THE GENERAL-LAW RIGHT TO BEAR ARMS

William Baude & Robert Leider***

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INTRODUCTION

New York State Rifle & Pistol Ass'n v. Bruen[1] marked an important methodological return to original legal principles. The legal issues in the case were whether the right to bear arms included the general right to carry handguns outside the home for self-defense, and if so, whether New York could restrict the carrying of handguns for self-defense to only those residents who had a special need for self-defense ("proper cause"). In answering these questions, however, the Court also made broad pronouncements about the correct way to decide the scope of the right to keep and bear arms, criticizing the methodological approach that had become common in the lower courts. Specifically, the Court emphasized the role of history and tradition, rather than what it called "interest balancing," and then proceeded to analyze the history of the regulation of arms bearing for eighteen pages.[2]

This was an attempt at an overdue doctrinal course correction. The Supreme Court first recognized an individual right to bear arms for self-defense in *District of Columbia v. Heller*.[3] But since *Heller*, lower-court judges had been "narrowing [*Heller*] from below."[4] For example, in the name of intermediate scrutiny, lower courts had upheld laws that, in essence, prevented most citizens in those jurisdictions from exercising the right to bear arms at all.[5]

Lower courts have since understood *Bruen*'s text, history, and tradition test to require them to survey historical gun laws to determine whether modern laws have analogues in early American practice.[6] And this presents a problem. The Framing era had few gun laws, and thus,

1 142 S. Ct. 2111 (2022).

2 *Id.* at 2129, 2138–56.

3 554 U.S. 570 (2008).

4 Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 962, 961–63 (2016).

5 *See* Gould v. Morgan, 907 F.3d 659, 674 (1st Cir. 2018); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (alternative holding); Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012). For historical approaches reaching the same result, see *Drake*, 724 F.3d at 432–33 (finding the regulation long-standing); and *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (conclusion after extensive historical analysis), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

6 *See, e.g.*, Lara v. Comm'r Pa. State Police, 91 F.4th 122, 135 (3d Cir.) (examining analogues to laws that prohibited those under 21 years of age from carrying firearms), *reh'g denied*, 97 F.4th 156 (3d Cir. 2024); United States v. Daniels, 77 F.4th 337, 345–348 (5th Cir. 2023) (surveying drug and alcohol laws), *petition for cert. filed*, 92 U.S.L.W. 3085 (U.S. Oct. 10, 2023) (No. 23-376); Range v. Att'y Gen. U.S., 69 F.4th 96, 105 (3d Cir. 2023) (examining laws allegedly analogous to the felon-in-possession ban), *petition for cert. filed sub nom.* Garland v. Range, 92 U.S.L.W. 3084 (U.S. Oct. 5, 2023) (No. 23-374); Miller v. Bonta, No. 19-cv-01537, 2023 WL 6929336, at *19 (S.D. Cal. Oct. 19, 2023) (surveying laws allegedly analogous to modern assault weapons bans), *appeal docketed*, No. 23-2979 (9th Cir. argued Jan. 24, 2024); *infra* notes 193–95, 235.

few analogues from which to draw. Meanwhile, judges also complain that they are not historians, even turning to expert testimony to apply the Second Amendment after *Bruen*.

In this Article, we argue that *Bruen*'s intended methodological shift has been widely misunderstood by the bench and bar.[7] This has led to confusion and misapplication in the lower courts, as well as much scholarly criticism of the test that is, we think, misdirected. As we will explain, *Bruen* calls for a form of legal originalism, applying a classical view of fundamental rights as a form of unwritten customary law. This is consistent with the text and history of the Constitution and leads to results that are less mechanical and more sensible than many lower courts have thought. Understanding *Bruen*'s methodology requires three basic legal concepts: original-law originalism, constitutionalization of preexisting rights, and the general law.

Original-law originalism maintains that our law today is a form of originalism.[8] Like all forms of originalism, this looks to the past for evidence of today's constitutional law. Original-law originalism focuses more specifically on the law of the past. It holds that our law today is "the Founders' law, as it's been lawfully changed."[9] This means that our law must trace a legal pedigree to the law of the Founding and its own rules of legal change.

The constitutionalization of a preexisting right means that sometimes, perhaps often, the Constitution's reference to a legal right must be understood by learning the historical customary law that defined and governed the right before its codification. Because the Constitution was not creating or defining these terms for the first time, but rather using the legal terminology and legal infrastructure of the day, one cannot entirely understand these rights just by parsing their literal meaning. The "Privilege of the Writ of Habeas Corpus,"[10] to take a simple example, should be understood in light of centuries of law about the writ, not only by using a Latin-English dictionary to learn

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7 *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 103 (2023); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 78 (2023); *see also* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 462–72 (2023) (correctly recognizing *Bruen*'s use of history as originalist, though understanding its methodology differently than we do here).

8 William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457–58 (2019). There are both positive arguments for this form of originalism, *see id.* at 1463–68, 1477–78, and normative ones, *see* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016), which for purposes of this Article we will bracket.

9 Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015); *see also* Baude & Sachs, *supra* note 8, at 1457.

10 U.S. CONST. art. I, § 9, cl. 2.

that "habeas" means "you have" and "corpus" means "the body." But the same may be true for many less simple examples, ranging from the right to due process, to the right to freedom of speech, to (indeed) the right to keep and bear arms.

The general-law approach to rights means that the scope of these preexisting rights was sometimes defined by unwritten law that was neither state common law nor federal common law. Rather the general law—made famous by Justice Story's opinion about commercial law in *Swift v. Tyson*,[11] and then made infamous by Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*[12]—was a form of common law shared among Anglo-American jurisdictions, which could be expounded by any of them, but controlled by none of them.[13] The general-law approach applied not just to the law merchant or the law of torts, but to the fundamental rights of citizenship, and was an important part of the law of the Founding,[14] as well as the original meaning of Section 1 of the Fourteenth Amendment.[15]

These three legal concepts overlap and reinforce one another in important ways. The constitutionalization of preexisting rights means that to understand the Constitution, we must understand the Constitution's legal background. Original-law originalism tells us that we are bound by that original meaning of the Constitution, including the surrounding law, not just the semantic meanings of the words. And the general-law approach tells us what kind of surrounding law that was, and how it might be applied over time to those bound by the Founders' law today. While much of this apparatus was operating "under the hood" in *Bruen*, it shows what the Court was trying to say, and how the right to keep and bear arms should work today.

I. THE GENERAL-LAW APPROACH TO THE SECOND AMENDMENT

From its first major Second Amendment ruling in 1876,[16] the Supreme Court treated the Second Amendment as securing a preexisting right to keep and bear arms. In doing so, it drew on a robust body of state court decisions describing the general-law right to keep and bear arms. By the time of *Heller* in 2008, the role of general law may have

11 41 U.S. (16 Pet.) 1, 19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

12 304 U.S. at 78.

13 William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024).

14 *See id.* at 1196–99. *See generally* Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611 (2023).

15 Baude, Campbell & Sachs, *supra* note 13, at 1222–25.

16 United States v. Cruikshank, 92 U.S. 542, 553 (1876).

become forgotten or disfavored, but as we will explain, *Bruen* appears to mark a return to the Court's historical general-law method.

A. *Nineteenth-Century State Courts and the Development of General Law*

To understand *Bruen* we first have to go back in time. The initial liquidation of the meaning and scope of the right to bear arms occurred in over fifty years of state court decisions. When the U.S. Supreme Court first opined on the right to keep and bear arms in 1876, it built on this established caselaw. These state cases consistently revealed two important premises: that the right to keep and bear arms was a preexisting right and that it should be analyzed in the mode of the general law.

A preexisting right: There was widespread agreement among state courts that the right to bear arms preexisted the adoption of either state or federal constitutions. The Kentucky Court of Appeals, which delivered the first important recorded decision on the right to bear arms, said that "[t]he right existed at the adoption of the [C]onstitution."[17] Subsequent courts agreed: The Supreme Court of Alabama explained that state's right to bear arms descended from the English Bill of Rights, which was recognized "to be for the most part, in affirmance of the common law."[18] The Supreme Court of Georgia declared that state constitutions recognizing a right to bear arms "confer no *new rights* on the people which did not belong to them before."[19] And, on the eve of the Civil War, the Massachusetts Supreme Judicial Court treated the Second Amendment "like similar provisions in our own Declaration of Rights" as "declar[ing] a great general right."[20]

This idea that constitutional provisions codified preexisting rights was within the contemporary mainstream of legal philosophy. Both natural rights and unwritten customary, common-law rights were important backdrops against which the Framing generation understood its legal system, and which it expected judges to take into account under the law.[21] We will put aside the details of this legal philosophy for present purposes except to observe that there are many sources describing the rights of self-defense and self-preservation as examples of natural rights, and the right to keep and bear arms either as a related

17 Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822).

18 State v. Reid, 1 Ala. 612, 615 (1840).

19 Nunn v. State, 1 Ga. 243, 249 (1846).

20 *In re* Op. of the Justs., 80 Mass. (14 Gray) 614, 620 (1859).

21 *See generally* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021) (explaining both the use of natural law in early American law and its eventual decline).

"auxiliary" common-law right[22] or as itself a natural right.[23] What is important is that Anglo-American legal thought coalesced around the idea that the right to bear arms, whether as a natural right or as a common-law right, preexisted the adoption of any constitution.

A general-law right: Additionally, courts generally recognized the right to keep and bear arms as a general-law right. A general-law right was a right common to Anglo-American legal systems rather than a right that was the creation of local law.

Because courts viewed these various constitutional provisions as declaring a preexisting general-law right, courts did not engage in a purely textual analysis.[24] Courts described the right to arms codified in legal instruments such as the English Bill of Rights, the Second Amendment to the U.S. Constitution, and various state constitutions as codifying the *same* preexisting right.[25] Thus, in the context of the right to bear arms, courts treated the various state and federal constitutional provisions as approximately equivalent, even when they were codified in different terms. For example, in 1840, the Tennessee Supreme Court thought its constitutional provision, which guaranteed that "the free white men of this State have a right to keep and bear arms for their common defence" was "of the same general import" as the Kentucky Constitution, which declared that "the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."[26]

Because the right to bear arms was a general-law right, judges looked across jurisdictional boundaries to understand the scope of the right to bear arms. For this right, the most contested legal issue of the

22 *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *136, *139–40; *see also id.* at *139 ("[H]aving arms for [one's] defence . . . is . . . a public allowance, under due restrictions, of the natural right of resistance and self-preservation . . . .").

23 *See, e.g.*, Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 36 (2020) (describing the natural-right view).

24 *Cf.* BANNER, *supra* note 21, at 23 (making the same point with respect to ordinary statutes).

25 *See, e.g.*, State v. Reid, 1 Ala. 612, 615 (1840) (English Bill of Rights and other states' constitutions); Fife v. State, 31 Ark. 455, 458 (1876) (Second Amendment and state constitutional provision "had a common purpose"); State v. Buzzard, 4 Ark. 18, 32 (1842) (opinion of Dickinson, J.) ("The principle contained in the provision of our Constitution . . . is precisely similar to that of the United States; it stands upon the same ground and is declaratory of the same right."); *id.* at 34 (opinion of Lacy, J.) (treating Second Amendment and Arkansas constitutional right to bear arms as fundamentally similar); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177 (1871) (Second Amendment and Tennessee Constitution codify "the same rights"); Aymette v. State, 21 Tenn. (2 Hum.) 154, 156–57 (1840) (examining English right and Second Amendment with Tennessee constitutional provision); English v. State, 35 Tex. 473, 478 (1871) (treating Second Amendment and Texas Constitution's right to bear arms as similar).

26 *Aymette*, 21 Tenn. (2 Hum.) at 156, 160.

nineteenth century was the constitutionality of laws prohibiting the carrying of concealed weapons. On this issue, courts routinely looked to guidance from other state courts, which had decided cases under their own constitutional provisions.[27]

This does not mean that the differences in language among the various declarations of rights were entirely irrelevant. Whether viewed as a natural right or as a general common-law right, the right to bear arms was generic and underspecified until fixed into positive law. The language used to concretize the right could affect its scope. The English Declaration of Rights protected only the rights of Protestants to have arms, and even then only arms "suitable to their Conditions and as allowed by Law."[28] The effect of this language was that it "only allowed persons of certain rank to have arms."[29] The Tennessee Constitution of 1835 lacked such qualifying language, providing instead that "the free white men of this State have a right to keep and to bear arms for their common defence."[30] This language meant that in Tennessee, unlike in Britain, "every free white man is of suitable condition, and, therefore, every free white man may keep and bear arms."[31] But the limitation to free white men reflected that, in the antebellum American South, free blacks either lacked or did not possess the full measure of the right to have arms.[32] Thus, although courts primarily relied on custom and history to determine the scope of the right, the text used to codify the right also provided additional detail about its scope in a particular jurisdiction.

