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IS *BRUEN* THE NEW *USERY*?

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ABSTRACT

In 2022, in New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court revolutionized the Second Amendment, achieving the long-held conservative goal of limiting gun restrictions by imposing an expansive, originalist view of the right to bear arms. However, within just three years,* Bruen *is showing cracks. Lower court judges are struggling mightily to apply it and are expressing their frustrations in exceptionally frank ways. And already the Supreme Court, in* Rahimi v. United States*, was forced to reconsider its approach. The Court has been here before, when it tried to revitalize the Tenth Amendment in the 1970s in* National League of Cities v. Usery. *As in* Bruen*,* Usery *attempted something doctrinally ambitious: to impose a broad, amorphous prohibition on*

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congressional interference with "traditional government functions." Then, too, lower courts tried and failed to give principled and workable meaning to that ambitious test. Within a decade, Usery *was overruled as unworkable.*

This Article details how difficult lower courts have found applying Bruen *and how contradictory the resulting outcomes have been. It also shows just how reminiscent this difficulty is of the jurisprudential confusion and frustration of lower court judges endeavoring to give meaning to the new balance of state and federal power that* Usery *attempted to create. The lessons of* Usery *for the* Bruen *Court, however, are complex.* Usery *failed, but the Rehnquist Court eventually forged a more focused, less ambitious path for reanimating the Tenth Amendment that proved lasting. But that compromise was led by the sort of ideological moderates and methodological pragmatists who no longer dominate the current Court.* Bruen *may suffer the same fate as* Usery *due to its doctrinal ambiguities and practical infirmities. If so, whether the Roberts Court can mimic the "Rehnquist Revolution" and enshrine its vision of the Second Amendment in a lasting and workable way may hinge on whether the* Bruen *Justices can learn from their conservative brethren's experiences in* Usery *and its aftermath. This Article outlines four possible paths forward, one of which is unique in being both principled and practical given the political realities of the current Court.*

TABLE OF CONTENTS

INTRODUCTION

The early Roberts Court began a Second Amendment revolution, expanding its scope from one that guarantees only "a well regulated militia"[1] to a broad individual right "to keep and bear arms."[2] Both phrases appear in the Constitution;[3] the battle had previously been over which phrase should dominate its interpretation.[4] The later Roberts Court has gone much further, leaving that debate behind and developing, in *New York State Rifle & Pistol Ass'n v. Bruen*, a novel method of analysis to enlarge the reach of the Second Amendment.[5] In forbidding any restraint on the right to bear arms that does not have an eighteenth-century corollary,[6] *Bruen* instituted the purest originalist test for any enumerated right.[7] But the method is equal parts ambitious and amorphous, such that lower courts, and even the Supreme Court itself, have struggled to apply it.[8]

Consequently, whether a successful expansion of the Second Amendment will constitute a major element of this Court's legacy remains to be seen. *Bruen* may go the way of another, older conservative jurisprudential project, the Court's initial attempt at reinvigorating the once-dormant Tenth Amendment in *National League of Cities v. Usery*[9]: inoperable and snuffed out as "impracticable and doctrinally barren."[10] This Article uses the history of *Usery* not only to show how *Bruen* may fail, but also to explore how it may ultimately succeed: Although *Usery* was overturned, it was ultimately replaced with a transformational shift

1. U.S. CONST. amend. II; *see infra* Part I.A (describing the narrow interpretation taken prior to 2008).

2. District of Columbia v. Heller, 554 U.S. 570, 622 (2008).

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

4. *See infra* Part I.A.

5. 142 S. Ct. 2111, 2126 (2022).

6. *Id.* ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

7. *See id.* at 2177 (Breyer, J., dissenting) (describing the Court's "adoption of a rigid history-only approach" as "anomalous").

8. *See infra* Parts I.D-I.E.

9. *See* 426 U.S. 833, 842-43 (1976), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

10. *Garcia*, 469 U.S. at 556-57.

that became a central pillar of the "Rehnquist Revolution."[11] Understanding why and how that shift occurred may reveal the future of the Second Amendment revolution.

For more than a decade before *Bruen*, the Court had allowed lower-court experimentation that largely upheld restrictions on guns, using a "means-end" standard with variable levels of scrutiny to weigh the "strength of the government's justification" for regulating firearm possession.[12] In rejecting that test, the Court articulated a new, regulation-skeptical framework for cases involving firearm restrictions.[13] *Bruen*'s analysis proceeds in two steps.[14] A regulation falls within the Second Amendment's ambit, and is presumptively prohibited by the Constitution, if it "covers an individual's conduct" in keeping or bearing arms.[15] Then, for the regulation to be upheld, the government must justify the regulation as consistent with "this Nation's historical tradition of firearm regulation."[16] Given the minimalism of the first requirement, the *Bruen* test has an almost exclusive focus on history,[17] with the fate of any legislative enactment rising and falling with the identification of a "well-established and representative historical analogue" for any constraint imposed.[18]

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11. *See infra* Part II.C.

12. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011) (citing District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008)).

13. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022) ("Despite the popularity of this two-step approach, it is one step too many.... *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.").

14. Whether the two steps are fully separable is an issue that arose during oral argument at the Supreme Court in the pending case *Wolford v. Lopez*. *See* Transcript of Oral Argument at 46, Wolford v. Lopez, No. 24-1046 (U.S. Jan. 20, 2026) (statement of Jackson, J.) ("No, I am backing away [from the *Bruen* framework] because the *Bruen* framework only applies where the Second Amendment is implicated. And what I'm suggesting is that the Second Amendment right is not being implicated when the regulation is about the property owner's consent, the form of it.").

15. *Bruen*, 142 S. Ct. at 2126.

16. *Id.*

17. In contrast to the ambiguity raised by Justice Jackson in *Wolford*, *see supra* note 14, Justice Kavanaugh made clear his view that the first step is of minimal significance: "Why are we making it complicated? The text of the Second Amendment covers arms.... Here, there's no sufficient history supporting the regulation, end of case." Transcript of Oral Argument, *supra* note 14, at 41-42.

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

This simple directive to find a historical analogue belies enormous ambiguity, resulting in lower courts struggling to apply the test and producing highly inconsistent outcomes. For instance, it is unclear how perfectly analogous a law has to be to constitute a historical analogue, an inquiry made enormously more difficult by differences in technology, social norms, and the type of social problems being addressed in legislation since the eighteenth century.[19] Further, judges have complained that *Bruen*'s test has generated an extensive workload for lower courts, which must review *Bruen* arguments in almost every criminal case involving a firearm.[20] In one judge's words, courts are now conscripted in a "game of historical Where's Waldo,"[21] in which they are charged with combing through archives to look for evidence of a precise historical analogue for a regulation—a labor-intensive exercise.[22]

The imprecision of the test and the inconsistency in outcomes produced became starkly apparent in *United States v. Rahimi*.[23] The Fifth Circuit originally upheld a federal statute that prohibited firearm possession by individuals under domestic violence restraining orders,[24] but then struck it down after *Bruen*, on grounds that laws disarming domestic abusers did not exist at the Founding.[25] Yet, when this question reached the Supreme Court, the Justices reversed, declaring the Fifth Circuit had taken *Bruen* too far.[26] The porousness of the *Bruen* test and its lack of clear boundaries was illustrated in the backtracking by the majority Justices in *Rahimi*, as well as in the multiple concurring opinions

19. *See infra* Part I.C.

20. *See, e.g.*, United States v. Love, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022) (bemoaning this requirement while applying *Bruen*).

21. *Id.*

22. *See infra* Part I.D.

23. 144 S. Ct. 1889 (2024).

24. *See* United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 n.1 (5th Cir. June 8, 2022) (per curiam), *withdrawn*, 2022 WL 2552046 (5th Cir. July 7, 2022), *and superseded on reh'g by* 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024). There, the Fifth Circuit dismissed Rahimi's Second Amendment challenge briefly in a footnote, acknowledging that the constitutional challenge was "foreclosed by [the Circuit's] binding precedent." *Id.* (citing United States v. McGinnis, 956 F.3d 747 (5th Cir. 2020)).

