the State of Vermont, vol. II, pp. 382, 387 (1808).

The same goes for courthouses:

- South Carolina directed that "sheriffs shall by themselves, or their lawful deputies respectively, attend all the courts hereby appointed, or directed to be held, within their respective districts."[279]
- Virginia enacted a 1792 law providing that "[t]he keeper of the public jail, shall constantly attend the General Court, and execute the commands of the Court," and further providing that "the Sheriff, or so many of the Under-Sheriffs as shall be thought necessary, of the County where such Court may be held, shall attend the said Court during their Sessions."[280]
- Delaware, in a 1793 law, directed that "the Sheriff of Kent county . . . shall be attendant on the said High Court of Errors and Appeals during the sitting thereof, and be the officer for the purpose of executing the orders and process of the said court."[281]
- New Jersey, in 1798, mandated that "the constables of the several townships in such county shall be the ministerial officers of the said court" and provided that the constable "shall be appointed to attend the jury."[282]
- New York, in 1801, required "sheriffs and their officers" to attend court proceedings "to do those things which to their officers shall appertain."[283]
- Pennsylvania, in 1780, acknowledged the power of courts to Pennsylvania to "compel the attendance of sheriffs, coroners, constables, and other ministerial officers...."[284]
- Connecticut's legislative record includes a fee schedule for sheriffs and constables attending court proceedings.[285]
- Georgia provided in a 1792 law for fees to sheriffs and constables for court proceedings.[286]
- Maryland law provided for compensation "to the Sheriff," including for "Empanelling" and "Swearing" juries and for "Attendances, per day."[287]

---

279. The Public Laws of the State of South Carolina, pp. 268, 271 (1790).

280. A Collection Of All Such Acts Of the General Assembly Of Virginia, pp. 69–71 (1803).

281. 2 Laws of the State of Delaware, From The Fourteenth Day Of October, One Thousand Seven Hundred, To The Eighteenth Day Of August, One Thousand Seven Hundred And Ninety-Seven, pp. 1088, 1091 (1797).

282. New Jersey, Laws of the State of New Jersey, Compiled and Published, Under the Authority of the Legislature, pp. 49, 50, 58 (Joseph Bloomfield, 1811).

283. 1 Laws of the State of New York, p. 172 (1807).

284. The Statutes at Large of Pennsylvania From 1682 to 1801, vol. X, p. 57 (Wm. Stanley Ray 1904).

285. Acts and Laws of the State of Connecticut, In America, pp. 63–65 (1784).

286. A Digest of the Laws of the State of Georgia, pp. 471, 473, 474, 478 (1800).

287. The Laws of Maryland to which are prefixed The Original Charter, with an English translation, v. 1, ch. XXV (1799) (1779 law).

- Massachusetts provided for payment to "[e]very Constable who shall attend the Supreme Judicial Court, or Court of General Sessions of the Peace, or Common Pleas."[288]
- New Hampshire law provided for "Sheriff's fees" "[f]or every trial," "[f]or attending the grand jury," and "[f]or attending the petit jury."[289]
- North Carolina allocated payment to sheriffs "[f]or summoning, impannelling and attending on every jury in every cause in court" and "[f]or attendance of a constable every court when summoned by the sheriff."[290]
- Rhode Island directed that "[t]he Sheriffs," "Town Sergeants, and Constables" "shall be allowed" fees "[f]or attending the General Assembly, the Supreme Judicial Court, and the Courts of Common Pleas, by the day."[291]
- Vermont provided for payment of fees to sheriffs and constables "[f]or attending before a justice's court, when required," "[f]or attending freeholders' courts," and "[f]or attendance on the general assembly, or supreme or county court."[292]

And so too for polling places:

- Georgia law required sheriffs to attend elections "for the purpose of enforcing the orders of the presiding magistrates in preserving good order."[293]
- Virginia provided in 1778 that "[t]he sheriff shall attend and take the poll at such election, entering the names of the persons voted for."[294]
- New Jersey provided in 1807 that constables and other elections officers with authority to detain "riotous" or "disorderly" people for up to 24 hours to preserve "good order" and "for the security of the election officers from insult and personal abuse."[295]
- Maryland's constitution mandated that "the Sheriff of each county, or . . . his Deputy . . . shall be the judges of the election" for the house of delegates, and "the Sheriff of each county, or . . . his Deputy . . . shall hold and be judge of the said election" for senate."[296]

288. Acts and Resolves of Massachusetts, 1786–87, p. 235 (1893) (1786 law).
289. The Laws of the State of New-Hampshire, pp. 112–16 (1797).
290. A Manual of The Laws of North-Carolina, pp. 190, 191, 196 (3d ed. 1814).
291. The Public Laws of the State of Rhode-Island, pp. 220, 222 (1798).
292. The Laws of the State of Vermont, vol. II, pp. 382, 387 (1808) (1798 law).
293. A Digest of the Laws of the State of Georgia, p. 611 (1800).
294. Abridgement Of The Public Permanent Laws Of Virginia, p. 325 (1796).
295. Laws of the State of New Jersey, p. 36 (Bloomfield, ed. 1811).
296. Md. Const. art. 1, §§ 3 & 14 (1776).

- Delaware law authorized "the Sheriffs" and other officials "to attend, conduct, and regulate the election."[297]
- South Carolina's laws contain a "Table of Fees" that includes payment to the sheriff for "publishing writs for electing members to the General Assembly, taking the ballots and returning the writ."[298]

In sum, the thread uniting the locations *Bruen* presumptively identified as "sensitive" was that they were protected by government-provided comprehensive security at the Founding. Their sensitivity was never a matter of government fiat.[299]

CONCLUSION

Since the Supreme Court decided *Bruen* in June 2022, Second Amendment-related litigation has exploded. Although this should be a positive trend to ensure finally that the right to bear arms is given its full constitutional respect and protection, the reality is more mixed. As this article shows, many lower courts remain in the mindset that the legal landscape is the same today as it was pre-*Bruen*, i.e., a landscape where the right to bear arms may be treated by the lower courts as a second-class right. This should not be happening given the Supreme Court's *Heller* and *Bruen* decisions, and the clear guidance those rulings provide. But lower courts are making obvious legal mistakes, and this article aims to put those lower courts on the correct path. If lower courts do not self-correct, it will be up to the Supreme Court to do so using the binding principles it has established in *Heller* and *Bruen*.

297. 2 Laws of the State of Delaware, From The Fourteenth Day Of October, One Thousand Seven Hundred, To The Eighteenth Day Of August, One Thousand Seven Hundred And Ninety-Seven, p. 984 (1797).

298. The Public Laws of the State of South Carolina, pp. 386–88 (1790).

299. This is not to say that such locations are necessarily sensitive today. In fact, they cannot be unless the government provides security there. Conceptually, the comprehensive security standard for evaluating whether a location is truly a "sensitive place" allowing the government to ban firearms for everyone, even those with concealed-carry licenses, requires the government to "put its money where its mouth is." If the government does not act as if a place is sensitive by providing comprehensive, armed security, then that location cannot be deemed sensitive. That is because, as *Heller* explained, self-defense is the central component of the Second Amendment right. Unless a government is comprehensively securing a location, that fundamental right to self-defense remains fully intact.