THE EVOLUTION OF THE SUPREME COURT'S SECOND AMENDMENT JURISPRUDENCE

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I. PROLOGUE

In April 2009, Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit published in the *Virginia Law Review* an article entitled "Of Guns, Abortions, and the Unraveling Rule of Law."[1] The United States Supreme Court had issued its seminal Second Amendment decision, *District of Columbia v. Heller*,[2] in June 2008. As the title of Judge Wilkinson's article suggests, he was harshly critical of the Supreme Court's decisions in both *Heller* and *Roe v. Wade*.[3] In his introduction, Judge Wilkinson summarized his critique: "Both decisions share four major shortcomings: an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism."[4] In that same introduction, Judge Wilkinson described the spirit of such criticism:

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1. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

2. District of Columbia v. Heller, 554 U.S. 570 (2008).

3. Roe v. Wade, 410 U.S. 113 (1973).

4. Wilkinson, *supra* note 1, at 254.

> It is the solemn duty of judges on the inferior federal courts to follow, both in letter and in spirit, rules and decisions with which we may not agree. Our oath demands it, and our respect for the Supreme Court as an institution and for the able and dedicated individuals who serve on it requires no less. But esteem can likewise be manifest in the respectful expression of difference—that too is the essence of the judicial craft.[5]

I, too, will be critical of Supreme Court decision-making in this article. The Supreme Court Justices themselves level such criticisms at their colleagues when they write their dissents, usually ending with "I respectfully dissent." I write this article in that same spirit. I agree with Judge Wilkinson that the "respectful expression of difference,"[6] whether in judicial opinions or in articles and speeches, is an important, necessary, and legitimate expression of the judicial craft.[7]

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5. *Id.* at 255–56.

6. *Id.* at 255.

7. Indeed, there are many examples of sitting judges publishing articles critical of the Supreme Court. I note the following: William H. Pryor Jr., *Honoring Good Jurists and Opposing Bad Rulings*, 22 TEX. REV. L. & POL'Y 1, 2–3 (2017) (contending that "at critical junctures, our judiciary, including our Supreme Court, has failed in its duty" and arguing that it is "important that the legal community critique the courts" when they fail); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008) [hereinafter *Looseness*] (describing *District of Columbia v. Heller*, 554 U.S. 570 (2008), as "questionable in both method and result"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006) (criticizing the Court's requirement in *Saucier v. Katz*, 533 U.S. 194 (2001), that a court first determine if an official's conduct violated the Constitution before dismissing the suit on qualified immunity grounds); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 34–35 (2005) (describing the Court as a "political organ" and lambasting its "aggressively political approaches covered by a veneer of legal reasoning"); David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1073, 1076 (2004) (arguing that *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Board of Education v. Dowell*, 498 U.S. 237 (1991), "are flawed in multiple ways, but particularly with respect to their departure from the principles of stare decisis"); Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 526, 529–30 (1976) (broadly criticizing *Miranda v. Arizona*, 384 U.S. 436 (1966)); LEARNED HAND, THE BILL OF RIGHTS, 42, 54–55 (1958) (criticizing several decisions by the Supreme Court on constitutional issues, including *Brown v. Board of Education*, 347 U.S. 483 (1954)). Of course, I am not remotely comparing myself to these distinguished

II. INTRODUCTION

We live in the shadow of an epidemic of gun violence.[8] We dread the next report of an inevitable mass shooting. We no longer feel secure in public places. We fear for the safety of our children and our grandchildren at their schools. We shake our heads in disbelief at the empty ritual of "thoughts and prayers" for victims and their families. As one commentator put it, we suffer from the "[u]nbearable [m]onotony of [g]rief."[9] Why must we live like this? Why are there no solutions?

In conversations posing these questions, there are often references to the Supreme Court's Second Amendment jurisprudence. However, there is no basis for suggesting that the Supreme Court is responsible in any way for the prevalence of gun violence in this country. There are many factors behind that awful reality. But the Court's Second Amendment jurisprudence, as it has evolved, might make it more difficult to find sensible solutions to the problem of gun violence. And therein lies a complicated story.

I hope to shed light on that complexity in this article. The story involves an evolution in the Supreme Court's view of the meaning of the words of the Second Amendment—a shift from the long-held understanding that the Amendment states a collective right to keep and bear arms[10] to its holding, in *District of Columbia v. Heller,*[11] that the core right of the Second Amendment is

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jurists. I simply cite their work to demonstrate that there is nothing anomalous about what I am doing here. As the Judicial Council of the Seventh Circuit declared in a decision resolving judicial misconduct complaints, "substantive criticism of Supreme Court decisions" is "well within the boundaries of appropriate discourse." *Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman*, JUD. COUNCIL OF THE SEVENTH JUD. CIR. (June 22, 2022).

8. *See infra* notes 260–269 and accompanying text (describing the prevalence of gun violence in the United States).

9. Jay C. Kang, *The Unbearable Monotony of Grief*, N.Y. TIMES, May 29, 2022, at 4.

10. *See* United States v. Miller, 307 U.S. 174 (1939).

11. District of Columbia v. Heller, 554 U.S. 570 (2008).

an individual right to keep and bear arms for self-defense.[12]

On its own, however, that new understanding of the Second Amendment had a modest impact. Post-*Heller*, most challenges to gun-control laws still failed.[13] As a result, gun rights advocates—and some Supreme Court Justices themselves—voiced their dissatisfaction with the state of the law, complaining that the individual right to keep and bear arms for self-defense was being treated as a second-class right, denied the protections afforded other rights in the Constitution.[14] Those complaints ultimately bore fruit. In 2022, in *New York State Rifle & Pistol Association v. Bruen*,[15] the Court established a new test for gun-control measures challenged under the Second Amendment—they must be "consistent with the Nation's historical tradition of firearm regulation."[16]

This new test is unprecedented and problematic. Now, legislative bodies trying to defend existing gun-control measures, and contemplating new ones, must focus on history in defending and drafting these measures rather than the current threats that require action. The Court's most recent Second Amendment decision in *United States v. Rahimi*,[17] which upheld a federal gun-control measure, and is therefore a hopeful sign, has only modestly redressed the uncertainty and confusion caused by *Bruen*. We are at a critical point in the evolution of the Supreme Court's Second Amendment jurisprudence. It is important to understand how we got here as we contemplate the future legal landscape for evaluating the constitutionality of gun-control laws.

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12. *Id.* at 630.

13. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1472 (2018) (determining through an empirical study of Second Amendment challenges post-*Heller* that "the vast majority of Second Amendment claims fail").

14. *See infra* notes 310–311.

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

16. *Id.* at 24.

17. United States v. Rahimi, 602 U.S. 680 (2024).

III. THE TEXT OF THE SECOND AMENDMENT

At the heart of the gun-control controversy are the twenty-seven words of the Second Amendment to the Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[18] A grammarian would describe the Second Amendment as a complex sentence with a main clause ("the right of the people to keep and bear Arms[] shall not be infringed") and a subordinate clause at the beginning ("A well regulated Militia, being necessary to the security of a free State").[19] "A main clause expresses a completed thought and can stand alone as a sentence. A subordinate clause does not express a completed thought and cannot stand alone. It must always be attached to the main clause" to give the subordinate clause meaning.[20] Here, standing alone, the subordinate clause of the Second Amendment ("A well regulated Militia, being necessary to the security of a free State")[21] prompts the question—so what? The main clause answers that question ("[T]he right of the people to keep and bear Arms, shall not be infringed.").[22]

In other words, grammatically, there is an inescapable link between the main clause (also called the operative clause) and the subordinate clause (also called the prefatory clause) of the Second Amendment. "[T]he right of the people to keep and bear Arms"[23] is not a free-floating concept. That right is arguably limited in its purpose by the subject to which it is attached: "A well regulated Militia."[24]

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18. U.S. CONST. amend. II.

19. *Id.*; JOHN E. WARRINER, WARRINER'S ENGLISH GRAMMAR AND COMPOSITION: COMPLETE COURSE 53 (1958).

20. WARRINER, *supra* note 19, at 53.

21. U.S. CONST. amend. II.

22. *Id.*

23. *Id.*

24. *Id.*

And what is a "Militia"? To the modern ear the "Militia" of the Founding era suggests the plain-clothed men in popular movies and books with long rifles called to battle from their everyday lives. Once together, they became a fighting force. And whom would they fight? Apparently, the federal government.[25]

We learned in our high school American history courses that there was a fierce debate at the Constitutional Convention in Philadelphia between the Federalists who wanted a strong central government—delegates such as George Washington, Alexander Hamilton, and John Jay—and the Antifederalists—delegates such as Luther Martin, Elbridge Gerry, and George Mason—who feared a strong central government and wanted to preserve state prerogatives.[26] This conflict played out in the ambiguity of the "military" clauses of Article I, Section 8 of the Constitution. Congress could "raise and support Armies,"[27] an unmistakable reference to a federal military force, "but no Appropriation of Money to that Use shall be for a longer Term than two Years,"[28] an apparent concession to widespread fears of a standing army.[29] Congress also could act militarily by

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25. As we shall soon see, the Supreme Court and scholars of the Second Amendment gave close attention to the historical meaning of the word "Militia." Today, the modern National Guard is a descendent of these Founding-era militias. In the Militia Act of 1903, Congress formally declared that "the organized militia" would henceforth "be known as the National Guard." Militia Act §1, ch. 196, 32 Stat. 775 (1903). Over the century that followed, Congress passed various laws reallocating authority over the National Guard between the states and the federal government. For a detailed account of this history, see H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI-KENT L. REV. 403 (2002).

26. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 19 (1989).

27. U.S. CONST. art. I, § 8, cl. 12.

28. *Id.*

29. *See* Roy G. Weatherup, *Standing Armies And Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 982–83 (1975) (explaining that "[t]he judgment of Congress and the two year appropriation limitation were thought to be sufficient safeguards" against central government abuse of a national standing army). While funds appropriated for "rais[ing] and support[ing] Armies" must be spent within the two-year limit set forth in Article I, Section 8, Clause 12, "the executive branch

"calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[30] and, in a curious hybrid of federal and state authority, by providing:

> for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[31]

Despite the authority reserved to the states, the Antifederalists worried that the authority of Congress "to organize, arm, discipline, and call into service 'the Militia' . . . would enable Congress to disarm them,"[32] thereby leaving the states exposed to the unchecked authority of the federal government. After the Constitutional Convention, during the ratification controversy, Antifederalists such as Luther Martin repeated the concern that the Constitution was taking from the states the "only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government."[33]

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has interpreted this restriction to allow the Army to make investments in military equipment and supplies using appropriations available for more than two years." Steve P. Mulligan, CONG. RSCH. SERV., LSB11206, THE ARMY CLAUSE, PART 3: APPROPRIATIONS, CONSCRIPTION, AND WAR MATERIALS 1 (2024). In the executive branch's view, the words "raise" and "support" "do[] not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for common defense." *Id.* (quoting Constitutional Prohibition—Appropriations for Armies, 25 Ops. Att'y Gen. 104, 108 (1904)). Congressional committees have similarly "advanced the view that the Army Clause's appropriation restriction does not apply to defense articles or equipment." *Id.* (citing S. REP. NO. 77-45, at 7 (1941)). The Supreme Court has not addressed the constitutionality of this interpretation of the appropriations restriction. *Id.*

30. U.S. CONST. art. I, § 8, cl. 15.

31. *Id.* art. I, § 8, cl. 16.

32. *Looseness*, *supra* note 7.

33. Ehrman & Henigan, *supra* note 26, at 26 (quoting 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 207–08 (1974)).

In 1791, Congress gathered to consider possible amendments to the Constitution.[34] Acutely aware that the widely held concern expressed by Luther Martin could scuttle the ratification process, James Madison introduced a draft of the Second Amendment that linked the right of the people to keep and bear arms to the need for a well-regulated militia to protect the "best security of a free country."[35] The draft also included an exemption from military service for those "religiously scrupulous of bearing arms."[36] The Senate subsequently adopted the Second Amendment in its present form: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[37] This Second Amendment history has been aptly summarized by two scholars:

> A traditional fear of standing armies in the hands of a powerful central government had instilled in Americans a belief that a militia was the proper form of defense. The proposed Constitution authorized standing armies and granted Congress sweeping power over the militia. Many saw the possibility of Congress failing to maintain the militias effectively and were unsure if the states retained the authority to do so. From the viewpoint of the individual citizen, the concern was simply to be able to keep and bear arms in his capacity as a state militiaman.[38]

Put more succinctly, the fear that Congress would disarm the people needed to serve in the militias was "the motivation for the Second Amendment."[39]

So, both as a matter of grammar and history, the right set forth in the operative clause of the Second Amendment ("[T]he right of the people to keep and bear Arms, shall not be infringed.") seems to serve the needs of the "well regulated Militia" of the prefatory clause.

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34. *Id.* at 31.

35. *Id.* at 32 (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971)).

36. *Id.* (quoting SCHWARTZ, *supra* note 35, at 1026).

37. U.S. CONST. amend. II.

38. Ehrman & Henigan, *supra* note 26, at 33.

39. *Looseness*, *supra* note 7.

That "right of the people to keep and bear Arms" shall not be infringed so that people bearing arms would be available to serve in state militias to protect the states from a potentially tyrannical federal government. Whether, and to what extent, the Second Amendment's language and history also supported a constitutional right to keep and bear arms apart from the needs of the militia were critical questions that would be addressed by the Court in subsequent cases.

IV. *UNITED STATES V. MILLER*—THE COLLECTIVE RIGHT TO KEEP AND BEAR ARMS

In 1939, in *United States v. Miller*,[40] the government had prosecuted two men who transferred a short-barreled shotgun across state lines without registering it as required by federal law.[41] The men argued that the Second Amendment protected them from prosecution. The Court rejected that argument at the outset of its opinion, holding that the guns at issue were not protected by the Second Amendment because they were not needed to ensure the effectiveness of a militia:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[42]

The Court explained its focus on "the preservation or efficiency of a well regulated militia"[43] by first quoting the militia provisions of Article I, Section 8 of the Constitution, which give Congress the authority to "call[]

40. United States v. Miller, 307 U.S. 174 (1939).
41. *Id.* at 175.
42. *Id.* at 178 (citation omitted).
43. *Id.*

forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to "provide for organizing, arming, and disciplining, the Militia" while "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[44] It then asserted without qualification that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness of such forces," and the provision therefore "must be interpreted and applied with that end in view."[45] Importantly, the Court explained that "the Militia comprised all males physically capable of acting in concert for the common defense. . . . And . . . that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[46]

Here, the *Miller* Court distilled the logic of the Second Amendment. "[T]he right of the people to keep and bear Arms, shall not be infringed" so that they can report for militia service bearing those arms.[47] The Court made this readiness point repeatedly by quoting an array of colonial and state laws imposing on able-bodied men the obligation to appear for militia service already armed with weapons in "common use."[48] Unfortunately for the

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44. *Id.* (quoting U.S. CONST. art. I, § 8).

45. *Id.*

46. *Id.* at 179.

47. *Id.* at 176 (quoting U.S. CONST. amend. II), 179.

48. *Id.* at 179. That array included a striking law adopted by the General Assembly of Virginia in 1785, which provides a detailed listing of the arms necessary for the common defense:

> Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows: * * * every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each non-commissioned officer and private shall have at every muster one pound of good powder, and four pounds of lead, including twenty blind cartridges; and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be

defendants in *Miller*, there was no evidence that their short-barreled shotguns were weapons in "common use" in 1939 and necessary "for the common defense" at that time.[49]

What kind of firearms would be protected by the Second Amendment's guarantee of the right to keep and bear arms because they were "in common use" and necessary "for the common defense," and, hence, had "some reasonable relationship to the preservation or efficiency of a well regulated militia"?[50] *Miller* did not answer that question. However, the focus in *Miller* on the type of weapons protected by the Second Amendment would become a critical issue in future decisions of the Supreme Court.

The *Miller* Court also had no reason to address or even mention another question of enormous future import: whether the Second Amendment might apply if the defendants had claimed that they needed their guns for personal reasons, such as self-defense. Rather, the Court linked "the right of the people to keep and bear Arms" only to the needs of a militia, a collective body, not the needs of individuals.[51] Justice Stevens later confirmed the prevalence of this understanding of *Miller*:

> When I joined the Supreme Court in 1975, both state and federal judges accepted the Court's unanimous decision in [*Miller*] as having established that the Second Amendment's protection of the right to bear arms was possessed only by members of the militia and applied only to weapons used by the militia.[52]

Subsequently, in a footnote in a 1980 opinion upholding a conviction for receipt of a firearm, the Court reiterated this understanding of the Second Amendment:

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purchased by the commanding officer out of the monies arising on delinquencies

Id. at 181–82 (citation omitted).

49. *Id.* at 179.

50. *Id.* at 178–79.

51. *Id.* at 176 (quoting U.S. CONST. amend. II).

52. John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, ATLANTIC (May 14, 2019), https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/.

"[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[53]

V. THE CAMPAIGN FOR AN INDIVIDUAL-RIGHT READING OF THE SECOND AMENDMENT

A. The Political Campaign

The *Miller* reading of the Second Amendment was not the end of the story. Richard Nixon won the presidency in 1968 on a campaign of "law and order."[54] He cited "the socially suicidal tendency—on the part of many public men—to excuse crime and sympathize with criminal[s] because of past grievances the criminal may have against society,"[55] thereby suggesting "linkages between racial conflict and lawlessness."[56] Easy access to guns was seen as protection against such lawlessness.[57]

The National Rifle Association (NRA), which had previously supported moderate gun-control measures, became a strong opponent of almost any gun-control measures. Increasingly, that opposition was expressed in terms of the individual's right to keep and bear arms.[58] Ronald Reagan, strongly supported by the NRA in his unsuccessful campaign against Gerald Ford for the 1976 Republican presidential nomination, wrote in *Guns and Ammo* magazine in the fall of 1975 that the "[S]econd [A]mendment gives the individual citizen a means of

53. Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (quoting *Miller*, 307 U.S. at 178).

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

55. *Id.* (alteration in original) (quoting Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 251 (2007)).

56. *Id.* (quoting Weaver, *supra* note 55, at 259).

57. *See id.* at 206–08, 226–28.

58. *See id.* at 204–05, 211–12.

protection against the despotism of the state."[59] The NRA began to spend millions of dollars to support political candidates who embraced its individual-right view of the Second Amendment.[60] Between 1970 and 1989, sixteen of the twenty-seven law review articles advancing the individual-right view were "written by lawyers who had been directly employed by or represented the NRA or other gun rights organizations."[61] In a recent investigative report on the architects of the lobbying power of the NRA, and its successful efforts to influence the decision-making process at all levels of government, *The New York Times* described an NRA plan, formulated in the 1970s, "to develop a legal climate that would preclude, or at least inhibit, serious consideration of many anti-gun proposals."[62] That plan included the following long-term goal: "When a gun control case finally reaches the Supreme Court, we want Justices' secretaries to find an existing background of law review articles and lower court cases espousing individual rights."[63] The *Times* noted that the plan identified "several scholars the N.R.A. was supporting," and their work would later be cited in landmark Second Amendment decisions of the Court.[64]

In Congress, in 1982, Senator Orrin Hatch of Utah, the new chair of a Subcommittee on the Constitution, issued a report entitled "The Right to Keep and Bear Arms."[65] According to the Hatch report, the

59. *Id.* at 210 (alteration in original) (quoting Ronald Reagan, *Ronald Reagan Champions Gun Ownership*, GUNS & AMMO, Sept. 1975, at 35).

60. *See id.* at 227.

61. *See id.* at 224–25 (quoting Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY 1, 4 (Carl T. Bogus ed., 2000)).

62. Mike McIntire, *The Secret History of Gun Rights: How Lawmakers Armed the N.R.A.*, N.Y. TIMES (July 30, 2023) (citing another source), https://www.nytimes.com/2023/07/30/us/politics/nra-congress-firearms.html.

63. *Id.* (citing another source).

64. *See id.*

65. *See* Siegel, *supra* note 54, at 216 (citing STAFF OF SUBCOMM. ON THE CONST., 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMM. ON THE CONST. i (Comm. Print 1982)).

subcommittee had discovered "clear—and long lost—proof that the [S]econd [A]mendment . . . was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms."[66] Under this view of the Second Amendment, individuals had a right to keep and bear arms for two purposes—for the fight against government tyranny and for self-defense. Therefore, the Second Amendment was not only about the needs of state-organized militias.

Witnessing this Second Amendment revisionism, former Chief Justice Burger, interviewed on PBS in December 1991, stated that the Second Amendment has been "the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime."[67] This was a stunning statement from a former Chief Justice. The statement, however, failed to account for an important development on the individual-right front—increasing support in the legal academy by respected constitutional scholars for the individual-right view of the Second Amendment.

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66. *Id.* (quoting STAFF OF SUBCOMM. ON THE CONST., *supra* note 65, at vii).

67. *The MacNeil/Lehrer NewsHour* (PBS television broadcast Dec. 16, 1991) (statement of Chief Justice Warren Burger). The Chief Justice was being interviewed as part of a series marking the 200th anniversary of the Bill of Rights. *WATCH: Special Interest Push Behind 2nd Amendment a "Fraud," Former Chief Justice Said in 1991*, WPBS (Apr. 11, 2023), https://www.wpbstv.org/watch-special-interest-push-behind-2nd-amendment-a-fraud-former-chief-justice-said-in-1991/. During the interview, NewsHour anchor Charlayne Hunter-Gault noted that "some scholars have argued that the Bill of Rights is still flawed, that some of its provisions need reconsidering, that it's overrated." Then, she asked Chief Justice Burger, "How do you respond to that?" The former Chief Justice responded, "[A]s with anything in this life, it could be better here or there." Hunter-Gault then asked, "Like where, for example?" and Chief Justice Burger said, "Well, that's a harder one to answer." The former Chief Justice then pulled out a pocket copy of the Constitution and, after reviewing it momentarily, continued, "If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment." He then read the Second Amendment aloud before making the "fraud" statement. *See The MacNeil/Lehrer NewsHour*, *supra*.