The general-law status of the right to bear arms was also evidenced in how courts handled disagreements about the right. In a post-*Erie* world, courts routinely conceptualize differences of opinion as simply differences of local law. They consign a holding in a different jurisdiction with which they disagree as the local rule that governs that

27 *See, e.g.*, *Reid*, 1 Ala. at 620 (looking to the Indiana Supreme Court and commenting that "[t]he difference between the terms used in the constitution of Indiana, and that of our own State, is so entirely immaterial, that it could not possibly authorize a difference of construction"); *Fife*, 31 Ark. at 459–60 (borrowing from Tennessee decisions); Nunn v. State, 1 Ga. 243, 247–50 (1846) (examining decisions from Kentucky, Indiana, and Alabama); Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896) (explaining that court decisions from Alabama, Arkansas, Indiana, Missouri, Tennessee, and Texas demonstrate that the right to bear arms may be regulated); *Andrews*, 50 Tenn. (3 Heisk.) at 186 (examining decisions from Kentucky, Alabama, and Georgia).

28 Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2.

29 *Aymette*, 21 Tenn. (2 Hum.) at 157.

30 TENN. CONST. of 1835, art. I, § 26.

31 *Aymette*, 21 Tenn. (2 Hum.) at 158.

32 *Cf.* State v. Newsom, 27 N.C. (5 Ired.) 250 (1844) (explaining that, under the North Carolina Constitution, free blacks could be subjected to additional legislative restriction on their right to bear arms).

jurisdiction under its constitution, while adopting another rule for their jurisdiction under their state's constitution.[33] But this kind of legal relativism is notably absent from nineteenth-century court decisions on the right to bear arms. When courts disagreed, they did not chalk up the disagreement to separate rights in different state constitutions. They asserted, more strongly, that the other side got it *wrong*.

For example, in 1822, the Kentucky Court of Appeals invalidated the state's law prohibiting the carrying of concealed weapons. The majority held that the law was unconstitutional because the right to bear arms prevented the legislature from "diminish[ing] or impair[ing] [the right] as it existed when the constitution was formed."[34] The ruling was universally condemned. In 1840, the Alabama Supreme Court quoted the decision at length and explained why it thought the majority's opinion was erroneous.[35] Later that year, the Tennessee Supreme Court commented that it could "not concur in their reasoning" and that the Kentucky court failed to give "a just construction of the meaning of the clause of the constitution they had under consideration."[36] The court also denied that it could attribute the opposing opinions to differences in language in the two state constitutions; to the contrary, the constitutions were close enough to adjudge that the Kentucky court had simply erred in its understanding of the right.[37] By 1896, the Massachusetts Supreme Judicial Court lined up all the cases holding that the right to carry arms could be regulated.[38] It then noted, "The early decision to the contrary, of Bliss v. Com., has not been generally approved."[39] *Bliss* was an outlier decision—a decision that did not correctly state the general law.

This leads to an important point. The reliance on and use of general law should not be confused with the claim that everyone agrees on what the general law is. To the contrary, disagreements about the

33 *See, e.g.*, State v. deLottinville, 890 N.W.2d 116, 122 (Minn. 2017) (feeling free to interpret the state constitution's prohibition against unreasonable searches and seizures more broadly than the Supreme Court understands the Fourth Amendment, although the Minnesota and Federal Constitutions contain identical prohibitions against unreasonable searches and seizures); State v. Mello, 27 A.3d 771, 776 (N.H. 2011) (explaining that "our law regarding information voluntarily exposed to third parties is in line with the protection afforded under the Fourth Amendment and diverges significantly from New Jersey law"); State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (discussing criteria for determining when the state constitution will be interpreted more expansively than the Federal Constitution).

34 Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822).

35 State v. Reid, 1 Ala. 612, 619 (1840).

36 *Aymette*, 21 Tenn. (2 Hum.) at 160.

37 *Id.*

38 Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896).

39 *Id.* (citation omitted).

precise scope of general law have been an important part of the law's development.

In sum, the nineteenth-century mode of analysis was one of general law. Courts looked to history and custom to understand the right. Where there were questions about the right's scope, courts also looked at the text used to codify it. And courts routinely looked across jurisdictions for assistance in determining the scope of right, usually following settled lines of precedent while ignoring incorrect and outlier decisions.

B. The Supreme Court Adopts the General-Law Approach

During the antebellum period there was little caselaw on the *federal* constitutional right to keep and bear arms. The Second Amendment was not thought to be incorporated against the states,[40] and there was no significant federal gun control legislation.[41]

The scope of these federal questions changed after the Civil War. The Fourteenth Amendment prohibited states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States."[42] One of these privileges or immunities was the right to keep and bear arms, so the Amendment was designed to secure that right against the states.[43]

Yet, four years later, the Supreme Court would largely neuter the Fourteenth Amendment's Privileges or Immunities Clause in the

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40 *See* Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 249–50 (1833). *But cf.* State v. Smith, 11 La. Ann. 633, 633 (1856) (holding that the Second Amendment was not violated by a law prohibiting the carrying of concealed weapons).

41 The first significant federal gun control legislation was adopted in 1934. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 58 (2017) (discussing the National Firearms Act, ch. 757, 48 Stat. 1236 (1934)). The one earlier legislative act that might have produced a federal court ruling—an 1857 City of Washington ordinance prohibiting the public carry of pistols and other weapons, Wash., D.C., Act of Nov. 4, 1857, ch. 5, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 75 (Washington, Robert A. Waters 1860)—was revised a year later to prohibit carrying only concealed weapons out of fear that a total ban would not survive judicial challenge. Wash., D.C., Act of Nov. 18, 1858, ch. 11, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON, *supra*, at 114; *Concealed Weapons*, EVENING STAR (Wash., D.C.), Nov. 11, 1858, at 3.

42 U.S. CONST. amend. XIV, § 1.

43 *See* McDonald v. City of Chicago, 561 U.S. 742, 832–34 (2010) (Thomas, J., concurring in part and concurring in judgment) (collecting evidence). For different accounts of *how* the Privileges or Immunities Clause was designed to do so, see Baude, Campbell & Sachs, *supra* note 13, at 1235–36; RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 239 (2021); and KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 13, 52–55 (2014).

Slaughter-House Cases.[44] A 5–4 majority of the Court believed that it would work a major and unintended revolution in federalism to conclude that the Fourteenth Amendment had given the federal government the power to protect all civil rights.[45] Instead, the majority held that the clause protected only the privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws"—that is, to rights *created* by the Constitution or by having a national government.[46] It then gave some examples, including the rights to travel to the District of Columbia to transact business with the federal government, to have the protection of the federal government outside the United States' borders, and to peaceably assemble for the purpose of petitioning the national government.[47] By contrast the principal dissent thought the clause protected "the natural and inalienable rights which belong to all citizens"—that is, the traditional general-law rights of citizenship.[48]

This framework brought the right to bear arms into federal courts. In the wake of *Slaughter-House*, the Supreme Court described the Second Amendment as securing a preexisting fundamental right. But because *Slaughter-House* had basically inverted the original meaning of the Privileges or Immunities Clause—protecting only newly created national rights, not preexisting fundamental rights—describing the right to keep and bear arms as a preexisting right meant that it received no federal protection.

This trick is what freed William Cruikshank, a participant in the Colfax Massacre, who murdered black prisoners taken after a white mob attacked a courthouse in Louisiana.[49] Cruikshank was prosecuted for having conspired "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[50] The indictment alleged, among other deprivations of rights, that Cruikshank had conspired to deprive the victims "of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the . . . United States

44 83 U.S. (16 Wall.) 36 (1873).

45 *Id.* at 77–78.

46 *Id.* at 79; *see also* Baude, Campbell & Sachs, *supra* note 13, at 1232–34.

47 *Slaughter-House*, 83 U.S. (16 Wall.) at 79–80.

48 *Id.* at 96 (Field, J., dissenting).

49 CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 105–06 (2008).

50 Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141.

for a peaceable and lawful purpose" and to violate the victims' "right to keep and bear arms for a lawful purpose."[51]

Relying on *Slaughter-House*, which limited the Privileges or Immunities Clause to rights created by the national government, the Court reversed the convictions. Although the right to peaceably assemble for the purpose of petitioning the national government was a nationally created right, the right to assemble for general lawful purposes was not.[52] This is because "[t]he right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States"[53] and "derives its source . . . from those laws whose authority is acknowledged by civilized man throughout the world."[54] The right, in other words, was a preexisting natural right, and the First Amendment secured that preexisting right against the national government alone.[55] The Court held that Congress could protect against state or private interference only the right of assembly for "the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government" because these rights were nationally created and, thus, "under the protection of, and guaranteed by, the United States."[56]

The Court then made a similar holding overturning the convictions on the indictment counts alleging interference with "bearing arms for a lawful purpose."[57] The Court reversed those convictions because it understood the Second Amendment to secure a preexisting right to bear arms against federal interference only; the Second Amendment did not create a new national right to bear arms. Thus, the Court said:

> The second and tenth counts [of the indictment] are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that

51 United States v. Cruikshank, 92 U.S. 542, 545 (1876) (preopinion statement of the case).

52 *Id.* at 551 (majority opinion).

53 *Id.*

54 *Id.* (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).

55 *Id.* at 551–52.

56 *Id.* at 552–53.

57 *Id.* at 553.

has no other effect than to restrict the powers of the national government . . . .[58]

A prominent commentator has argued that *United States v. Cruikshank* rejected the "expansive reading of the right to bear arms as an individual right of private self-defense."[59] Instead, he asserts that *Cruikshank* "endorsed a limited states' rights conception of the Second Amendment" in which "the Second Amendment would be understood to be a limit on federal power to disarm the state militias."[60] But this is a profound—one dares say anachronistic—misunderstanding of *Cruikshank* and subsequent cases. The Court did not deny that the right to bear arms, or the Second Amendment, included individual self-defense. Rather, *Cruikshank* refused to protect the right to bear arms precisely because it was a preexisting general-law right, rather than one newly created by the Second Amendment.

A few years after *Cruikshank*, *Presser v. Illinois* reinforced that the Second Amendment protected only a preexisting general-law right. Herman Presser had been convicted of unlawfully parading with arms in public as part of a private military organization.[61] Illinois law made it unlawful for any "body of men," except the Illinois National Guard or federal troops, to form a military company or to parade publicly with arms in a city or town, except under license from the Governor.[62]

Presser took his appeal to the U.S. Supreme Court, where both Presser and Illinois understood *Cruikshank* to hold that the Second Amendment secured a preexisting general-law right. In his brief, Presser disclaimed any intent to "contend[] that the right, to keep and bear arms owes its origin to any Constitution, for none knew better than the framers of that instrument, that the right was pre-existent."[63] That preexisting right, he said, was "guaranteed, also, by State and Federal Constitutions."[64] Similarly, the Attorney General of Illinois, quoting *Cruikshank*, argued that the Second Amendment, as a preexisting right, was not incorporated against the states by the Fourteenth Amendment.[65]

If the Second Amendment had created a right not to have the federal government interfere with organized militias, then the *Slaughter-House* Court would have incorporated the Second Amendment

58 *Id.*

59 SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 194 (2006).

60 *Id.* at 195.

61 Presser v. Illinois, 116 U.S. 252, 253 (1886).

62 Military Code of Illinois, art. XI, § 5, 1879 Ill. Laws 192, 203.

63 Argument for Plaintiff in Error at 31, *Presser*, 116 U.S. 252 (No. 73).

64 *Id.* at 33.

65 Brief & Argument for Defendants in Error at 8, *Presser*, 116 U.S. 252 (No. 73).

against the states. That right would have been new and nationally created in 1791, and thus, a privilege or immunity of United States citizenship under *Slaughter-House*'s narrow and inverted definition of that term. A supplemental brief by Lyman Trumbull tried to make a version of that argument, but the Court rejected it, too.[66] After questioning whether the right to bear arms included bearing arms in private military organizations or unauthorized armed parades,[67] the Court fell back to *Cruikshank*'s conclusion that the right was preexisting and, thus, federally enforceable only against the national government.[68] In support, the Court additionally cited state cases from North Carolina, Tennessee, and Arkansas that concerned the right to bear arms.[69] Though *Cruikshank* and *Presser* were decided in the upside-down shadow of *Slaughter-House*, they confirmed that the Second Amendment protected a preexisting right to keep and bear arms.

By the end of the nineteenth century, the general-law approach was so well entrenched that the Court felt comfortable casually mentioning it in dicta. In *Robertson v. Baldwin*, the Court faced the question of whether a seaman could face criminal sanctions for refusing to perform his contract or whether such criminal sanctions violated the Thirteenth Amendment's prohibition against involuntary servitude.[70] The Court held that seaman contracts fell within a well-understood exception to the Thirteenth Amendment. In its analysis, the Court analogized to the rights enumerated in the Bill of Rights. The Court explained that

> [t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.[71]

Among these exceptions, the Court continued, "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons."[72] This was an offhand reference to the Second Amendment as a preexisting right, but also one with recognized general-law exceptions.