25. *See Rahimi*, 61 F.4th at 448, 460-61 ("The Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation.").

26. *See Rahimi*, 144 S. Ct. at 1903; *see also infra* Part I.E.

attempting to better define its boundaries and curtail its ambiguities.[27] And in June 2025 the Court declined to hear a challenge to sweeping state bans on semiautomatic rifles,[28] suggesting it is less than eager to extend *Bruen*'s reach much further. But then in the October 2025 Term, the Court accepted two new *Bruen*-style challenges to law,[29] and a majority of Justices seemed amenable to overturning those laws.[30]

This Article provides the first systematic categorization of the contrary approaches and outcomes emerging in lower courts, and documents how judges of all ideological persuasions have found *Bruen* difficult to apply. It analyzes lower courts' efforts to apply the *Bruen* test, shows that similar cases result in different outcomes, and quotes lower-court judges who have frankly expressed their confusion and frustration with both the extraordinary workload a *Bruen* analysis creates and the uncertainty the methodology entails.[31] It demonstrates that state courts, even when addressing identical legislative provisions, diverge on nearly every part of the analysis: interpreting key facts, such as how common particular weapons were; the history, including how analogous early laws are; the requirements of the legislation; which step of *Bruen* their analysis should fall under; indeed, whether *Bruen* analysis even applies; what outcomes it leads to; how to find the evidence to base such analysis upon; and the relevant "founding" period when *Bruen* is being applied to state laws.[32]

This Article also argues that we have been here before. The methodological tumult and apprehension in the lower courts caused by *Bruen* is highly reminiscent of the Court's struggle in the 1980s

27. *See infra* Part I.E.

28. *See* Snope v. Brown, 145 S. Ct. 1534 (2025) (denying certiorari).

29. *See* Wolford v. Lopez, 146 S. Ct. 79 (2025) (granting certiorari to consider whether Hawai'i may prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier); United States v. Hemani, 146 S. Ct. 326 (2025) (granting certiorari to consider whether a federal statute may prohibit persons who are unlawful users of controlled substances from possessing firearms).

30. *See infra* Part III.E.

31. *See infra* Part I.D.

32. *See infra* Part I.D. The Second Amendment applies to the states via the Fourteenth Amendment, which was passed almost eight decades after the Second Amendment. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

over the scope of federal power under the Tenth Amendment. In *National League of Cities v. Usery*, the Supreme Court attempted to revive a substantive interpretation of the Tenth Amendment that recognized "states' rights."[33] That doctrine had been repudiated since the "switch-in-time that saved nine," when the conservative Supreme Court Justices had finally forsaken their efforts to fight the New Deal after their attempts had led to grave threats to the Court's independence.[34] Nonetheless, the Rehnquist Court attempted in *Usery* to reanimate the Tenth Amendment's limitation on the federal legislative power by forbidding Congress from impairing "the essentials of state sovereignty."[35] This vague term was operationalized by a similarly ambiguous test: The Court declared that the Tenth Amendment prohibited Congress from displacing "the States' freedom to structure integral operations in areas of traditional governmental functions."[36]

That delineation—between what is a "traditional government function" and not—proved as conceptually elusive and practically challenging as whether there is a history of certain types of gun regulation. The *Usery* test attempted to restrict congressional action, particularly under the Commerce Clause, by defining certain activities as the sole prerogative of the states, due to being "traditional" or "integral" to state decision-making.[37] But defining what was traditional or integral proved slippery and discretionary.[38] The vagaries of the *Usery* test led to numerous challenges to federal laws, the outcomes of which widely varied across lower courts, as did the analyses.[39] In four subsequent cases, the Supreme Court

33. 426 U.S. 833, 851-52 (1976) (holding that Congress may not "wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'" (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975))), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

34. *See infra* Part II.B.

35. *See* 426 U.S. at 855 (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

36. *Id.* at 852.

37. *See id*. at 855 ("Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.").

38. *See, e.g.*, *Garcia*, 469 U.S. at 531 ("[T]he attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism[.]").

39. *See infra* Part II.D.

attempted to "clarify" the *Usery* standard,[40] until, eventually, the problematic nature of the distinction led to its disavowal by the Court.[41] In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court overruled *Usery*, holding that it was impractical and unsound for courts to attempt to discern the scope of "integral" and "traditional" state functions for purposes of determining the limits of federal regulatory authority.[42]

The post-*Bruen* Court is in a similar position to the post-*Usery* Court. *Bruen*'s novel and indeterminate standard has steered the Second Amendment into incoherence. *Rahimi* already forced the Court to recalibrate its approach, just as the Court did in the post-*Usery* cases regarding the balance of state and federal power. This raises the question: Is *Bruen* the new *Usery*, and will it suffer the same fate due to these infirmities and ambiguities?

Yet, the jurisprudence that followed *Garcia*'s overturning of *Usery* is also instructive. Rather than abandoning the task of vigilant enforcement of the Tenth Amendment, as *Garcia* suggested it might do,[43] within seven years, the Rehnquist Court regrouped and reinvigorated the Tenth Amendment from a new angle.[44] First, it introduced an "anticommandeering" principle in *New York v. United States*, in which the Court held that Congress may not compel states to adopt any particular laws or regulations[45]—a far narrower, more practical restriction on federal power than adopted in *Usery*.[46] Then, it built on *New York* in *Printz v. United States*, ruling that Congress also may not force state executive officials to carry out federal mandates.[47] Thus, although the *Usery* experiment failed, its core aim was ultimately revived, with the Court developing a more

40. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88, 290-93 (1981); United Transp. Union v. Long Island R.R., 455 U.S. 678, 683-87, 690 (1982); FERC v. Mississippi, 456 U.S. 742, 758-59, 767 (1982).

41. *See Garcia*, 469 U.S. at 556-57.

42. *Id.* at 546-47.

43. *See id.* at 556 (stating federalism would now be honored primarily through "the built-in restraints that our system provides through state participation in federal governmental action").

44. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?,* 111 HARV. L. REV. 2180, 2181-82 (1998) (describing the Court's "recent federalist revival").

45. 505 U.S. 144, 188 (1992).

46. *See infra* Part II.F.

47. 521 U.S. 898, 935 (1997).

targeted Tenth Amendment framework that ended up achieving similar, and more lasting, results,[48] with continuing impact under the Roberts Court.[49]

The current Court now faces a similar path. *Rahimi*, with its narrow holding and multiple concurrences, suggests the Court will need to significantly revise or even abandon *Bruen* in the face of its unworkability.[50] But *Usery* teaches that the Court will likely do so by finding an "alternate route" to Second Amendment-friendly results, with a standard that the lower courts will be better able to apply. A heavy dose of caution is warranted, though, in predicting such a turnabout: In contrast to the more moderate Justices who steered the federalism debate—Justice Blackmun in *Garcia* and Justice O'Connor in *New York*—the current majority is far more ideologically extreme,[51] and the conservative majority acts more in lockstep.[52] This suggests that the contemporary Court may be slower to recognize the failure of *Bruen* and, once it does, more likely to impose another stringent, "purist" approach rather than the pragmatic compromise of *New York* and *Printz*.

This Article outlines four possible paths forward, ranging from overturning *Bruen* altogether to doing nothing, simply standing by as the lower courts are overwhelmed. Between those two extremes lie two more principled and pragmatic paths. One is to clarify *Bruen* by providing greater specificity as to the appropriate level of generality required in historical analogues. This minimal switch would satisfy Justice Barrett in particular and could garner a possible majority, but it has its own vagaries.[53] The fourth option, which we propose and endorse, is to modify *Bruen* to recognize a "Safe Hands" principle which balances Second Amendment rights

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48. *See infra* Part III.

49. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1467-77, 1481, 1484-85 (2018); *see also infra* Parts II.F, III.

50. *See infra* Part II.

51. *See, e.g.*, Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, PNAS, June 14, 2022, at 1, 1-3, 5, https://www.pnas.org/doi/epdf/10.1073/pnas.2120284119 [https://perma.cc/J7FG-JYEP].

52. *See* Adam Feldman, *It Is Not a 3-3-3 Supreme Court*, SCOTUSBLOG (Aug. 5, 2025, at 10:27 ET), https://www.scotusblog.com/2025/08/it-is-not-a-3-3-3-supreme-court/ [https://perma.cc/9VPA-MNMW].

53. *See infra* Parts I.E, III.B.

with the need to keep society safe from lawlessness. Such a principle would provide robust protection for the right to bear arms in self-defense, while giving a wider berth to the government in disarming those who pose a danger to society. We do not claim this is a unique solution—there may well be others that, like *New York* and *Printz*, provide a clean framework for a broader interpretation of the constitutional right at issue without the doctrinal quagmire of *Bruen* and *Usery*. But it can be reconciled with the Court's most recent opinion in in *Rahimi*,[54] and is both principled and practical, given the political realities of the current Court.

This Article proceeds as follows. Part I describes the Court's pre-*Bruen* Second Amendment jurisprudence and the development of the *Bruen* test; it then comprehensively details the difficulties courts have experienced in applying the test—including both lower courts and the Supreme Court itself in *Rahimi*. Part II discusses the Court's pre-*Usery* understanding of the Tenth Amendment, the *Usery* test, and the struggles lower courts had in applying it. It then describes *Garcia*, which overturned *Usery*, and explains the subsequent revival of the Tenth Amendment, when the Court found an alternate route to limit federal power through anticoercion and anticommandeering principles. Part III lays out what the *Usery* and *Garcia* episode portends for *Bruen* and explores what an "alternate route" jurisprudence might look like in a post-*Bruen* world. It provides four possible alternatives, spread across a broad spectrum of options, and presents one that we argue satisfies the dual needs of protecting a constitutional right without creating doctrinal chaos. The Article then briefly concludes, proposing that ultimately, both the *Usery* and *Bruen* episodes form a cautionary tale about the consequences of a Court that overreaches and overprescribes when it has ambitions to dramatically shift the law in a preferred ideological direction. In the area of gun regulation, which implicates pressing concerns about public safety and community welfare, the stakes are especially high.

54. *See infra* Parts I.E, III.D.

I. *BRUEN*'S BURDEN: THE PAST, PRESENT, AND FUTURE

The long-established understanding of the Second Amendment—that it protects the right to bear arms in the context of service in state militias[55]—was fundamentally altered by the Supreme Court in 2008, when, in *District of Columbia v. Heller*, the Court interpreted the Amendment as protecting an individual's right to possess and carry firearms.[56] Yet, *Heller* did nothing to specifically outline the boundaries of the right beyond recognizing a right to keep firearms in the home for self-defense; the Court explicitly refused to enumerate a standard of review.[57] For more than a decade, despite many opportunities, the Court continued to decline to elaborate the contours of that individual right.[58] Then, in 2022, in *New York State Rifle & Pistol Ass'n v. Bruen*, the Court's new conservative six-Justice majority established a stringent standard for evaluating firearm regulations, requiring that such laws be consistent with the nation's historical tradition of firearm regulation.[59] The lower courts have struggled to apply *Bruen*'s test, a fact epitomized in *United States v. Rahimi*, in which the Fifth Circuit reversed its own prior ruling, and ultimately found that, under *Bruen*, a firearm restriction for individuals under domestic violence restraining orders was unconstitutional.[60] The Supreme Court then reversed the Fifth Circuit in an opinion notable for its many separate concurrences[61] and now faces the difficult task of how to "fix" *Bruen*: either by recognizing narrow, case-by-case carveouts or by reconceptualizing its framework altogether.

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55. *See* United States v. Miller, 307 U.S. 174, 178-79 (1939).

56. 554 U.S. 570, 592 (2008).

57. *Id.* at 628-29.

58. *See infra* notes 116-19 and accompanying text (describing Justice Thomas's repeated dissents in denials of certiorari of Second Amendment cases).

59. 142 S. Ct. 2111, 2126 (2022).

60. 61 F.4th 443, 448 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

61. *See* 144 S. Ct. at 1903; *id.* at 1903-07 (Sotomayor, J., concurring); *id.* at 1907-10 (Gorsuch, J., concurring); *id.* at 1910-24 (Kavanaugh, J., concurring); *id.* at 1924-26 (Barrett, J., concurring); *id.* at 1926-30 (Jackson, J., concurring).

A. The Heller *Baseline*

To be able to predict what the Court is likely to do about the problems with *Bruen*, it is first necessary to understand just how revolutionary the Roberts Court's rapid expansion of the Second Amendment has been. This Section briefly outlines the Second Amendment's prior case history—or rather, the striking lack thereof.

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[62] For most of American history, the Amendment was understood to protect a collective right, linked to state and national defense through militia service.[63] And before 2008, the Court had never invalidated a law for violating the Amendment.[64] The collective-right approach was cemented by the Court's first authoritative construction of the Amendment in *United States v. Miller*.[65] In upholding the National Firearms Act of 1934, which regulated and taxed the transfer of sawed-off shotguns, the Court held that the Second Amendment right was not unlimited and was tied to the preservation or efficiency of a well-regulated militia.[66] Per the Court, only those arms that had a reasonable relationship to that goal were protected by the Second Amendment.[67] As a result, the Second Amendment's protections were for decades widely understood to apply to the collective right of states to maintain militias, rather than an individual's right to own firearms.[68]

Lower courts steadfastly adhered to *Miller*'s understanding of the Second Amendment throughout the twentieth century.[69] Indeed,

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62. U.S. CONST. amend. II.

63. *See* United States v. Miller, 307 U.S. 174, 179 (1939); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 956 (5th ed. 2015).

64. *See* CHEMERINSKY, *supra* note 63, at 956.

65. *See* 307 U.S. at 178-79, 182.

66. *See id.* at 178.

67. *Id.* (noting that the "obvious purpose" of the Amendment was to "assure the continuation and render possible the effectiveness of such forces").

68. *See* District of Columbia v. Heller, 554 U.S. 570, 637-38 (2008) (Stevens, J. dissenting).

69. *See, e.g.*, United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam) ("The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation

until 2007, no federal court had overturned a gun regulation, and not until 1960 was there any published legal scholarship promoting the view that the Second Amendment contained an individual right.[70] The Third Circuit, writing in 1942, summed up the understanding:

> It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.[71]

The Court obliterated this interpretation in 2008 in *District of Columbia v. Heller*.[72] *Heller* arose from a challenge to firearm regulations in the District of Columbia,[73] which were some of the strictest in the nation.[74] At the time, D.C. laws banned handgun possession by making it illegal to carry an unregistered firearm[75]

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or efficiency of a well regulated militia.'" (quoting *Miller*, 307 U.S. at 178)); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) ("[The] right to 'keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms." (citing *Miller*, 307 U.S. at 178)); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) ("[T]he right to bear arms is inextricably connected to the preservation of a militia."); United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988) ("Later cases have analyzed the [S]econd [A]mendment purely in terms of protecting state militias, rather than individual rights." (citing *Miller*, 307 U.S. 174)); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1418 (E.D. Cal. 1990) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982) ("[T]he Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies." (citing *Miller*, 307 U.S. 174)).

70. Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 12 (2010).

71. United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942) (footnotes omitted), *rev'd on other grounds*, 319 U.S. 463 (1943).

72. 554 U.S. 570, 592 (2008).

73. *See id.* at 574; D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

74. *See* Dina Temple-Raston, *Supreme Court: Individuals Have Right to Bear Arms*, NPR (June 26, 2008, at 10:31 AM ET), https://www.npr.org/2008/06/26/91911807/supreme-court-individuals-have-right-to-bear-arms [https://perma.cc/65WV-QSKQ].