B. The Scholars Speak

In 1989, Sanford Levinson, a University of Texas law professor, published an article entitled *The Embarrassing Second Amendment*.[68] Noting that the Second Amendment had been largely ignored by legal scholars, and hence largely neglected in leading constitutional law casebooks and law reviews, Levinson speculated that the neglect of the Second Amendment reflected fears about the implications of the Amendment's true meaning.[69] He chided academics who resisted engagement with the Second Amendment because they were "embarrass[ed]" by its potential meaning.[70]

In his review of text and history, Levinson focused on the relationship between "the people" language of the main clause of the Second Amendment—"the right of the people to keep and bear Arms"[71]—and the militia referred to in the subordinate, or prefatory, clause.[72] He wrote that "[t]here is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community,"[73] just as references to "the people" in the First, Fourth, and Ninth Amendments refer to individuals who have the personal rights set forth in those amendments.[74] In other words, "the Militia" of the prefatory clause of the Second Amendment remained "the people" in a different guise. It is simply wrong, Levinson argued, to view "the Militia" as a collective body distinct from "the people."[75] An armed public, or an "armed yeomanry," as it was called in contemporaneous sources, was essential to preserve

68. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

69. *See id.* at 639–40.

70. *See id.* at 642.

71. U.S. CONST. amend. II.

72. Levinson, *supra* note 68, at 646–47.

73. *Id.*

74. *See id.* at 645.

75. *See id.*

liberty, a point emphasized by Joseph Story in his *Commentaries on the Constitution*:[76]

> The right of the citizens to keep and bear arms has justly been considered . . . as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[77]

Levinson placed Story's views about the importance of an armed citizenry into the "checks and balances" framework that is so central to American political theory.[78] Within that framework, he found vulnerability in the collective-right reading of the Second Amendment—namely, that it is designed to protect only state-regulated militias:

> [T]hose who would limit the meaning of the Second Amendment to the constitutional protection of state-controlled militias agree that such protection rests on the perception that militarily competent states were viewed as a potential protection against a tyrannical national government. . . . But this argument assumes that there are only two basic components in the vertical structure of the American polity—the national government and the states. It ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.

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76. *See id.* at 648.

77. *Id.* at 649 (quoting 3 Joseph Story, *Commentaries on the Constitution*, in 3 THE FOUNDERS' CONSTITUTION 214 (Philip B. Kurland & Ralph Lerner eds., 1987)).

78. *See id.* at 649–52.

> One implication of this republican rationale for the Second Amendment is that it calls into question the ability of a state to disarm its citizenry.[79]

Here, Levinson suggested that the Second Amendment should be read as a limit on not only the power of Congress to disarm the people but also on the individual states to do so.[80]

Of course, Levinson understood that the Second Amendment, by its inclusion in the Bill of Rights, only curtailed the power of Congress to infringe the right of the people to keep and bear arms. He also acknowledged that the Supreme Court, in its 1875 decision in *United States v. Cruikshank*,[81] explicitly stated that the Second Amendment is "one of the amendments that has no other effect than to restrict the powers of the national government," thereby rejecting the argument that the Second Amendment applied to the states.[82]

However, Levinson did not shy away from his view that the Second Amendment contemplated an armed citizenry that could challenge government tyranny at any level. As he put it bluntly:

> One would, of course, like to believe that the state, whether at the local or national level, presents no threat to important political values, including liberty. But our propensity to believe that this is the case may be little more than a sign of how truly different we are from our radical forbearers. I do not want to argue that the state is necessarily tyrannical; I am not an anarchist. But it seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state.[83]

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79. *Id.* at 651.

80. *See id.*

81. United States v. Cruikshank, 92 U.S. 542 (1875).

82. *See* Levinson, *supra* note 68, at 652 (quoting *Cruikshank*, 92 U.S. at 553). As we shall see, *Cruikshank* was not the Supreme Court's last word on the application of the Second Amendment to the states.

83. *Id.* at 656.

Levinson was less definitive, however, on whether this individual right to keep and bear arms is limited to the personal right to oppose government tyranny or whether it also embraces the personal right of self-defense—the right to protect oneself against private threats and violence:

> Although the record is suitably complicated, it seems tendentious to reject out of hand the argument that one purpose of the Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct. . . . It would be especially unsurprising if this [protection were included] given the fact that the development of a professional police force (even within large American cities) was still at least a half century away at the end of the colonial period.[84]

However, as Levinson acknowledged, we now have police forces in our communities, allowing one to argue that "the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime."[85] Again, Levinson avoided a definitive response to this argument, observing that "we ignore at our political peril the good-faith belief of many Americans that they cannot rely on the police for protection against a variety of criminals."[86]

In 1991, Akhil Reed Amar, a Yale Law School professor, published an article entitled *The Bill of Rights as a Constitution*,[87] in which he offered an individual-right view of the Second Amendment similar to Levinson's. Amar linked the use of the words "the people" in the Second Amendment's main clause ("the right of the people to keep and bear Arms, shall not be infringed") to the use of those same words in the First Amendment.[88]

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84. *Id.* at 645–46.

85. *Id.* at 656.

86. *Id.*

87. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

88. *See id.* at 1162–63 (quoting U.S. CONST. amend. II).

He argued that the rights to assembly and petition in the First Amendment have populist connotations, giving the people the right to come together and reassert their sovereignty.[89] He saw the use of the phrase "the people" in the Second Amendment as similarly populist.[90] By populist, Amar meant that individuals have a right to defend themselves in a form of "popular sovereignty."[91]

Amar also focused on the Second Amendment's use of the word militia in its prefatory clause ("a well regulated Militia, being necessary to the security of a free State"[92]). He acknowledged that this language suggested to many scholars that the Second Amendment was about federalism—"protecting only arms-bearing in organized 'state militias.'"[93] As such, "the Second Amendment would be at base a right of state governments rather than Citizens."[94]

Amar rejected that reading because he believed it reflected a misunderstanding of the relationship between the meaning of the word militia in the Second Amendment's prefatory clause and the reference to "the right of the people" in the main clause.[95] At the time of the Amendment's adoption, "when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms."[96] Thus, the people referred to in the main clause of the Second Amendment are identical to the people referred to in the prefatory clause of the Second Amendment through the use of the word militia. Amar said that "[t]he seeming tension between the dependent [prefatory] and the main clauses of the Second Amendment thus evaporates on closer inspection—the 'militia' is identical to 'the people'"

89. *Id.*
90. *Id.*
91. *Id.* at 1163.
92. U.S. CONST. amend. II.
93. Amar, *supra* note 87, at 1165.
94. *Id.* at 1166.
95. *See id.*; U.S. CONST. amend. II.
96. Amar, *supra* note 87, at 1166.

referred to in the main clause.[97] Amar cited critical evidence for this conclusion: "[T]he version of the [Second] Amendment that initially passed in the House, only to be stylistically shortened in the Senate, explicitly defined the 'militia' as 'composed of the body of the People.'"[98]

In summary, for Levinson and Amar, the text and history of the Second Amendment supported the proposition that the Amendment's protection of a well-regulated militia, located in the various states, serves as a bulwark against central government tyranny. Congress, with its great powers, might become the enemy. But the Second Amendment does not limit the power to resist to the organized militias. Ultimately, that power resided in the people themselves, whose right to keep and bear arms shall not be infringed so that they could, if necessary, also protect themselves independently of the militias.

The impact of the articles by Levinson and Amar on the debate over the nature of the Second Amendment right—collective or individual—cannot be overstated. As Reva Siegel, another Yale Law School professor, put it, "Now prominent law professors were beginning to examine constitutional understandings of the right to bear arms as a republican strategy of the founders for resisting government tyranny."[99] Indeed, only weeks before *District of Columbia v. Heller*[100] was argued before the Supreme Court in March 2008, Professor Laurence Tribe of Harvard Law School explained in an opinion piece in *The Wall Street Journal* that he had long viewed the purpose of the Second Amendment as preventing "such federal interferences with the state militia as would permit the establishment of a standing national

97. *Id.*

98. *Id.* (quoting EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 214 (1957)).

99. Siegel, *supra* note 54, at 225. By "republican strategy," Professor Siegel used "republican" as Professor Amar used "populist" to refer to the right of individuals to defend themselves in a form of popular sovereignty. *See id.*

100. District of Columbia v. Heller, 554 U.S. 570 (2008).

army and the consequent destruction of local autonomy."[101] In the wake of the scholarship of Levinson and Amar, Tribe acknowledged the change in his own position on the Second Amendment: "It is true that some liberal scholars like me, having studied the text and history closely, have concluded, against our political instincts, that the Second Amendment protects more than a collective right to own and use guns in the service of state militias and national guard units."[102] What exactly was that *more* in the view of the Supreme Court? We were about to find out.

VI. *DISTRICT OF COLUMBIA V. HELLER*— THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

When *Heller* reached the Supreme Court in the 2007 Term, the contending arguments were well-developed. There was the supposedly settled precedent of the Supreme Court, reflected in its *Miller* decision, that the Second Amendment protected only the right to possess and carry a firearm that "has some reasonable relationship to the preservation or efficiency of a well regulated militia."[103] There was the more recently developed view, advanced by politicians, the NRA, other special interest groups, and some scholars, that there was an individual right to keep and bear arms unconnected to service in a militia.[104] The *Heller* case highlighted these conflicting views.[105]

Dick Heller, a D.C. special police officer, applied for a registration certificate for a handgun that he wanted to keep at home, but the District denied the application.[106] A D.C. law prohibited the registration of

101. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 (2d ed. 1988).

102. Laurence H. Tribe, *Sanity and the Second Amendment*, WALL ST. J. (Mar. 4, 2008, 12:01 AM), https://www.wsj.com/articles/SB120459428907209205.

103. United States v. Miller, 307 U.S. 174, 178 (1939).

104. *See supra* notes 54–102 and accompanying text.

105. *See Heller*, 554 U.S. at 574–76.

106. *Id.* at 575.

handguns.[107] It also required residents to keep their lawfully owned firearms, such as registered long guns, "'unloaded and dissembled or bound by a trigger lock or similar device' unless they are located in a place of business or are being used for lawful recreational activities."[108] Defending its law, the District argued that it was constitutional because the Second Amendment protected only a collective right to keep and bear arms related to militia service.[109] Heller argued that he had an individual right to possess a handgun for self-defense within his home.[110]

To resolve the conflicting arguments, Justice Scalia, writing for a five-member majority, relied on the interpretive method of originalism. Justice Scalia explained that methodology:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[111]

Once judges find this original meaning in the historical sources, their job of interpretation is over.[112]

Thus guided, he began his analysis by acknowledging the unusual structure of the Second Amendment—its division into the prefatory (or subordinate) clause and the operative (or main)

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107. *Id.* at 574–75.

108. *Id.* at 575 (quoting D.C. Code § 7-2507.02 (2001)).

109. *See id.* at 577.

110. *See id.*

111. *Id.* at 576–77 (second alteration in original) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); *see also* Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Address at Catholic University of America on Oct. 18, 1996, THE PROGRESSIVE CONSERVATIVE, U.S.A. (Sept. 5, 2003), https://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml [hereinafter *Judicial Adherence*].

112. *See Judicial Adherence*, *supra* note 111.

clause.[113] Relying on nineteenth-century treatises on statutory interpretation, Justice Scalia noted that a prefatory clause "announces a purpose" of a statute, but it "does not limit or expand the scope of the operative clause."[114] Indeed, "[i]t is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law."[115] Still, as Justice Scalia acknowledged, "[l]ogic demands that there be a link between the stated purpose [of the prefatory clause] and the command [of the operative clause]."[116] With those connections and parameters established, Justice Scalia announced the sequence of the analysis to follow: "[W]hile we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose."[117]

The influence of Levinson and Amar, and the individual-right proponents of the Second Amendment, was immediately apparent in Justice Scalia's analysis of the operative clause. Citing the use of the phrase "right of the people**"** in the First and Fourth Amendments, and "very similar terminology" in the Ninth Amendment, Justice Scalia asserted that "[a]ll three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."[118] So, too, with the reference to "the right of the people" in the Second Amendment.[119] Moreover, after a lengthy consideration of historical sources, he concluded that the phrase "to keep and bear Arms" in the operative clause is best read

113. *Heller*, 554 U.S. at 577.

114. *Id.* at 577–78.

115. *Id.* at 578 (omission in original) (quoting JOEL P. BISHOP, COMMENTARIES ON WRITTEN LAWS AND THEIR INTERPRETATION 49 (1882)).

116. *Id.* at 577.

117. *Id.* at 578.

118. *Id.* at 579. Nevertheless, Justice Scalia did not wholly adopt Professors Levinson and Amar's analysis of the language of the Second Amendment. *See infra* note 137.

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

as a reference "to the carrying of weapons outside of an organized militia" for "a particular purpose—confrontation."[120]

With the meanings of "the people" and "keep and bear Arms" resolved, Justice Scalia declared the meaning of the operative clause:

> Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States* v. *Cruikshank*, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [S]econd [A]mendment declares that it shall not be infringed."[121]

To support this critical pre-existence point, Justice Scalia went well beyond his reliance on the 1875 *Cruikshank* decision[122] and immersed himself once again in history:

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120. *Id.* at 581 (quoting U.S. CONST. amend. II), 584.

121. *Id.* at 592 (first alteration in original) (quoting United States v. Cruikshank, 92 U.S. 542, 553 (1876)).

122. "*Cruikshank* arose from a Reconstruction Era incident[,] . . . the Colfax Massacre, a gun battle that resulted in the killing of a large number of blacks who had gathered together for mutual protection from a white paramilitary group." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 187 (2008). After the paramilitary group members were indicted and convicted, they challenged their convictions based on the text of the indictment. *Id.* at 187–88. The case examined "whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States." *Cruikshank*, 92 U.S. at 551. The Supreme Court ultimately ruled in favor of the defendants, holding that the constitutional amendments that the defendants were charged with conspiring to violate did not limit the actions of individuals. *Id.* at 552–55. Thus, the criminal counts were "so defective that no judgment of conviction should be pronounced upon them." *Id.* at 559; *see also supra* note 82.

> Under the auspices of the 1671 Game Act, for example, the Catholic Charles II [a Stuart King] had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed. . . . This right has long been understood to be the predecessor to our Second Amendment.[123]

Justice Scalia further explained that "Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,' cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen."[124] Justice Scalia then carried his historical analysis to our Revolutionary War era, explaining that "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists."[125] Faced with this threat, "Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"[126]

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123. *Heller*, 554 U.S. at 593 (citations omitted). Charles II was the king of England, Scotland, and Ireland from the 1660 restoration of the monarchy until his death in 1685. *Charles II of England*, WIKIPEDIA, https://en.wikipedia.org/wiki/Charles_II_of_England (last visited May 21, 2025). His reign was characterized by clashes with the English Parliament, often due to conflicting views on religion. *Id.*

124. *Heller*, 554 U.S. at 593–94 (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

125. *Id.* at 594.

126. *Id.* at 595 (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 145–46 & n.42 (1803)). Justice Scalia's emphasis on the Second Amendment right to keep and bear arms as a "preexisting" right draws support from the language of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Scholars who subscribe to the "natural law" reading of the Ninth Amendment view the purpose of its enactment as "to clarify that the specification of rights in the *written* Constitution was not intended to imply that the natural rights not included in the writing were forfeited; they were still 'retained' and held

With the meaning of the operative clause now confirmed, Justice Scalia turned to the meaning of the prefatory clause ("A well regulated Militia, being necessary to the security of a free State"[127]). In *Miller*, he said, "we explained that 'the Militia comprised all males physically capable of acting in concert for the common defense.'"[128] That "Congress is given the power [in Article I, Section 8] to 'provide for calling forth the militia' and . . . to organize 'the' militia"—as opposed to "a" militia—"connot[es] a body already in existence,"[129] and "the federally organized militia may consist of a subset of" this preexisting body.[130] "[T]he adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training" on this "body of the people, trained to arms."[131]

As for "[t]he phrase 'security of a free State,'" Justice Scalia explained that the phrase does not refer to "individual States."[132] It is used in the larger sense of a "'free country' or free polity," secured by a militia "trained in arms and organized" and thus "better able to resist tyranny."[133]

Justice Scalia then reached the question he had posed earlier in the opinion—the logical link between the prefatory clause and the operative clause.[134] He asserted that the prefatory clause "fits perfectly" with the

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constitutional status." Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 268 (1992). Consistent with this reading of the Ninth Amendment, some scholars have also described Justice Scalia's *Heller* opinion as recognizing a "*natural* right to bear arms, a right that preexisted the enactment of the Second Amendment. This natural right would have limited the government's authority even if the Founders had failed to recognize it in the Constitution." Michael S. Green, *Why Protect Private Arms Possession—Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 136 (2008).

127. U.S. CONST. amend. II.

128. *Heller*, 554 U.S. at 595 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

129. *Id.* at 596 (quoting U.S. CONST. art. I, § 8).

130. *Id.*

131. *Id.* at 597 (citations omitted).

132. *Id.*

133. *Id.* at 597–98.

134. *Id.* at 598.

operative clause because the purpose announced in the prefatory clause—the need for a well-regulated militia to protect the security of a free state against federal government tyranny—involved only one aspect of a much broader, preexisting right to keep and bear arms that has, at its core, the right to self-defense.[135] As Justice Scalia explained:

> [T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written constitution. . . . [S]elf-defense had little to do with the right's *codification*; it was the *central component* of the right itself.[136]

In other words, the codification of the right to keep and bear arms in the Second Amendment served a narrow but critical purpose—preventing elimination of the militia. That codification did not limit in any way the preexisting right to keep and bear arms for self-defense.[137]

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135. *Id.*

136. *Id.* at 599.

137. Notably, Justice Scalia's answer to the question of the link between "the people" in the operative clause and "the Militia" in the prefatory clause differed from that of Professors Levinson and Amar. As noted, Levinson and Amar argued that "the people" referred to in the operative clause of the Second Amendment are the same people referred to in the prefatory clause through the word "Militia." Levinson, *supra* note 68, at 646–47; Amar, *supra* note 87, at 1166. In other words, "the Militia" simply refers to "the people" in a different guise. Thus, in the scholars' view, "[t]he seeming tension between" the clauses "evaporates on closer inspection," and the reference to "the Militia" in the prefatory clause does not limit the scope of the right of the people to keep and bear arms set forth in the operative clause. Amar, *supra* note 87, at 1166. By contrast, Justice Scalia did not accept the notion that "the Militia" and "the people" are the same, insisting that the phrase "the people" in the Second Amendment "contrasts markedly with the phrase 'the militia' in the prefatory

There was still a large piece of unfinished business that Justice Scalia had to address in *Heller*—the *United States v. Miller* precedent, which seemed to link the "right of the people to keep and bear Arms"[138] only to the needs of a militia, not the self-defense needs of individuals.[139] Justice Scalia emphasized the narrowness of the *Miller* decision.[140] In his view, *Miller* only ruled "that the *type of weapon at issue* [short-barreled shotguns] was not eligible for Second Amendment protection."[141] Moreover, Justice Scalia asserted that this focus on the type of weapon at issue supported the individual-right view of the Second Amendment: "Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen."[142]

Justice Scalia then turned to a critique of the way in which the *Miller* case was presented to the Supreme Court.[143] He noted that the defendants did not appear in the case,[144] and they did not file a brief or appear for oral argument before the Supreme Court.[145] Only the government participated, "reason enough," Justice Scalia observed, "not to make that case the beginning

clause." *Heller*, 554 U.S. at 580. In Justice Scalia's view, "the Militia" refers to only "a subset of 'the people'—those who were male, able bodied, and within a certain age range." *Id.* Thus, on Justice Scalia's reading, unlike Levinson and Amar's, there is a seeming tension between the operative and prefatory clauses. Justice Scalia resolves that tension by invoking the principle of statutory interpretation that statutory preambles often state a purpose that is narrower than the remedy provided in the law. As such, the preamble in no way limits the scope of the remedy provided. Justice Scalia applied that principle to the Second Amendment. The fact that "the Militia" is a subset of "the people" does not in any way limit the scope of "the right of the people to keep and bear Arms." *See id.* at 596–600.

138. U.S. CONST. amend. II.

139. *See generally* United States v. Miller, 307 U.S. 174 (1939).

140. *See Heller*, 554 U.S. at 621–22.

141. *Id.* at 622.

142. *Id.*

143. *See id.* at 623–24.

144. *Id.* at 623.

145. *Id.*

and the end of this Court's consideration of the Second Amendment."[146] The government's brief also spent only "two pages discussing English legal sources."[147] Not surprisingly given this deficiency in briefing, the *Miller* decision "discusses *none* of the history of the Second Amendment."[148] Instead, *Miller*

> assumes from the prologue that the Amendment was designed to preserve the militia (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word *(not a word)* about the history of the Second Amendment.[149]

Thus, *Miller* did not preclude a full examination of the scope of the Second Amendment right to keep and bear arms and the in-depth historical analysis now undertaken by the Court in *Heller* to resolve that critical scope question.

Having disposed of *Miller* as a troublesome precedent, Justice Scalia grappled immediately with a vexing problem left unresolved by *Miller*, one that he acknowledged he would "have to consider eventually"—"*what* types of weapons *Miller* permits."[150] Justice Scalia noted the statement in *Miller* that the Second Amendment protects only guns that have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[151] The shotguns at issue in *Miller* were not protected because there was no showing that the weapons were "any part of the ordinary military equipment"[152] in "common use at the time."[153] "Read in isolation," Justice Scalia said, "*Miller*'s phrase 'part of

146. *Id.*
147. *Id.*
148. *Id.* at 624.
149. *Id.* (citations omitted).
150. *Id.*
151. *Id.* at 622 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).
152. *Id.* (quoting *Miller*, 307 U.S. at 178).
153. *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

[the] ordinary military equipment' could mean that only those weapons useful in warfare are protected,"[154] a reading that he conceded would be "startling."[155] Thus, Justice Scalia said:

> *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." 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."[156]

That sameness was no longer true. Weapons used for military purposes and weapons used in defense of person and home were now vastly different. The untenable prospect of protecting both categories of weapons under the Second Amendment created an undeniable fitness problem between the prefatory and operative clauses of the Second Amendment. Justice Scalia was unfazed:

> It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.[157]

Justice Scalia anticipated that fitness problem when he quoted the nineteenth-century treatise on statutory interpretation for the proposition that the "remedy" of a law—the right to keep and bear arms in the operative

154. *Id.* (quoting *Miller*, 307 U.S. at 178).

155. *Id.*

156. *Id.* at 624–25 (alterations in original) (quoting *Miller*, 307 U.S. at 179; State v. Kessler, 614 P.2d 94, 98 (1980)).