66 Brief of Lyman Trumbull at 10–11, *Presser*, 116 U.S. 252 (No. 73).

67 *Presser*, 116 U.S. at 264–65.

68 *Id.* at 265.

69 *Id.* (first citing State v. Newsom, 27 N.C. (5 Ired.) 250 (1844); then citing Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); and then citing Fife v. State, 31 Ark. 455 (1876)).

70 165 U.S. 275, 280 (1897).

71 *Id.* at 281.

72 *Id.* at 281–82.

This general-law approach continued into the twentieth century, when the Supreme Court faced its first major decision on the scope of the Second Amendment in *United States v. Miller*.[73] In 1934, Congress passed the National Firearms Act, a taxing and registration scheme that restricted machine guns, sawed-off shotguns, and some other highly destructive weapons.[74] Two defendants were charged with transporting an unregistered sawed-off shotgun in interstate commerce.[75] The district court dismissed the indictment, holding that the National Firearms Act violated the Second Amendment.[76]

The federal government took a direct appeal to the Supreme Court, and even though *Erie* had been decided by then, the government's arguments still echoed the earlier general-law approach. Citing *Cruikshank* and *Presser*, the government asserted that the Second Amendment secured a preexisting right to bear arms.[77] Because the right was a preexisting right, the government argued that courts must look to original law to determine its scope.[78] The government then made two arguments that sounded in the same general-law principles. First, referencing state cases in Kansas and Arkansas, the government claimed that individuals had a right to bear arms only when "the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state."[79] Second, and alternatively, even if the right to bear arms included carrying arms for private self-defense, the government asserted that "the cases are unanimous in holding that the terms 'arms' as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals."[80] For this proposition, the government quoted from the Tennessee Supreme Court's 1840 decision in *Aymette v. State* and an 1891 West Virginia Supreme Court of

73 307 U.S. 174, 178 (1939).

74 National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

75 United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark.), *rev'd*, 307 U.S. 174.

76 *Id.*

77 Brief for the United States at 8–9, *Miller*, 307 U.S. 174 (No. 696) ("The Second Amendment does not *confer* upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress.").

78 *Id.* at 9 ("Accordingly, in determining the nature and extent of the right referred to in the Second Amendment, we must look to the common law on the subject as it existed at the time of the adoption of the Amendment.").

79 *Id.* at 15–16 (first citing City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905); and then citing State v. Buzzard, 4 Ark. 18, 24–25 (1842)).

80 *Id.* at 18.

Appeals opinion.[81] The government also supported this second argument by citing sixteen other cases from state courts all over the country, cases primarily decided under state analogues of the Second Amendment.[82] These decisions would have had little precedential value if they were merely expounding various state constitutional provisions unrelated to the Second Amendment. Rather, the government relied on them because it recognized that the Second Amendment and various state analogues secured the same preexisting general right to bear arms.

Relying on the government's second argument, the Supreme Court reversed and remanded for a criminal trial.[83] The Court held that it could not consider sawed-off shotguns to be "arms" within the meaning of the Second Amendment without "evidence tending to show that possession or use of a [short-barreled shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia."[84] The Court explained that it was 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."[85] This decision borrowed the legal test from *Aymette*, which had held that the arms protected by the right to bear arms are those arms that "are usually employed in civilized warfare, and that constitute the ordinary military equipment."[86]

The Supreme Court's decision in *Miller* bears marks of the general-law approach. *Aymette* was not a decision that directly applied the Second Amendment. Instead, *Aymette* applied the Tennessee state constitutional right to bear arms.[87] Yet, in making its holding, the state court thought the federal constitutional right to bear arms, the right to bear arms in various state analogues, and the right to bear arms declared by the English Bill of Rights were approximately equivalent.[88] Perhaps the U.S. Supreme Court thought so, too, for this reliance on *Aymette* is suggestive of the earlier general-law approach.

Additionally, the government's brief on this point was probably correct that the general-law right protected those arms primarily useful for public defense, rather than those weapons primarily useful for criminal purposes and private conflicts. This is why the government's

81 *Id.* at 18–19 (first citing Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840); and then citing State v. Workman, 14 S.E. 9, 11 (W. Va. 1891)).

82 *Id.* at 19–20.

83 United States v. Miller, 307 U.S. 174, 183 (1939).

84 *Id.* at 178.

85 *Id.* (citing *Aymette*, 21 Tenn. (2 Hum.) at 158).

86 *Aymette*, 21 Tenn. (2 Hum.) at 158.

87 *Id.* at 160.

88 *Id.* at 157.

brief could cite nearly two dozen cases from a variety of jurisdictions for support of this point. Indeed, this argument stood in contrast to the government's first argument (that the right to bear arms only applied to those actively enrolled in the militia), for which the government could muster only two cases, and which we think was not a correct statement of general law.[89] If *Miller* was influenced by the general-law approach, perhaps that is why the Court endorsed the stronger of the government's two arguments, resting ultimately on the character of the weapon and drawing from law on which American courts had broadly coalesced.

Similarly, the very end of *Miller* also invokes the general-law framework:

> Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.[90]

Again, this passage seems to imagine that various state constitutions and decisions all describe the scope of the preexisting right to bear arms. And while the *Miller* Court recognizes that differences in the local concretization of the right could lead to some local differences in scope, none of this variation mattered for the case before it. No matter how a state concretized the right to bear arms, there was overlapping consensus that the right extended only to weapons having public-defense value. That is why sawed-off shotguns were not protected "arms" within the scope of the general-law right to keep and bear arms.

C. Heller

After *Miller*, the Second Amendment underwent a period of dormancy. Lower courts rejected Second Amendment challenges, often misreading *Miller* to have adopted the government's first argument—that the Second Amendment applied only to individuals enrolled in

89 *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1617–18 (2014). The government's reliance on the Arkansas case as supporting a collective right may also have been erroneous. *See id.*

90 *Miller*, 307 U.S. at 182.

military organizations.[91] Lower courts also refused to apply the Second Amendment to the states, relying on *Cruikshank* and *Presser*.[92]

The Supreme Court overturned that dormancy in *District of Columbia v. Heller*.[93] *Heller* involved the constitutionality of the District of Columbia's ban on the possession of handguns. The Court addressed two questions: first, whether the Second Amendment secured a right of individuals who were not enrolled in organized militia units to have arms, and second, whether the right included the ability to possess handguns in the home.

Answering the first question, *Heller* recognized that the Second Amendment was not limited only to those enrolled in the militia.[94] The initial parts of the opinion are textualist. They examine the original public meaning of phrases like "right of the people" and "keep and bear Arms" in great detail.[95]

Heller did add to this exegesis the recognition that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right,"[96] and used this recognition to turn to various historical sources.[97] The Court also looked to the adoption of state constitutional provisions securing the right to bear arms to inform its understanding of the Second Amendment.[98] And, after examining nineteenth-century legal treatises,[99] the Court looked at antebellum caselaw, explaining that state courts in Georgia, Louisiana, and Tennessee had all recognized that the right to bear arms protected some species of individual right.[100]

But the Court did not seem to be using a general-law framework. Instead, it saw history as relevant to "*the public understanding* of a legal text in the period after its enactment or ratification."[101] And when the Court went to apply its legal rules to the case at bar—a ban on the possession of handguns—its decision moved away from a historical

91 *See, e.g.*, United States v. Wright, 117 F.3d 1265, 1273–74 (11th Cir. 1997), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); *see also* Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996) (generally in accord but vesting the right in state governments); Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002) (reaffirming *Hickman* with substantially more analysis).

92 *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261, 269 (7th Cir. 1982).

93 554 U.S. 570 (2008).

94 *Id.* at 585–86.

95 *Id.* at 579–86.

96 *Id.* at 592.

97 *Id.* at 592–95.

98 *Id.* at 600–03.

99 *Id.* at 606–10.

100 *Id.* at 612–614.

101 *Id.* at 605.

general-law approach.[102] The Court held that handguns were constitutionally protected because they "are the most popular weapon chosen by Americans for self-defense in the home."[103] But the Court never justified this conclusion by an examination of historical sources of law.[104]

To much greater controversy, some of the legal rules articulated in *Heller* were direct collisions with general-law principles. *Miller* had held that the Second Amendment protected weapons that had "some reasonable relationship to the preservation or efficiency of a well regulated militia"—that is, arms that constituted "the ordinary military equipment."[105] *Miller* followed virtually all nineteenth-century decisions and treatises, which had recognized that the "arms" protected by the Second Amendment were military weapons "usually employed in civilized warfare."[106] But weapons technology had changed since the nineteenth century, and the primary individual weapons of the military when *Heller* was decided were the select-fire M-16 assault rifle and its derivatives—weapons generally considered inappropriate for civilian possession. *Heller,* thus, found it "a startling reading" of *Miller* that it would protect highly unusual arms even if those arms were ordinary

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102 Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355 (2009).

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

104 Lund, *supra* note 102, at 1355–56 ("[T]his is not the result of an historical study of the scope of the preexisting eighteenth-century right to arms.").

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

106 Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840); *accord, e.g.*, Fife v. State, 31 Ark. 455, 458–61 (1876); Hill v. State, 53 Ga. 472, 474 (1874); State v. Smith, 11 La. Ann. 633, 633 (1856); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179, 184–87 (1871); English v. State, 35 Tex. 473, 476–77 (1871); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891); 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124, at 75 (Boston, Little, Brown, & Co. 4th ed. 1868) [hereinafter BISHOP, CRIMINAL LAW]; JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 793, at 469 (Boston, Little, Brown, & Co. 2d ed. 1883); HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 144, at 403 (St. Paul, W. Publ'g Co. 1895); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 299 (Boston, Little, Brown, & Co. 3d ed. 1898); 2 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES § 1030, at 205 (Chicago, Callaghan & Co. 1897); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 140c, at 503 (St. Louis, The F. H. Thomas L. Book Co. 1886); *see also* State v. Duke, 42 Tex. 455, 458 (1875) (protecting *both* military arms and those "commonly kept, according to the customs of the people" for "open and manly use in self-defense").

military weapons.[107] *Heller* reformulated the test to protect arms "'in common use at the time' for lawful purposes like self-defense."[108]

Justice Scalia's subsequent justification for this change also misapplied general-law principles. Justice Scalia explained that the prohibition on individuals owning military rifles, such as the M-16, "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[109] But the common-law crime of going armed to the terror of the people, to which Justice Scalia alluded, did not prohibit the possession of military weapons in the home.[110] It instead banned carrying arms in public under circumstances that were likely to terrify the people.[111] And treatise writers had long recognized that individuals did not commit the common-law offense by keeping such arms in their homes or by bearing them in public for defense of the community and for law enforcement purposes.[112] Justice Scalia, thus, converted a common-law restriction on public carry into a precedent to ban possession in the home. Knowingly or not, *Heller* seemed to move away from parts of the general-law approach, though it continued the understanding of the Second Amendment as a preexisting right.

II. READING *BRUEN*

Between *Heller* and *Bruen*, the Supreme Court incorporated the full scope of the Second Amendment against the states in *McDonald v. City of Chicago*,[113] effectively overturning *Cruikshank*. Following the incorporation of the Second Amendment against the states, individuals began challenging state restrictions on the public carry of handguns. In *Bruen*, the Supreme Court evaluated a challenge to a New York law requiring "proper cause" to obtain a license to carry a handgun.[114] In interpreting "proper cause," New York courts had held that licensing authorities could refuse to issue a carry license for self-defense unless

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107 *Heller*, 554 U.S. at 624.

108 *Id.* (quoting *Miller*, 307 U.S. at 179). The Court reiterated this point from *Heller* as well in the summary per curiam opinion in *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016). *See also id.* at 418–19 (Alito, J., concurring in judgment).

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

110 *See* State v. Huntly, 25 N.C. (3 Ired.) 418, 421–23 (1843).

111 *Id.* at 421; *see also* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION 233, 257–58 (Joseph Blocher et al. eds., 2023).

112 *See, e.g.*, 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135–36 (London, B. Nutt 3d ed. 1739); *see also* JAMES E. GRIGSBY, THE CRIMINAL LAW INCLUDING THE FEDERAL PENAL CODE § 335, at 285 (1922) (distinguishing affrays from going armed to the terror of the people).