75. D.C. CODE § 7-2502.01(a).

and prohibiting the registration of handguns.[76] Those firearms that could be owned lawfully were required to be kept "unloaded and disassembled or bound by a trigger lock or similar device," so as to be kept safe from use by children.[77] Dick Heller, a D.C. special police officer, applied to register a handgun he wished to keep at home but was denied under the law.[78] Heller argued that the Second Amendment protects an individual's right to possess firearms, independent of service in a state militia, and applies to private, civilian use.[79] He presented historical evidence suggesting that the Framers of the Constitution intended the Second Amendment to protect the right of individuals to own firearms for lawful purposes, such as self-defense.[80] D.C. argued the traditional *Miller* view: The Amendment protected only the collective right of the people to maintain effective state militias.[81] D.C. officials also contended that the handgun ban and other regulations were reasonable measures intended to reduce violent crime and increase public safety.[82] Given that handguns were disproportionately involved in accidental shootings and domestic violence incidents, the District posited that it had the authority to regulate firearm possession to prevent violence and protect residents.[83]

The Court, in a five-to-four decision, sided with Heller.[84] The opinion of the Court, delivered by Justice Scalia, held that the Second Amendment protects an individual's right to possess a firearm "for traditionally lawful purposes," including "self-defense within the home."[85] The Court thus found that the D.C. laws, by effectively banning handgun possession and requiring firearms to be kept nonfunctional, were unconstitutional.[86] The Court interpreted the prefatory clause—"A well regulated Militia, being necessary to the security of a free State"—as suggesting a purpose

76. § 7-2502.02(a)(4).
77. D.C. CODE § 7-2507.02 (2001); U.S. CONST. amend. II.
78. *Heller*, 554 U.S. at 575.
79. *See id.* at 575-76.
80. *See id.* at 577.
81. *Id.*
82. *See id.* at 693-94 (Breyer, J., dissenting).
83. *See id.* at 694-96.
84. *Id.* at 635 (majority opinion).
85. *See id.* at 577, 635.
86. *Id.* at 635.

for the right, but not as restricting or expanding the operative clause—"the right of the people to keep and bear Arms, shall not be infringed."[87] In fact, the clauses "fit[ ] perfectly" together because the founding generation was concerned that confiscating arms would be the means to eliminate the ability to form a militia if it proved necessary.[88] Ultimately, the Second Amendment precluded the government from regulating the possession of weapons "in common use."[89] Because D.C. had done so, its handgun ban was unconstitutional.

The Court's reasoning was subject to widespread critique, including for Justice Scalia's brand of originalism,[90] and his textual analysis.[91] But importantly, despite being the first case to recognize that the Second Amendment protects an individual's right to own a firearm for personal use, *Heller* is also significant for what it did *not* do in terms of expanding gun rights. The Court cautioned that the Second Amendment right was "not unlimited," and that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[92]

As discussed below, this emphasis on limits to the individual right contrasts sharply with *Bruen*, which embraced a broader interpretation of the Amendment and placed new constraints on states' authority to restrict public carrying of firearms. While *Heller* left room for certain regulatory measures, *Bruen* dismissed this

87. *See id.* at 599.

88. *Id.* at 598.

89. *Id.* at 624.

90. *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626 (2008) (describing the analysis as "little more than a lawyer's ... parlor trick").

91. *See, e.g.*, Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 268 (2008) ("[I]f we accept Justice Scalia's interpretation of the clause, we have to assume that the First Congress put the well regulated militia provision in the Amendment for no good purpose at all.").

92. *Heller*, 554 U.S. at 626-27.

traditional regulatory framework, prompting questions about the boundaries of permissible regulation post-*Bruen*.[93]

But *Heller* shared one commonality with *Bruen*: It created significant ambiguity by failing to detail how it should be applied by lower courts or would be applied in the future by the Supreme Court. Beyond Justice Scalia's caution quoted above, *Heller* was "expressly noncommittal" about how to apply its holding, and about what standard to use when doing so.[94] Instead, the Court declared that the D.C. law would fail "any of the standards of scrutiny that we have applied to enumerated constitutional rights."[95] Thus, the day would have to wait for when the Court would set forth any kind of legal guide for determining when a law passes muster under the Second Amendment.

Two years after *Heller*, in *McDonald v. City of Chicago*, the Court held that the Second Amendment's protection of the right to keep and bear arms was incorporated under the Fourteenth Amendment and thus applies against the states, effectively expanding *Heller* to encompass the entire nation.[96] Yet, *McDonald* did little to clarify *Heller*'s standard, offering no new guidance on how lower courts should assess state laws under the Second Amendment—leaving unanswered questions about the Amendment's scope for years to come.

B. Lower Court Experimentation: The Marzzarella *Framework*

By setting a baseline principle and declining to apply a particular "tier of scrutiny" or any other legal framework to the Second Amendment, the Court in *Heller* allowed for experimentation and regional variation, both in the lower courts and in legislatures. Closely following *Heller*, Connecticut, for instance, passed one of the strictest gun control laws in the country following the Sandy Hook Elementary School shooting in 2012,[97] while Texas passed laws

93. *See infra* Parts I.E, III.

94. Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 81 (2023).

95. *Heller*, 554 U.S. at 628.

96. *See* 561 U.S. 742, 791 (2010).

97. *See* An Act Concerning Gun Violence Prevention and Children's Safety, Pub. Act No. 13-3, 2013 Conn. Acts 47 (Reg. Sess.).

lowering the barriers for carrying handguns and allowing for open carry without a permit for most citizens.[98] For fervent Second Amendment proponents, *Heller* failed to meet the Court's obligation to apply the most exacting scrutiny to all firearm regulations.[99] Eventually the Court in *Bruen* did just that, handing down an emphatic affirmance of the primacy of the Second Amendment. But the Court resisted the call to do so for many years, and in the pre-*Bruen* wake of *Heller* and *McDonald*, that decade-long silence left lower courts to develop their own tools to navigate the uncertain terrain of Second Amendment jurisprudence.

What emerged from this judicial improvisation was a flexible framework that balanced constitutional principles with practical governance. The first court of appeals to grapple with the post-*Heller* Second Amendment, the Third Circuit, set a standard that other courts then followed. In *United States v. Marzzarella*, the circuit panel upheld the legality of a federal statute prohibiting the possession of firearms with obliterated serial numbers.[100] In doing so, the *Marzzarella* court applied a two-step framework. The court first inquired whether the challenged law impacted conduct protected by the Second Amendment.[101] If it did not, then the analysis ended, and the law was upheld.[102] However, if the law did affect protected conduct, the court applied an appropriate level of scrutiny, either strict or intermediate, to determine whether the law could pass constitutional muster.[103] The *Marzzarella* court explicitly borrowed this framework from First Amendment jurisprudence.[104] In *Marzzarella* itself, the court determined that the statute banning possession of firearms with obliterated serial numbers "[did] not come close" to the level of Second Amendment infringement of the D.C. handgun ban at issue in *Heller*, and so intermediate scrutiny

98. *See* Firearm Carry Act of 2021, ch. 809, 2021 Tex. Gen. Laws 1960.

99. *See infra* note 116 (collecting Justice Thomas's post-*Heller* dissents from denials of certiorari in gun cases).

100. 614 F.3d 85, 87 (3d Cir. 2010).

101. *See id.* at 89.