157. *Id.* at 627–28.

clause of the Second Amendment[158]—"often extends beyond the particular act or mischief which first suggested the necessity of the law"[159]—the security of a free State in the prefatory clause.[160] Moreover, a remedy that incorporates a preexisting right, such as the right to keep and bear arms, would seem particularly impervious to limitation by a statutory preamble.

Therefore, Justice Scalia said, "[w]e . . . read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right,"[161] which he had declared to be the right of self-defense.[162] He added that the "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[163]

In other words, going forward, "sophisticated arms that are highly unusual in society at large,"[164] such as those used by the military, will not merit Second Amendment protection. Instead, weapons will merit Second Amendment protection only if they are "typically possessed by law-abiding citizens" for self-defense.[165] The military needs of a militia to confront the modern army of the central government are no longer relevant to the Second Amendment analysis. In this scenario, there is hardly the "perfect fit" between the prefatory clause and the operative clause that Justice Scalia had declared.[166] Rather, as Professor Reva Siegel has observed, the enunciated purpose of the prefatory clause

158. U.S. CONST. amend. II.

159. *Heller*, 554 U.S. at 578 (quoting JOEL P. BISHOP, COMMENTARIES ON WRITTEN LAWS AND THEIR INTERPRETATION 49 (1882)).

160. U.S. CONST. amend. II.

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

162. *Id.* at 628.

163. *Id.* at 627 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148–49 (1769)).

164. *Id.*

165. *Id.* at 625.

166. *See id*. at 598.

of the Second Amendment to preserve the strength of militias has essentially lost all significance:

> [T]he majority imposes restrictions on the kinds of weapons protected by the Second Amendment that the majority concedes would disable exercise of the right for the amendment's textually enunciated purposes. How could an originalist interpretation of the Second Amendment exclude from its protection the kinds of weapons necessary to resist tyranny—the republican purpose the text of the Second Amendment discusses and, on the majority's own account, "the purpose for which the right was codified"? In these passages Justice Scalia seems to apply something other than an original "public understanding" analysis.[167]

In effect, Justice Scalia conceded the contemporary irrelevance of his originalist reading of the prefatory clause while embracing the enduring relevance of his originalist reading of the operative clause. Put another way, "[b]y creating a privilege to own guns of no interest to a militia, the Court decoupled the amendment's two clauses."[168]

Having limited the relevance of *Miller*'s Second Amendment analysis and addressed the difficult issue raised by *Miller*—the types of weapons protected by the Second Amendment—Justice Scalia announced other important limitations on the scope of the right to keep and bear arms. Like the First Amendment, the right is "not unlimited" and does not "protect the right of citizens to carry arms for *any sort* of confrontation."[169] Therefore,

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

167. Siegel, *supra* note 54, at 200 (quoting *Heller*, 554 U.S. at 599).

168. *Looseness*, *supra* note 7.

169. *Heller*, 554 U.S. at 595.

> buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[170]

Also, importantly, Justice Scalia acknowledged that the Court in *Heller* had not established for use by the lower courts "a level of scrutiny for evaluating Second Amendment restrictions."[171]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote a long, passionate dissent from Justice Scalia's decision. He criticized what he considered Justice Scalia's misuse of history.[172] For example, Justice Scalia said that his review of the historical sources established that the Second Amendment phrase "bear arms" unambiguously included the carrying of weapons outside of an organized militia.[173] According to Justice Stevens, this interpretation was not borne out by contemporaneous texts. Rather, he asserted, the phrase "bear arms" "refers most naturally to a military purpose, as evidenced by its use in literally dozens of [Founding-era] texts."[174]

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170. *Id.* at 626–27.

171. *Id.* at 634. Throughout the Second Amendment jurisprudence, as we shall see, there are references to different standards of judicial review or scrutiny. There are primarily three such standards: rational basis review, intermediate scrutiny, and strict scrutiny. Although the case law reveals variations in the formulation of these three standards, they can be captured as follows. Rational basis review represents the most deferential standard and requires the government's law or action to be rationally related to a legitimate state interest. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645–46 (2d ed. 2002). Intermediate scrutiny requires a higher showing. To survive intermediate scrutiny, the government must demonstrate that the law in question serves an important governmental interest and is closely related to the achievement of the government's objectives. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); United States v. Virginia, 518 U.S. 515, 533 (1996). Strict scrutiny is the most stringent level of review and requires the government to establish that the law serves a compelling state interest and is narrowly tailored to that end. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); CHEMERINSKY, *supra*, at 645.

172. *Heller*, 554 U.S. at 652–79 (Stevens, J., dissenting).

173. *See id.* at 584 (majority opinion).

174. *Id.* at 647 (Stevens, J., dissenting). Justice Stevens added: "Had the Framers wished to expand the meaning of the phrase 'bear arms' to encompass civilian possession and use, they could have done so by the addition of phrases such as 'for the defense of themselves,' as was done in the Pennsylvania and Vermont Declarations of Rights." *Id.*

Indeed, Justice Stevens's assessment of that language finds support in the work of an academic who examined literally thousands of texts available at the time the Second Amendment was drafted and concluded that the phrase "bear arms" almost invariably had a military meaning unrelated to an individual right of self-defense.[175]

Justice Scalia also said that the historical sources confirmed that militias comprised of groups of men, so-called citizens' militias, unregulated by the state, could gather on their own initiative to fight the tyranny of the federal government if necessary.[176] There were indeed historical sources supporting this position. But Justice Stevens highlighted other sources demonstrating that militias were also organized by and under the command of the state governments.[177] These were not volunteer groups of like-minded men.[178] Justice Stevens saw the right to keep and bear arms as necessarily linked to these well-regulated, state-organized militias.

Thus, pursuant to his review of history, Justice Stevens concluded that the purpose of the Second Amendment was to protect against congressional disarmament of the states' militias. He insisted that this was the very conclusion that the *Miller* Court had reached:

> The view of the amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail

175. Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510 (2019); s*ee also* Joseph Blocher & Darrell A.H. Miller, *Stevens, J., Dissenting: The Legacy of* Heller, 103 JUDICATURE 9, 10–11 (2019) ("Most linguists and historians agreed with Stevens's interpretation, emphasizing that the phrase 'bear arms' in 1791 was used most often in a collective, military sense.").

176. *See Heller*, 554 U.S. at 596–600.

177. *See id.* at 653–60, 674–79 (Stevens, J., dissenting).

178. Noah Shusterman, *Why* Heller *Is Such Bad History*, DUKE CTR. FOR FIREARMS L. BLOG (Oct. 7, 2020), https://firearmslaw.duke.edu/2020/10/why-heller-is-such-bad-history/; *see also* Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 661 (2015) (arguing that *Heller* misconstrues historical sources).

> the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.
>
> . . . .
>
> The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons.[179]

Justice Stevens dismissed Justice Scalia's attempt to diminish *Miller* because of deficiencies in the Court's "decisional process"[180] with a telling comparison:

> It is true that the appellees in *Miller* did not file a brief or make an appearance . . . . But, as our decision in *Marbury v. Madison,* in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court.[181]

He also challenged the notion that the *Miller* decision did not consider the Second Amendment's history, given its attentiveness to history in its construction of the term "Militia." Hence,

> [t]he majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.[182]

After Justice Stevens retired from the Court, he became even more outspoken in his critique of *Heller*, calling it "unquestionably the most clearly incorrect

179. *Heller*, 554 U.S. at 637–39 (Stevens, J., dissenting).
180. *Id.* at 639.
181. *Id.* at 677 (citation omitted).
182. *Id.* at 679.

decision that the Supreme Court announced during my tenure on the bench," "the worst self-inflicted wound in the Court's history," and "my greatest disappointment as a member of the Court."[183] He cited the "twin failure [of *Heller*]—first, the misreading of the intended meaning of the Second Amendment, and second, the failure to respect settled precedent."[184]

Justice Stevens also took the unusual step of publishing an internal document from the Court's deliberations in *Heller*—a memorandum that he circulated to his colleagues, along with his proposed dissent, on April 28, 2008, five weeks before Justice Scalia circulated the majority opinion to his colleagues on June 2, 2008.[185] Notably, Justice Stevens referred in this memo to the views of former Chief Justice Burger about the fraudulent nature of the individual-right interpretation of the Second Amendment and the change in views of some important constitutional law scholars.

> While I think a fair reading of history provides overwhelming support for Warren Burger's view of the merits, even if we assume that the present majority is correct, I submit that they have not given adequate consideration to the certain impact of their proposed decision on this Court's role in preserving the rule of law. . . .
>
> What has happened that could possibly justify such a massive change in the law? The text of the amendment has not changed. The history leading up to the adoption of the amendment has not changed. . . . There has been a change in the views of some law professors, but I assume there are also some professors out there who think Congress does not have the authority to authorize a national bank, or to regulate small firms engaged in the production of goods for sale in other states, or to enact a graduated income tax. In my judgment, none of the arguments advanced by respondents or their

183. *See* Stevens, *supra* note 52.

184. *Id.*

185. *See id.*

> numerous amici justify judicial entry into a quintessential area of policy-making in which there is no special need or justification for judicial supervision.
>
> This is not a case in which either side of the policy debate can be characterized as an "insular minority" in need of special protection from the judiciary. On the contrary, there is a special risk that the action of the judiciary will be perceived as the product of policy arguments advanced by an unusually powerful political force. Because there is still time to avoid a serious and totally unnecessary self-inflicted wound, I urge each of the members of the majority to give careful consideration to the impact of this decision on the future of this institution when weighing the strength of the arguments I have set forth in what I hope will not be a dissent.[186]

Justice Stevens, of course, did have to publish that dissent, with its prophetic warning about the danger of the Justices relying solely on history to determine the meaning and scope of constitutional rights.[187]

VII. *MCDONALD V. CITY OF CHICAGO*—CLEAR INCORPORATION, UNCLEAR SCRUTINY

About two years after *Heller* came the inevitable aftermath. *Heller* involved a challenge to a law of the District of Columbia. The Second Amendment, like each of the first eight amendments to the Constitution, circumscribes only the power of Congress and the federal

186. *Id.*

187. *Heller*, 554 U.S. at 636–80 (Stevens, J., dissenting). Still, Justice Stevens took some solace in moving Justice Kennedy to insist upon some changes in the Court's opinion to get his vote—notably, the important language in *Heller* about the limitations of the decision. *See* Adam Liptak, *'It's a Long Story': Justice John Paul Stevens, 98, Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html ("Justice Stevens wrote that he helped persuade Justice Anthony M. Kennedy, who was in the majority, to ask for 'some important changes' to Justice Scalia's opinion. A passage in the opinion, which Justice Scalia had plainly added to secure a fifth vote, said the decision 'should not be taken to cast doubt' on many kinds of gun control laws.").

government.[188] The question remained whether the Second Amendment applied to the states through incorporation in the Due Process Clause of the Fourteenth Amendment. The *McDonald*[189] case posed that question.

Four Chicago residents wanted to keep handguns in their homes for self-defense but were prohibited from doing so by a Chicago ordinance providing that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm."[190] The ordinance then prohibited "registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City."[191] The parallels of this ordinance to the ordinance at issue in *Heller* were unmistakable.

Pursuant to the incorporation doctrine, "the only rights protected against state infringement by the Due Process Clause were those rights 'of such a nature that they are included in the conception of due process of law.'"[192] To meet this standard, the *Heller* supporters on the Court had an opportunity in *McDonald* to emphasize the fundamental nature of the Second Amendment right declared in *Heller*—"the right to keep and bear arms for the purpose of self-defense."[193] Writing for a five-member majority, Justice Alito engaged in the kind of extensive historical analysis pursued by Justice Scalia in *Heller*,

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188. *See* Barron v. City of Baltimore, 32 U.S. 243, 247–51 (1833) (holding that the first eight amendments of the Bill of Rights limit the power of the federal government, not the states). Unlike the first eight amendments to the Constitution, the Ninth and Tenth Amendments do not enumerate specific rights. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

189. McDonald v. City of Chicago, 561 U.S. 742 (2010).

190. *Id.* at 750 (alteration and omissions in original) (quoting CHI., ILL. MUN. CODE § 8-20-040(a) (2009) (repealed 2013)).

191. *Id.* (citing § 8-20-040(a)).

192. *Id.* at 759 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

193. *Id.* at 749–50.

concluding on the basis of that review that the constitutionally protected right of self-defense meets the requirements for incorporation.[194] As he put it, "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day."[195] As such, it "is fundamental to our scheme of ordered liberty."[196]

There was nothing surprising about this conclusion. Indeed, as Justice Alito saw it, to reject incorporation would be "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause."[197]

Of course, different does not necessarily mean second-class. It might mean that the subject of the Second Amendment—keeping and bearing arms—has potential consequences that the other rights recognized in the Bill of Rights do not. The City of Chicago had argued that "the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety."[198] Justice Alito

194. Before reaching the merits of the incorporation issue, Justice Alito had to address the *Cruikshank* decision, mentioned earlier, *see supra* notes 82 and 122 and accompanying text, and two subsequent Supreme Court decisions, *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), affirming that the Second Amendment applies only to the federal government. As Justice Alito pointed out:

> None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." . . . *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of "selective incorporation" under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

McDonald, 561 U.S. at 758–59 (alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008)).

195. *Id.* at 767.

196. *Id.* (emphasis omitted) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

197. *Id.* at 780.

198. *Id.* at 782 (citing Brief for Respondents Chi. & Oak Park at 11, *McDonald*, 561 U.S. 742 (No. 08-1521)).

rejected this argument because "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category."[199] He noted that the exclusionary rule sometimes permits the guilty to go free, and so too does dismissal of a case because of a speedy trial violation.[200]

Justice Alito's response is unpersuasive. Whatever the numbers of criminal defendants who go free because of the exclusionary rule or the violation of speedy trial requirements, those numbers are obviously small in comparison to the vast number of law-abiding people who keep and bear arms. Given that large number, even a small subset that misuses guns poses a much greater risk to others than the criminal defendants who are released from custody prematurely. Acknowledging the difference between the public safety implications of the Second Amendment and the public safety implications of the Fourth and Fifth Amendments does not mean that the Second Amendment right of self-defense is a second-class right. It just means that the public safety implications of the Second Amendment are far more portentous.

In his dissent in *McDonald*, Justice Breyer emphasized this significant difference between the Second Amendment right to keep and bear arms and the rights set forth in other provisions of the Bill of Rights: "Unlike other forms of substantive liberty," he argued, "the carrying of arms . . . often puts others' lives at risk."[201] Moreover, he repeated the point made by Justice Stevens in his memo to his colleagues in *Heller* about the rights of vulnerable minorities or individuals:

> Unlike the First Amendment's religious protections, the Fourth Amendment's protection against

199. *Id.* at 783.

200. *Id.*

201. *Id.* at 912 (Breyer, J., dissenting).

> unreasonable searches and seizures, the Fifth and Sixth Amendments' insistence upon fair criminal procedure, and the Eighth Amendment's protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority.[202]

Such differences mattered to Justice Breyer because the history-only approach of the majority in *Heller* and *McDonald* failed to account for them.[203] The application of the Second Amendment required more than an understanding of its origins in early English law and the history surrounding its adoption. It also required an understanding of its implications for people living today. In his view, courts considering Second Amendment challenges to gun-control laws should consider the governmental interest at stake and the burdens imposed by the law or regulation.[204] In essence, Justice Breyer was arguing for the "interest-balancing approach" to court consideration of challenges to gun-control laws criticized by the *Heller* Court.[205] He pointed out that many state courts that consider a challenge to a firearm regulation that burdens a state constitutional right to keep and bear arms engage in such an analysis. They assess the strength of the government's regulatory interest, the tailoring of the regulation to address the

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202. *Id.* at 921.

203. *See id.* at 916, 922–25.

204. *Id.* at 922–25.

205. In *Heller*, the majority observed:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. . . . Like the First [Amendment], [the Second Amendment] is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

government interest, and whether there are less restrictive alternatives to the regulation challenged.[206] That form of judicial scrutiny acknowledges the important role that legislatures play in addressing the gun violence epidemic. By placing "virtually determinative weight upon historical considerations" in both *Heller* and *McDonald*, Justice Breyer saw the Court as profoundly misguided, particularly when "the history is so unclear that the experts themselves strongly disagree."[207] Instead of this myopic focus on history, he said, the Court should "consider the basic values that underlie a constitutional provision and their contemporary significance."[208]

To a considerable extent, the competing opinions of the Justices in *McDonald* repeated the debate from *Heller* over the role of history in Second Amendment jurisprudence. *McDonald* also resembled *Heller* in another significant respect. Once again, the Court did not embrace any standard of judicial scrutiny for Second Amendment challenges to gun-control measures. In the absence of guidance in *Heller* and *McDonald*, how were the lower courts supposed to analyze challenges to gun-control laws?

VIII. THE LEGAL AFTERMATH OF *HELLER* AND *MCDONALD*: TWO FIRST CIRCUIT DECISIONS

With the recognition of an individual right to keep and bear arms under the Second Amendment, and with the right of self-defense identified as the core of the right, *Heller* and *McDonald* were enormously consequential decisions. However, that enormity was not immediately apparent because of the standard of review vacuum.[209] In that vacuum, federal courts rejected many challenges

206. *See McDonald*, 561 U.S. at 925 (Breyer, J., dissenting).

207. *Id.* at 916.

208. *Id.*

209. *See generally* Ruben & Blocher, *supra* note 13 (conducting an analysis of lower court decisions in the wake of *Heller* to assess the standard of review applied in the absence of Supreme Court guidance).

to gun-control measures. I wrote two decisions for the First Circuit illustrating this phenomenon.

A. United States v. Rene E.

We heard this case approximately one year after *Heller*.[210] A seventeen-year-old juvenile was charged with possessing a handgun in violation of the federal Juvenile Delinquency Act.[211] On appeal, having entered a conditional guilty plea,[212] he argued that the provision of the federal Juvenile Delinquency Act prohibiting his possession of a handgun violated the Second Amendment under *Heller* because his interest in self-defense as a seventeen-year-old juvenile was just as strong as the interest of the adult in *Heller*.[213] In response, the government argued that there were longstanding prohibitions on the juvenile possession of firearms.[214] "[J]uveniles did not serve in militias" and they were the type of "potentially irresponsible persons historically targeted by restrictive gun laws."[215] Hedging its bet, the government also argued that the prohibition on possession could survive even strict scrutiny because the government's interest in regulating the illicit market of handguns was compelling and the ban, narrowly tailored, contained an exception for self-defense.[216]

In our ruling, we responded only to the government's historical argument.[217] Congress had regulated firearms sales and possession since the 1930s, with the first

210. *See* United States v. Rene E., 583 F.3d 8 (1st Cir. 2009).

211. *Id.* at 9 (citing 18 U.S.C. § 922(x)(2)(A) and 18 U.S.C. § 5032).

212. A conditional guilty plea allows the defendant to enter a plea of guilty or nolo contendere while reserving "the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." *Rule 11. Pleas*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/rules/frcrmp/rule_11 (quoting FED. R. CRIM. P. 11(a)(2)) (last visited May 21, 2025).

213. *Rene E.*, 583 F.3d at 12.

214. *Id.*

215. *Id.* (internal quotation marks omitted).

216. *Id.*

217. *Id.* at 12–13.

restriction on the transfer of weapons on the basis of age set forth in 1968.[218] Much earlier, the states had regulated firearms, "including their transfer to, and possession by, juveniles."[219] Then, tracking the historical analysis in *Heller* and *McDonald*, we looked for evidence of the attitude of the Founders toward the regulation of juvenile access to handguns. We found

> some evidence that the founding generation would have shared the view that public-safety-based limitations of juvenile possession of firearms were consistent with the right to keep and bear arms. In the parlance of the republican politics of the time, these limitations were sometimes expressed as efforts to disarm the "unvirtuous."[220]

We added that, "[i]n this sense, the federal ban on juvenile possession of handguns is part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public."[221] As such, the federal ban on the possession of handguns by juveniles was consistent with the observation in *Heller* that "the right secured by the Second Amendment is not unlimited."[222] More specifically, that ban was consistent with longstanding restrictions, noted in *Heller*, that were presumptively lawful under the Second Amendment, including laws prohibiting the possession of firearms by felons and the mentally ill.[223] Having thus placed the gun possession ban at issue in *Rene E.* comfortably within the ambit of *Heller*, we rejected Rene E.'s Second Amendment challenge to the constitutionality of the federal ban.[224]

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218. *Id.* at 13.

219. *Id.* at 14.

220. *Id.* at 15 (quoting Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995)).

221. *Id.*

222. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

223. *Rene E.*, 583 F.3d at 12 (citing *Heller*, 554 U.S. at 625–26).

224. *Id.*

In our conclusion, however, we were careful "to emphasize the circumscribed nature of our decision."[225] Although our dispositive analysis had been exclusively historical, we noted that the federal ban on the possession of handguns by juveniles was narrowly drawn, with "exceptions for self- and other-defense in the home, national guard duty, and hunting, among other things."[226] With this invocation of an element of strict scrutiny, we, like the government, were hedging our bets. Although the Court in *Heller* had relied on history to establish an individual right to keep and bear arms, with self-defense as its central component, and the Court in *McDonald* had relied on history to resolve the question of incorporation of that right in the Fourteenth Amendment, the Court had never said that history alone determined the compatibility of a gun regulation with the Second Amendment. To the extent that a standard of review was still in play in Second Amendment jurisprudence, we thought we should cover that possibility, at least in part. However, as we shall see, our reliance on history in *Rene E.* to resolve the Second Amendment challenge to the federal law prohibiting the possession of firearms by juveniles was far more prescient than we realized.

B. United States v. Booker[227]

Almost three years after the *Heller* decision, we heard a consolidated appeal from the conditional guilty pleas of two defendants charged with violating 18 U.S.C. § 922(g)(9), "a law that prohibits individuals convicted of a 'misdemeanor crime of domestic violence' from possessing, shipping, or receiving firearms."[228] The appellants' convictions "each rested on a prior

225. *Id.* at 16.

226. *Id.*

227. For clarity, I note that this *Booker* is not the case from which the Supreme Court's well-known sentencing opinion originated. *See* United States v. Booker, 543 U.S. 220 (2005).