113 McDonald v. City of Chicago, 561 U.S. 742, 778–79 (2010).

114 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2123 (2022).

the applicant had "demonstrate[d] a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[115] As a result, exceedingly few New Yorkers could obtain a license to carry a handgun as a matter of right.[116] *Bruen* invalidated this scheme. The Supreme Court held that the right to bear arms extended to carrying arms beyond the home and that New York could not restrict this right to a few New Yorkers who faced special dangers.[117]

A. Bruen *as a Return to the General-Law Approach*

In the Court's opinion, there are several clues that *Bruen* marks a return to the Court's original-law approach to the Second Amendment. As in *Heller*, the Court in *Bruen* explicitly claims that the right to keep and bear arms was a preconstitutional legal right: "'[I]t has always been widely understood that the Second Amendment . . . codified a *pre-existing* right.' The Amendment 'was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors.'"[118] But from here, *Bruen* imposes a noticeably less textualist focus than *Heller* had. *Bruen* moves much more firmly to historical understandings about the scope of the right as reflected in legal materials such as statutes and court decisions.

Bruen also makes clear that it is applying a form of originalism: one in which the Constitution's "meaning is fixed according to the understandings of those who ratified it," but "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[119] And the Court says that these applications will be accomplished with a historical inquiry that is also a legal inquiry. As the Court describes it, "this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge."[120]

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115 Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 256 (N.Y. App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981).

116 We say "as a matter of right" because licensing officials had wide discretion to interpret proper cause, which led to considerable variation in de facto issuance policies. Absent the most extreme facts, however, courts would not reverse a decision to deny a self-defense license for lack of proper cause. *See* Delgado v. Kelly, No. 104061/12, 2013 WL 5615046, at *4 (N.Y. Sup. Ct. Oct. 11, 2013) ("Judicial review is limited to determining whether the administrative decision to deny petitioner a handgun license is arbitrary and capricious or an abuse of discretion."), *aff'd*, 8 N.Y.S.3d 172 (N.Y. App. Div. 2015).

117 *Bruen*, 142 S. Ct. at 2122.

118 *Id.* at 2127 (omission in original) (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 592, 599 (2008)).

119 *Id.* at 2132.

120 *Id.*

This, we dare say, is not just originalism, but an inquiry into what one of us has called "the law of the past" called for by original-law originalism.[121] (Finally and perhaps superficially, we observe that *Bruen* cites legal scholarship by one of us that explicitly argues for original-law originalism,[122] and that it refers to the "Founders' law"—and indeed is the first Supreme Court opinion to do so—and it calls it "part of our law.")[123]

This brings us to what is perhaps the most controversial part of *Bruen*—its discussion of the "historical approach" to understanding the scope of the right to keep and bear arms.[124] As to the specific law before it, *Bruen* relied on two main conclusions from the history. The first was that a total or near-total ban on carrying weapons outside the home would infringe the right.[125] The Court thought this conclusion of "little difficulty," and the respondents did not contest it.[126] Rightly so. Such a total ban would be entirely disproportionate and would go beyond what could fairly be called a regulation of the right.[127]

The second, more difficult, conclusion was whether exercise of the right could be conditioned upon a showing of special need. After an extensive survey of laws and court decisions, the Court concluded that there was little support for such a principle. History supported restrictions such as "limit[ations on] the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials."[128] But apart from a few "outliers" there was no support for either a "broad[] prohibit[ion of] public carry" or the "'demonstrat[ion of] a special need

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121 William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 817–18 (2019) ("The difficulty of applying old law to new facts is in no way unique to *originalism*. It is the stuff of first-year law classes the world over. A town forbids 'vehicles in the park' with an eye to cars, buses, and motorcycles. The case of motorized wheelchairs had not occurred to anyone, but the judges who face it 'do not just push away their law books and start to legislate without further guidance'; rather, they 'proceed[] by analogy' to principles with 'a footing in the existing law,' after carefully investigating what that existing law might be." (quoting H.L.A. HART, THE CONCEPT OF LAW 128–29, 274 (3d ed. 2012))).

122 *Bruen*, 142 S. Ct. at 2130 n.6 (citing Baude & Sachs, *supra* note 121, at 810–11).

123 *Id.* at 2136; *cf.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

124 *Bruen*, 142 S. Ct. at 2129.

125 *Id.* at 2134–35.

126 *Id.* at 2134.

127 *See* sources cited *infra* note 141 (distinguishing between a regulation and a prohibition).

128 *Bruen*, 142 S. Ct. at 2156.

for self-protection distinguishable from that of the general community' in order to carry arms in public."[129]

Perhaps the length at which the Court discussed the details of these laws—going through each statute and court decision and explicitly parsing them, distinguishing them, and then counting them or setting them aside—obscured the Court's more fundamental inquiry: an inquiry into the general law. One might frequently describe the scope of a common-law doctrine by looking to a wide range of cases, parsing the close cases, setting aside unusual outliers, and trying to distill the general principles. This is a common task for a treatise writer, a restatement reporter, or a traditional common-law judge. And as we will explain, we think it was what the Court was doing in *Bruen*.

B. Understanding the General-Law Approach to the Second Amendment

How did courts applying the general law traditionally determine whether regulations of weapons violated the right to bear arms? We think they did so very similarly to the framework that *Bruen* articulates.

Bruen provides the following test to determine the constitutional validity of a law regulating weapons:

> 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."[130]

The Supreme Court's two-step *Bruen* test resembles, if not nearly mirrors (albeit in different language), the traditional general-law approach in state court cases involving the right to bear arms. Most states also applied a two-part test to decide the constitutional validity of a weapons regulation. At the first step, a court had to determine whether the conduct fell within the scope of the right.[131] If it did not, then the challenge was doomed at the outset because the government may regulate unprotected conduct without constraint.[132]

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129 *Id.* (quoting Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 256 (N.Y. App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981)).

130 *Id.* at 2129–30 (quoting Konigsberg v. State Bar, 366 U.S. 36, 50 n.10 (1961)).

131 *See, e.g.*, Fife v. State, 31 Ark. 455, 461 (1876); Wright v. Commonwealth, 77 Pa. 470, 471 (1875); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179, 186 (1871).

132 Or, perhaps more accurately, subject only to other constitutional constraints, such as that the laws were racially neutral. For examples where challenges fell at the outset, see *Fife*, 31 Ark. at 461 (upholding conviction for publicly carrying a weapon where person

If the conduct fell within the scope of the right, then a different analysis applied. At that point, the question became whether the legislature had reasonably regulated the right using its police power.[133] Although we do not exhaustively detail the police power to regulate rights,[134] scholars and cases suggest that legislation could fail to be a proper exercise of the police power in multiple ways. The regulation could be arbitrary,[135] such that it did not "bear a fair relation to the preservation of the public peace and safety."[136] The law could be disproportionate to the legitimate ends sought to be achieved.[137] And, perhaps most importantly, the law could eviscerate the core purpose that the right sought to achieve, in which case the law would amount to a denial or abridgment of the right rather than a mere regulation.[138]

These principles explained why laws restricting the carrying of concealed weapons were valid regulations of the right to bear arms. A law that prohibited concealed weapons "does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them."[139] Individuals could still exercise their right to bear arms by carrying their weapons openly.[140]

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possessed a pistol that did not fall within the class of constitutionally protected arms); and *Wright*, 77 Pa. at 470–71 (holding that carrying a concealed weapon for an unlawful purpose fell outside the constitutional right to bear arms for defense).

133 *See* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 598 (2006). We do not agree entirely with Winkler's view that the standard must be "extremely deferential to state legislative efforts." *Id.*; *see, e.g.*, *Andrews*, 50 Tenn. (3 Heisk.) at 179–80 (describing the police power to regulate protected arms).

134 For attempts at this, see, for example, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); W.P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY (New York & Albany, Banks & Bros. 1894); and TIEDEMAN, *supra* note 106. Thanks to Eric Claeys for discussions on the scope of the police power.

135 Strickland v. State, 72 S.E. 260, 263 (Ga. 1911); Winkler, *supra* note 133, at 598.

136 Britt v. State, 681 S.E.2d 320, 322 (N.C. 2009) (quoting State v. Dawson, 159 S.E.2d 1, 10 (N.C. 1968)).

137 Dano v. Collins, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990) ("[A] legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." (citing State v. Comeau, 448 N.W.2d 595, 598 (Neb. 1989))).

138 *See, e.g.*, State v. Reid, 1 Ala. 612, 616–17 (1840) ("We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); Winkler, *supra* note 133, at 598.

139 State v. Nieto, 130 N.E. 663, 664 (Ohio 1920).

140 *See* FREUND, *supra* note 134, § 90, at 91 ("We find here an application of the general principle that constitutional rights must if possible be so interpreted as not to conflict with

In contrast, laws entirely prohibiting the public carry of constitutionally protected arms were unconstitutional.[141] Even if the government had legitimate public safety concerns necessitating the regulation of weapons in public, it could not pursue those aims by nullifying the right. The police power allows for the regulation of rights. But the power to regulate is not the power to prohibit the exercise of the right.[142]

These legal principles could be adapted to novel regulations. For example, in 1893, Massachusetts passed a law (analogous to the Illinois law at issue in *Presser v. Illinois*)[143] that prohibited bodies of men from parading with firearms.[144] The Massachusetts Supreme Judicial Court upheld the law and gave two primary reasons for its decision.[145] First, it held that the law was a reasonable regulation of bearing arms and relied on the authority of the U.S. Supreme Court's decision in *Presser v. Illinois*.[146] Second, it analogized the law to other laws prohibiting the carrying of concealed weapons.[147]

This analogy may seem odd and loose. What made a law against carrying concealed weapons analogous to a law prohibiting armed bodies of men from parading together? The answer was the underlying legal principle. The court explained that these laws were relevant because "it has been almost universally held that the legislature may regulate and limit the mode of carrying arms."[148] (Note that, in stating

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the requirements of peace, order and security, and that regulations manifestly demanded by these requirements are valid, provided they do not nullify the constitutional right or materially embarrass its exercise.").

141 *Reid*, 1 Ala. at 616–17; Nunn v. State, 1 Ga. 243, 249 (1846); *In re* Brickey, 70 P. 609, 609 (Idaho 1902); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 191 (1871); Aymette v. State, 21 Tenn. (2 Hum.) 154, 160–61 (1840); *see also* State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) ("It is also but a reasonable regulation, and one which has been adopted in some of the states, to require that a pistol shall not be under a certain length, which if reasonable will prevent the use of pistols of small size which are not borne as arms but which are easily and ordinarily carried concealed. To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of 'arms' which the people are entitled to bear.").

142 *See Andrews*, 50 Tenn. (3 Heisk.) at 181 ("The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated."); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139–47 (2001) (similarly discussing regulation for purposes of the Commerce Clause).

143 116 U.S. 252, 253 (1886) (quoting Military Code of Illinois, art. XI, § 5, 1879 Ill. Laws 192, 203); *see supra* notes 61–69 and accompanying text (discussing *Presser*).

144 Act of May 19, 1893, ch. 367, § 124, 1893 Mass. Acts 1017, 1049–50.

145 Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896).

146 *Id.*

147 *Id.*

148 *Id.*

this principle, the court also disregarded an outlier jurisdiction.)[149] The legal principle that supported prohibitions against concealed weapons also supported the restriction on parading with arms.

Importantly, moreover, the general-law method does not require courts to find a critical mass of historical firearm regulations that look precisely (or almost precisely) like the challenged law. Thus, in applying this two-step approach, courts did not ask whether there were specific Framing-era analogues of the laws under consideration. Nor could they have. The statutory laws against carrying concealed weapons or taking arms to parades without license of the governor were largely novel regulations governing the carrying of weapons. Courts nevertheless upheld them as reasonable regulations of the right to bear arms.

As the foregoing discussion shows, some form of interest balancing is a part of our nation's tradition of regulating firearm ownership—something that *Bruen* seemed to deny.[150] But what the traditional approach permitted was a sort of *rights-based* interest balancing, where the state could regulate a right for limited purposes, such as to protect the rights of others.[151] It did not necessarily allow legislatures to restrict a right simply out of disagreement with the value of the right. And even when the legislature had the power to restrict rights out of public necessity, restrictions could not be so severe as to amount to a nullification of the right.[152]

Implementation of these kinds of legal principles, we think, is not the kind of interest balancing that *Bruen* meant to reject. *Bruen* rejects modern utilitarian balancing tests (such as intermediate scrutiny) that it deemed to be "judge-empowering."[153] Utilitarian balancing tests invited courts "to decide on a case-by-case basis whether the right is *really worth* insisting upon."[154] The Supreme Court may have rejected these tests in part because it disliked how they had worked in practice: lower courts gladly seized the opportunity, upholding virtually every modern gun control law.[155] Some of these laws completely banned the bearing

149 *Id.* ("The early decision to the contrary, of Bliss v. Com., has not been generally approved." (citation omitted) (citing Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822))); *see also infra* note 204.

150 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)) (citing McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)).

151 *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553–54 (2003).

152 *See supra* note 138.