102. *Id.*

103. *See id.*

104. *See id.* at 96 (first citing Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009); then citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); then citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); then citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); and then citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

applied.[105] The court found that the interest served by the regulation—allowing law enforcement to trace weapons via their serial numbers—was substantial, and that the statute "fit[ ] reasonably with that interest," as required by intermediate scrutiny.[106] But the court further deemed that even if strict scrutiny were to apply, the law would survive because serial number tracing is not only a substantial state interest, but also a "compelling" one.[107]

The two-step *Marzzarella* framework found widespread support among scholars.[108] And the flexibility of the two-step framework proved useful as courts across the country applied it to a variety of statutes, demonstrating its adaptability to diverse factual contexts.[109] In *United States v. Chovan*, the Ninth Circuit used the two-step framework to evaluate a law prohibiting domestic violence offenders from owning firearms.[110] The court determined that the law implicated Second Amendment rights but ultimately upheld it under intermediate scrutiny, as it was substantially related to the important government interest of preventing domestic gun violence.[111]

The test cut in both directions. For instance, a lifetime ban on firearm possession for people convicted of misdemeanor domestic violence likely went too far, according to the Fourth Circuit in *United States v. Chester*.[112] The court employed *Marzzarella*'s two-step analysis, and because historical evidence was "inconclusive," the court "assume[d]" that domestic violence misdemeanants came under the protection of the Second Amendment and moved to the second step, concluding that the government had not yet "carried its burden" of demonstrating that the law was justified under intermediate scrutiny.[113] Like the *Marzzarella* court, the *Chester* court found that strict scrutiny, while appropriate for a "severe

105. *Id.* at 97.
106. *Id.* at 98.
107. *Id.* at 100.
108. *See, e.g.*, Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 11, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).
109. *See id.* at 13-15.
110. 735 F.3d 1127, 1136 (9th Cir. 2013).
111. *See id.* at 1137-41.
112. 628 F.3d 673, 683 (4th Cir. 2010).
113. *Id.* at 681-83.

burden on the core Second Amendment right of armed self-defense," was not merited for lesser restrictions.[114] In this way, the two-step framework gave courts the latitude to navigate the tricky terrain between protecting public safety and honoring *Heller*'s commitment to individual rights. By tailoring their scrutiny to the specifics of each case, judges demonstrated the two-step framework's capacity to blend principled fidelity with pragmatic judgment. And interestingly, the outcomes produced by the two-step framework were not one-sided: One study showed that 40 percent of represented litigants asserting Second Amendment claims in federal appeals courts prevailed under the framework.[115]

Until *Bruen*, the Supreme Court did not intervene to either bless or renounce the *Marzarella* framework or its applications. But its denials of grants of certiorari in gun cases drew no less than five separate dissents from Justice Thomas, lamenting the differential treatment being afforded to the Second Amendment as compared with other provisions in the Bill of Rights.[116] In one instance, the Court declined to review a California law imposing a ten-day waiting period on anyone attempting to purchase a firearm, which the Ninth Circuit had upheld under the two-step framework.[117] Accusing the Court of hypocrisy, Justice Thomas speculated that his colleagues would never hesitate to review a state law that imposed a ten-day waiting period on obtaining an abortion or on the publication of racist speech—or on even a ten-*minute* delay of a traffic stop.[118] Another case, in which the Court turned away a challenge to California's ban on the open and concealed carry of firearms, prompted Justice Thomas to reach even deeper into the rhetorical well, writing that for "those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force,

114. *Id.* at 682 (quoting United States v. Skoien, 587 F.3d 803, 813-14 (7th Cir. 2009)).

115. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1478 tbl. 4, 1479 tbl. 5 (2018).

116. *See* Jackson v. City of San Francisco, 576 U.S. 1013, 1017 (2015) (Thomas, J., dissenting from denial of certiorari); Friedman v. City of Highland Park, 577 U.S. 1039, 1043 (2015) (Thomas, J., dissenting from denial of certiorari); Peruta v. California, 582 U.S. 943, 947-48 (2017) (Thomas, J., dissenting from denial of certiorari); Silvester v. Becerra, 138 S. Ct. 945, 950-52 (2018) (Thomas, J., dissenting from denial of certiorari); Rogers v. Grewal, 140 S. Ct. 1865, 1875 (2020) (Thomas, J., dissenting from denial of certiorari).

117. *Silvester*, 138 S. Ct. at 945, 947.

118. *Id.* at 951-52.

the guarantees of the Second Amendment might seem antiquated and superfluous," but nonetheless, that the Framers "reserved to all Americans the right to bear arms for self-defense."[119] These dissents read like a manifesto for a more rigid, categorical approach—one that would sweep away balancing tests in favor of an absolutist approach.

Many observers attributed the Court's reluctance to take any Second Amendment cases to the continuing tenure of Justice Kennedy, the crucial median Justice who was generally considered less dogmatic on the Second Amendment than some of his fellow conservative Justices.[120] And indeed, his departure, and Justice Kavanaugh's arrival on the bench, signaled a seismic shift in the Court's dynamics—one that soon made itself felt. When the Court agreed to hear *New York State Rifle & Pistol Ass'n v. City of New York*,[121] a challenge to New York City's restrictions on transporting licensed handguns, the Court at last seemed poised to weigh in post-*Heller* on the boundaries of the Second Amendment. The challenge, though, was quickly defanged.

Initially, the City had strict rules that prevented licensed gun owners from taking their firearms outside their homes, except to specified shooting ranges within the city; gun owners could not transport their handguns to homes or shooting ranges upstate.[122] Facing the Court's scrutiny, however, New York City amended the rule shortly after the certiorari grant, allowing gun owners to transport their firearms to second homes or ranges outside city limits.[123] The State of New York went further, passing legislation to prevent the City from reverting to its original restrictions.[124] This

119. *Peruta*, 582 U.S. at 943, 948.

120. *See, e.g.*, Jacob Sullum, *Kennedy's Departure Probably Will Give Us a Court More Inclined to Defend Gun Rights*, REASON (June 28, 2018, at 12:30 ET), https://reason.com/2018/06/28/kennedys-departure-probably-will-give-us/ [https://perma.cc/LG72-JQV3].

121. *See* 139 S. Ct. 939, 939 (2019) (mem.).

122. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020) (per curiam).

123. *See id.*; *see also* Suggestion of Mootness at 5-6, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280) (explaining that the relevant rules were changed due to the litigation); Adam Liptak, *Fearing Supreme Court Loss, New York Tries to Make Gun Case Vanish*, N.Y. TIMES (May 27, 2019), https://nyti.ms/2QnNsCg [https://perma.cc/C4NL-WV8H] (reporting that New York City changed its gun regulations in fear of a Supreme Court decision that "would endanger gun control laws across the nation").

124. *See* N.Y. PENAL LAW § 400.00(6) (McKinney 2025).

bureaucratic maneuver effectively stripped the case of its substance. The Court sidestepped the opportunity for a broader ruling and found the claims moot because petitioners had already been granted "the precise relief" they sought.[125] Accordingly, the Court declined to reach the merits or address the propriety of the *Marzzarella* framework.[126]

Justice Kavanaugh, however, used the occasion to hint at a brewing judicial reckoning. In a concurrence suggesting *Marzzarella*'s balancing act was too malleable, he wrote that "[t]he Court should address that issue soon."[127] The fulfillment of this wish was not long in coming. The following Term, the Court took up *Bruen*, sweeping aside the two-step framework and replacing it with a rigid historical approach that left no room for the judicial judgment that had defined Second Amendment jurisprudence for more than a decade.

C. The Bruen *Test*

Bruen is fundamentally a case about discretion—who wields it, how it is exercised, and whether it has any place in the modern interpretation of the right to bear arms. By rejecting both discretionary gun licensing regimes and the *Marzzarella* two-step test, the Court embraced a static view of the Second Amendment, imposing a rigid framework rooted solely in history. What would emerge from the case is not only a vision of the Constitution as an artifact frozen in time, but also an unworkable formula that ignores the realities judges face in the vast run of cases. *Bruen* rejects discretion in both licensing and judicial reasoning, leaving little room for the flexibility that had allowed courts to balance gun rights with public safety.