228. *See* United States v. Booker, 644 F.3d 12, 13 (1st Cir. 2011).

misdemeanor offense under Maine's simple assault statute."[229] The appellants claimed that § 922(g)(9) unconstitutionally abridged their Second Amendment right to keep and bear arms.[230] Known as the Lautenberg Amendment, the statutory provision was enacted as part of the Omnibus Consolidated Appropriations Act of 1997. Congress recognized with its enactment a "problem of significant national concern in the combination of domestic violence and guns."[231] Federal law prohibited possession of firearms only by individuals who had been convicted of a felony.[232]

In discussing the appellants' argument that § 922(g)(9) was unconstitutional under *Heller*, we noted that the problem of domestic violence addressed by the Lautenberg Amendment only began to receive widespread attention as a legal and public policy issue in the mid-twentieth century.[233] We acknowledged that "the modern federal felony firearm disqualification law . . . [was] firmly rooted in the twentieth century and likely [bore] little resemblance to laws in effect at the

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229. *Id.*

230. *Id.* The appellants made two "primary arguments" on appeal. *Id.* In addition to their constitutional claim, they also claimed that "only an *intentional* offense can qualify as a 'misdemeanor crime of domestic violence' within the meaning of § 922(g)(9)." *Id.* Hence, the "fact of a conviction under Maine's undifferentiated assault statute, which may be violated 'intentionally, knowingly, or recklessly,' cannot alone establish" the requisite "predicate domestic violence offense under § 922(g)(9)." *Id.* We rejected that argument. *Id.* at 13–14.

231. *Id.* at 16.

232. *See* 18 U.S.C. § 922(g)(1).

233. *See Booker*, 644 F.3d at 15–16. Some of the earliest documentation of domestic violence, or intimate partner violence, dates from 753 B.C., and the issue has been present in American society since the founding of the nation. *See* Sarah Trieu, *History of Intimate Partner Violence Reform*, FREEDOM & CITIZENSHIP https://freedomand citizenship.columbia.edu/ipv-history (last visited May 21, 2025) (explaining the history of intimate partner violence in the U.S. and noting that "[t]he social acceptance of wife beating can be traced back to 753BC"). By the turn of the twentieth century, the social acceptance of "wife beating" became a topic of public discussion, and the momentum of the women's movement brought the topic firmly into the public sphere in the 1960s and '70s. *See id.* Intimate partner violence is now recognized as a public health issue. *See About Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 16, 2024), https://www.cdc.gov/intimate-partner-violence/about/.

time the Second Amendment was ratified."[234] Yet we agreed with the Seventh Circuit's observation in *United States v. Skoien* that it seemed improbable under *Heller* that the relative age of a regulation was the key to its constitutionality.[235] Also, § 922(g)(9), with its focus on a "crime of violence," which includes "an offense that has as an element the use . . . of physical force against the person or property," seemed consistent with *Heller*'s reference to certain presumptively lawful regulatory measures restricting gun possession by classes of persons—e.g., felons and the mentally ill—rather than requiring that restrictions on the right be imposed only on an individualized, case-by-case basis.[236] In other words, the Lautenberg Amendment, with its focus on domestic violence, identified a class of criminals whose past behavior "indicates a present danger that one will misuse arms against others and the disability [relating to the prohibition on the possession of guns] redresses that danger."[237] Still, the Lautenberg Amendment was "a new categorical limit" on the Second Amendment right, not deeply grounded in history.[238] As such, we agreed with the Seventh Circuit in *Skoien* that "some sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right."[239]

What kind of showing should that be for a law with few precedents that burdened the right to keep and bear arms in such a categorical way? *Heller* itself had made clear that a rational basis alone would be insufficient to justify laws burdening the Second Amendment,[240]

234. *Booker*, 644 F.3d at 23–24.

235. *See id.* at 24–25 (citing United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc)).

236. *See id.* at 19 (omission in original) (quoting 18 U.S.C. § 16(a)), 24–25.

237. *Id.* at 25 (quoting C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009)). As discussed *infra*, our reliance on the historical disarmament of individuals deemed a present danger to the safety of another anticipated the Supreme Court's reasoning in *United States v. Rahimi*, 602 U.S. 680 (2024).

238. *Booker*, 644 F.3d at 25.

239. *Id.* (citing *Skoien*, 614 F.3d at 641).

240. District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

without specifying what standard would be sufficient. The choices were intermediate scrutiny or strict scrutiny. Not surprisingly, the appellants argued for strict scrutiny because "§ 922(g)(9) infringes upon the 'core' constitutional right recognized in *Heller* to 'possess firearms in the home.'"[241] The government argued for intermediate scrutiny "while asserting that the law would survive more stringent review."[242]

We avoided labels by simply saying that "[w]e think it sufficient to conclude . . . that a categorical ban on gun ownership by a class of individuals must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective."[243] That language certainly sounded like the intermediate scrutiny test without explicitly saying so.[244]

Having articulated the standard of review that we would apply to the prohibition of § 922(g)(9), we cited facts from the record required by that standard of review. The important government interest was clear—"keeping guns away from people who have been proven to engage in violence with those with whom they share a domestically intimate or familial relationship, or who live with them or the like."[245] To demonstrate the substantial relationship between § 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and the government interest in preventing gun violence in the home, we cited Justice Department statistics that "nearly 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the perpetrator used a firearm in roughly 65% of the murders (33,500)."[246] We cited findings that "[t]he

241. *Booker*, 644 F.3d at 25.

242. *Id.*

243. *Id.* (quoting *Skoien*, 614 F.3d at 641).

244. As discussed in detail below, scholars have since shown that, in the decade after *Heller*, courts typically applied some form of "heightened scrutiny," most frequently intermediate scrutiny, but often did not state explicitly that they were doing so. *See* Ruben & Blocher, *supra* note 13, at 1490–91, 1496.

245. *Booker*, 644 F.3d at 25.

246. *Id.* at 25–26.

presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide.'"[247] It followed "that removing guns from the home will materially alleviate the danger of intimate homicide by convicted abusers."[248] Hence, the government had made a strong showing "that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence."[249] We therefore rejected the Second Amendment challenge to the law.[250]

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As it turns out, our decisions in *Rene E.* and *Booker* became data for academic analysis of the post-*Heller* work of the federal and state courts. In 2018, two law

247. *Id.* at 26 (quoting *Skoien*, 614 F.3d at 643–44 (quoting Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home,* 329 NEW ENG. J. MED. 1084, 1087 (1993))).

248. *Id.*

249. *Id.*

250. *Id.* We also dropped a footnote at the end of our opinion suggesting that the appellants, with their history of domestic violence, might not be entitled to invoke Second Amendment protection at all:

> [W]e note that *Heller* stated that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." We would question whether appellants, who manifestly are not "law-abiding, responsible citizens," fall within this zone of interest.

Id. at 25 n.17 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)). Other courts adopted a similar rationale to conclude that some individuals raising constitutional challenges are not protected by the Second Amendment as they are not "law-abiding, responsible citizens." *Id.*; *see, e.g.*, Medina v. Whitaker, 913 F.3d 152, 157–60 (D.C. Cir. 2019); United States v. Nevens, No. CR 19-774-DMG, 2022 WL 17492196 at *1–2 (C.D. Cal. Aug. 15, 2022); United States v. Belin, No. 21-CR-10040-RWZ, 2023 WL 2354900 at *2 (D. Mass. Mar. 2, 2023). Moreover, the government frequently proposed that felons and people subject to domestic violence restraining orders are not "law-abiding, responsible citizens" and thus cannot claim that statutes prohibiting their possession of firearms are unconstitutional. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 451 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024); Range v. Att'y Gen. U.S., 69 F.4th 96, 101 (3d Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024) (mem.). However, as discussed *infra*, the Supreme Court explicitly rejected this "responsible" citizen argument in *United States v. Rahimi*, 602 U.S. 680, 701–02 (2024).

school professors, Eric Ruben and Joseph Blocher, published what they described as "the first comprehensive empirical analysis of post-*Heller* Second Amendment doctrine."[251] They "coded every available Second Amendment opinion—state and federal, trial and appellate—from *Heller* up until February 1, 2016."[252] After reviewing those opinions, they concluded that the most common mode of judicial scrutiny in the developing Second Amendment jurisprudence was "a two-pronged inquiry that first asks whether a challenged law imposes a burden on conduct falling within the scope of the Second Amendment, and, second, if it does, whether the law satisfies the applicable level of scrutiny."[253] At the second stage of the two-step test, "lower courts 'have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned [in *Heller*], adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.'"[254]

Our decision in *Rene E.* had not conformed to the paradigm described by Ruben and Blocher. Except for a brief nod to the language of strict scrutiny at the end of our opinion, we had relied on the long history of regulation dealing with the possession of handguns by juveniles to assess the constitutionality of the federal proscription on their possession. Our analysis, consistent with the historical analysis employed in *Heller* and *McDonald*, extended as far back as the views of the Framers of the Second Amendment, allowing us to conclude that "the founding generation would have regarded [laws proscribing the possession of handguns

251. *See* Ruben & Blocher, *supra* note 13, at 1433.

252. *Id.*

253. *See id.* at 1451 (quoting LAW CTR. TO PREVENT GUN VIOLENCE, POST-*HELLER* LITIGATION SUMMARY 6 (Mar. 31, 2015), http://smartgunlaws.org/wp-content/uploads/2014/11/Post-Heller-Litigation-Summary-March-2015-Final-Version.pdf).

254. *Id.* at 1452 (quoting Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012)).

by juveniles] as consistent with the right to keep and bear arms."[255]

In *Booker*, however, we had conformed to the two-step inquiry described by Ruben and Blocher. At the first step, we assumed, sensibly, that the challenged law, with its ban on the possession of guns by individuals convicted of a misdemeanor crime of domestic violence, burdened conduct falling within the scope of the Second Amendment.[256] Then, at the second step, without using the label, we conducted what was essentially an intermediate-scrutiny analysis to conclude that the prohibition on the possession of guns at issue was constitutional under the Second Amendment.[257]

We reached our *Booker* decision in 2011. Ruben and Blocher noted that "cases applying the two-part test increased steadily after 2012,"[258] while the historical analysis that we used in *Rene E.* receded in importance without completely disappearing.[259] They did not offer an explanation for this phenomenon. Importantly, as we demonstrated with our analysis in *Booker*, facts are critical in the application of intermediate scrutiny. Identifying the nature of the legislative interest, evaluating the evidence that supports the importance of that interest, and assessing the way in which the law at issue addresses the legislative concerns are inescapably factual inquiries about the world in which we live.

IX. SOME DATA

There have been many factual inquiries into the unsettling pervasiveness of gun violence in our country, its causes, and ways to prevent it. I am going to cite the findings of some of those studies without suggesting that they are definitive or beyond challenge. I fully appreciate the complexity of the issues. My lens is wide. Each issue

255. United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009).
256. *See* United States v. Booker, 644 F.3d 12, 22–25 (1st Cir. 2011).
257. *Id.* at 25–26.
258. Ruben & Blocher, *supra* note 13, at 1491.
259. *See id.* at 1492–94.

discussed is worthy of a deep dive. I touch the surface here for the limited but important purpose of demonstrating the kind of material that would be available to judges deciding Second Amendment cases if they were free to use it.

Reports of mass shootings dominate the news. As a matter of definition, mass shootings occur when four or more people, excluding the shooter, are injured or killed.[260] Between 2014 and 2019, there were about 350 mass shootings annually, on average, in the United States.[261] In 2020, there were 610.[262] In 2021, there were 689.[263] In 2022, there were 644.[264] In 2023, there were 658.[265] The increase in mass shootings was driven by men, particularly young men.[266] The Columbine shooters were seventeen and eighteen; the Uvalde shooter had just turned eighteen; the Parkland shooter was nineteen; the Sandy Hook shooter was twenty; and the Virginia Tech shooter was twenty-three.[267] There is increasing research on the striking correlation between mass shootings and young men.[268] Some medical research has

260. Janie Boschma et al., *Mass Shootings in the US Fast Facts*, CNN (Sept. 17, 2024, 11:08 AM), https://www.cnn.com/us/mass-shootings-fast-facts/index.html.

261. *See id.*

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *Public Mass Shootings: Database Amasses Details of a Half Century of U.S. Mass Shootings with Firearms, Generating Psychosocial Histories*, NAT'L INST. OF JUST. (Feb. 3, 2022), https://nij.ojp.gov/topics/articles/public-mass-shootings-database-amasses-details-half-century-us-mass-shootings (noting that 97.7% of mass shooters in public settings between 1966 and 2019 were male, and the mean age was 34.1 years old); Jillian J. Turanovic, et al., *A Comprehensive Assessment of Deadly Mass Shootings, 1980-2018*, NAT'L INST. OF JUST. (July 2022), https://www.ojp.gov/pdffiles1/nij/grants/305090.pdf (noting that 30.7% of known mass shooters between 1980 and 2018 were under twenty-five years old and 49.5% were under thirty years old).

267. Ariana E. Cha et al., *Young Men, Guns and the Prefrontal Cortex*, WASH. POST (June 3, 2022, 7:54 AM), https://www.washingtonpost.com/health/2022/06/03/why-so-many-mass-shooters-young-angry-men/.

268. *See generally, e.g.*, James Alan Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2015*, 4 VIOLENCE & GENDER 37 (2017); Peter Langman, *A Bio-Psycho-Social Model of School Shooters*, 5 J.

linked impulsivity, among other behavioral factors, to their brain development: "'[T]heir brains are not fully developed in terms of regulation[]' . . . . [T]he prefrontal cortex, which is critical to understanding the consequences of one's actions and controlling impulses, does not fully develop until about age 25."[269]

The Supreme Court recognized the value of this kind of research in *Roper v. Simmons*,[270] where the Court justified a categorical ban on the death penalty for people who are under the age of eighteen at the time of their offense, citing the degree of criminal responsibility fairly attributable to them.[271] Often, young men who have committed mass shootings have experienced some kind of traumatic childhood event such as violence in the home, sexual assault, parental suicides, or extreme bullying.[272] Such trauma can ominously compound the effects of behavioral factors linked to the developing brain:

> [Y]ou see the build toward hopelessness, despair, isolation, self-loathing, oftentimes rejection from peers. That turns into a really identifiable crisis point where they're acting differently. Sometimes they have previous suicide attempts.
>
> What's different from traditional suicide is that the self-hate turns against a group. They start asking

CAMPUS BEHAV. INTERVENTION 27 (2017), https://70daf429-d4ec-4875-9eb5-b28958ffb4fa.filesusr.com/ugd/b64c59_8d86ad93f52145249d6094ed3327d63f.pdf.

269. *See* Cha et al., *supra* note 267 (quoting Vanderbilt University psychiatrist Jonathan Metzl); *see also* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013).

270. Roper v. Simmons, 543 U.S. 551 (2005).

271. *Id.* at 569–71. *See generally* CATHERINE INSEL ET AL., CTR. FOR L., BRAIN & BEHAV. AT MASS. GEN. HOSP., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS (2022) (summarizing relevant research and explaining the effects of youth, trauma, and socioenvironmental factors on neurocognitive processes and, consequently, criminal responsibility).

272. *See generally* JILLIAN PETERSON & JAMES DENSLEY, THE VIOLENCE PROJECT: HOW TO STOP A MASS SHOOTING EPIDEMIC (2021); JILLIAN PETERSON, A MULTI-LEVEL, MULTI-METHOD INVESTIGATION OF THE PSYCHO-SOCIAL LIFE HISTORIES OF MASS SHOOTERS (2021), https://www.ojp.gov/pdffiles1/nij/grants/302101.pdf; *see also* Langman, *supra* note 268, at 30–31.

> themselves, "Whose fault is this?" Is it a racial group or women or a religious group, or is it my classmates? The hate turns outward. There's also this quest for fame and notoriety.[273]

This kind of research supports proposals to increase the age requirements for the purchase of guns.[274]

There is also the notion of "toxic masculinity," a concept that includes the alarming idea that violence is an expression of masculinity.[275] There is evidence that sexual frustrations are a component in many male shooters' decisions, with one criminologist noting that "[m]any shooters leave manifestos explicitly detailing their hatred of women and of men who seemed to navigate relationships with women with ease."[276]

If these biological, psychological, and societal factors contribute to the misuse of guns by young men, perhaps advocates for better mental health services and detection are right when they argue that improving such services is the solution to the problem of gun violence in this

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273. Melanie Warner, *Two Professors Found What Creates a Mass Shooter. Will Politicians Pay Attention?*, POLITICO (May 27, 2022, 2:54 PM), https://www.politico.com/news/magazine/2022/05/27/stopping-mass-shooters-q-a-00035762.

274. *See, e.g.*, S. 597, 119th Cong. (2025) ("To amend title 18, United States Code, to prohibit the purchase of certain firearms by individuals under 21 years of age, and for other purposes.").

275. *See* Stephanie Pappas, *Female Mass Killers: Why They're So Rare*, LIVE SCIENCE (Apr. 3, 2018), https://www.livescience.com/53047-why-female-mass-shooters-are-rare.html; *see also* Langman, *supra* note 268, at 27–28 (explaining that many shooters display a "sense of damaged masculinity" due to their "failures and inadequacies" earlier in their lives, such as being the victims of bullying, childhood sexual and physical abuse, and feeling outcast in a society that equates dominance and assertion with desirable masculinity).

276. Pappas, *supra* note 275; *see also* Olivia Riggio & Julie Hollar, *Mass Shooters' Most Common Trait—Their Gender—Gets Little Press Attention*, FAIRNESS & ACCURACY IN REPORTING (June 30, 2022), https://fair.org/home/mass-shooters-most-common-trait-their-gender-gets-little-press-attention/ (explaining that, for example, the Sandy Hook shooter "had a Word document on his computer explaining why females are inherently selfish," and the shooter near the University of California, Santa Barbara posted a YouTube video before his shooting "in which he ranted about women not being attracted to him and swore to seek revenge") (citation omitted) (internal quotation marks omitted).

country.[277] Indeed, by any measure, mass shooters seem disturbed. So there can be no argument against the value of improved mental health services to detect mental illness that may lead to gun violence.

However, it is dangerously misleading to envisage a system in which "mental health practitioners . . . become the persons most empowered to make decisions about gun ownership and most liable for failures to predict gun violence."[278] The hard truth is that, historically, the predictive value of mental health diagnoses is limited.[279] In one study, a forensic psychiatrist created and maintained a database of over 300 killers, most of whom shot four or more people.[280] Only two out of ten of the mass killers in that database suffered from some form of serious mental illness.[281] The remaining individuals had "personality or antisocial disorders or were disgruntled,

277. *See* Statista Rsch. Dep't, *Number of Mass Shootings in the United States Between 1982 and September 2024, by Shooter's Race or Ethnicity*, STATISTA (Dec. 9, 2024), https://www.statista.com/statistics/476456/mass-shootings-in-the-us-by-shooter-s-race/ ("Analysis of the factors Americans considered to be to blame for mass shootings showed 80 percent of people felt the inability of the mental health system to recognize those who pose a danger to others was a significant factor.").

278. Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shooting, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4318286/ (noting that political polarization has meant that "relationships between shootings and mental illness often appear to be the only points upon which otherwise divergent voices in the contentious national gun debate agree," leading to the "untenable situation" in which political and public discourse moves further away from productively addressing gun violence and instead places the burden on mental health practitioners).

279. *See id.* (also noting the role of stereotyping and stigma in mental health diagnoses, further explaining that "the notion that mental illness causes gun violence stereotypes a vast and diverse population of persons diagnosed with psychiatric conditions and oversimplifies links between violence and mental illness. Notions of mental illness that emerge in relation to mass shootings frequently reflect larger cultural issues that become obscured when mass shootings come to stand in for all gun crime and when 'mentally ill' ceases to be a medical designation and becomes a sign of violent threat").

280. Michael S. Rosenwald, *Most Mass Shooters Aren't Mentally Ill. So Why Push Better Treatment as the Answer?*, WASH. POST (May 18, 2016, 12:34 PM), https://www.washingtonpost.com/local/most-mass-shooters-arent-mentally-ill-so-why-push-better-treatment-as-the-answer/2016/05/17/70034918-1308-11e6-8967-7ac733c56f12_story.html.

281. *See id.*

jilted, humiliated or full of intense rage," all issues not easily identifiable and treated by the mental health system.[282] Also, many troubled people simply do not seek treatment.[283]

Importantly, researchers point out that "[p]sychiatric diagnosis is in and of itself not predictive of violence, and even the overwhelming majority of psychiatric patients who fit the profile of recent US mass shooters—gun-owning, angry, paranoid [w]hite men—do not commit crimes."[284] Therefore, relying on psychiatric diagnoses to look for patterns of violence will not reduce mass shootings.[285]

However, there is one type of aberrational conduct that is strongly predictive of mass shootings—domestic violence. The evidence of this linkage is overwhelming.[286] According to a 2021 study, in more than two-thirds of mass shootings between 2014 and 2019, at least one "victim was a partner or family member of the perpetrator or the perpetrator had a history of [domestic

282. *Id.*; *see also* Michael H. Stone, *Mass Murder, Mental Illness, and Men*, 2 VIOLENCE & GENDER 51 (2015) (noting that the majority of mass murderers feel a "deep sense of disgruntlement and unfairness"); Michael H. Stone, *Violent Crimes and Their Relationship to Personality Disorders*, 1 PERSONALITY & MENTAL HEALTH 138, 138–39 (2007).

283. *See The State of Mental Health in America*, MENTAL HEALTH AM., https://www.mhanational.org/issues/state-mental-health-america (last visited May 21, 2025) (noting that over half of adults with a mental illness in the United States do not receive treatment).

284. Metzl & MacLeish, *supra* note 278, at 243 (citation omitted).

285. *See id.* at 243–44; *see also* John J. Miller, *Mass Shootings' Relationship to Mental Illness*, 41 PSYCH. TIMES 3, 3 (2024) ("[R]esearch highlights the lack of evidence pointing to mental illness as the main reason for mass shootings."); Jillian K. Peterson et al., *Psychosis and Mass Shootings: A Systematic Examination Using Publicly Available Data*, 28 PSYCH., PUB. POL'Y, & L. 280, 280–91 (2022) (finding that symptoms of psychosis played no role in sixty-nine percent of mass shootings).