153 *Bruen*, 142 S. Ct. at 2129 (quoting *Heller*, 554 U.S. at 634). Thanks to Eric Claeys and Adam Mossoff for their suggestions in distinguishing these approaches.

154 *Id.* (quoting *Heller*, 554 U.S. at 634).

155 *See, e.g.*, cases cited *supra* note 5.

of arms by most citizens, thus entirely nullifying the right for them. Traditional rights-based interest balancing is different from this utilitarian balancing approach, in part because it does not allow legislatures to pursue legitimate aims (e.g., public safety) by completely nullifying rights.

To be sure, there is much about the general-law right to keep and bear arms that remains to be worked out. For instance, the Court has not been entirely clear on the relevant timing question—whether to use the general-law understanding of the right from 1791, 1868, or even today. There are parts of *Heller* and *Bruen* compatible with any of these three.[156] And more importantly, the Court has yet to clearly articulate the principles that its own inquiry calls for: "how and why"[157] the government may burden the right to keep and bear arms for self-defense or otherwise. These are the principles that will ultimately come from the general-law inquiry—i.e., the analogical approach—and which the courts must say more about soon, as we will discuss.

C. *Bruen and Analogical Reasoning*

Bruen's discussion of analogies must be read in this general-law light. As noted, the Court tried to explain that courts must extrapolate from the historical data points to new cases by way of general principles—they should not "uphold every modern law that remotely resembles a historical analogue"[158] nor demand "a historical *twin*" or "dead ringer."[159] Instead, they should engage in "reasoning by analogy—a commonplace task for any lawyer or judge."[160]

The Court then broke down the use of analogy explicitly, citing prominent scholars who had explained that analogical reasoning "requires a determination of whether the two regulations are 'relevantly similar,'"[161] and that "one needs 'some metric enabling the analogizer to assess which similarities are important and which are not.'"[162] Borrowing an example from two of those scholars, the Court noted: "For instance, a green truck and a green hat are relevantly similar if one's

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156 *Compare, e.g.*, *Bruen*, 142 S. Ct. at 2138 ("acknowledg[ing] . . . [the] ongoing scholarly debate" whether courts should examine the understanding of the right to bear arms in 1791 or 1868), *with id.* at 2138 n.9 (suggesting, in dicta, that twentieth-century "shall-issue" licensing regimes are constitutional).

157 *Id.* at 2133.

158 *Id.* (quoting Drummond v. Robinson Township, 9 F.4th 217, 226 (3d Cir. 2021)).

159 *Id.*

160 *Id.* at 2132.

161 *Id.* (quoting Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

162 *Id.* (quoting Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017)).

metric is 'things that are green.' They are not relevantly similar if the applicable metric is 'things you can wear.'"[163]

What the Court, and these scholars, are describing here is simply the common-law method! Common-law courts decided new cases by looking to relevant, i.e., analogous, precedents. As many scholars eventually pointed out, there were potentially any number of ways to describe a case as analogous or disanalogous—that case was decided on a Wednesday, but this case is being decided on a Tuesday.[164] So the use of relevant precedents required criteria of relevance—which were the principles of the common law.

Similarly, the Court in *Bruen* notes that common-law reasoning about the Second Amendment contained "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[165] Thus, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry."[166] This is the application of the methods of common-law reasoning to the right to keep and bear arms, just as the general-law approach would have it.

Perhaps *Bruen*'s readers have missed this point because the Court described the general-law approach in such a roundabout fashion. By going through the basics of reasoning by analogy and inferring metrics of similarity, the Court is sort of reinventing an introduction to legal reasoning.[167] But it is difficult for the Court to state its approach more directly because so much confusion has been introduced into legal reasoning today. The notion of a common-law method that involves extrapolating and finding the law is lost to those who were taught and teach that the common law is simply "judge-made law."[168] Even calling this approach the "common-law" method would be as likely to call to mind the living constitutionalism of David Strauss[169] as the method of classical common lawyers.

What the Court is doing is basically redescribing the common-law or general-law method of understanding the scope of fundamental

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163 *Id.* (citation omitted) (citing Schauer & Spellman, *supra* note 162).

164 *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2224–25 (2017).

165 *Bruen*, 142 S. Ct. at 2133.

166 *Id.* (emphasis omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

167 *Cf.* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

168 *See* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1343–48 (2023).

169 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

rights, without using those terms—like a player of the old party game Taboo, who must describe a particular term without using the five most useful words for doing so. *Bruen* reflects a valiant attempt to avoid the confusion created by changing conceptions of the common law. But in the process it may have made the inquiry sound more novel than it really is.

The general-law framework also provides a better explanation for the Court's criticized decision to ignore certain "outliers" such as court decisions from Texas and West Virginia. While some have complained that this part of *Bruen*'s analysis has the distinct air of special pleading,[170] the basic enterprise of distinguishing outlier precedents is core to the common-law method as well.

Nowhere as part of this analogical reasoning does *Bruen* require courts to find a critical mass of similar firearm regulations from early America. That interpretation of *Bruen* is based on misreading this explanation of the analogical method:

> In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.[171]

To make proper sense of this passage, one must first understand traditional Anglo-American constitutionalism. Both the traditional English constitution and American constitutions were grounded in customary law.[172] As John Philip Reid explains, "[C]ustom obtains the force of law by a combination of time and precedent. Whatever had been done from time immemorial in a community was legal; whatever had been abstained from was illegal. To say an action was unprecedented was to say it was illegal."[173]

Bruen's initial analogy passage instructs courts to apply traditional common-law jurisprudential principles, nothing more, nothing less. If

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170 *E.g.*, Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 60.

171 *Bruen*, 142 S. Ct. at 2131.

172 JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 160 (1981).

173 *Id.* (footnote omitted).

Anglo-American society suffered from urban violence, and if from time immemorial that violence was not addressed through a flat ban on the possession of handguns, that "is relevant evidence" that the *customary right* codified by the Second Amendment did not permit such regulation.[174]

To be clear, *Bruen* never states that a lack of a precedential regulation is dispositive evidence of its unconstitutionality. Quite the contrary, the Court also recognizes that some laws will "implicat[e] unprecedented societal concerns or dramatic technological changes."[175] In this case, courts must analogize by adapting historical examples and precedents to modern conditions.[176] How does a court determine whether federal law may prohibit the carrying of a concealed weapon aboard a commercial aircraft?[177] By looking at the law governing sensitive places. The Court recognizes that a few locations, such as legislative assemblies, polling places, and courthouses, had been off-limits to weapons during the eighteenth and nineteenth centuries.[178] A court must analogize from "those historical regulations" to determine the constitutional validity of "*new* and analogous sensitive places."[179]

When looking for analogies and precedents, a court must not lose sight of the mandate given by the Supreme Court. If *Bruen* means what it says, then its two-step approach is aimed at determining whether a challenged law is "consistent with this Nation's historical tradition of firearm regulation."[180] The discussion of analogical reasoning is in service of this objective. Analogical reasoning is not the tail that wags the dog.

Thus, the requirement to determine whether a challenged law coheres with the country's tradition of regulating weapons is best understood as applying the traditional two-step approach familiar in the general law of the right to bear arms. The strongest understanding of *Bruen* is that the Supreme Court is adopting the standard of review generally accepted by courts applying the right to bear arms, not some novel and *sui generis* test that looks for a direct analogue of the specific law.

174 *Bruen*, 142 S. Ct. at 2131.
175 *Id.* at 2132.
176 *Id.* at 2132–33.
177 *See* 49 U.S.C. § 46505 (2018).
178 *Bruen*, 142 S. Ct. at 2133.
179 *Id.*
180 *Id.* at 2126.

D. Hard Cases

To be sure, not every case is easily governed by an analogy. *Bruen* acknowledges this. In such cases, it is important not to neglect other important elements of common-law legal reasoning. If the Second Amendment really does codify a preexisting right, then judges must look beyond the amendment's semantic meaning to determine the legal customs that were being codified. Yet, determining the scope of a customary right is hard work, for customs are unwritten and often disputed.

But this is an ancient problem. Importantly, the methods (and difficulties) in determining the scope of the customary right to bear arms are not *sui generis.* These problems inhere in determining the scope of any unwritten law. At the very introduction of Blackstone's *Commentaries,* Blackstone notes "a very natural, and very material, question arises: how are these customs or maxims [of common law] to be known, and by whom is their validity to be determined?"[181]

The answer is a familiar one, and it is no different in the right to bear arms than it is in other areas of common law. To know the customs, one must examine precedents and look to reliable treatises, which may contain "settled and first principles" based on ancient cases lost to history.[182] Indeed, the Solicitor General made this point during the *United States v. Rahimi* oral argument, when she explained that the proper evidence of legal customs comes from "English practice, state constitutional precursors, treatises, commentary, [and] state judicial decisions."[183] Thus, while the effort to determine legal custom looks backward to history, the endeavor is decidedly legal and belongs to the judge based on his legal training, not to the professor of history.[184]

This is not to understate the degree of difficulty in many cases. Determining the scope of the customary right to keep and bear arms is particularly difficult because it requires judges to untangle rights and mere liberties.[185] The possession and carrying of arms were lightly regulated in early America. The law mainly regulated arms when they were kept and borne in ways that threatened the rights of others, such as by imposing storage requirements on large quantities of gun powder

181 BLACKSTONE, *supra* note 22, at*69.

182 *Id.* at *69, *72.

183 Transcript of Oral Argument at 39, United States v. Rahimi, No. 22-915 (U.S. Nov. 7, 2023).

184 *See* BLACKSTONE, *supra* note 22, at *69 (explaining that the determination of legal customs is made "by the judges in the several courts of justice" who learn them "from experience and study").

185 We are using "rights" and "liberties" as approximating the Hohfeldian idea of claim-rights and mere liberty rights. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30, 36 (1913).

(which was a fire and explosion risk in cities) and by restricting the carrying of arms when done in a manner that would likely breach the peace.[186] Nothing stopped individuals (at least those who had the resources) from owning cannons, having rockets, or maintaining privately armed ships. Nor, at the adoption of the Second Amendment, were there many cases elucidating the scope of the right to bear arms. So how does one untangle the *right* to keep and bear arms—that is, the legal claim individuals have against the government not to regulate arms in certain ways—from the mere liberty that early Americans had to possess and carry all sorts of weapons (including some that the Framers may not have recognized as constitutionally protected)?

To untangle the "right" from the mere Framing-era "liberty," judges will often have to reason from first principles, at least where the law is underdeveloped. Judges will have to look to the text and purpose of the right. They will have to make judgments about whether legislatures have regulated the right for proper purposes and whether the regulations are sufficiently severe that they undermine the core function of the right. Analogies can assist in making these difficult judgments, but only to a point.

Finally, one should not confuse this endeavor with living constitutionalism. The first-principles reasoning that we are discussing is the traditional work of the common-law judge: finding or declaring law, by taking longstanding principles and concretizing them in specific cases involving novel facts. Living constitutionalism, in contrast, allows for judges to make law, and to make it by directly changing the legal principles themselves. Think of the difference between a court deciding whether the law of slander or libel applies to novel forms of media[187] and a court deciding to replace contributory negligence with comparative negligence on policy grounds.[188] Or think of the difference between deciding whether admiralty jurisdiction extended to navigable freshwater lakes in the age of the steamship,[189] and deciding to completely abolish a long-recognized privilege because its costs exceed its

186 *See, e.g.*, Act of Jan. 29, 1795, ch. 2, 1795 Mass. Acts 436; Act in Addition to an Act for Erecting of a Powder-House in Boston, no. 234, 1715 Mass. Acts 311; Act of Feb. 28, 1786, 1786 N.H. Laws 383; Act for Restraining and Punishing Privateers and Pirates, 1699 N.H. Acts 3, 4; Act Forbidding and Punishing Affrays, ch. 49, 1786 Va. Acts 35.

187 *See, e.g.*, Lyrissa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SPEECH L. 79, 84–85 (2023) (explaining that "courts have had to decide whether an Internet post is slander or libel, whether a person who provides a hyperlink to an article has 'published' it for defamation purposes, and what to do about defamation cases based on reviews or rankings determined by algorithms").

188 *See, e.g.*, Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1232 (Cal. 1975).

189 The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454–55 (1852).

benefits.[190] As we have noted earlier, these distinctions were central to the traditional role of a judge under the general law. The traditional general-law approach allows judges to "expound" the fundamental law but not to "alter" it.[191]

III. *BRUEN* IN THE LOWER COURTS

While we think that the allegations of *Bruen*'s incoherence and inconsistency are overstated, lower courts have struggled to apply it correctly in some areas. Analogies are helpful only when someone has an underlying theory about how to identify the relevant similarity.[192] In a judicial case, identifying that similarity requires the judge to discern the underlying legal principles that govern. Only with that legal principle in hand can the judge analogize, adapt, and apply the law to novel circumstances. Currently, judges are analogizing without understanding the legal principles that governed earlier precedents. This is causing them either to reach incorrect judgments or to reach correct judgments for the wrong reasons.