Central to *Bruen* is the distinction between two types of state firearm licensing regimes. In "shall issue" jurisdictions, the authorities must issue a concealed carry permit to any applicant who meets specific statutory criteria,[128] such as being of a certain age, having no criminal record, and completing a firearms training

125. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526.
126. *Id.*
127. *Id.* at 1527 (Kavanaugh, J., concurring).
128. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2123 (2022).

course.[129] If an applicant meets these criteria, the issuing authority has no discretion to deny the permit.[130] By contrast, "may issue" states allow the issuing authority to exercise considerable discretion in determining whether to issue a concealed carry permit.[131] Even if an applicant meets all the specified criteria, the authority can deny the permit based on additional considerations, such as the applicant's character or the perceived necessity for carrying a weapon.[132] Often, applicants must demonstrate a specific need for carrying a firearm, such as a credible threat to their personal safety.[133] Thus, "shall issue" states, with their predictable criteria, treat gun ownership as a bureaucratic, automatic entitlement, stripped of subjective judgment. "May issue" states, by contrast, treat gun ownership as a conditional allowance, with state authorities granted the power to require certain commitments to shared values and responsibilities. It is here, in this exercise of discretion, that New York State's licensing regime drew fire.

New York was one of six "may issue" states.[134] Its regime required applicants to demonstrate "proper cause" to obtain a license to carry a concealed handgun.[135] No part of the statute defined the scope of "proper cause," but New York courts had ruled it was a highly demanding standard that required proof of a "special need for self-protection" that was "distinguishable from that of the general community."[136] Individualized evidence "of particular threats, attacks, or other extraordinary danger to personal safety" were generally required to make that showing.[137] If an application was denied, judicial review was deferential, conducted pursuant to the "arbitrary and capricious" standard.[138] The plaintiffs in *Bruen*

129. *See id.* at 2162 (Kavanaugh, J., concurring).

130. *See id.*

131. *See id.* at 2161.

132. *See id.* at 2122-23 (majority opinion).

133. *Id.* at 2123.

134. The other states were California, Hawai'i, Maryland, Massachusetts, and New Jersey, joined by the District of Columbia. *Id.* at 2123-24.

135. *Id.* at 2123.

136. *Id.* (quoting Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

137. *Id.* (quoting Martinek v. Kerik, 743 N.Y.S.2d 80, 81 (App. Div. 2002)) (citing Kaplan v. Bratton, 673 N.Y.S.2d 66, 68 (App. Div. 1998)).

138. *Id.* (quoting Bando v. Sullivan, 735 N.Y.S.2d 660, 661 (App. Div. 2002)). As in federal court, "arbitrary and capricious" review is a deferential standard under which an agency's

challenged this regime, arguing that it infringed upon their Second Amendment rights by subjecting their ability to carry a concealed weapon to an undue level of discretion by state authorities.[139]

In a six-to-three decision, the Court invalidated New York's licensing regime.[140] Criticizing "may issue" laws, Justice Thomas dismissed the rationale behind them, stating flatly: "We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need."[141] To the new Court majority, discretion was a betrayal of the Second Amendment's guarantee. The decision announced the Second Amendment as a right that must stand on equal footing with other constitutional guarantees—immune from the perceived paternalism of public safety concerns.[142]

But *Bruen* went further, introducing a new interpretive framework that discarded the flexibility of the *Marzzarella* test, which, wrote Justice Thomas, included "one step too many."[143] Its second step, which involved balancing interests and means-end scrutiny, was "inconsistent with *Heller*'s historical approach."[144] Going forward, "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[145] In other words, a law must be justified by historical lineage rather than by contemporary public policy goals. The new "*Bruen* test" asks: (1) whether the regulated conduct falls within the scope of the Second Amendment; and if so, (2) whether that regulation is consistent with the historical tradition of firearm regulation in the United States.[146]

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decision "must be upheld if the record shows a rational basis for it." Kaplan v. Bratton, 673 N.Y.S.2d 66, 68 (App. Div. 1998) (citing Sullivan Cnty. Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972)).

139. *See* 142 S. Ct. at 2125.

140. *See id.* at 2156.

141. *Id.* at 2156.

142. Left unmentioned was the unusually deferential version of the "undue burden" standard previously applied in abortion cases such as *Gonzales v. Carhart*, which resulted in the Court upholding restrictions on abortion even when they imposed significant hurdles on access. *See* 550 U.S. 124, 146, 168 (2007).

143. *Bruen*, 142 S. Ct. at 2127.

144. *Id.* at 2129.

145. *Id.* at 2127.

146. *See id.* at 2126.

In some cases, this inquiry will be relatively "straightforward."[147] For instance, if a "regulation addresses a general societal problem that has persisted since the eighteenth century," the absence of a similar historical regulation may serve as evidence that the modern law is inconsistent with the Second Amendment.[148] Similarly, if historical attempts to address a comparable issue used "materially different means," this, too, could indicate that the "modern regulation is unconstitutional."[149] Conversely, if jurisdictions proposed analogous regulations during the relevant historical periods but those proposals were "rejected on constitutional grounds," such rejections would provide "probative evidence of unconstitutionality."[150] Notably, all these easy case examples would result in rulings of unconstitutionality.

The Court acknowledged, however, that not all cases will lend themselves to clear-cut historical comparisons. Regulations addressing "unprecedented societal concerns" or responding to "dramatic technological changes may require a more nuanced approach."[151] In these cases, the Court explained, history continues to serve as the primary guide but must often be applied through reasoning by analogy.[152] Analogical reasoning, the Court claimed, is a familiar tool for judges and lawyers, requiring an evaluation of whether modern and historical regulations are "relevantly similar,"[153] which may depend on "how and why" a regulation burdens the "right to armed self-defense," which the Court deemed "'the central component' of the Second Amendment right."[154]

The Court emphasized this approach does not demand a perfect historical match—a "historical *twin*"—but rather a "well-established and representative historical *analogue*."[155] As an example, the Court cited *Heller*'s invocation of the "longstanding" tradition of laws prohibiting "the carrying of firearms in sensitive places," such as

147. *Id.* at 2131.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 2132.
152. *Id.*
153. *Id.*
154. *Id.* at 2133 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).
155. *Id.*

polling places or courthouses.[156] Although the Court acknowledged that the historical record contains few examples of such prohibitions, it deemed that the absence of disputes regarding their lawfulness suggests their consistency with the Second Amendment.[157] But at the same time, it warned that simply finding a historical analogue does not guarantee constitutionality because such legislation could be an outlier.[158] The opinion advised that courts can use these examples to determine whether modern regulations governing new "sensitive places" are sufficiently similar to and representative of historical regulations, and thus similarly permissible.[159] Although the Court declined to provide an exhaustive guide to identifying relevant historical analogues, it asserted confidence that judges could navigate this delicate framework as they evaluate Second Amendment claims.[160] Ultimately, the Court held that New York's requirement to demonstrate "proper cause" was inconsistent with the nation's historical tradition of firearm regulation.[161]

The *Bruen* Court's new "historical tradition" inquiry effectively discards any evaluation, or even discussion, of governmental interests, or of the efficacy of laws or regulations in achieving those interests.[162] The Court justified this approach by arguing that such an analysis requires making "difficult empirical judgments" that are not appropriate for judicial determination within the context of constitutional rights.[163] But as a result, *Bruen* "has rendered the right to bear arms the most protected of rights in the Constitution."[164] Or, as one court said, "Any modern regulation that

156. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

157. *See id.*

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

159. *See id.* ("[A]nalogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check.").

160. *See id.* at 2134.

161. *Id.* at 2156.

162. Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 798-99 (2023) ("By adopting a historical tradition approach, the Court ruled that considerations with the aim of harm reduction are irrelevant to the constitutional inquiry.").

163. *See Bruen*, 142 S. Ct. at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 790-91 (2010)).