286. *See Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY (Mar. 2023), https://everytownresearch.org/maps/mass-shootings-in-america/ (explaining that most mass shootings in the U.S. happen in the home and in the context of domestic violence); *When Men Murder Women: An Analysis of 2020 Homicide Data*, VIOLENCE POL'Y CTR., https://vpc.org/when-men-murder-women-black-females/ (last visited May 21, 2025) (demonstrating that nine out of ten Black women murdered by men are killed in domestic situations and most commonly with a gun).

violence]."[287] Hence, women and family members close to domestic abusers are at an elevated risk of becoming mass shooting victims. Given this study and others like it, researchers emphasize the obvious—easy access to firearms for abusers increases the risk of harm for family members living in those homes.[288] We emphasized this relationship between easy access to guns and the risk of fatality in domestic violence incidents in our *Booker* decision.[289]

This theme—the relationship between easy access to guns and the pervasiveness of gun violence—also highlights the flaw in the argument that improved mental health services and detection are the answer to gun violence. Although mental illness is a universal phenomenon, few countries in the world approach our level of gun violence.[290] However, we are unique in the vast numbers of guns circulating in the population and

287. Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, INJURY EPIDEMIOLOGY, May 31, 2021, at 1, 5, https://doi.org/10.1186/s40621-021-00330-0. The researchers defined domestic violence as violence perpetrated by an intimate partner, a person with whom the victim cohabits, or a person with whom the victim shares a child or family member. *Id.* at 2. The researchers used the Center for Disease Control and Prevention's definition of "intimate partner": "anyone with whom a person has a close, personal relationship. Specifically, this [definition] could include 'current or former spouses, boyfriends or girlfriends, dating partners, or sexual partners,' and can occur 'between heterosexual or same-sex couples and does not require sexual intimacy.'" *Id.* (quoting *Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 9, 2021), https://www.cdc.gov/violenceprevention/ intimatepartnerviolence/index.html).

288. *See generally, e.g.*, April M. Zeoli & Jennifer K. Paruk, *Potential to Prevent Mass Shootings Through Domestic Violence Firearm Restrictions*, 19 CRIMINOLOGY & PUB. POL'Y 129 (2020); Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 6 VIOLENCE & GENDER 27 (2019); APRIL M. ZEOLI, MULTIPLE VICTIM HOMICIDES, MASS MURDERS, AND HOMICIDE-SUICIDES AS DOMESTIC VIOLENCE EVENTS (2018), https://nrcdvf.org/wp-content/uploads/2024/07/multiple-killings-zeoli-updated-112918.pdf.

289. United States v. Booker, 644 F.3d 12, 25–26 (1st Cir. 2011).

290. *Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (Feb. 13, 2023), https://everytownresearch.org/report/gun-violence-in-america/ (noting that the gun homicide rate in the U.S. is twenty-six times higher than in other high-income countries).

ready access to them.[291] In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, which amounts to 120 firearms per 100 residents.[292] The pace of gun purchases is accelerating.[293] Americans purchased 22.8 million guns in 2020, which was the record high as of 2022.[294] Between January 2020 and April 2021, approximately 1.9 million people per month, on average, bought a firearm, with the largest increase occurring in January 2021,[295] the month of the events of January 6 and President Biden's inauguration (President Biden has been an outspoken proponent of gun-control laws, especially in recent years).[296] However, these events were not the only ones contributing to the phenomenon of "armed individualism":

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291. Kara Fox et al., *How US Gun Culture Stacks up with the World*, CNN (Feb. 15, 2024, 6:09 AM), https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html. Factors beyond the vast number of firearms readily available to civilians also distinguish our country from other high-income countries, such as socioeconomic disparity, particularly across racial groups, and unequal access to health and psychological support services. *See* Derin Marbin et al., *Perspectives in Poverty and Mental Health*, 10 FRONTIERS IN PUB. HEALTH 1, 2 (2022); Anshu Siripurapu, *The U.S. Inequality Debate*, COUNCIL ON FOREIGN RELS. (Apr. 20, 2022, 5:14 PM), https://www.cfr.org/backgrounder/us-inequality-debate; Hemangi Modi et al., *Exploring Barriers to Mental Health Care in the U.S.*, ASS'N OF AM. MED. COLLS. (Oct. 10, 2022), https://www.aamc.org/advocacy-policy/aamc-research-and-action-institute/barriers-mental-health-care.

292. *See* AARON KARP, SMALL ARMS SURV., ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (2018), https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-Firearms-Numbers.pdf.

293. *See* Joe Walsh, *U.S. Bought Almost 20 Million Guns Last Year—Second-Highest Year on Record*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/joewalsh/2022/01/05/us-bought-almost-20-million-guns-last-year—-second-highest-year-on-record/?sh=3102ddd113bb.

294. *See id.*

295. *See* Matthew Miller et al, *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey*, 175 ANNALS INTERNAL MED. 219, 223 (2022).

296. *See Fact Sheet: President Biden Announces 13 New Actions to Reduce Gun Violence by Maximizing the Benefits of the Bipartisan Safer Communities Act*, THE WHITE HOUSE (May 14, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/05/14/fact-sheet-president-biden-announces-13-new-actions-to-reduce-gun-violence-by-maximizing-the-benefits-of-the-bipartisan-safer-communities-act/; Chip Brownlee, *Joe Biden's Evolution on Guns*, TRACE (Oct. 26, 2020), https://www.thetrace.org/2020/10/biden-gun-plan-rights-history-crime-bill-politics-election/.

> To those buying and selling guns, the multilayered crises of the long 2020—first coronavirus, then anti-Black police violence and anti-racist civil unrest, and finally democratic instability—provided a vindication of gun rights as an ultimate safety net in a country rocked by uncertainty, insecurity, and chaos. Struck with an uncomfortable and extraordinary dread, millions of people—including many who fell outside the profile of gun owners as white, conservative men—found themselves drawn to guns as a matter of practical necessity. . . . Armed individualism was not simply an ideology; it was a way to navigate seemingly unprecedented insecurity that millions of Americans suddenly found useful.[297]

As a result, gun ownership is now more deeply embedded in the American way of life than ever. And we confront the dispiriting logic that the only answer to gun violence is more guns.

Can we expect increased gun violence in states with weaker gun-control laws? In fact, that is what the evidence suggests. The Violence Policy Center found that "the state with the highest per capita gun death rate in 2020 was Mississippi, followed by Wyoming, Louisiana, Alaska, Missouri, and Alabama."[298] These states have "extremely lax gun violence prevention laws as well as a higher rate of gun ownership."[299] By contrast, "[t]he state with the lowest gun death rate in the nation was Hawaii,

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297. JENNIFER CARLSON, MERCHANTS OF THE RIGHT: GUN SELLERS AND THE CRISIS OF AMERICAN DEMOCRACY 39–40 (2023).

298. *States with Weak Gun Laws and Higher Gun Ownership Lead Nation in Gun Deaths, New Data for 2020 Confirms*, VIOLENCE POL'Y CTR. (Feb. 1, 2022), https://vpc.org/states-with-weak-gun-laws-and-higher-gun-ownership-lead-nation-in-gun-deaths-new-data-for-2020-confirms [hereinafter VIOLENCE POL'Y CTR.]; *see also* Erin Digitale, *Lax State Gun Laws Linked to More Child, Teen Gun Deaths*, STAN. MED. (Nov. 1, 2018), https://med.stanford.edu/news/allnews/2018/11/lax-state-gun-laws-linked-to-more-child-teen-gun-deaths.html (demonstrating that gun deaths among children and teenagers are twice as common in states with lax gun laws, as compared to states with strict gun-control legislation); *States with Weak Gun Laws Suffer from More Gun Violence*, U.S. SENATE COMM. ON THE JUDICIARY (Sept. 24, 2019), https://www.judiciary.senate.gov/press/dem/releases/states-with-weak-gun-laws-suffer-from-more-gun-violence (pointing out the link between poor gun regulation and high rates of gun violence in some states).

299. VIOLENCE POL'Y CTR., *supra* note 298.

followed by Massachusetts, New Jersey, Rhode Island, and New York."[300] These states have some of the strongest gun violence prevention laws in the country, and a lower rate of gun ownership.[301] The study defined states with "weak" gun laws as "those that add little or nothing to federal law and have permissive laws governing the open or concealed carrying of firearms in public," while states with "strong" gun laws are "those that add significant state regulation that is absent from federal law, such as restricting access to particularly hazardous and deadly types of firearms."[302]

Texas offers a particularly striking example of a troubling relationship between weak gun laws and high rates of gun violence. In recent years, Texas has relaxed rules around guns on school campuses[303] and enacted a law allowing guns to be carried in places of worship[304] as well as an open carry law.[305] The latter, passed in 2021,

300. *Id.*

301. *Id.*

302. *Id.*

303. Although Texas law prohibits the open carry of handguns in all schools, including college campuses, TEX. PENAL CODE ANN. § 46.03(a)(1) (West 2021), Texas permits eligible adults to apply for and receive a "license to carry" ("LTC") a concealed handgun on their person, and Texas's so-called "Campus Carry Law" mandates that post-secondary public schools allow LTC holders to carry concealed handguns on their campuses, including in most classroom buildings, parking garages, and student gathering places (not including sporting arenas), *see* TEX. GOV'T CODE ANN. § 411.2031 (West 2021). Public colleges and universities have only a limited ability to adopt certain "gun exclusion zones," such as allowing for restrictions and policies on the storage of handguns in college residences. *Id.* § 411.2031(d), (d-1), (e). Public school faculty members are prohibited from banning the carry of handguns by LTC holders in their classrooms, and because only law enforcement can verify whether a person is carrying and has an LTC under Texas law, faculty members and students may not know whether anyone in their classroom is carrying a gun. *See, e.g.*, *Campus Carry FAQs*, UNIV. OF TEX. AT AUSTIN, https://www.utexas.edu/campus-carry/faqs (last visited May 21, 2025).

304. S.B. 535, 2019 Leg., 86(R) Sess. (Tex. 2019).

305. "Open carry" refers to the practice of carrying a loaded firearm on one's person in plain sight while in a public place (whereas "concealed carry" refers to the practice of carrying firearms in a manner not visible to a casual observer). *Compare Open Carry*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/open%20carry (last visited May 21, 2025), *with Concealed Carry*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/concealed%20carry (last visited

allows individuals to carry guns in public spaces without a permit, background check, or any prior training.[306] These laws coincided with a large increase in gun crimes and deaths across the state. In 2021, 4,613 people in Texas were killed by guns, which represented an increase of more than ten percent from 2020, and more than forty-four percent from 2015.[307] In 2022, that number was 4,630.[308] Moreover, four of the ten deadliest mass shootings in U.S. history happened in Texas, and gun homicides in the state have increased steadily over the last decade.[309]

What is the relevance of all such studies, and the vast empirical data on the causes of and solutions to gun violence, when legislative initiatives to deal with gun violence are challenged in court? According to the Supreme Court, none.

X. *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*—"ALL IN" ON HISTORY

In the wake of *Heller* and *McDonald*, gun rights proponents grew impatient with the willingness of the lower federal courts to continue upholding gun-control measures. They were eager for the Supreme Court to decide a Second Amendment case that would tell the lower courts exactly how to resolve new challenges to

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May 21, 2025). Texas has some of the country's most permissive open carry laws, with a "constitutional carry" bill enacted in 2021 allowing for the permit-less open carry of holstered handguns by most persons in most public places. *See* Firearm Carry Act of 2021, H.B. 1927, 2021 Leg., 87(R) Sess. (Tex. 2021); *see also Carry of Firearms*, TEX. STATE L. LIBR. (Jan. 14, 2025), https://guides.sll.texas.gov/gun-laws/carry-of-firearms.

306. *See* H.B. 1927, 2021 Leg., 87(R) Sess. (Tex. 2021).

307. *Fact Sheet: Dangerous Gun Laws in Texas*, THE CTR. FOR AM. PROGRESS ACTION FUND (Nov. 3, 2022), https://www.americanprogressaction.org/article/fact-sheet-dangerous-gun-laws-in-texas/.

308. *Gun Violence in Texas*, JOHNS HOPKINS CTR. FOR GUN VIOLENCE SOLS., https://publichealth.jhu.edu/sites/default/files/2024-10/gun-violence-in-texas-2022-factsheet.pdf.

309. Sophie Durham, *The Uvalde School Shooting Underscores Texas's Terrible Gun Laws*, GIFFORDS (May 26, 2022), https://giffords.org/blog/2022/05/the-uvalde-school-shooting-underscores-texass-terrible-gun-laws/.

gun-control laws, hopefully in a way that would prevent the lower courts from upholding so many gun-control measures.[310] Justices Thomas and Alito also showed their eagerness for such a case, accusing the lower federal courts of treating the individual right to keep and bear arms declared in *Heller* and reaffirmed in *McDonald* as a "second-class right."[311] In their view, the gun rights of the Second Amendment were comparable in all respects to the other rights protected by the Bill of Rights.[312]

Gun rights advocates found their case in *New York State Rifle & Pistol Association v. Bruen*.[313] New York made it a crime to possess a firearm without a license, whether inside or outside the home.[314] An individual who wanted to carry a firearm outside his home could obtain an unrestricted license "to 'have and carry' a concealed

310. This impatience and eagerness are reflected in the following sample of law review articles: Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL'Y 17, 33 (2016) (arguing that lower courts are "undercutting . . . Supreme Court precedent" on the Second Amendment); Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1425 (2014) (characterizing the "tenor" of lower court Second Amendment decisions as "deeply skeptical, bordering on hostile, to claims that the Second Amendment limits government action"); Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014) ("In the wake of the Supreme Court's *District of Columbia v. Heller* ('*Heller I*') and *McDonald v. Chicago* decisions that clarify, expand, and protect Second Amendment rights, federal and state inferior courts have been engaging in massive resistance." (footnotes omitted)); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 230 (2014) (comparing lower court decisions post-*Heller* to the widespread resistance to *Brown v. Board of Education*).

311. As previously noted, in his *McDonald* majority opinion, Justice Alito argued that to reject incorporation of the Second Amendment would be "to treat the right recognized in *Heller* as a second-class right." McDonald v. City of Chicago, 561 U.S. 742, 780 (2010); *see also* Friedman v. City of Highland Park, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting) ("I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.").

312. *See, e.g.*, *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting).

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

314. *See id.* at 11–12.

'pistol or revolver'" if the individual could "prove that 'proper cause exists'" for doing so.[315] An applicant could satisfy the "proper cause" requirement only by demonstrating "a special need for self-protection distinguishable from that of the general community."[316] The petitioners, both adult, law-abiding New York residents, applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense.[317] State licensing officers denied both of their applications.[318] The petitioners then sued, alleging that the state officials who oversaw the State's gun-licensing regime "violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications on the basis that they had failed to show 'proper cause,' i.e., had failed to demonstrate a unique need for self-defense."[319] Petitioners lost before the district court, the Second Circuit Court of Appeals affirmed, and the Supreme Court agreed to hear the appeal.[320]

Writing for a six-member majority, Justice Thomas noted at the outset of his opinion that the Court in *Heller* and *McDonald* "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."[321] The parties and the Court agreed on a broader application of that right—specifically, "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[322]

Justice Thomas then stated the issue that divided the parties: whether New York's licensing regime, with the requirement that an applicant demonstrate a special

315. *Id.* at 12 (quoting N.Y. PENAL LAW § 400.011(2)(f) (McKinney 2023)).

316. *Id.* (quoting Klenosky v. N.Y. City Police Dep't, 75 A.D.2d 793, 793 (1980), *aff'd*, 53 N.Y.2d 685 (1981)).

317. *Id.* at 15–16.

318. *See id.*

319. *Id.* at 16.

320. *Id.* at 16–17.

321. *Id.* at 8–9.

322. *Id.* at 9–10.

need for self-protection, respected the constitutional right to carry handguns publicly for self-defense.[323] Setting the stage for the analysis to follow, Justice Thomas said that forty-three states issued licenses to carry handguns based on objective criteria, but that "in six states, including New York, the government further condition[ed] issuance of a license to carry on a citizen's showing of some additional special need."[324] This requirement went too far. "Because the State of New York issue[d] public-carry licenses only when an applicant demonstrate[d] a special need for self-defense," the Court concluded that "[New York]'s licensing regime violate[d] the Constitution."[325]

Justice Thomas then devoted the balance of his opinion to explaining the basis for this conclusion. In so doing, he addressed the critical question left open by *Heller* and *McDonald*: how should the lower courts decide challenges to gun-control laws? Justice Thomas began his answer to that question by describing what he called "the two-step test that Courts of Appeals have developed to assess Second Amendment claims,"[326] which he described as "means-ends" scrutiny[327] or a balancing test.[328] As a prelude to rejecting the compatibility of this type of scrutiny or balancing with *Heller*, Justice Thomas described it meticulously.

At the first step, the courts decided if the challenged law regulated activity "falling outside the scope of the right" to keep and bear arms "as originally understood."[329] This first step was a historical inquiry in the sense that the court must determine "the original scope of the right based on its historical meaning."[330] If

323. *See id.* at 11.

324. *Id.*

325. *Id.*

326. *Id.* at 18.

327. Ruben and Blocher described this "means-end" scrutiny in their study of post-*Heller* decision-making by the lower courts. *See supra* notes 251–254 and accompanying text.

328. *See Bruen*, 597 U.S. at 22–23.

329. *Id.* at 18 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).

330. *Id.*

the regulated conduct fell beyond the Amendment's original scope, "then the analysis can stop there; the regulated activity is categorically unprotected."[331] But "if the historical evidence at this step is 'inconclusive or suggests that the regulated activity is *not* categorically unprotected,' the courts generally proceed to step two."[332]

At step two, the courts determined how close the law came to the core Second Amendment right as the courts had understood it prior to *Bruen* ("self-defense *in the home*")[333] and "the severity of the law's burden on" it.[334] If the courts determined that the Second Amendment right, so understood, was burdened, the courts applied strict scrutiny and asked whether the government could prove that the law was narrowly tailored to achieve a compelling interest.[335] If the core Second Amendment right was not so burdened, the court applied intermediate scrutiny and considered whether the government could show that the regulation was "substantially related to the achievement of an important governmental interest."[336]

Justice Thomas concluded that only the first step of this two-step inquiry was consistent with *Heller,* "which demands a test rooted in the Second Amendment's text, as informed by history."[337] None of the inquiries at step two—the government's interest, the burden imposed, narrow tailoring, and the law's relationship to the achievement of an important government interest—had any relevance to the Second Amendment inquiry once it was determined that the law burdened the core Second Amendment right of self-defense. Indeed, in Justice Thomas's view, "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering "interest-

331. *Id.* (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

332. *Id.* (quoting *Kanter*, 919 F.3d at 441).

333. *Id.* (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018)).

334. *Id.* (quoting *Kanter*, 919 F.3d at 441).

335. *Id.* at 18–19 (citing Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).

336. *Id.* at 19 (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

337. *Id.*

balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.""[338] Instead, the only appropriate question was whether the government's "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[339] Or, as Justice Thomas stated the *Bruen* test more fully:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[340]

In a lengthy review of history, Justice Thomas concluded that New York's licensing officials could not demonstrate that the proper cause requirement for the issuance of a firearms license was "consistent with the Nation's historical tradition of firearm regulation."[341] On that basis alone, the New York law could not survive Second Amendment scrutiny.[342] True to his methodology, Justice Thomas said nothing in his opinion about the epidemic of gun violence in urban areas—a problem invoked by New York—except for a footnote chiding Justice Breyer for writing a dissent that details, with statistics, the crimes committed by individuals with firearms, apparently in a misguided effort, as Justice Thomas saw it, to justify greater leeway for states to restrict gun ownership and use.[343]

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338. *Id.* at 22 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

339. *Id.* at 19.

340. *Id.* at 24 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

341. *See id.* at 24, 31–70.

342. *See id.* at 70.

343. *See id.* at 17 n.3.

Justice Breyer did indeed begin his dissent with considerable data about the number of firearms in the United States, the disproportionately high rate of firearm-related deaths and injuries in the United States, the unmistakable rise in gun violence, including mass shootings, and the relationship between easy access to guns and gun violence.[344] He also noted that the dangers and benefits posed by firearms may differ between urban and rural areas, a distinction that might well justify New York's stricter approach to the issuance of licenses for gun possession.[345] Justice Breyer pointedly explained the reason for his recitation of data:

> The primary difference between the Court's view and mine is that I believe the [Second] Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them.[346]

Justice Breyer engaged in his own exploration of history to challenge Justice Thomas's conclusion that history does not support New York's strict regime for the issuance of licenses to carry handguns in public. He found substantial evidence of an "Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular."[347] In light of this contradictory history, he argued that "a standard that relies solely on history is unjustifiable and unworkable."[348] As a matter of institutional competence, judges are not trained historians, and they do not have the resources to conduct exhaustive historical analyses. He asserted that "[l]aws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons

344. *Id.* at 83–89 (Breyer, J., dissenting).
345. *See id.* at 90.
346. *Id.* at 91.
347. *Id.* at 115.
348. *Id.*

will be of little help to courts confronting modern problems."[349]

Critically, Justice Breyer challenged Justice Thomas's claim that the majority's history-only approach accorded with the way in which the Supreme Court resolved other challenges to laws implicating the rights protected by the Bill of Rights.[350] Justice Breyer's critique on this point captured what is so problematic about the *Bruen* decision:

> [T]he Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history "accords with how we protect other constitutional rights." As the Court points out, we do look to history in the First Amendment context to determine "whether the expressive conduct falls outside of the category of protected speech." But, if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden.[351]

Justice Breyer noted that the Court had regularly used this means-ends scrutiny in cases involving other constitutional provisions: the free exercise of religion; the equal protection clause in dealing with race-based classification; applying the equal protection clause to sex-based classifications; and to Fourth Amendment search and seizure issues.[352] Justice Breyer concluded his critique with a statement that further captures the problem with the *Bruen* decision: "The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional anomaly. Rather, it is the Court's

349. *Id.*

350. *See id.* at 24 (majority opinion).

351. *Id.* at 106 (Breyer, J., dissenting) (citations omitted).

352. *Id.*

rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous."[353]

Justice Thomas and his five colleagues in the *Bruen* majority had created a unique historical test to protect the Second Amendment right to keep and bear arms, even though that right does not protect an "insular minority"[354] and it has public safety implications far more serious than any other constitutional right. [355]

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The rush of post-*Bruen* litigation was astonishing and destabilizing, a phenomenon captured well by Professor Jacob D. Charles of Pepperdine University's Caruso School of Law in his article *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*.[356] In a quantitative analysis, Charles identified federal court decisions adjudicating a Second Amendment claim on the merits from the day *Bruen* was decided (June 23, 2022) until one year later (June 22, 2023).[357] Of 375 claims pressed, there were forty-four

353. *Id.* at 107.