A. Arms Protected by the Second Amendment

Historically, constitutionally protected "arms" were those arms particularly appropriate for defense of the community. Weapons of purely private conflict, particularly those adapted to criminal use or designed as concealed weapons, were not protected. Bad analogizing, however—perhaps exacerbated by some inaccurate dicta in *Heller*—has caused current precedent to invert the "arms" that are protected under the Second Amendment. Today, courts find weapons of purely private conflict protected, while denying protection to arms designed for the common defense.

1. Semiautomatic Rifles Designated "Assault Weapons"

Some of the most prevalent challenges recently have been to state and local laws that prohibit certain semiautomatic firearms designated as "assault weapons." Courts are split on whether these rifles are "arms" within the meaning of the Second Amendment. One district

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190 State v. Gutierrez, 482 P.3d 700, 711 (N.M. 2019), *retracted in relevant part on reh'g*, *id.* at 725; *see also* Baude, *supra* note 168, at 1346.

191 *See* Letter from James Madison to N.P. Trist (Dec. 1831), *in* 9 THE WRITINGS OF JAMES MADISON 471, 477 (Gaillard Hunt ed., 1910), *quoted in* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001), *and* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 15–16 (2019).

192 *See* Blocher & Ruben, *supra* note 7, at 147 ("The judicial task is finding what principles are reflected by the historical restrictions.").

court has concluded that these "arms" are in common use, and thus, are presumptively protected by the Second Amendment.[193] Another found it unlikely that these weapons are in common use, but has nevertheless assumed *arguendo* that they are.[194] And a third believed that "history and tradition demonstrate[d] that particularly 'dangerous' weapons are unprotected."[195] In an appeal from this last decision, the Seventh Circuit declared that arms "exclusively or predominantly useful [for military purposes] in military service" are categorically unprotected by the Second Amendment.[196]

Despite the slight differences in theory, courts in all three cases upheld these laws on the theory that banning these weapons is consistent with the nation's tradition of firearm ownership.[197] In making this determination, courts analogized these laws to nineteenth-century restrictions on Bowie knives, clubs, slungshots, and revolvers.[198] Courts found this analogy appropriate because both sets of laws "were enacted in response to pressing public safety concerns regarding weapons determined to be dangerous" and because "they impose comparable burdens on the right of armed self-defense."[199]

Examining the issue abstractly, these courts' arguments from analogy are eminently reasonable. Nineteenth-century courts upheld bans on possessing or carrying various dangerous weapons that had become noxious to public safety.[200] And they are correct that these bans left a variety of other weapons available for self-defense.

Reasonable as these analogies are, however, they are wrong, even backwards, as a matter of original law. The general law permitted the banning of noxious weapons for two reasons: (1) these weapons were

193 *See* Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 664 F. Supp. 3d 584, 595 (D. Del. 2023).

194 Hartford v. Ferguson, 676 F. Supp. 3d 897, 904 (W.D. Wash. 2023).

195 Bevis v. City of Naperville, 657 F. Supp. 3d 1052, 1067 (N.D. Ill.), *aff'd*, 85 F.4th 1175 (7th Cir. 2023), *petition for cert. filed sub nom.* Nat'l Ass'n for Gun Rts. v. City of Naperville, 92 U.S.L.W. 3208 (U.S. Feb. 12, 2024) (No. 23-880).

196 *Bevis*, 85 F.4th at 1194.

197 *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 602–03; *Hartford*, 676 F. Supp. 3d at 906–07; *Bevis*, 657 F. Supp. 3d at 1069–73.

198 *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600–01; *Hartford*, 676 F. Supp. 3d at 905–06; *Bevis*, 657 F. Supp. 3d at 1070–73.

199 *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 602–03 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022)); *accord Hartford*, 676 F. Supp. 3d at 907 (quoting *Bruen*, 142 S. Ct. at 2133); *Bevis*, 657 F. Supp. 3d at 1073 ("The history of firearm regulation, then, establishes that governments enjoy the ability to regulate highly dangerous arms (and related dangerous accessories).").

200 *See, e.g.*, Fife v. State, 31 Ark. 455, 458–61 (1876); Hill v. State, 53 Ga. 473, 474 (1874); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179, 186–87 (1871); Aymette v. State, 21 Tenn. (2 Hum.) 154, 158–59 (1840); English v. State, 35 Tex. 473, 476–77 (1871); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891).

particularly useful for criminal purposes, and (2) these weapons had no military or public defense value. To quote the Tennessee Supreme Court's rule (which the U.S. Supreme Court adopted in *Miller*), "The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence."[201]

This rule was not some outlier position. *Every* nineteenth-century court and legal treatise writer to consider the question understood that arms useful for militia service fell within the very core of the right.[202] Courts debated whether handguns were such arms.[203] Courts debated how far states could go in regulating public carry.[204] Courts debated whether the right to keep and bear arms protected using arms for individual self-defense against crime, as opposed to using arms to resist invasions or oppression.[205] But not even the most restrictive courts

201 *Aymette*, 21 Tenn. (2 Hum.) at 159.

202 *See, e.g.*, Wilson v. State, 33 Ark. 557, 559 (1878); *Fife*, 31 Ark. at 458; *Hill*, 53 Ga. at 475; State v. Bias, 37 La. Ann. 259, 260 (1885); State v. Smith, 11 La. Ann. 633, 633 (1856); *Andrews*, 50 Tenn. (3 Heisk.) at 179; *Aymette*, 21 Tenn (2 Hum.) at 159–60; *English*, 35 Tex. at 475; 2 BISHOP, CRIMINAL LAW, *supra* note 106, § 124, at 75; BLACK, *supra* note 106, § 144, at 403; COOLEY, *supra* note 106, at 299.

203 *Compare, e.g.*, *Hill*, 53 Ga. at 474–75 (stating judge's belief that, as a matter of first principles, handguns were not protected arms, but recognizing that precedent was otherwise), *and* Nunn v. State, 1 Ga. 243, 246 (1846) (holding that pistols carried openly were protected arms), *and* State v. Duke, 42 Tex. 455, 458 (1875) (protecting "such pistols at least as are not adapted to being carried concealed"), *and Fife*, 31 Ark. at 461 (military pistols only), *with English*, 35 Tex. at 476–77 (leaving most pistols unprotected), *and Workman*, 14 S.E. at 11 (all pistols unprotected).

204 *Compare, e.g.*, Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 91–92 (1822) (holding that the legislature lacks power to limit the right to bear arms in any manner), *and* Simpson v. State, 13 Tenn. (5 Yer.) 356, 360 (1833) ("By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defence, without any qualification whatever as to their kind or nature . . . ."), *with* Haile v. State, 38 Ark. 564, 567 (1882) (upholding law requiring army pistol to be carried openly in the hand), *and Aymette*, 21 Tenn. (2 Hum.) at 160 (disagreeing with *Bliss* and stating, "The citizens have the unqualified right to keep the weapon, it being of the character before described as being intended by the provision. But the right to bear arms is not of that unqualified character."), *and* Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896) ("[I]t has been almost universally held that the legislature may regulate and limit the mode of carrying arms. The early decision to the contrary, of Bliss v. Com., has not been generally approved." (citations omitted)).

205 *Compare, e.g.*, State v. Reid, 1 Ala. 612, 619 (1840) (individual self-defense protected), *and Nunn*, 1 Ga. at 251 (same), *and* Cockrum v. State, 24 Tex. 394, 401 (1859), *and Duke*, 42 Tex. at 458 ("The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."), *with* State v. Buzzard, 4 Ark. 18, 25–26 (1842) (common defense only).

debated whether rifles and muskets designed for military use fell within the "arms" protected by the right to keep and bear arms.[206] On this question, the general law was not just general; it was unanimously understood.

Measured by this understanding, so-called assault weapons are at the core of the right to keep and bear arms. Because of the importance of having a population ready for military service, courts understood the right to keep and bear arms to include *at least* those arms appropriate for individual militia service. Protected arms included rifles, muskets, bayonets, and (according to most courts) at least some pistols.[207] As the Supreme Court explained, "when called for service [able-bodied] men were expected to appear bearing arms supplied by themselves and . . . in common use at the time."[208] Yet, these assault-weapon bans identify prohibited weapons based on certain enumerated military features, such as pistol grips and bayonet lugs.[209] In other words, these assault-weapon bans prohibit weapons *because* they are useful for militia service. From the point of view of the general-law right to keep and bear arms, this is backwards.[210]

Yet, in a recent appeal from the Illinois case, the Seventh Circuit explicitly declared this backward understanding to be the proper interpretation of the Second Amendment. The Seventh Circuit understood *Heller* to divide arms into two categories: military arms (e.g., the M-16 rifle) and civilian arms for self-defense (e.g., an ordinary handgun).[211] The court then held that because semiautomatic rifles were closer to military arms than to self-defense arms, these weapons were categorically unprotected by the Constitution.[212]

The Seventh Circuit's methodology does not track *Bruen*'s. The court never grappled with overwhelming caselaw holding that military arms were within the core of the right. Nor did it discuss the learned

206 *E.g.*, *Aymette*, 21 Tenn. (2 Hum.) at 160–61; *English*, 35 Tex. at 476.

207 *See* cases *supra* note 203.

208 United States v. Miller, 307 U.S. 174, 179 (1939).

209 *See, e.g.*, CAL. PENAL CODE § 30515(a)(1) (West 2021); CONN. GEN. STAT. § 53-202a(1)(E) (2023); DEL. CODE ANN. tit. 11, § 1465(6)(a) (Supp. 2023); D.C. CODE § 7-2501.01(3A)(A)(i)(IV) (2018); WASH. REV. CODE § 9.41.010(2)(a)(iv) (2023).

210 To the extent courts feel compelled to reach this conclusion because of *Heller*'s emphasis on individual self-defense and its dicta on "dangerous and unusual weapons," District of Columbia v. Heller, 554 U.S. 570, 627 (2008), perhaps *Bruen*, and future cases, will function as a course correction.

211 Bevis v. City of Naperville, 85 F.4th 1175, 1195 (7th Cir. 2023), *petition for cert. filed sub nom.* Nat'l Ass'n for Gun Rts. v. City of Naperville, 92 U.S.L.W. 3208 (U.S. Feb. 12, 2024) (No. 23-880). In dicta, the court also recognized that some arms may have both civilian and military applications, and said that these arms were presumptively protected. *Id.* at 1195 n.8.

212 *Id.* at 1195.

treatises, all of which agreed with these decisions. Nor did it look at extensive legislative precedents, from the Assize of Arms in 1181 through the Militia Act of 1792, all of which compelled ordinary citizens to have military arms at the ready.[213] (In contrast, the Supreme Court's opinion in *Miller* extensively surveyed such laws.)[214] Instead, the Seventh Circuit reached its conclusion by conducting a lengthy (and questionable) exegesis of some dicta in *Heller* about "dangerous and unusual" weapons and the centrality of individual self-defense to the Second Amendment.[215] And we question that exegesis, in part, because the Seventh Circuit reached its result by construing *Heller*'s self-defense language to apply only to individual self-defense against crime, thereby abrogating any right to bear arms for community defense.[216]

Despite our disagreement with the Seventh Circuit's methodology, it is essential to note the centrality of the Second Amendment's purpose to its judicial interpretation. This is because to conduct the first-principles reasoning we discussed above, judges should have a theory about what function the right to keep and bear arms serves. This is what enables them to tell whether the right's core has been nullified, as opposed to merely regulated. To its credit, the Seventh Circuit may have had such a theory—but it was a theory derived from *Heller* rather than from history.[217] To the extent that *Heller* commanded courts to focus on the purpose of individual self-defense in exclusion of the purpose of community defense (which we do not agree that it did), it created a great tension with the historical understanding of the right to keep and bear arms.[218]

Clarifying the core function of the right to keep and bear arms is something the Supreme Court may have to do in the future. For a judge who believes that the Second Amendment's purpose is exclusively individual self-defense against crime will reach different conclusions about which arms are protected and what constitutes a "reasonable regulation" of the right from a judge who recognizes that the Amendment additionally protects the right to bear arms for community defense. Lower court judges will struggle to apply first-principles reasoning in Second Amendment cases without clarification of this important issue.

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213 *See, e.g.*, Assize of Arms 1181, 27 Hen. 2 (Eng.); Statute of Winchester 1285, 13 Edw. 1 Stat. Wynton c. 6 (Eng.); Act of May 8, 1792, ch. 33, 1 Stat. 271.

214 United States v. Miller, 307 U.S. 174, 179–82 (1939).

215 *Bevis*, 85 F.4th at 1190 (quoting Friedman v. City of Highland Park, 784 F.3d 406, 408 (7th Cir. 2015)).