164. Khiara M. Bridges, *The Supreme Court 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 69-70 (2022) ("In other areas of constitutional law, a finding that

does not comport with the historical understanding of the right is to be deemed unconstitutional, regardless of how desirable or important that regulation may be in our modern society."[165]

The *Marzzarella* two-step framework candidly acknowledged that history rarely provides definitive answers to modern constitutional questions. The first step of the test asked whether the challenged regulation affected conduct outside the scope of the Second Amendment as originally understood, with the *Marzzarella* court recognizing that this inquiry would often lead to ambiguities.[166] Historical records, after all, are not self-interpreting; they require context, judgment, and often a fair amount of humility about their limits. The second step embraced this uncertainty, allowing courts to weigh public safety and governmental interests when history alone could not resolve the issue.[167]

Bruen, by contrast, refuses to admit that history might ever be ambiguous. It discards the flexibility of *Marzzarella*'s second step, replacing it with an insistence that all answers lie in the past, no matter how murky or fragmented the record may be. It presumes—contrary to the constitutional design that makes legislation difficult to pass—that the historical record is complete. It implicitly assumes that the Founders passed every policy they thought sound in principle. There is no room for the possibility that regulation could have been permissible at the founding if it was not passed by a legislature, giving no heed to the possibility that norms, rather than laws, may have been operative, rendering some legislation theoretically sound but unnecessary. By putting the burden on the government to find a historic analogue, *Bruen* denies that any reason could exist for a lack of regulation other than its unconstitutionality at the founding.

Further, *Bruen* reverses the presumptions that grounded *Marzzarella* in practicality. The first step of the *Marzzarella* test asked whether the conduct in question was clearly outside the historical scope of the Second Amendment, leaving regulations

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a regulation implicates or burdens a fundamental right does not end the inquiry.").

165. United States v. Price, 635 F. Supp. 3d 455, 460-61 (S.D. W. Va. 2022), *rev'd*, 111 F.4th 392 (4th Cir. 2024).

166. *See* United States v. Marzzarella, 614 F.3d 85, 91-94 (3d Cir. 2010).

167. *See id.* at 95-101.

presumptively valid unless history definitively said otherwise.[168] *Bruen* flips this inquiry, asking instead whether the regulation restricts an individual's conduct that could plausibly fall under the Amendment.[169] Once that threshold is crossed—and it almost always will be, given the broad phrasing of the question—the regulation is presumed unconstitutional unless a court can find a historical analogue, but not just any analogue, a representative analogue.[170] This shift narrows judicial discretion and effectively rewrites the Second Amendment as a blunt instrument against even modest gun control.

And more practically, as the next Section demonstrates, *Bruen* imposed a burdensome new task on lower courts: to comb through historical records and determine whether the law under review has "analogues" from the eighteenth and nineteenth centuries.

D. The Lower Courts Grapple with Bruen

Although the *Bruen* Court promised that a historical analysis would be more administrable than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions,"[171] many lower-court judges disagree. Indeed, many academics argue that *Bruen* has done "more to obscure than clarify the law."[172] As Professor Michael L. Smith has predicted, this ambiguity and confusion "will lead to fragmentation of the constitutional law and incorrect historical views gaining the force of law and becoming the basis for overturning laws and regulations."[173] This Section examines significant lower-court decisions applying *Bruen*, organized by type of firearm regulation. It shows that some courts have upheld certain regulations while others have invalidated the same regulations by applying *Bruen* in a different way. The inconsistency of the various rulings on the same provisions in different courts shows how *Bruen* fails at its most fundamental

168. *See id.*
169. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).
170. *See id.*
171. *Id.* at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 790-91 (2010)).
172. Kevin G. Schascheck II, *Recalibrating* Bruen: *The Merits of Historical Burden-Shifting in Second Amendment Cases*, 11 BELMONT L. REV. 38, 90 (2023).
173. Smith, *supra* note 162, at 833.

goal: constraining judicial discretion. If lower-court judges, working hard to genuinely find historical analogues and uncertain whether they have done so, regularly reach contrary outcomes, then *Bruen* does not provide certainty or ameliorate discretion; it simply masks its shortcomings in the language of certainty.

1. Felons in Possession

In one strand of cases, courts have confronted the federal "felon-in-possession" law, which bans possession of firearms or ammunition by individuals previously convicted of a crime punishable by more than one year.[174] Judges have come to different conclusions about the constitutionality of the ban under *Bruen*, for varying reasons. While doing so, several have expressed their frustration with the *Bruen* test. In *United States v. Nutter*, for instance, a federal district court in West Virginia upheld the ban against a defendant previously convicted of domestic violence.[175] The judge lamented *Bruen*'s directive, writing that it "requires original historical research into somewhat obscure statutory and common law authority from the eighteenth century by attorneys with no background or expertise in such research."[176]

Similarly, in *United States v. Butts*, a federal district court in Montana held that *Bruen* did not render 18 U.S.C. § 922(g)(1) unconstitutional and upheld its application against a defendant who had previously been convicted of making a false statement during a firearm transaction.[177] The court reasoned that *Bruen* explicitly preserved the framework established in *Heller* and *McDonald*, which deemed felon dispossession laws "presumptively lawful," and emphasized that *Heller* explicitly affirmed that the right to keep and bear arms is not unlimited and does not extend to disqualified individuals, such as felons.[178] As in *Nutter*, the *Butts* court questioned the utility of *Bruen*'s historical inquiry, writing that

174. *See* 18 U.S.C. § 922(g)(1).

175. *See* 624 F. Supp. 3d 636, 637-38, 645 (S.D. W. Va. 2022), *aff'd*, 137 F.4th 224 (4th Cir. 2025).

176. *Id.* at 640 n.6.

177. 637 F. Supp. 3d 1134, 1135, 1138 (D. Mont. 2022).

178. *Id.* at 1137 (quoting District of Columbia v. Heller, 554 U.S. 570, 626-27, 627 n.26 (2008)).

"[f]actual truth, as distinct from rational truth, informs legal thinking[,] but the problem is defining factual truth by 'amateur historians' like most judges."[179] Historians, the court wrote, "have demonstrated the impossibility of ascertaining facts without interpretation since facts themselves must first be picked out from the chaos of happenings and then fitted into a 'story' that is told from only one perspective which may have nothing to do with what originally occurred."[180]

In *United States v. Charles*, the defendant possessed a semiautomatic handgun, despite having felony convictions for residential burglary and possession with intent to distribute narcotics.[181] The district judge in Texas upheld the law restricting the defendant's access to his weapons, reading "the people" in the Second Amendment as "all *members of the political community*," which does not include those who lack political rights, such as felons.[182] The judge observed that at the time of the Second Amendment's ratification, rights to vote, hold public office, and serve on a jury were political rights thought of as equal to bearing arms; construing "the people" to exclude those without political rights was consistent with constitutional provisions governing rights to assemble and to vote for members of the House of Representatives, as well as with the historic tradition of prohibiting those convicted of crimes from voting.[183] The court cautioned against a cramped reading of *Bruen*:

> [W]ith more crimes called 'felonies' compared to 200 years ago, reading *Bruen* robotically would require the Government in ... as-applied challenges to find an analogy specific to the crime charged. For instance ... if someone already convicted of selling pigs without a license in Massachusetts (a felony) was then charged under § 922(g)(1), the Government would need to show a historical tradition since the founding of removing firearms from those who sold pigs without a license. That's absurd.[184]

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179. *Id.* at 1136 n.2 (quoting McDonald v. City of Chicago, 561 U.S. 742, 910 (2010) (Stevens, J., dissenting)).

180. *Id.*

181. 633 F. Supp. 3d 874, 875 (W.D. Tex. 2022).

182. *Id.* at 880 (quoting *Heller*, 554 U.S. at 580).

183. *See id.* at 880-82.

184. *Id.* at 884.