354. *See* McDonald v. City of Chicago, 561 U.S. 742, 921 (2010) (Stevens, J., dissenting) ("We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting 'discrete and insular minorities.'" (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938))).

355. There was no daylight between Justice Thomas and his five colleagues with respect to the rigid history-only test. Although Justices Alito, Kavanaugh, and Barrett wrote concurring opinions, their concurring opinions did not question that test. Justice Alito wrote separately to respond to Justice Breyer's dissent. *See Bruen*, 597 U.S. at 71–79 (Alito, J., concurring). Justice Kavanaugh wrote separately to emphasize that the Court's decision only affected "the unusual discretionary licensing regimes, known as 'may-issue' regimes, that are employed by [six] States including New York," rather than the forty-three states with objective "shall-issue" regimes. *See id.* at 79–81 (Kavanaugh, J., concurring). Justice Barrett wrote separately only "to highlight two methodological points" about the use of history in Second Amendment jurisprudence. *See id.* at 81–83 (Barrett, J., concurring). Justice Gorsuch joined Justice Thomas's majority opinion without comment. *See id.* at 7. Chief Justice Roberts joined Justice Thomas's opinion and Justice Kavanaugh's concurrence. *See id.*

356. Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

357. *Id.* at 122–23.

successful Second Amendment claims in the first year after *Bruen*.[358] Two-hundred and eight of those 375 claims involved challenges by criminal defendants to provisions of 18 U.S.C. § 922(g), the federal statute prohibiting firearm possession by various groups.[359] One hundred sixty-one of those claims—more than forty percent—concerned § 922(g)(1), which forbids convicted felons from possessing firearms.[360] Also notable, fifteen of the 375 claims involved challenges to firearms restrictions in "sensitive places,"[361] which succeeded fifty-three percent of the time—a far higher success rate than any other category with a substantial number of claims.[362]

By comparison, according to the Ruben and Blocher study cited earlier in this article, and noted by Charles, none of the seventy Second Amendment claims in the first six months after the *Heller* decision were successful, and only eleven of 327 challenges prevailed in the first two and a half years after that ruling.[363] Charles found that the "44 successful claims in the first year after *Bruen* are staggering in comparison" and indicate just "how disruptive *Bruen* has been."[364]

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358. *Id.* at 126 tbl.2.

359. *Id.* at 127 tbl.3; *see* 18 U.S.C. § 922(g).

360. Charles, *supra* note 356, at 127 n.351; *see* § 922(g)(1).

361. The Supreme Court has recognized a "longstanding" tradition of "laws forbidding the carrying of firearms in sensitive places." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)). While the Court has not "comprehensively define[d]" the term, it has pointed to "schools and government buildings" as well as "legislative assemblies, polling places, and courthouses" as examples of "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.* The "sensitive places" claims identified in Charles's study include a successful challenge to a regulation prohibiting the possession of firearms in public libraries and museums, *see* Koons v. Reynolds, 649 F. Supp. 3d 14, 31 (D.N.J. 2023), and unsuccessful challenges to restrictions on possessing firearms on public transportation, *see* Frey v. Nigrelli, 661 F. Supp. 3d 176, 186 (S.D.N.Y. 2023), *appeal docketed sub nom.* Frey v. Bruen, No. 23-365 (2d Cir. Mar. 16, 2023), and at the National Institutes of Health, *see* United States v. Tallion, No. CR 8:22-PO-01758-AAQ, 2022 WL 17619254, at *1 (D. Md. Dec. 13, 2022).

362. Charles, *supra* note 356, at 127 tbl.3.

363. *Id.* at 128 (citing Ruben & Blocher, *supra* note 13, at 1486 tbl.8).

364. *Id.*

In a qualitative analysis of federal court decisions post-*Bruen*, Charles identified many issues that have perplexed the lower courts. For example, there was widespread uncertainty about the first step of *Bruen*, which requires the lower courts to decide whether the Second Amendment applies at all to the laws at issue.[365] In *Bruen*, Justice Thomas said explicitly that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[366] Some courts have interpreted this language to mean that the Second Amendment applies if the plain text covers a challenger's conduct regardless of "whether the person claiming a right or the weapon they claim protection for is covered by the plain text," while others have found coverage only if the plain text covers the person, weapon, *and* conduct.[367]

Step two of *Bruen* requires an inquiry into "the Nation's historical tradition of firearm regulation."[368] What exactly is the relevant tradition? What is the

365. The reference here is to the first step of the two-step test announced in *Bruen*, as distinguished from the two-step test utilized by the lower courts before *Bruen* and described at length by Justice Thomas in his majority opinion. As explained above, pre-*Bruen*, the appellate courts engaged in a two-step test that included an interest-balancing inquiry as the second step. *See supra* notes 251–254 and accompanying text. Post-*Bruen*, courts must engage in a different two-step test that includes the historical inquiry adopted in *Bruen* as the second step. *See supra* notes 337–340 and accompanying text.

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

367. Charles, *supra* note 356, at 132–33 (footnotes omitted). *Compare, e.g.*, United States v. Quiroz, 629 F. Supp. 3d 511, 521–22 (W.D. Tex. 2022) ("Indeed, *Bruen*'s first step mentions only 'conduct.' So . . . 'who' may keep and bear arms is relegated to step two."), *rev'd*, 125 F.4th 713 (5th Cir. 2025), *with, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232, 297 (N.D.N.Y. 2022) (finding, on the plain-text prong, that "(1) Plaintiff . . . is part of 'the People' protected by the amendment, (2) the weapons in question are in fact 'arms' protected by the amendment, and (3) the regulated conduct (i.e., bearing a handgun in public for self-defense) falls under the phrase 'keep and bear'"), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), *vacated sub nom.* Antonyuk v. James, 144 S. Ct. 2709 (2024), *reinstated in part, aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. James, 120 F.4th 941 (2d Cir. 2024).

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

relevant time period?[369] If the social problem addressed by the contemporary firearms regulation appears to be a problem unknown to the Founders, does that change the relevant inquiry? What if that problem was known to the Founders but they addressed it in a way that differs from the contemporary regulation? In how much detail do the historical precedents have to match the contemporary regulation? How many old laws establish a tradition? And on and on.[370]

Surveying this uncertainty in the lower courts, Professor Charles offered the following bleak assessment: "[Post-*Bruen*], the early returns show disagreement not only about how to apply the test to particular laws but also over fundamental questions about when it applies at all and what it requires the government to show in each case."[371] Given this state of affairs, there was an urgent need for more guidance from the Court on the application of *Bruen*'s history-only test. Hence, there was great anticipation when the Supreme Court agreed in June 2023 to hear a Second Amendment case out of the Fifth Circuit, *United States v. Rahimi*.[372]

369. Justice Barrett noted this issue in her *Bruen* concurrence: "[T]he Court avoids another 'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791." *Id.* at 82 (Barrett, J., concurring) (citation omitted). While she agreed with the majority that "the lack of support for New York's law in either period makes it unnecessary to choose between them," she warned that "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." *Id.* at 82–83.

370. *See* Charles, *supra* note 356, at 137–45.

371. *Id.* at 145.

372. United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (June 30, 2023) (mem.) (granting cert.).

XI. *UNITED STATES V. RAHIMI*—INCHING THE BALL FORWARD[373]

A. The Prelude to Rahimi

The procedural history of *United States v. Rahimi*[374] illustrates dramatically *Bruen*'s disruptive impact in the lower courts. By any measure, Zackey Rahimi was a violent man. He was a suspect in a series of shootings,[375] had used a firearm in an assault on his girlfriend,[376] and had been charged with aggravated assault with a deadly weapon—another firearm—against a different woman.[377] As a result of the assault on his girlfriend, he was subject to a civil protective order that restrained him from, among other things, "[e]ngaging in conduct . . . reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass" her or any member of her family (including their child).[378] Because that protective order qualified as a domestic violence restraining order under federal law, and because the police found Rahimi in possession of firearms, he was charged with violating 18 U.S.C. § 922(g)(8), a federal law prohibiting an individual who is subject to a domestic violence protection order from possessing a firearm.[379]

Prior to entering a guilty plea, Rahimi had moved to dismiss the indictment on the § 922(g)(8) charge, claiming that the federal statute was unconstitutional

373. This language comes from Justice Jackson's concurring opinion. *See* United States v. Rahimi, 602 U.S. 680, 746 (2024) (Jackson, J., concurring) ("[T]oday's opinion inches that ball forward.").

374. United States v. Rahimi, 602 U.S. 680 (2024).

375. United States v. Rahimi, 61 F.4th 443, 448–49 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

376. *See* United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 (5th Cir. June 8, 2022) (per curiam), *withdrawn*, No. 21-11001, 2022 WL 2552046 (5th Cir. July 7, 2022) (per curiam), *superseded by* 61 F.4th 443 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

377. *See id.*

378. *Rahimi*, 61 F.4th at 449 (alteration in original).

379. *Id.* (citing 18 U.S.C. § 922(g)(8)).

under the Second Amendment.[380] He filed that motion to preserve the issue for a future appeal, knowing that a Fifth Circuit precedent foreclosed his argument.[381] In an appeal to the Fifth Circuit after the entry of his plea, he renewed his Second Amendment challenge to § 922(g)(8) while again acknowledging the bar of the Fifth Circuit precedent.[382] A panel of the Fifth Circuit, in a summary disposition, relied on that precedent to reject Rahimi's appeal.[383]

The Fifth Circuit precedent, *United States v. McGinnis*,[384] did indeed preclude Rahimi's Second Amendment challenge to § 922(g)(8).[385] Applying the intermediate scrutiny standard of review so prevalent in the circuit courts pre-*Bruen*, the panel had concluded that § 922(g)(8) did not violate the Second Amendment: "[Section] 922(g)(8) rests on an established link between domestic abuse, recidivism, and gun violence and applies to persons already individually adjudged in prior protective orders to pose a future threat of abuse."[386] In emphasizing this well-established link, the Fifth Circuit had cited the same evidence so important to my panel in our *Booker* opinion, where we rejected the Second Amendment challenge to the Lautenberg Amendment, § 922(g)(9), which prohibited "individuals convicted of a 'misdemeanor crime of domestic violence' from possessing, shipping, or receiving firearms."[387] Together, § 922(g)(8) and § 922(g)(9) reflected the federal

380. *See id.*

381. *Id.*

382. *Id.*

383. *See* United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 n.1 (5th Cir. June 8, 2022) (per curiam), *withdrawn*, No. 21-11001, 2022 WL 2552046 (5th Cir. July 7, 2022) (per curiam), *superseded by* 61 F.4th 443 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

384. United States v. McGinnis, 956 F.3d 747 (5th Cir. 2020).

385. *See id.* at 759 (holding that "[18 U.S.C.] § 922(g)(8) passes constitutional muster").

386. *Id.* at 758 (quoting United States v. Mahin, 668 F.3d 119, 128 (4th Cir. 2012)).

387. United States v. Booker, 644 F.3d 12, 13–14, 25–26 (1st Cir. 2011) (quoting 18 U.S.C. § 922(g)(9)).

government's efforts to weaken the link between domestic abuse and gun violence.

Rahimi had been smart to preserve his Second Amendment challenge to § 922(g)(8) despite the Fifth Circuit's *McGinnis* precedent. The Fifth Circuit per curiam opinion invoking *McGinnis* to deny Rahimi's appeal was filed on June 8, 2022.[388] *Bruen* was issued two weeks later on June 23, 2022.[389] In the wake of that decision, the Fifth Circuit panel withdrew its opinion denying Rahimi's appeal and ordered supplemental briefing and an expedited oral argument to address Rahimi's contention that the *Bruen* decision overruled *McGinnis* and that, under *Bruen*, § 922(g)(8) was now unconstitutional.[390] The Fifth Circuit then agreed with Rahimi that § 922(g)(8) violated the Second Amendment.[391]

The court began its opinion by distancing itself from any policy concerns relating to the use of guns and domestic violence: "The question presented in this case is *not* whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal."[392] Instead, "[t]he question is whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional under the Second Amendment of the United States Constitution."[393]

Applying *Bruen*, the panel first considered whether Rahimi's possession of a pistol and rifle "falls within the purview of the Second Amendment."[394] It readily

388. *See Rahimi*, 2022 WL 2070392, *1.

389. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

390. *See* United States v. Rahimi, No. 21-11001, 2022 WL 2552046, at *1 (5th Cir. 2022) (per curiam) (order of July 7, 2022, withdrawing panel opinion, setting the case for rehearing, and directing the clerk to expedite the oral argument and the parties to file additional briefing).

391. United States v. Rahimi, 61 F.4th 443, 450 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

392. *Id.* at 448.

393. *Id.*

394. *Id.* at 454.

concluded that it did.[395] The question then became whether the government had presented evidence of historical analogues to § 922(g)(8) that placed the statute within "the historical tradition that delimits the outer bounds of the right to keep and bear arms."[396] In particular, the court looked for "historical analogues more contemporaneous to the Second Amendment's ratification" in 1791.[397] The government had offered historic analogues that fell "generally into three categories: (1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws."[398] The Fifth Circuit panel analyzed "each of these historical regulations" and found that none was a "'relevantly similar' precursor[] to § 922(g)(8)."[399]

The disarming laws "disarmed classes of people considered to be dangerous, specifically including those unwilling to take an oath of allegiance, slaves, and Native Americans."[400] In the court's view, "these laws fail[ed] on substance as analogues to § 922(g)(8), because . . . [t]he purpose of laws disarming 'disloyal' or 'unacceptable' groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat . . . posed by another individual," as was the case with § 922(g)(8).[401]

Next, the court determined that the "going armed" laws failed as a persuasive historical analogue because

395. *See id.* ("The amendment grants him the right 'to keep' firearms, and 'possession' is included within the meaning of 'keep.' And it is undisputed that the types of firearms that Rahimi possessed are 'in common use,' such that they fall within the scope of the amendment. Thus, *Bruen*'s first step is met.")

396. *See id.* at 450, 454–55 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022)).

397. *Id.* at 456.

398. *Id.*

399. *Id.*

400. *Id.* at 456–57 (citing Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 157–60 (2007)).

401. *Id.* at 457.

"those laws only disarmed an offender after criminal proceedings and conviction."[402] "By contrast, § 922(g)(8) disarms people who have merely been civilly adjudicated to be a threat to another person."[403] Moreover, like the dangerousness laws, the "going armed" laws were "aimed at curbing terroristic or riotous behavior, i.e., disarming those who had been adjudicated to be a threat to society generally, rather than to identified individuals."[404] The Fifth Circuit concluded that this specificity of the federal law made it incompatible with our nation's history of firearms regulation.[405]

Although the Fifth Circuit viewed the public surety laws as "closer" to providing a relevant historical analogue, those laws failed to support the government's position because they "did not prohibit public carry, much less possession of weapons, so long as the offender posted surety."[406] This "conditional, partial restriction on the Second Amendment right" contrasted sharply with § 922(g)(8), which "works an absolute deprivation of the right, not only publicly to carry, but to *possess* any firearm, upon entry of a sufficient protective order."[407] In short, "the historical surety laws did not impose 'a comparable burden on the right of armed self-defense.'"[408]

Having thus found no relevant historical analogue under its granular application of *Bruen*'s test, the Fifth Circuit held that "§ 922(g)(8) falls outside the class of firearm regulations countenanced by the Second Amendment"[409] and hence was unconstitutional. The court concluded its opinion by emphasizing that it was no longer constrained by the means-ends intermediate

402. *Id.* at 458.
403. *Id.* at 458–59.
404. *Id.* at 459.
405. *See id.*
406. *Id.* at 460.
407. *Id.*
408. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022)).
409. *Id.* at 460–61.

scrutiny standard of review that it had applied in *McGinnis*:

> Doubtless, 18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society. Weighing those policy goals' merits through the sort of means-end[s] scrutiny our prior precedent indulged, we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right. Through that lens, we conclude that § 922(g)(8)'s ban on possession of firearms is an "outlier[ ] that our ancestors would never have accepted."[410]

Recalling the pre-*Bruen* refrain of many scholars and jurists, a concurring colleague wrote: "[L]ower courts have routinely . . . treat[ed] the Second Amendment as 'a second-class right.' So the Supreme Court has now commanded lower courts to be more forceful guardians of the right to keep and bear arms, by establishing a new framework for lower courts to apply under the Second Amendment."[411]

The United States quickly filed a petition for a writ of certiorari with the Supreme Court.[412] The petition was granted three months later,[413] and the case was argued on November 7, 2023.[414] That argument captured the difficult state of the law post-*Bruen* and presaged some of the responses of the Justices to those difficulties.

Wisely, rather than mounting a surely futile challenge to the *Bruen* test itself, the government argued that the Fifth Circuit had misapplied *Bruen* when it rejected the government's position that laws from the

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410. *Id.* at 461 (second alteration in original) (quoting *Bruen*, 597 U.S. at 30).

411. *Id.* (Ho, J., concurring) (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

412. Petition for a Writ of Certiorari at *6–7, United States v. Rahimi, 2023 WL 2600091 (2023) (No. 22-915).

413. United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (June 30, 2023) (mem.) (granting cert.).

414. United States v. Rahimi, 602 U.S. 680 (2024).

colonial period established a tradition of disarming dangerous individuals.[415] The court's focus on the particulars of those laws led it to conclude incorrectly that they were not similar to § 922(g)(8) in the way that *Bruen* required.[416] This preoccupation with detail, Solicitor General Elizabeth Prelogar argued, "would enact the very sort of regulatory straitjacket that this Court disclaimed in *Bruen*."[417]

The government also emphasized that the Fifth Circuit had ignored the recognition in *Heller* itself of the tradition of disarming dangerous people.[418] There, the Supreme Court had explicitly noted that laws disarming dangerous people, such as felons and the mentally ill, did not violate the Second Amendment.[419] As Solicitor General Prelogar put it: "[W]e're not asking the Court to break new ground here . . . . Section 922(g)(8) is a clear application of that principle."[420]

The focus on the dangers posed by individuals subject to civil domestic protection orders drew a positive response from Justice Barrett in this exchange with Solicitor General Prelogar:

> JUSTICE BARRETT: So could I just say it's dangerousness? Let's say that I agree with you that when you look back at surety laws and the affray laws, et cetera, that it shows that the legislature can make judgments to disarm people consistently with the Second Amendment based on dangerousness. . . . Why can't I just say that?
>
> GENERAL PRELOGAR: We certainly agree that that's what history and tradition show. . . . So, yes, we would be happy with a decision that says legislatures for time immemorial throughout

415. Transcript of Oral Argument at 4–5, *Rahimi*, 602 U.S. 680 (2023) (No. 22-915).

416. *Id.*

417. *Id.* at 5; *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022).

418. *See* Transcript of Oral Argument, *supra* note 415, at 4–5.

419. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

420. Transcript of Oral Argument, *supra* note 415, at 19.

> American history have been able to disarm those who are dangerous.[421]

There was also a critical exchange about the laws disarming dangerous people between Chief Justice Roberts and the assistant federal public defender representing Rahimi. Justice Gorsuch had previously noted that the challenge to § 922(g)(8) adopted by the Fifth Circuit was a facial challenge,[422] meaning that the court had ruled that the statute was unconstitutional in all its applications.[423] Chief Justice Roberts elicited from Rahimi's attorney a concession that "there will be circumstances where someone could be shown to be sufficiently dangerous that the firearm can be taken from him."[424] Asking "why isn't that the end of the case," the Chief Justice pointedly observed that the government wins its appeal if it can "show that there are circumstances in which the statute can be constitutionally applied."[425]

The government was less successful when it attempted to exclude dangerous individuals from the Second Amendment's protection based on language in *Heller* that the Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[426] By invoking this reference to "responsible citizens," the government signaled its hope to use this language in future cases defending other gun-control laws. Indeed, some lower courts had previously relied on that language in rejecting Second Amendment challenges by individuals who were not "law-abiding, responsible citizens."[427]

Chief Justice Roberts had no patience with this argument, challenging the government's attempt to create a test that relies on the word "responsible."

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421. *Id.* at 49–50.
422. *Id.* at 42–43.
423. *Id.* at 62.
424. *Id.* at 81–82.
425. *Id.* at 82.
426. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
427. *See supra* note 250.

> CHIEF JUSTICE ROBERTS: "[R]esponsible" presents all sorts of problems, and "dangerous" is sort of a different set of considerations. I mean, if you thought that our prior precedents were talking about dangerous, it was a little confusing to all of a sudden find "responsible" being the operative term.
>
> GENERAL PRELOGAR: Well, we relied on the same phrasing the Court itself used when it first articulated . . . this constitutional principle in *Heller*. And so I think we were trying to point out that the Court itself has already recognized the category of regulation that's consistent with original meaning under the Second Amendment, and we just followed the Court's lead in using that phrase, those who are not law-abiding, responsible citizens. . . .
>
> CHIEF JUSTICE ROBERTS: Well, but just to be clear, your argument today is that it doesn't apply to people who present a threat of dangerousness? Whether you want to characterize them as responsible or irresponsible, whatever, the test that you're asking us to adopt turns on dangerousness?
>
> GENERAL PRELOGAR: Correct[.] . . . [W]e do think that dangerousness defines the category of those who are not responsible.[428]

Justice Barrett also questioned the significance of the "law-abiding, responsible" language from *Heller*, noting that the government was seemingly "asking for that to be a test."[429] "But," she continued, "I don't think we presented it as a test."[430]

There was also a telling exchange between Justice Kagan and Solicitor General Prelogar about the

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428. Transcript of Oral Argument, *supra* note 415, at 30–32. Solicitor General Prelogar presumably did not mean that "dangerousness" is the sole criterion for "those who are not responsible." Rather, consistent with other parts of her argument, she appeared to be saying that "those who are not responsible" necessarily includes those who are dangerous. *See id.* at 49 (General Prelogar arguing "that legislatures, consistent with the Second Amendment, can take action to disarm particular types of people whose possession of weapons present these types of concerns, *either* that they have committed serious crimes or present a danger" (emphasis added)).

429. *Id.* at 48.