216 *Id.*

217 *See id.*

218 *See* Leider, *supra* note 89, at 1643–47.

2. Dangerous Knives and Nunchucks

Because of courts' exclusive focus on individual self-defense against crime, the opposite problem is happening in other courts. Many courts are finding that various weapons are constitutionally protected despite being dangerous concealable weapons with no public-defense value. Some courts have invalidated bans on switchblade knives,[219] dirk knives,[220] butterfly knives,[221] and nunchucks.[222] A district court, for example, found that "[t]he centuries-old history of nunchaku being used as defensive weapons strongly suggests their possession, like the possession of firearms, is at the core of the Second Amendment."[223]

A general-law approach would make quick work of these cases. The same law that would find assault weapons within the core of the right to keep and bear arms would exclude these weapons. These weapons "belong to no military vocabulary"; they are not arms useful for public defense.[224] Nor are these weapons "appropriate for open and manly use in self-defense," as are shotguns and similar firearms.[225] The general law did not afford constitutional protection to small, dangerous weapons primarily designed as concealed weapons. While one can find a few outlier decisions to the contrary,[226] the great weight of authority holds that such weapons are not "arms" within the meaning of the Second Amendment.[227]

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219 *See, e.g.*, State v. Herrmann, 873 N.W.2d 257, 265 (Wis. Ct. App. 2015).

220 *See, e.g.*, State v. DeCiccio, 105 A.3d 165, 173 (Conn. 2014).

221 *See, e.g.*, Teter v. Lopez, 76 F.4th 938, 942 (9th Cir. 2023), *vacated pending reh'g en banc*, 93 F.4th 1150 (9th Cir. 2024).

222 *See* Maloney v. Singas, 351 F. Supp. 3d 222, 238 (E.D.N.Y. 2018).

223 *Id.* (citation omitted) (citing Maloney v. Singas, 106 F. Supp. 3d 300, 314 n.22 (E.D.N.Y. 2015)).

224 English v. State, 35 Tex. 473, 477 (1871).

225 State v. Duke, 42 Tex. 455, 458–59 (1875); *accord* State v. Smith, 11 La. Ann. 633, 633 (1856) (protected arms are "such as are borne by a people in war, *or at least carried openly*" (emphasis added)); State v. Reid, 1 Ala. 612, 619 (1840) (explaining that only when arms are "carried openly, that they can be efficiently used for defence"); *infra* note 229 and accompanying text (distinguishing arms and concealed weapons).

226 *See, e.g.*, Cockrum v. State, 24 Tex. 394, 403 (1859) (dictum) ("The right to carry a bowie-knife for lawful defense is secured, and must be admitted."); State v. Delgado, 692 P.2d 610, 614 (Or. 1984) (invalidating ban on the possession of switchblade knives); *see also* Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 843 (1997) (alluding to a particular local history behind *Delgado*'s reasoning); David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 184–90 (2013) (providing a first-principles argument for why such knives should have been deemed protected).

227 *See* sources cited *supra* note 202; State v. Kerner, 107 S.E. 222, 224 (N.C. 1921). Note that some modern weapons (e.g., pepper spray and stun guns) are useful for both

3. Prohibition Versus Regulation of Protected Arms

We end the discussion of protected arms by also cautioning that identifying which arms are constitutionally protected is only the first step in analyzing whether a regulation of specific weapons is constitutional. If certain weapons (e.g., butterfly knives) are not "arms" protected by the Constitution, then the legislature may regulate or ban those weapons entirely.[228] Such a regulation would be upheld at *Bruen*'s first step: that the law falls outside the conduct protected by the text of the Amendment.

It does not follow, however, that if a weapon is constitutionally protected, then it is beyond all legislative regulation. Rather, constitutionally protected "arms" are subject to a different analytical framework for judicial review. Such weapons may be reasonably regulated using the police power, but they may not be banned entirely.

For example, it has long been held to be a reasonable regulation of protected arms to prohibit handguns "under a certain length, which if reasonable will prevent the use of pistols of small size which are not borne as arms but which are easily and ordinarily carried concealed."[229] Likewise, even if AR-15s are protected arms today, the legislature may still require that their barrels be over a certain length to prevent their use as concealed weapons.

The constitutionality of restrictions on the capacity of ammunition magazines used in protected arms is also a question of whether the right to keep arms has been reasonably regulated. We do not answer here exactly what size magazines the legislature must allow for protected arms. But we do give some methodological pointers. A magazine restriction that limited protected arms to a two-round capacity would be unconstitutional because it would unreasonably inhibit any form of self-defense. At the other extreme, a prohibition on 100-round drum magazines would not trigger constitutional concerns because such unusually large magazines are not commonly used for either public or private defense. There is obviously much space between these extremes. Determining where to draw the constitutional line heavily depends on first-principles reasoning.

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public and private defense and are not as dangerous or deadly as Bowie knives and similar weapons. Given these features, some of these weapons might be constitutionally protected, despite their concealability. *See* Caetano v. Massachusetts, 577 U.S. 411, 412 (2016) (per curiam); *id.* at 419–20 (Alito, J., concurring in judgment). *See generally* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 218–22 (2009).

228 *See supra* notes 130, 199 and accompanying text; Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182, 186–87 (1871).

229 *Kerner*, 107 S.E. at 225.

Here, again, we emphasize the centrality of the right's purpose to determinations about whether legislative restrictions are reasonable. For example, a judge who understands the right to bear arms to protect only individual self-defense against crime will likely uphold more stringent magazine restrictions than a judge who understands that the right protects both private and public defense.[230] This is because individuals generally need to use fewer rounds when acting in personal self-defense than when engaged in law enforcement or military operations.

Thus, beliefs about the underlying principles and purposes of the right to bear arms heavily influence how a judge expounds the right. The Framers obviously had no conception of modern automatic and semiautomatic weapons, nor of the ammunition magazines that they use. In evaluating restrictions on such weapons, judges cannot analogize to Framing-era regulations, for no analogous regulations existed. Where arms are constitutionally protected, they may be regulated but not banned. When legislatures regulate such weapons, judges will have to reason from first principles to determine whether the regulations are reasonable or materially frustrate the right. The determination of what frustrates the right requires some commitment about what gives the right value. For cases involving the right to bear arms, judges will not be able to avoid these first-principle questions.

230 For example, consider state court decisions evaluating the constitutionality of bans on certain kinds of automatic or semiautomatic weapons and restrictions on magazine capacity under state constitutional provisions protecting the right to bear arms for defense of the people and the state. These courts have upheld such laws as reasonable regulations of the right to bear arms for individual self-defense. Notably, these courts have not analyzed whether such laws are reasonable regulations of the right to bear arms for the common defense or defense of the state. These decisions have either ignored state constitutional provisions protecting the right to bear arms for defense of the state or they have declared such provisions "obsolete." For opinions exclusively determining whether the laws were reasonable regulations of the right to bear arms for individual self-defense against crime, see, for example, *Robertson v. City & County of Denver*, 874 P.2d 325, 334–35 (Colo. 1994); *Benjamin v. Bailey*, 662 A.2d 1226, 1232–33 (Conn. 1995); and *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993). *See also* Rocky Mountain Gun Owners v. Polis, 467 P.3d 314, 318 n.3 (Colo. 2020) (claiming that plaintiffs failed to preserve an argument that Colorado's magazine restriction violated the right to bear arms "in aid of the civil power when thereto legally summoned" (quoting COLO. CONST. art. II, § 13)). For opinions declaring that the right to bear arms for defense of the state is obsolete, see *People v. Brown*, 235 N.W. 245, 246 (Mich. 1931); and *State v. Misch*, 256 A.3d 519, 527 (Vt. 2021). Judges who continue to value the right to bear arms for collective defense might have reached different conclusions in these cases.

B. Sensitive Places

After *Bruen*, a major question has been what specific locations can legislatures declare off-limits to the public carry of weapons. In dicta, *Heller* said that its holding should not "be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[231] *Bruen* repeated the dicta, with the added gloss that all of Manhattan could not be a sensitive place.[232] Several states have tried to nullify or mitigate *Bruen*'s practical effect by expanding the places where licensed individuals cannot carry firearms. These locations include, among many others, restaurants, theaters, beaches, parks, hospitals, public transportation, and all private property without the explicit consent of the owner.[233] New Jersey even went so far as to ban the carrying of loaded and accessible firearms in automobiles.[234]

After *Bruen*, district courts have gone location by location to decide whether each location restriction has a Framing-era analogue. In the case of government buildings, a New Jersey district court held that the constitutional validity of a prohibition must be determined by analogizing to each government property.[235] The court found that the absence of historical laws banning guns specifically at public libraries and museums meant that such regulations are invalid.[236] The same for bars and restaurants.[237] Despite considerable nineteenth-century precedent upholding restrictions of firearms at public gatherings, the court further found that these laws were not "'well-established' and 'representative' historical firearm regulations to justify prohibiting Carry Permit holders from carrying their handguns at public gatherings."[238] The court also invalidated New Jersey's prohibition against carrying firearms on private property without the explicit consent of the owner because New Jersey could not find similar historical laws.[239]

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

232 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022).

233 *See, e.g.*, N.J. STAT. ANN. § 2C:58-4.6 (West Supp. 2023).

234 § 2C:58-4.6(b).

235 Koons v. Platkin, 673 F. Supp. 3d 515, 606 (D.N.J. 2023) (explaining that "prohibitions on carrying firearms at government buildings tend not to violate the Second Amendment, but to the extent that a dispute arises concerning a prohibition at a particular government building, resolution will turn on whether analogies to historical regulations can justify the challenged law"), *appeals docketed sub nom.* Koons v. Att'y Gen. N.J., Nos. 23-1900, 23-2043 (3d Cir. argued Oct. 25, 2023).

236 *Id.* at 643–44.

237 *Id.* at 644–45.

238 *Id.* at 630 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

239 *Id.* at 618–23.

The Maryland district court undertook a similar analysis, reaching somewhat different results. The court upheld Maryland's ban on firearms in museums on the strength of post–Civil War laws restricting weapons "in places of gathering for education, literary, or scientific purposes."[240] The court also upheld the ban on possessing firearms in state parks based on mid-nineteenth-century municipal bans at municipal parks.[241] The court, however, enjoined Maryland's ban on possessing weapons at locations that serve alcohol because these bans "are not analogous to any established sensitive place."[242] It also enjoined Maryland's presumptive ban on carrying weapons in all private buildings because the court could not find a historical tradition of requiring private property owners to give express consent before a person could carry a weapon on property generally held open to the public.[243] And the court enjoined the law against having firearms within 1,000 feet of a public demonstration after being warned by a law enforcement officer that a demonstration was taking place, again, because it could not find enough historical analogues.[244] The district court, however, expressed regret at that holding, explaining that "it is obligated to question the constitutionality of Maryland's restriction on carrying at public demonstrations because of *Bruen*'s narrow historical framework" and that it would have upheld the law on strict or intermediate scrutiny.[245]

The examples given are representative samples. These laws banned public carry in dozens of other places. But with respect to these other places, the analysis from these courts was substantially the same: to go location by location and ask whether there were sufficient historical examples to justify the modern ban.

This historical approach to sensitive places is also spawning some nascent scholarship on what counts as adequate precedent. Although legislative restrictions on carrying firearms in public transportation vehicles are relatively modern, Josh Hochman has argued that private-law traditions should count, too.[246] He has compiled many examples of private companies prohibiting the carrying of loaded firearms in railroad cars.[247] He argues that these examples should serve as

240 Kipke v. Moore, No. GLR-23-1293, 2023 WL 6381503, at *8 (D. Md. Sept. 29, 2023).

241 *Id.* at *10.

242 *Id.* at *11.

243 *Id.* at *13–14.

244 *Id.* at *15–16.

245 *Id.* at *16.

246 Joshua Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 YALE L.J. 1676 (2024).

247 *Id.* at 1690–1701.

precedents to prohibit the carrying of weapons in modern forms of transportation.[248]

We do not think this kind of analogy parsing is profitable or required by *Bruen*. The constitutional validity of a prohibition on carrying arms aboard aircraft does not turn on whether the eighteenth and nineteenth centuries had analogous regulations of ships and railcars. The search should instead be for the legal principles that govern sensitive places. It is these legal principles that must be adapted, not the Framing era's specific applications.

This becomes clear when *Bruen* rejects New York City's "attempt to characterize New York's proper-cause requirement as a 'sensitive-place' law."[249] Here, the Court looks to legal principles and engages in legal reasoning. It understands New York to be arguing that sensitive places are anywhere large numbers of people congregate and which are under police protection.[250] And this cannot be the correct legal principle behind the sensitive place doctrine, the Court explains, because that principle "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense."[251] This is straightforward constitutional interpretation: ensuring that the legal interpretation of a provision coheres with the goals or aims that the provision was designed to serve.[252] Notably, the Court does not conduct a fourteen- or thirty-seven-state survey of sensitive place restrictions in 1791 or 1868.