430. *Id.* at 48–49.

uncertainties faced by the lower courts post-*Bruen*. Noting that there "seem[ed] to be a fair bit of division and a fair bit of confusion about what *Bruen* means and what *Bruen* requires in the lower courts," Justice Kagan asked if there was "any useful guidance we can give to lower courts about the methodology that *Bruen* requires be used and how that applies to cases even outside of this one."[431]

The Solicitor General knew this question was coming from one of the dissenters in *Bruen*.[432] It was the question that added so dramatically to the stakes in *Rahimi*. In response, she identified "three fundamental errors [in] methodology that this case exemplifies and that we are seeing repeated in other lower courts": (1) the relevant historical inquiry into the tradition of firearm regulation should be as wide-ranging as it was in *Heller*, and not limited to specific laws and regulations;[433] (2) instead of "nit-pick[ing] . . . the historical analogues," the lower courts should use this comprehensive view of the relevant history to "identify . . . the enduring principles that define the scope of the Second Amendment right"[434]—i.e., the courts should be advised to "come up a level of generality;"[435] and (3) most innovatively, the lower courts should be instructed to stop placing "dispositive weight on the absence of regulation in a circumstance where there's no reason to think that that was due to constitutional concerns."[436]

Elaborating on the last point, the Solicitor General acknowledged that the government could not cite a regulation from the ratification era disarming domestic abusers.[437] "But," she continued, there is also no evidence "to suggest that anyone thought you couldn't disarm

431. *Id.* at 38.

432. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 83 (2022) (Breyer, J., dissenting).

433. Transcript of Oral Argument, *supra* note 415, at 38–39.

434. *Id.* at 40.

435. *Id.*

436. *Id.*

437. *Id.*

domestic abusers or . . . dangerous people. . . . [T]o suggest that the absence of regulation [in that context] bears substantially on the meaning of the Second Amendment is to take a wrong turn."[438] Here, again, the Solicitor General was anticipating future Second Amendment challenges under *Bruen*. In many cases, the government will be unable to cite specific historical analogues to the statute in question. Thus, the government asked the Supreme Court to instruct the lower courts that the absence of an analogue should be determinative only if the historical record reveals that the absence "was due to constitutional concerns."[439]

B. The Rahimi *Decision*

Chief Justice Roberts wrote for an eight-member majority vacating the Fifth Circuit's decision.[440] Before getting to the details of Rahimi's case, the Chief addressed a critical methodological concern about *Bruen* raised by Solicitor General Prelogar in her oral argument—the need, as she put it, for the lower courts "to come up a level of generality."[441] Chief Justice Roberts agreed, noting that "some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber."[442] Instead, if a law burdens the Second Amendment right of self-defense, it "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin,'" citing language used by Justice Thomas in *Bruen*.[443]

438. *Id.* at 40–41.
439. *Id.* at 40.
440. United States v. Rahimi, 602 U.S. 680 (2024).
441. Transcript of Oral Argument, *supra* note 415, at 18.
442. *Rahimi*, 602 U.S. at 691
443. *Id.* at 692 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)).

To demonstrate his point, the Chief Justice noted the limits of the originalism that drove the analysis in *Heller*:

> As we explained in *Heller*, . . . the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.[444]

Hence, under *Bruen*, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[445]

Refining further the historical inquiry, the Chief Justice emphasized that "[w]hy and how the regulation burdens the right are central to this inquiry."[446] The "why" refers to the reason for the regulation—the problem that the law addresses. If there is a match between the 1791 problem and the contemporary problem, that will be a "strong indicator" that the contemporary law "fall[s] within a permissible category of regulations."[447] Still, to survive Second Amendment scrutiny, the challenged law must also withstand the "how" portion of the *Bruen* test—it cannot burden the Second Amendment right "to an extent beyond what was done at the founding."[448]

Having addressed the methodological approach to be used post-*Bruen*, Chief Justice Roberts began his analysis of the specifics of the *Rahimi* case by emphasizing how narrow the Court's decision would be.

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444. *Id.* at 691–92 (alteration in original) (citations omitted).
445. *Id.* at 692.
446. *Id.*
447. *Id.*
448. *Id.*

First, he noted the point emphasized at oral argument—that Rahimi had challenged § 922(g)(8) on its face, requiring Rahimi "to 'establish that no set of circumstances exists under which the Act would be valid.'"[449] The Chief Justice then pointed out that § 922(g)(8) "provides two independent bases for liability," including the one that would be the focus of the opinion: "bar[ring] an individual from possessing a firearm if his restraining order includes a finding that he poses 'a credible threat to the physical safety' of a protected person."[450] That particular ground posed no Second Amendment problem "because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others."[451] Reviewing the government's "ample evidence," he explained why, contrary to the Fifth Circuit's conclusion, the proffered historical regulations were fair analogues to § 922(g)(8).[452]

Specifically, Chief Justice Roberts emphasized that "regulations targeting individuals who physically threatened others persisted" at the time of our country's founding, including legal regimes that "specifically addressed firearms violence."[453] The first were "the surety laws [that] could be invoked to prevent all forms of violence, including spousal abuse. As Blackstone explained, '[w]ives [could] demand [sureties] against their husbands; or husbands, if necessary, against their wives.'"[454] Importantly, the surety laws "also targeted the misuse of firearms. In 1795, for example,

449. *Id.* at 693 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

450. *Id.* (quoting 18 U.S.C. § 922(g)(8)(C)(i)). Section 922(g)(8) also bars possession of a firearm by an individual who is "subject to a court order that . . . by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." § 922(g)(8)(C)(ii).

451. *Rahimi*, 602 U.S. at 693.

452. *See id.* at 693–700.

453. *Id.* at 694–95.

454. *Id.* at 695 (first alteration added) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *254).

Massachusetts enacted a law authorizing justices of the peace to 'arrest' all who 'go armed offensively [and] require of the offender to find sureties for his keeping the peace.'"[455]

The historical record also revealed "a second regime [that] provided a mechanism for punishing those who had menaced others with firearms"—the "going armed" laws.[456] These laws

> prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land." Such conduct disrupted the "public order" and "le[d] almost necessarily to actual violence." Therefore, the law punished these acts with "forfeiture of the arms . . . and imprisonment."[457]

"Taken together," the Chief Justice concluded, "the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[458]

With this historical review, the Chief Justice had answered the "why" question of the *Bruen* test. The law being challenged—§ 922(g)(8), which "prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of [an] intimate partner,' or a child of the partner or individual,"[459]—was "relevantly similar" in its purpose to the colonial-era surety and going armed laws, which also sought to disarm people who posed a clear threat to the physical safety of others.[460] Accordingly, the federal law fell "within a permissible category of regulations."[461]

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455. *Id.* at 696 (alteration in original) (quoting 1795 Mass. Acts ch. 2, in ACTS AND RESOLVES OF MASSACHUSETTS, 1794–1795, ch. 26, pp. 66–67 (1896)).

456. *Id.* at 697.

457. *Id.* (alterations and omission in original) (citations omitted).

458. *Id.* at 698.

459. *Id.* at 684–85 (alteration in original) (quoting 18 U.S.C. § 922(g)(8)).

460. *Id.* at 698 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022)).

461. *Id.* at 692.

As for the "how" question posed by *Bruen*, the Chief carefully scrutinized the procedures and consequences of § 922(g)(8).[462] The statute "applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another" and only for the period the defendant is subject to a restraining order.[463] Also, the temporary disarmament imposed by the law is a lesser penalty than the imprisonment provided for by the going armed laws.[464] Thus, these burdens did not exceed those imposed by the historical analogues.

In holding otherwise, Chief Justice Roberts explained, the Fifth Circuit had erred by "read[ing] *Bruen* to require a 'historical twin' rather than a 'historical analogue.'"[465] In other words, the Fifth Circuit needed "to come up a level of generality."[466]

Before concluding his opinion, the Chief Justice addressed a loose end from his exchange with Solicitor General Prelogar at the oral argument—her attempt to circumscribe the protective scope of the Second Amendment on the basis of the language in *Heller* that the Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[467] In her view, as some lower courts had decided, legislatures could limit the Second Amendment rights of those who were not "responsible citizens."[468] The Chief Justice was having none of it:

> [W]e reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class

462. *Id.* at 698.

463. *Id.* at 699 (quoting § 922(g)(8)(C)(i)).

464. *Id.*

465. *Id.* at 701 (quoting *Bruen*, 597 U.S. at 30).

466. *See* Transcript of Oral Argument, *supra* note 415, at 18.

467. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

468. *See* Transcript of Oral Argument, *supra* note 415, at 30–32; *see also supra* note 250.

> of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.[469]

If there is an opening left by this rejection, it is a small one.

There were six separate opinions in *Rahimi*: concurrences by Justices Gorsuch, Kavanaugh, Barrett, Sotomayor (joined by Kagan), and Jackson, and a dissent by Justice Thomas. Justice Gorsuch responded to critics of *Bruen* who emphasized that its reliance on history and tradition alone leaves legislatures almost defenseless in trying to respond to the modern problems of gun violence. Regardless of how "the world may change" or "facts on the ground may evolve," Justice Gorsuch wrote, "the Constitution the people adopted remains our enduring guide. If changes are to be made to the Constitution's directions, they must be made by the American people."[470]

Apparently worried about a possible dilution of *Bruen*'s originalist message because of the Chief Justice's insistence that the Court's Second Amendment cases were "not meant to suggest a law trapped in amber,"[471] Justice Gorsuch used the Chief's language to insist that the "people's directions in the Constitution" are "trapped in amber."[472] Also worried that the Chief's response to the Solicitor General's "level of generality" concern[473] might invite judges "to glean" from history "overarching policies, purposes, or values to guide them

469. *Rahimi*, 602 U.S. at 701–02 (citations omitted).

470. *Id.* at 709–10 (Gorsuch, J., concurring) (citations omitted).

471. *Id.* at 691 (majority opinion).

472. *Id.* at 709 (Gorsuch, J., concurring).

473. In response to this concern raised by the Solicitor General, Chief Justice Roberts explained that "the appropriate analysis [under *Bruen*] involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692 (majority opinion).

in future cases,"[474] Justice Gorsuch warned that there is no such invitation:

> Allow judges to reign unbounded [by text and history], or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. . . . Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.[475]

In other words, whatever the limits of originalism, the path that the Court chose in *Bruen*, "seeking to honor the supreme law the people have ordained rather than substituting our will for theirs[,] . . . offers surer footing than any other this Court has attempted from time to time."[476]

In his concurrence, Justice Kavanaugh articulated his objective: "to review the proper roles of text, history, and precedent in constitutional interpretation."[477] He defended *Bruen* by posing the same choice as Justice Gorsuch—if judges do not rely on history to decide constitutional questions, they become unprincipled policy makers.[478] He then added that "[h]istory is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."[479]

Justice Barrett also defended the originalist approach of *Bruen* in her concurrence:

> The theory is built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the "discoverable historical meaning . . . has legal significance and is authoritative in most circumstances." Ratification is

474. *Id.* at 710 (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting Giles v. California, 554 U.S. 353, 374–75 (2008)).

475. *Id.* at 712.

476. *Id.* at 711–12.

477. *Id.* at 714 (Kavanaugh, J., concurring).

478. *See id.* at 717.

479. *Id.* at 718.

> a democratic act that renders constitutional text part of our fundamental law, and that text "remains law until lawfully altered."[480]

Unlike Justice Gorsuch, however, she was not wary of the invocation by Chief Justice Roberts of "principles" discernible in the early history of gun regulation. Indeed, she thoughtfully made the "level of generality problem" the focus of her concurrence:

> Courts have struggled with th[e] use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?[481]

She unequivocally opted for principles:

> [I]mposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us "a law trapped in amber." And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a "use it or lose it" view of legislative authority. Such assumptions are flawed, and originalism does not require them.
>
> . . . Historical regulations reveal a principle, not a mold.[482]

With her reference to a "'use it or lose it' view of legislative authority,"[483] Justice Barrett, without acknowledging that she was doing so, embraced a refinement of the *Bruen* methodology suggested by Solicitor General Prelogar in her oral argument—namely, that the lower courts should be instructed to stop placing "dispositive weight on the absence of regulation in a circumstance where there's no reason to

480. *Id.* at 737 (Barrett, J., concurring) (omission in original) (citation omitted).

481. *Id.* at 739.

482. *Id.* at 739–40 (citations omitted).

483. *See id.* at 740.

think that that was due to constitutional concerns."[484] In other words, the absence of a gun regulation from the ratification era on a subject may not reflect a judgment that the Second Amendment proscribed such a regulation. It may simply reflect the reality that the problem requiring a contemporary response was not recognized in the Founding era. As noted earlier, Solicitor General Prelogar acknowledged that the government could not cite a law from the ratification era disarming domestic abusers. Given that domestic abuse was widespread and tolerated at that time,[485] that fact is hardly surprising. As the Chief Justice explained in his decision, however, there were ample examples of laws from the ratification era disarming dangerous people. Modern day domestic abusers readily fit into that dangerous person category.

In that circumstance, the principles underlying the gun regulations from the ratification era disarming dangerous people demonstrate that the contemporary law disarming domestic abusers is compatible with the Second Amendment. As Justice Barrett explained:

> Here, . . . the Court settles on just the right level of generality: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." . . . Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi's facial challenge fails. Harder level-of-generality problems can await another day.[486]

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484. *See* Transcript of Oral Argument, *supra* note 415, at 40.

485. *See* Natalie Nanasi, *Reconciling Domestic Violence Protections and the Second Amendment*, 59 WAKE FOREST L. REV. 131, 156–61 (2024) (noting that "[t]he disparate treatment and condonation of violence against women is a historical fact" and explaining that "intimate partner violence was for most of U.S. history not considered an issue worth addressing"); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996) (explaining that "a husband could command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority" by law until the late nineteenth century).

486. *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring) (citation omitted).

Justice Sotomayor, who dissented in *Bruen*, and who restated in her concurrence her strong belief that the history-only test of *Bruen* was deeply misguided, acknowledged that the Court at least applied the *Bruen* test properly here. To be sure, her praise was muted. "Even under *Bruen*," she observed, "this is an easy case,"[487] precisely because the Court clarified the important methodological point that courts applying *Bruen* "should 'conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.'"[488] That clarification "permits a historical inquiry calibrated to reveal something useful and transferable to the present day."[489] Still, with an eye on Justice Thomas's application of *Bruen* in his *Rahimi* dissent, Justice Sotomayor restated her deep misgivings: "History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."[490]

Justice Jackson, who joined the Court after *Bruen* was decided,[491] did not replay the *Bruen* debate in her concurrence. Instead, in a series of observations, she focused on the tumultuous impact that *Bruen* had on the lower courts. "This case highlights the apparent difficulty faced by judges on the ground. Make no mistake: Today's effort to clear up 'misunderst[andings],' is a tacit admission that lower courts are struggling. In

487. *Id.* at 703 (Sotomayor, J., concurring).

488. *Id.* at 703–04 (alteration in original) (quoting *Rahimi*, 602 U.S. at 692 (majority opinion)).

489. *Id.* at 702.

490. *Id.* at 706.

491. Justice Jackson was sworn in as the 104th Associate Justice of the Supreme Court on June 30, 2022. *Judge Ketanji Brown Jackson Takes Her Seat on the Supreme Court of the United States*, SUP. CT. HISTORICAL SOC'Y, https://supremecourthistory.org/society-news/judge-ketanji-brown-jackson-takes-her-seat-on-supreme-court/ (last visited May 21, 2025).

my view, the blame may lie with us, not with them."[492] And this: "Scholars report that lower courts applying *Bruen*'s approach have been unable to produce 'consistent, principled results,' and, in fact, they 'have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them.'"[493] And this: "[I]t appears indisputable that, after *Bruen*, 'confusion plagu[es] the lower courts.'"[494] And finally this:

> "[I]t normally might be fair to venture the assumption that case-by-case development [will] lead to a workable standard." By underscoring that gun regulations need only "comport with the *principles* underlying the Second Amendment," today's opinion inches that ball forward.
>
> But it is becoming increasingly obvious that there are miles to go. Meanwhile, the Rule of Law suffers.[495]

In his solo dissent, Justice Thomas insisted that § 922(g)(8) should not survive Second Amendment scrutiny because the government did not identify "a single historical regulation that is relevantly similar to § 922(g)(8)."[496] Like the Fifth Circuit, he explained at length why the "surety" and "going armed" laws cited by the government were not "relevantly similar" to § 922(g)(8).[497] He then offered this observation: Section "922(g)(8) addresses a societal problem—the risk of interpersonal violence—'that has persisted since the 18th century,' yet was addressed 'through [the] materially different means' of surety laws."[498]

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492. *Rahimi*, 602 U.S. at 741 (Jackson, J., concurring) (alteration in original) (quoting *Rahimi*, 602 U.S. at 691 (majority opinion)).

493. *Id.* at 743 (quoting Brief for Second Amendment Law Scholars as Amici Curiae 4–6, *Rahimi*, 602 U.S. 680 (No. 22-915)).

494. *Id.* (quoting Brief for Second Amendment Law Scholars as Amici Curiae, *supra* note 493, at 6)

495. *Id.* at 746 (second alteration in original) (citations omitted).

496. *Id.* at 753 (Thomas, J., dissenting).

497. *See id.* at 753–62.

498. *Id.* at 767 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26, 27 (2022)).

In other words, if "interpersonal violence" has been with us since the eighteenth century, a phenomenon that includes domestic violence, and the Founders responded with the surety and going armed laws that differ materially from the § 922(g)(8) response to that violence, the contemporary law is incompatible with the original understanding of the Second Amendment. This position is precisely the *Bruen* methodology that Chief Justice Roberts rejected. He focused instead on the discernible principles underlying the different regulatory regimes of the ratification era. Like § 922(g)(8), the old surety and going armed laws were designed to curtail the threat from dangerous people. That shared principle supports the compatibility of § 922(g)(8) with the tradition of firearms regulation required by *Bruen.*

XII. REFLECTIONS

A. The Limits of Originalism

As I have explained, Justice Scalia concluded in *Heller* that the core of the Second Amendment right to keep and bear arms is the individual right of self-defense. In reaching that conclusion, he applied an originalist approach to constitutional interpretation. Justice Scalia has offered his own definition of originalism. It is

> [t]he doctrine that words are to be given the meaning they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.[499]

For Justice Scalia, his devotion to history (to "the historical ascertainment of . . . meaning") to interpret the

499. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 435 (2012). Justice Scalia offered a similar definition of originalism at the outset of his decision in *Heller*. *See supra* note 111 and accompanying text.

generalities of the Constitution reflected his belief that such originalism is the only legitimate form of constitutional interpretation. In his view, once judges find that meaning, they can resolve the conflict before them in a neutral, principled fashion free of judicial bias.[500] In their *Rahimi* concurrences, Justices Gorsuch, Kavanaugh, and Barrett extolled this virtue of originalism—it is the most principled, neutral, and objective form of constitutional interpretation available.

This originalist claim to objectivity is unpersuasive. Meaning is often in the eye of the beholder. One can embrace or reject historical sources because of preferences informed by ideology. In a candid moment during a talk at Catholic University's law school in September 2023, Justice Barrett acknowledged that a judge's hunt for historical sources could be like "looking over a crowd and picking out your friends."[501]

In his sharp critique of *Heller*, referred to at the outset of this article, Judge Wilkinson saw the phenomenon described by Justice Barrett at work in *Heller*: "While *Heller* can be hailed as a triumph of originalism, it can just as easily be seen as the opposite—an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other."[502] He added: "Originalism, though important, is not determinate enough to constrain judges' discretion to decide cases based on outcomes they prefer."[503]

Oddly, with his own language in the opinion, Justice Scalia gave credence to the view that *Heller* was far from

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500. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849, 862 (1989); *Judicial Adherence*, *supra* note 111.

501. *See* Emily Bazelon, *How "History and Tradition" Rulings Are Changing American Law*, N.Y. TIMES MAG. (Apr. 29, 2024). Justice Scalia had previously invoked this metaphor to criticize the judicial use of legislative history. *See* Justin Driver, *How Scalia's Beliefs Completely Changed the Supreme Court*, NEW REPUBLIC (Sept. 9, 2014), https://newrepublic.com/article/119360/scalia-court-one-reviewed-justin-driver ("Scalia, amplifying a critique initially pressed by Judge Harold Leventhal, has condemned using legislative history as the 'equivalent of looking over the faces of the crowd at a large cocktail party and picking out your friends.'").

502. Wilkinson, *supra* note 1, at 256.

503. *Id.* at 257.

a disinterested historical inquiry into the original meaning of the Second Amendment. As noted earlier, the *Heller* Court faced a conundrum. If *Miller*'s collective right version of the Second Amendment (the right of the people to keep and bear arms only serves the needs of the militia)[504] remained the essence of that right going forward, there was a danger of Second Amendment obsolescence. As Justice Scalia explained, it was unthinkable to grant Second Amendment protection to the military-style weapons required by a modern state militia, whatever form that militia took, to fight a modern federal army.[505] The refusal to grant protection to such weapons meant that the stated purpose of the prefatory clause of the Second Amendment—protecting the well-regulated militia, necessary to the security of a free state[506]—was now largely irrelevant. Justice Scalia spoke to that problem at the end of *Heller*:

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[507]

This powerful rhetoric suggests something other than an objective consideration of the historical sources to determine the original meaning of "the right of the people to keep and bear Arms."[508] Instead, the Court avoided the constitutional obsolescence of the Second Amendment by giving it a more enduring and relevant purpose—protecting the individual right of self-defense.

Still, there are many historians and scholars who supported Justice Scalia's reading of the right to keep

504. *See generally* United States v. Miller, 307 U.S. 174 (1939).

505. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008); *see also supra* note 25.

506. *See* U.S. CONST. amend. II.

507. *Heller*, 554 U.S. at 636.

508. *Id.* at 576 (quoting U.S. CONST. amend. II).

and bear arms. After a careful analysis of the historical record, a prominent legal historian concluded that "the arguments about the Second Amendment's meaning are in reasonably close balance."[509]

That history also supports another aspect of *Heller* that has generated some criticism: its many references to a Second Amendment that was adopted because of a fear of federal government tyranny.[510] For example, Justice Scalia wrote: "It was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."[511] It is true that such language has been used repeatedly by modern, self-styled militia groups to justify arming themselves for a future confrontation with government at all levels and for intense opposition to all forms of gun control.[512] The conspiratorial mentality of such groups is alarming. But it is a historical fact that the Second Amendment was proposed and ratified because of a fear of federal government tyranny. If, to use the language of Sanford Levinson, that fear makes the Second Amendment an embarrassing part of our history,[513] so be it. The Second Amendment was written and ratified in the wake of the Revolutionary War. The Founding generation knew, as

509. Wilkinson, *supra* note 1, at 271 (quoting MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS xvi (2007)).

510. *See Heller*, 554 U.S. at 600, 613.

511. *Id.* at 599.

512. *See, e.g.*, *Oath Keepers*, THE S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers (last visited May 21, 2025) (describing one group that strives to uphold the "citizens' militia" tradition that Justice Scalia spoke of in *Heller* and understands the Second Amendment as essential in the fight against government tyranny); *see also* Jamie Raskin, *The Second Amendment Gives No Comfort to Insurrectionists*, N.Y. TIMES (Sept. 27, 2022), https://www.nytimes.com/2022/09/27/opinion/us-second-amendment.html (explaining that "champions of this insurrectionist theory of the Second Amendment" embrace "the myth that frustrated citizens have a Second Amendment right to raise arms against the government"); Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 324 (2011).

513. *See* Levinson, *supra* note 68 and accompanying text.

Justice Scalia wrote in *Heller*, that English tyrants had "tak[en] away the people's arms . . . to suppress political opponents."[514] Hence, we have in our Constitution a "right to keep and bear Arms" that is unusual among nations.[515] The Court chose in *Heller* to give that right a contemporary relevance.

Also, critically, the task before the Court in *Heller* was only the first part of the story—determining the scope of the right to keep and bear arms. The Court relied solely on originalism to make that determination. *Heller* did not tell the lower courts how to determine when the Second Amendment right must give way to other interests. In our constitutional system, no rights are absolute. They have traditionally been subject to laws that recognize competing interests. The courts assess the constitutionality of these laws pursuant to different standards of review.[516] Did those standards of review still apply when the right at issue was the Second Amendment right to keep and bear arms? Or did originalism produce a different ending to that part of the story? Enter *Bruen*.

B. The Problem with Bruen

Bruen ruled that the originalist, history-only approach used by Justice Scalia in *Heller* to determine the meaning of the right to keep and bear arms should apply henceforth to an evaluation of the constitutionality of any laws burdening that right.[517] The traditional

514. *Heller*, 554 U.S. at 598.

515. *See* Brennan Weiss et al., *Only 3 Countries in the World Protect the Right to Bear Arms in Their Constitutions: The US, Mexico, and Guatemala*, BUS. INSIDER (Nov. 22, 2022, 1:50 PM), https://www.businessinsider.com/2nd-amendment-countries-constitutional-right-bear-arms-2017-10 (noting the exceptional quality of the Second Amendment as compared to other countries' constitutions worldwide); Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 10, 2022, 9:00 AM), https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons (noting that U.S. gun laws and policy are unusual compared to peer countries).

516. *See supra* note 171.

517. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

standards of review applied to constitutional-rights adjudication, all of which involve some form of means-ends scrutiny, were to play no role in this evaluation. Supplanting the traditional standards of review with this history-only approach was a revolutionary step, creating a unique standard of review for Second Amendment challenges.[518] Also, the Court chose this dramatic course despite the widespread criticism in the academy and the courts of the originalist methodology used in *Heller*.

It is important to be clear about the nature of this criticism. It does not deny the value of originalism as one source of constitutional meaning. Instead, it decries the reliance on originalism as the sole source of constitutional meaning. Justice Breyer offered this critique:

> [O]riginalism's exclusive focus on the historical meaning of text creates three significant problems. First, it requires judges to be historians—a role for which they may not be well qualified—constantly searching historical sources for the "answer" where there often isn't one there. Second, it leaves no room for judges to consider practical consequences of the constitutional rules they propound. And third, it does not take into account the ways in which our

518. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 133 (2023) ("*Bruen* breaks not only from standard forms of originalism but from other areas of constitutional-rights adjudication—none of which employ historical-analogical inquiry as the sole means of determining constitutionality."); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 807 (2023) (arguing that the Court's "First Amendment approach, as a whole, is not at all analogous to the historical tradition approach" because the former ostensibly relies on history only to define "unprotected categor[ies] of speech" whereas the latter "treats analysis of historical restrictions on gun use as the entire inquiry"); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2207–11 (2015) (demonstrating that "[i]n practice, . . . the Court relied very little on historical precedent" to define the categories of unprotected speech); *see also infra* note 550.

> values as a society evolve over time as we learn from the mistakes of our past.[519]

Judge Richard Posner and Judge Wilkinson specifically criticized this sole reliance on originalism in *Heller*. Judge Posner:

> The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding.[520]

And Judge Wilkinson:

> [I]t is patently wrong to have an issue that will not only affect people's lives, but could literally *cost* them their lives, decided by courts that are not accountable to them. Some studies suggest that restrictions on handguns reduce violent crime, and that overturning these laws may lead to increased rates of murder and suicide. Absent the clearest sort of textual mandate, we should not entrust courts with such life and death decisions.[521]

As the comments of Judge Posner and Judge Wilkinson suggest, there is considerable irony in the adoption by the *Bruen* majority of a history-only test designed to avoid, as Justice Thomas declared in *Bruen*, the "judge-empowering 'interest-balancing inquiry'" of intermediate scrutiny.[522] In truth, the history-only test is the most judge-empowering, anti-democratic model of judging imaginable. Legislatures building records of cause and effect to justify their gun-control measures will be told by their attorneys that these justifications are irrelevant to any legal challenges. An issue of enormous complexity—requiring careful study by experts from many disciplines, the collection of data, and

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519. STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 149 (2024).

520. *Looseness*, *supra* note 7.

521. Wilkinson, *supra* note 1, at 302 (footnote omitted).

522. *Bruen*, 597 U.S. at 22 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

legislative experimentation with gun-control laws that will work—cannot be addressed in that rational, sensible way because the only measure of the constitutional validity of such laws is their compatibility with a Founding-era tradition of firearms regulation.

Indeed, it is impossible to overstate how removed from reality judges feel when they must apply *Bruen*, which mandates their immersion in esoteric eighteenth-century legal history, to modern gun-control measures designed to ameliorate a level of gun violence unknown in the eighteenth century.[523] Some numbers help to explain this sense of unreality.

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523. I note the following examples of opinions in which judges have expressed their misgivings about *Bruen's* test: Bianchi v. Brown, 111 F.4th 438, 473–74 (4th Cir. 2024) (Diaz, J., concurring) ("*Bruen* has proven to be a labyrinth for lower courts, including our own, with only the one-dimensional history-and-tradition test as a compass." (footnote omitted)); United States v. Smith, No. 22-CR-20351, 2023 WL 2215779, at *4 (E.D. Mich. Feb. 24, 2023) ("An honest search for an 'American' tradition on gun regulation is especially challenging, given that well over half of the American population—including women, Blacks, and others—were generally excluded by law from political participation at the time of the Second Amendment's passage and for decades thereafter."); United States v. Jackson, 661 F. Supp. 3d 392, 407 (D. Md. 2023) ("[H]istorians continue to explore, discover, interpret, and *disagree* about more complex historical matters, including the Founders' intent. . . . [J]udges are not historians."); United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) ("This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. . . . And we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication."); State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) ("[T]he glaring flaw in any analysis of the United States' historical tradition of firearm regulation . . . is that no such analysis could account for what [that tradition] would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations."); United States v. Holden, 638 F. Supp. 3d 931, 941 (N.D. Ill. 2022) ("The United States Constitution, as amended and as imperfect as it was, is the legacy of . . . eighteenth-century Americans; it insults both that legacy and their memory to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways."), *rev'd*, 70 F.4th 1015 (7th Cir. 2023); United States v. Kelly, No. 3:22-CR-00037, 2022 WL 17336578, *3 (M.D. Tenn. Nov. 16, 2022) ("What is left, then, is the necessity of deciding serious criminal cases—involving pressing questions of individual liberty and public safety—based on the arguments of non-historian lawyers, citing cases by non-historian judges, who relied on arguments by other non-historian lawyers, and so on . . . ."). For additional examples, see Clara Fong et al., *Judges Find Supreme Court's* Bruen *Test*

The Bill of Rights, including the Second Amendment, became law on December 15, 1791, when Virginia became the eleventh state to ratify the ten amendments, thus providing the three-fourths approval required for the Bill of Rights to take effect.[524] The state legislators who voted to adopt the amendments were exclusively white, land-owning men—women and nonwhite men were not permitted to participate formally in the constitutional system for more than a century after the amendments' ratification.[525] The total population of the United States in 1790 was 3,929,214, according to the census conducted that year.[526] For purposes of apportionment of the House of Representatives, the population was calculated as 3,461,686 because only three of every five enslaved persons were counted.[527] By contrast, per the most recent census, the United States' population in 2020 was 331,449,281.[528] Yet, as noted, Justice Scalia wrote that the theory of originalism applied in *Bruen* required "that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when

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Unworkable, BRENNAN CTR. FOR JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable.

524. *Bill of Rights*, HISTORY.COM (Feb. 28, 2025), https://www.history.com/topics/united-states-constitution/bill-of-rights#the-bill-of-rights.

525. *See 8 Things You Should Know About the Bill of Rights*, HISTORY.COM (Feb. 20, 2025), https://www.history.com/news/8-things-you-should-know-about-the-bill-of-rights; *The Bill of Rights: A Brief History*, ACLU (Mar. 4, 2002), https://www.aclu.org/documents/bill-rights-brief-history.

526. *Decennial Census Historical Facts, 1790*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-facts.1790.html#list-tab-1813000050.

527. Ctr. for the Study of the Am. Const., *Apportionment of House of Representatives—1787, 1792*, UNIV. OF WIS.-MADISON (Aug. 1, 2022), https://csac.history.wisc.edu/wp-content/uploads/sites/281/2022/07/Apportionment-of-House-of-Representatives-1787-1792.pdf; *see also Three-fifths Compromise*, WIKIPEDIA, https://en.wikipedia.org/wiki/Three-fifths_Compromise (last visited May 21, 2025) (explaining the Three-fifths Compromise).

528. *Decennial Census Historical Facts, 2020*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-facts.2020.html#list-tab-1813000050.

the text first took effect,"[529] in this instance, December 15, 1791.

If we could have interrogated one of Justice Scalia's fully informed observers in 1791, defined by the law of the time as a white, land-owning man, and asked him if he thought his understanding of the Second Amendment should continue to apply to his descendants in 250 years, it is doubtful that he would respond, "Of course! My understanding should control forever." More likely, our hypothetical fully informed observer in 1791 would be what Judge Posner described in his article on *Heller* as a "loose constructionist" who reflected the "reigning theory of legislative interpretation in the eighteenth century."[530] That Founding-era theory would call for a more sensible response to my hypothetical: "I have no idea what this country will look like in 250 years. Yes, you should consider my understanding of the Second Amendment as one factor in its application, but you should also consider other factors that may be more relevant to that future time." Judge Posner has traced this originalist, loose constructionist understanding of constitutional interpretation to Blackstone's Commentaries on the Laws of England and Chief Justice Marshall.[531] He then added this critical point:

> Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism. True originalism licenses loose construction. And loose construction is especially appropriate for

529. SCALIA & GARNER, *supra* note 499, at 435.

530. *Looseness*, *supra* note 7.

531. *Id.* Judge Posner elaborated on this point: "Blackstone explained that 'the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or *the spirit and reason of the law* . . . . As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, *we must a little deviate from the received sense of them*.' John Marshall, the greatest Supreme Court justice of the generation that wrote the Constitution and the Bill of Rights, was also a loose constructionist." *Id.* (omission in original).

> interpreting a constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry.[532]

For the Supreme Court, the challenge post-*Bruen* is to moderate the alarming disconnect in the opinion between past and present.

C. Looking Ahead

Over time, in the common law tradition, creating a body of law case-by-case, the Supreme Court will try to provide more guidance to the lower courts about the applicability of the *Bruen* test. Although *Rahimi* is a narrow decision in the way I have described, that decision offers some hope that the Court's future application of *Bruen* will be flexible enough to take into account contemporary realities. There is the pointed reminder of Chief Justice Roberts that "the methodology of our recent Second Amendment cases" was "not meant to suggest a law trapped in amber."[533] Hence, a law burdening the Second Amendment right of self-defense "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"[534] True, Justices Gorsuch and Kavanaugh seem to be wary of this invocation of principles by the Chief Justice. They worry, as Justice Gorsuch put it, that such a search for principles might "[a]llow judges to reign unbounded [by text and history], or permit them to extrapolate their own broad new principles from those sources."[535] But Justice Barrett endorsed the Chief's focus on principles enthusiastically,

532. *Id.*
533. United States v. Rahimi, 602 U.S. 680, 691 (2024).
534. *Id.* at 692.
535. *Id.* at 712 (Gorsuch, J., concurring).

asserting that "[h]istorical regulations reveal a principle, not a mold."[536]

Certainly, *Rahimi* should be helpful to the lower courts in deciding future cases involving Second Amendment challenges to gun-control measures designed to disarm individuals subject to court findings of dangerousness. *Rahimi* may also be helpful to courts in deciding challenges to laws dealing with modern weapons often used in mass casualty events. In such cases, the courts will have to decide, to quote a test enunciated by Justice Thomas in *Bruen*: are those weapons "modern instruments that facilitate armed self-defense"[537] and thus protected by the Second Amendment? Or, to use Justice Scalia's language in *Heller*, are they "dangerous and unusual weapons,"[538] "not typically possessed by law-abiding citizens for lawful purposes"[539] and so unprotected by the Second Amendment?[540]

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536. *Id.* at 740 (Barrett, J., concurring).

537. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28 (2022).

538. District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148–49 (1769)).

539. *Id.* at 625.

540. The Supreme Court has so far declined to address the permissibility of bans on semiautomatic firearms and large-capacity magazines. *See* Snope v. Brown, No. 24-203, 2025 WL 1550126, at *1 (U.S. June 2, 2025) (denying petition for writ of certiorari from Fourth Circuit decision upholding Maryland's prohibition on possession of semiautomatic rifles, including the AR-15 rifle); Ocean State Tactical, LLC v. Rhode Island, No. 24-131, 2025 WL 1549866, at *1 (U.S. June 2, 2025) (denying petition for writ of certiorari from First Circuit decision declining to enjoin Rhode Island's prohibition on possession of large-capacity magazines). However, in both *Snope* and *Ocean State*, three Justices—Thomas, Alito, and Gorsuch—would have granted certiorari, suggesting that the Court is likely to take up these issues soon. Indeed, Justice Kavanaugh, who could have provided the fourth vote for certiorari, made this point explicitly in his statement respecting the denial of certiorari in *Snope*. After observing that "the Fourth Circuit's decision is questionable," Justice Kavanaugh added:

> Although the Court today denies certiorari, a denial of certiorari does not mean that the Court agrees with a lower-court decision or that the issue is not worthy of review. The AR-15 issue was recently decided by the First Circuit and is currently being considered by several other Courts of Appeals. Opinions from other Courts of Appeals should assist this Court's ultimate decisionmaking on the AR-15 issue. Additional petitions for certiorari will likely be before this Court shortly and, in

The Chief and Justice Barrett agreed on another promising point in *Rahimi*. After reviewing the surety and going armed laws invoked by the government as historical analogues, the Chief observed that these laws "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[541] At the end of her *Rahimi* concurrence, Justice Barrett, quoting herself in another opinion, also linked history and common sense to explain her support for the Court's decision: "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."[542]

Was that consistency just fortuitous in *Rahimi*? Or can common sense, even in the absence of "overly specific analogues,"[543] help assess how the Founders would have responded to a contemporary problem of gun violence if they could have foreseen it? Justice Barrett may have intimated an affirmative response to that question when she wrote in her *Rahimi* concurrence, as already noted, that originalism does not require "21st-century regulations to follow late-18th-century policy choices,"[544] nor does it require an assumption "that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority."[545] She added pointedly: "Such assumptions are flawed."[546]

> my view, this Court should and presumably will address the AR-15 issue soon, in the next Term or two.

Snope, 2025 WL 1550126, at *1 (citations omitted). Justice Thomas dissented from the denial of certiorari in *Snope*. By declining to decide the legality of assault-weapon bans, Justice Thomas said, the Court was permitting "the right to bear arms [to] remain 'a second-class right.'" *Id.* at *5 (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

541. *Rahimi*, 602 U.S. at 698.

542. *Id.* at 740 (Barrett, J., concurring) (quoting Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting)).

543. *Id.* at 739.

544. *Id.*

545. *Id.* at 739–40.

546. *Id.* at 740.

Legal historian Patrick Charles, a critic of *Bruen*, argues that "historical common sense" could ameliorate some of the shortcomings of a rigid reliance on history to determine the constitutional propriety of modern gun-control measures.[547] He further argues that common sense also coincides with the historical practice of government bodies using the "police power to regulate arms in the interest of society's health, safety, and welfare," which he states "has coexisted with the right to arms from the beginning."[548]

Also, in a way that is surely unanticipated by the Court, there is a critical element of the *Bruen* test that may require a form of means-end scrutiny. In both *Bruen* and *Rahimi*, the Court emphasized that "[w]hy and how the regulation burdens the right [to self-defense] are central to th[e] inquiry" of whether the contemporary law at issue is "'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'"[549] This formulation, with its references to "burdens," "balances," and "modern circumstances," inescapably requires indeterminate, nuanced judgments. As Professor Nelson Lund put it, focusing on the burden issue:

> "[W]hether 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." . . . [C]omparing the burden on a constitutional right with the justification for that burden is nothing other than means-end scrutiny.[550]

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547. *See* Patrick J. Charles, *The Fugazi Second Amendment:* Bruen's *Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 697–701 (2023).

548. *Id.* at 698–99.

549. *Rahimi*, 602 U.S. at 692 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022)).

550. Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 298 (2022) [hereinafter Preliminary Preservation] (citations omitted). To be sure, Professor Lund, a

Although Professor Lund insists that any such means-end scrutiny must "maintain fidelity to the central purpose of the Second Amendment, namely protecting the right of armed self-defense,"[551] his insight suggests the potential complexity and flexibility of *Bruen*'s historical inquiry. There must be a determination about "why" the contemporary law burdens the right to keep and bear arms—its "end."[552] If laws from the Founding era reflect similar "ends"—an inquiry that is largely exploratory and descriptive—"that will be a strong indicator," the Chief said, "that contemporary laws imposing similar restrictions . . . fall within a permissible category of regulations."[553] Then comes the indeterminate, judgmental part of the inquiry—how do the burdens imposed on the right to keep and bear arms by the Founding-era regulations and the contemporary regulations compare? If the contemporary law burdens the right to keep and bear arms "to an extent beyond what was done at the founding," the "how" "may not be compatible" with the Second Amendment right.[554] The Chief then adds this important caveat: "[W]hen a challenged regulation does not precisely match its historical precursor, 'it still may

professor at the Antonin Scalia Law School at George Mason University, applauded the *Bruen* decision generally—he thought it was an important reset in Second Amendment jurisprudence that wisely rejected the means-end scrutiny relied upon by the federal courts prior to *Bruen*. *See id.* at 283. However, he insisted that, contrary to the Court's assertions, *Bruen*'s test "is quite novel," and he criticized the *Bruen* majority for "exaggerat[ing] the extent to which the Court's First Amendment jurisprudence has relied on historical evidence rather than interest-balancing under the tiers of scrutiny." *Id.* at 290. In the future, he asserted, "There is good reason to doubt that the Court will be able and willing to apply [*Bruen*'s text-and-history test] consistently and reliably." *Id.* at 291. Professor Lund wrote some important articles pre-*Heller* advancing the individual-right view of the Second Amendment. *See, e.g.,* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL'Y 157 (1999); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

551. *Preliminary Preservation*, *supra* note 550, at 298.

552. *See Rahimi*, 602 U.S. at 692.

553. *Id.*

554. *Id.*

be analogous enough to pass constitutional muster.'"[555] How much similarity is enough? At this point, we have no idea.

Of course, this uncertainty in the *Bruen* inquiry creates great uncertainty for the lower courts about its proper application. *Rahimi* ameliorated some of that uncertainty, but not nearly enough. Without further guidance from the Court, *Bruen*'s history-only approach will continue to destabilize Second Amendment jurisprudence. Gun-control measures come in many forms. They will provoke competing narratives from the parties about the history that does or does not establish the compatibility of the gun-control measure with "the Nation's historical tradition of firearm regulation."[556] Judges, largely untrained in history, will have to resolve these arcane disputes with only a limited ability to engage with the real-world violence that prompted a legislature to enact the gun-control measure at issue. We need to be in a better place.

D. A Final Word: Justice Souter on Originalism

In a 2010 commencement address at Harvard University, Justice Souter, then recently retired from the Supreme Court, discussed the demanding requirements of constitutional judging.[557] He described the phenomenon of some judges responsible for such decision-making, uncomfortable with the "open-ended guarantees" of the Constitution, searching for facts that would, as he put it, "just [be] there waiting for an objective judge to view them"—an approach that he called, somewhat sarcastically, the "fair reading model" of constitutional decision-making.[558] He criticized this

555. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)).

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

557. Justice David H. Souter, Harvard Commencement remarks (as delivered), in HARV. GAZETTE (May 27, 2010), https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/.

558. *Id.*

so-called fair reading model because it fails to account for the fact that "the Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another."[559] Justice Souter observed that it "egregiously . . . misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments."[560]

Although he never used the word, there is no doubt that the target of Justice Souter's criticism in his commencement address was originalism. In an observation consistent with Judge Posner's view that the Framers believed in a "loose constructionist" theory of constitutional interpretation,[561] Justice Souter said that the sole reliance on originalism prevents judges from addressing constitutional uncertainties in the way that the Framers "must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people."[562]

Still, there is hope. In the timeframe of constitutional adjudication, *Bruen*, with its full embrace of originalism, is in its infancy. *Rahimi* engaged constructively with the meaning of the Second Amendment "for living people."[563] In future cases, sooner rather than later, the Supreme Court must refine the *Bruen* methodology to do more of the same.

559. *Id.*
560. *Id.*
561. *See Looseness*, *supra* note 7.
562. Souter, *supra* note 557.
563. *See id.*