When it comes to determining how expansively a legislature may prohibit weapons in specific locations, probably the most important principle is that the legislature cannot designate places (either individually or when aggregated) that operate to effectively deny people most of the right to bear arms outside the home. This is why designating ordinary, common, and necessary means of daily transit (e.g., cars) as sensitive places is too broad. Meanwhile designating more specialized and rarer forms of transportation (like airplanes and most interstate railroads) may well be permissible. The nation's history of firearm regulation (and of rights regulation more broadly) permits *regulation* of the right, not infringement or abridgement. Until they reach this limitation, legislatures have flexibility to determine that having weapons in certain areas is inconsistent with public safety or morals. They are not bound to precise eighteenth- or nineteenth-century analogues of specific places.

248 *Id.* at 1701–26.

249 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

250 *Id.* (quoting Brief for Respondents at 34, *Bruen*, 142 S. Ct. 2111 (No. 20-843)).

251 *Id.* at 2134.

252 BARNETT & BERNICK, *supra* note 43, at 10–11.

IV. *RAHIMI* AND BEYOND

This brings us to the Supreme Court's currently pending case *United States v. Rahimi*, a case reviewing the Fifth Circuit's holding that 18 U.S.C. § 922(g)(8)—which forbids gun possession by those subject to domestic violence restraining orders[253]—is facially unconstitutional.[254] There is much to be said on the merits of the case, but our central point here is one of methodology. The Fifth Circuit erred by analyzing the case at the level of overly specific analogies—too close to demanding the kind of "historical twin" or "dead ringer" that *Bruen* rejects.[255]

Instead, the case should be approached at the level of general-law principle—by asking not just *who* historically has been denied the right to arms, but *why* and *to what extent.* Section 922(g)(8), like many federal prohibitions, amounts to a total denial of the right for certain people. In evaluating the constitutionality of this ban, the most important questions are the public interests the state seeks to pursue and whether pursuing those interests with a complete ban on possession has a basis in general-law principles.

For instance, then–Seventh Circuit Judge Barrett derived from the historical sources a basic principle that "legislatures have the power to prohibit dangerous people from possessing guns. But that power

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253 For reference, the full prohibition is:

> (g) It shall be unlawful for any person—
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> . . . .
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> (8) who is subject to a court order that—
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> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
>
> . . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g) (2018).

254 *See* United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

255 *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

extends only to people who are *dangerous*."[256] As then-Judge Barrett argued, this dangerousness principle can perhaps be gleaned from discussions at the state conventions to ratify the original Constitution, and is certainly more plausible as a matter of Founding-era law than a broader principle of disarming all lawbreakers, or even all criminal felons.[257] At the level of method, this is exactly the right *kind* of principle for adjudicating the right to keep and bear arms. It would be a defensible approach for the Court to take in analyzing § 922(g) in *Rahimi* and future cases.[258]

Applying a hypothetical general-law dangerousness principle would provide a reason to reject the Fifth Circuit's approach in *Rahimi*. The Fifth Circuit found § 922(g)(8) facially unconstitutional.[259] But § 922(g)(8)(C)(i) applies only to those restraining orders that "include[] a finding that" the defendant "represents a credible threat to the physical safety" of their partner or child—that is, a specific finding of dangerousness.[260] If a general-law dangerousness principle exists, this provision certainly satisfies it. So § 922(g)(8) as a whole would not be facially unconstitutional by depriving dangerous individuals of arms.[261]

Assuming the dangerousness principle is correct, the other half of § 922(g)(8)—clause (C)(ii)—presents a serious problem. That provision does not require any finding of dangerousness, applying to any restraining order that explicitly prohibits the use of physical force. To uphold § 922(g)(8)(C)(ii) would require judges to give Congress a fair measure of freedom to regulate dangerousness prophylactically, even

256 Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

257 *Id.* at 454–56.

258 We bracket various questions of substance, among them: whether reasonable grounds to suspect future dangerousness is a correct principle by which certain individuals may be barred from having arms; whether the dangerousness principle, if it is correct, permitted the government to completely ban a person from possessing weapons as opposed to limiting him from carrying them in public; and whether the government's power to regulate weapons possession is broader when it is exercising the war power (e.g., confiscating arms from Loyalists during the Revolutionary War) versus exercising the domestic police power.

259 *Rahimi*, 61 F.4th at 461.

260 18 U.S.C. § 922(g)(8)(C)(i) (2018).

261 We leave aside the arguments that § 922(g)(8) is invalid for procedural reasons, whether analyzed under the Fifth and Fourteenth Amendments' Due Process Clauses or the Second Amendment and the right to keep and bear arms. Thus, for example, in Rahimi's Supreme Court brief he acknowledges that the restraining order contained a finding that he was a "credible threat" to "physical safety," but he nonetheless objects that the finding was "boilerplate" and without meaningful judicial scrutiny. Brief for Respondent at 5, United States v. Rahimi, No. 22-915 (U.S. Sept. 27, 2023); *see also Rahimi*, 61 F.4th at 465–66 (Ho, J., concurring) (raising concerns about abuse of process when restraining orders are issued). We do not tackle such questions here.

in cases involving a permanent and total denial of the right. That may be asking too much of the general law.

These questions, and this framework, will have application beyond *Rahimi*. The Court is already confronting multiple cases about the constitutionality of other federal prohibitions, including the prohibition on possession of guns by any felon.[262] Again, something like the dangerousness principle would give the Court a tractable way to adjudicate the lawful scope of this statute. If the dangerousness principle is the lodestar, a complete lifetime ban on possession of a firearm by any felon is plainly too broad. Rather, the dangerousness principle would require more proportionality and tailoring between the government's interests and the burden on the right. For one thing, it would support a distinction between some felonies and others. At the extremes, a murder conviction has long been thought obvious evidence of future dangerousness; but it seems impossible to imagine that a conviction for making false statements about stock transactions would be.[263] Exactly where in between to draw the line is something the courts are currently debating and would eventually resolve in common-law fashion.[264]

For another thing, the constitutionality of § 922(g) might be bolstered by—and might even require—tailoring not just of the triggering offense but of the duration of disarmament. A potentially important but moribund provision of federal law, 18 U.S.C. § 925(c), allows those who are prohibited from possessing firearms to "make application to the Attorney General for relief from the disabilities imposed by Federal laws."[265]

> [T]he Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.[266]

262 *See* United States v. Cunningham, 70 F.4th 502 (8th Cir.), *reh'g denied*, No. 22-1080, 2023 WL 5606171 (8th Cir. 2023), *petition for cert. filed*, No. 23-6602 (U.S. Jan. 25, 2024); Range v. Att'y Gen. U.S., 69 F.4th 96 (3d Cir. 2023), *petition for cert. filed sub nom.* Garland v. Range, 92 U.S.L.W. 3084 (U.S. Oct. 5, 2023) (No. 23-374); United States v. Jackson, 69 F.4th 495 (8th Cir.), *reh'g denied*, 85 F.4th 468 (8th Cir.), *petition for cert. filed*, No. 23-6170 (U.S. Nov. 28, 2023).

263 *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 696, 699 (2009).

264 Courts may also owe some deference to the legislature about where the precise line should be. But even here, courts would be expected to police the outer bounds of proper legislative discretion.

265 18 U.S.C. § 925(c) (2018).

266 *Id.*

Section 925(c) also provides for judicial review of a denial of this application.[267]

Taken seriously, this provision could do a great deal to render the various federal firearms provisions consistent with a hypothetical general-law dangerousness principle.[268] Part of the standard for relief *is* basically a dangerousness principle ("likely to act in a manner dangerous to public safety"[269]), and so this might be the appropriate legal channel for anybody who would otherwise have an as-applied constitutional challenge to the federal prohibitions.

However, for over thirty years, Congress has blocked the implementation of § 925(c). As the Bureau of Alcohol, Tobacco, Firearms, and Explosives reports,

> Although federal law provides a means for the relief of firearms disabilities, ATF's annual appropriation since October 1992 has prohibited the expending of any funds to investigate or act upon applications for relief from federal firearms disabilities submitted by individuals. As long as this provision is included in current ATF appropriations, ATF cannot act upon applications for relief from federal firearms disabilities submitted by individuals.[270]

And because ATF cannot review the petitions at all, the Supreme Court has held, judicial review is unavailable too.[271] Implementing a general-law approach through a dangerousness principle might force Congress to reconsider this intransigence and restore § 925 to its original role, or else face the legal consequences.[272]

Admittedly, a general-law approach to evaluate laws restricting who may possess a firearm is more difficult than using the approach to evaluate restrictions on public carry. Early Americans had few laws

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267 *Id.*

268 *See* Kari Lorentson, Note, *18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban*, 93 NOTRE DAME L. REV. 1723, 1740–41 (2018); Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1619 (2022). *But see* Atkinson v. Garland, 70 F.4th 1018, 1035 & n.3 (7th Cir. 2023) (Wood, J., dissenting) (arguing that § 922(g)(1) is constitutional, and that "[w]hile we certainly would have a different case before us if section 925(c) were available, my argument does not depend on its existence"); Binderup v. Att'y Gen. U.S., 836 F.3d 336, 350 (3d Cir. 2016), *abrogated in part by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

269 § 925(c).

270 *Is There a Way for a Prohibited Person to Restore Their Right to Receive or Possess Firearms and Ammunition?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Aug. 21, 2019), https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and [https://perma.cc/D54N-DHCV].

271 United States v. Bean, 537 U.S. 71, 78 (2002).

272 We take no position on the correct outcome as a matter of severability if Congress continues to block the implementation of § 925(c). See generally William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 41–56 (2023), for possibilities.

restricting who may possess a firearm, and the few laws that they had often involved invidious discrimination based on race and religion. This has prompted an inquiry into whether lawyers should cite these laws in litigation, which, in cases involving a deprivation of the right to keep arms, may be the only Framing-era precedents they have.[273] One scholar has suggested that lawyers have two viable choices, either to "renounce" these laws or to "abstract from their specific application a broader principle that might be applied consistently with contemporary values and understandings."[274] We think a permutation of the latter approach is the correct one. In these cases, lawyers and judges should seek to discern the general-law principles that undergird these laws and to apply those principles today, except where the legal principles have been otherwise changed (e.g., by the Fourteenth Amendment).

Take, for example, laws prohibiting Indians, slaves, and Loyalists from having arms. The legal principle governing these examples is that certain individuals are not part of the political community (i.e., "the people") in whom the right to keep and bear arms is vested, particularly those in a state of war with the political community or who would rise up against it if given the opportunity. That legal principle remains valid today in some ways—enemy aliens in wartime, for example, are clearly not part of "the people" in whom the right to bear arms is vested—but in other ways it has been abrogated by the expansion of citizenship. The once-acceptable idea that a state may adopt more restrictive gun control laws applied only to certain races based on their peculiar status[275] has been thoroughly abrogated by the Thirteenth and Fourteenth Amendments.[276] But perhaps there are other categories of people today, such as minors, as to whom the peculiar-status principle still has some validity.

To be sure, these specific legal principles can be debated, and defending them all is not our point here. The important point is that the underlying principles may have continued validity, even where the specific Framing-era applications have been confined to the dustbin of history. Moreover, one should note that these legal principles can be identified at a relatively high level of specificity. They do not permit discerning from these precedents vague and malleable abstract principles, such as that the legislature has broad discretion to disarm individuals, which, if accepted, could justify a total destruction of the right.

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273 *See* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).

274 *Id.* at 34–35.

275 State v. Newsom, 27 N.C. (5 Ired.) 250, 254–55 (1844).

276 *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1880); Baude, Campbell & Sachs, *supra* note 13, at 1235, 1238–39.

Whether and how the Court will implement these general-law principles is something that will have to be left to future cases. Indeed, as in any common-law field, and so many other areas of law, it is difficult to fully assess a decision like *Bruen* until its meaning has been "liquidated and ascertained by a series of particular discussions and adjudications."[277] But our fundamental point is that this kind of general common-law exposition is what *Bruen* calls for—not blanket deference to the legislature or the mindless parsing of historical analogies.

CONCLUSION

Readers of *Bruen* who see it as breaking new interpretive ground have found a lot of room to overread or underread its scope—either by exhibiting excessive deference to legislative abridgments of the right to keep and bear arms, or by exhibiting excessive skepticism of any novel form of regulation. We think *Bruen* calls for something more moderate and straightforward. The key is to realize that instead of breaking new ground, it breaks *very old* ground, making use of classical elements of our legal tradition: original law, preexisting rights, and the general law.

277 THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961); *cf.* Baude, *supra* note 191.