And yet, the Third Circuit, sitting en banc, struck down the felon-in-possession provision under just such *Bruen*-inspired reasoning. In *Range v. Attorney General*, the defendant had been denied a firearm because he had previously been convicted of making a false statement in order to obtain food stamps.[185] The court rejected "the Government's contention that only 'law-abiding, responsible citizens' are counted among 'the people' protected by the Second Amendment."[186] And per step two of *Bruen*, the court found that the U.S. does not have a longstanding history and tradition of depriving people like Range of their firearms.[187] This was despite, as the dissenting judges emphasized, the "consistent admonishment" in *Heller* and *Bruen* "that felon bans are 'longstanding' and 'presumptively lawful.'"[188]

2. Felony Indictment

A similar split in cases emerged regarding 18 U.S.C. § 922(n), the federal ban on firearm possession by individuals under felony indictment, and lower-court judges once again expressed their frustration in applying the *Bruen* test to a federal firearm ban. In *United States v. Kelly*, a district court in Tennessee upheld the ban against a defendant who knowingly received a firearm while under indictment for aggravated assault.[189] The court's rationale was largely rooted in the pre-*Bruen* understanding that the common law permitted disarming people based on the distinction between "peaceable," "law-abiding citizens" and criminal ones.[190] The judge also provided a variety of criticisms of *Bruen*. The vast majority of firearms cases, she emphasized, are not argued with the intensive historical research seen in high-profile Supreme Court cases.[191] This

185. 69 F.4th 96, 98-99 (3d Cir. 2023) (en banc), *vacated sub nom.*, Garland v. Range, 144 S. Ct. 2706 (2024).

186. *Id.* at 103.

187. *See id.* at 104.

188. *See id.* at 114 (Shwartz, J., dissenting).

189. *See* No. 22-cr-00037, 2022 WL 17336578, at *1 (M.D. Tenn. Nov. 16, 2022).

190. *See id.* at *5 (first citing United States v. Carpio-Leon, 701 F.3d 974, 981 (4th Cir. 2012); then citing United States v. Yancey, 621 F.3d 681, 685-86 (7th Cir. 2010); and then citing United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010)).

191. *See id.* at *3.

is a foreseeable problem because, in contrast to the Court, which has taken fewer than eighty cases per Term in recent years,[192] the Department of Justice handles thousands of such cases annually, making it impractical to expect deep historical research in every instance.[193] This reality leads to decisions in serious criminal cases being made on "law office history."[194] Additionally, the judge noted that firearms today are vastly different from those at the time of the founding, a fact that escapes scrutiny even under *Bruen*.[195]

The Northern District of Indiana reached the opposite conclusion when analyzing the same federal ban. In *United States v. Holden*, the court found the ban was unconstitutional because it was not "consistent with the history and tradition of firearm regulation."[196] This is because the earliest prohibitions on felon possession are from 1938, too far after ratification of the Second Amendment, and surety laws, which were not analogous enough to the current regulation.[197] But the judge in *Holden* nonetheless agreed with the *Kelly* court on one core issue: the difficulty of applying *Bruen* in a reliable manner. In an unusual passage, the judge emphasized his discomfort with his own decision: "This opinion was drafted with an earnest hope that its author has misunderstood [*Bruen*]. If not, most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional."[198] Even more pointedly, the judge remarked that the "Constitution, as amended and as imperfect as it was, is the legacy of those eighteenth-century Americans; it insults both that legacy and their memory to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways."[199]

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192. *See Analysis*, WASH. UNIV. L.: SUP. CT. DATABASE, http://scdb.wustl.edu/ [https://perma.cc/3U8W-683F] (Under "Range of Terms," input "2022- 2024"; then under "Limit cases by Court Era," select "Roberts 10 | 2022-Present"; then click "analyze").

193. *See Kelly*, 2022 WL 17336578, at *3.

194. *See id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting)).

195. *See id.* at *4.

196. 638 F. Supp. 3d 931, 938 (N.D. Ind. 2022), *rev'd*, 70 F.4th 1015 (7th Cir. 2023).

197. *See id.* at 937.

198. *Id.* at 941 (citation omitted).

199. *Id.*

3. State Assault Weapons Bans

State laws prohibiting assault weapons have also faced contrasting fates in federal court, illustrating once again the lack of predictability of the *Bruen* test and the falsity of the notion that it constrains judicial discretion. In *National Ass'n for Gun Rights v. Lamont*, a district court upheld Connecticut's post-Sandy Hook law restricting the ability of individuals to own specific types of firearms and accessories (assault weapons), as well as large-capacity magazines.[200] The court reasoned that, first, the plaintiffs did not show that the assault weapons at issue were "commonly sought out, purchased, and used for self-defense."[201] Second, because the weapons were "more often sought out for their militaristic characteristics than for self-defense," the weapons were "disproportionately dangerous to the public based on their increased capacity for lethality, and ... more often used in crimes and mass shootings than in self-defense."[202] The court interpreted *Bruen* and *Heller* to mean that the "[p]laintiffs must bear the burden of producing evidence that the specific firearms they seek to use and possess are in common use for self-defense, that the people possessing them are typically law-abiding citizens, and that the purposes for which the firearms are typically possessed are lawful ones."[203]

In other words, the "common use" inquiry must come under the first *Bruen* step, interpreting the text of the Amendment, not under the historical analysis inquiry. But it is arguable that this analysis belongs in the second *Bruen* step, not in the first. Regardless of which is correct, this question illustrates that there is ambiguity—and thus discretion—even in what is covered by each stage of the analysis. Further, the court in *Lamont* had to decide how broadly to read the scope of allowable historical evidence. It chose a broad reading: "Nowhere does *Bruen* forbid consideration of any regulations or history after the end of the nineteenth century, and the Court will consider evidence from this period as it relates to, either confirming or contradicting, earlier Founding, antebellum,

200. 685 F. Supp. 3d 63, 71 (D. Conn. 2023), *aff'd*, 153 F.4th 213 (2d Cir. 2025).
201. *Id.*
202. *Id.*
203. *Id.* at 89.

and Reconstruction-era evidence."[204] It is easy to imagine Justice Thomas fuming at such a conclusion,[205] but once again the problem lies with the ambiguity of his *Bruen* opinion.

Other state assault weapons bans have also faced scrutiny, and two cases that came out of separate federal districts in Illinois, interpreting the same law but reaching opposing conclusions, are instructive. In *Bevis v. City of Naperville*, a gun store brought a challenge to laws prohibiting the sale of assault weapons and high-capacity magazines.[206] The northern district court, which upheld the laws, found specifically that "assault weapons" are commonly regulated and held that they are not protected by the Second Amendment because they are "particularly dangerous."[207] According to the court, the historical analogues supported banning weapons that pose a danger to public safety even if the weapons were not unusual.[208] As such, banning weapons with such public safety implications is consistent with the nation's history and tradition of firearms regulation.[209] Yet, when the southern district court addressed the same provision in *Barnett v. Raoul*, it found that both AR-15-style rifles and magazines with a capacity of greater than ten rounds are "in common use," as required by *Bruen*, and that historical conceal-carry regulations were not sufficiently similar to the Illinois law banning possession of assault rifles.[210] The court also found that, per *Bruen*, firearms must be "dangerous and unusual" to fall outside of the Second Amendment's protection, which the defendants had not shown.[211] Altogether, the two courts in the same state, addressing the same provision of the same law, disagreed on: the relevance of the facts, including whether particular weapons were common; the significance of the history, including how similar other laws were;[212] and even the requirements of the challenged

204. *Id.* at 110 n.51.

205. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136-37 (explaining that postenactment history should not be given undue weight when interpreting the meaning of the Second Amendment).

206. 657 F. Supp. 3d 1052, 1056 (N.D. Ill. 2023), *aff'd*, 85 F.4th 1175 (7th Cir. 2023).

207. *See id.* at 1075.

208. *See id.*

209. *Id.*

210. *See* 671 F. Supp. 3d 928, 945-46 (S.D. Ill. 2023) (quoting *Bruen*, 142 S. Ct. at 2128), *vacated sub nom.*, Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023).

211. *See id.* at 946 (quoting *Bruen*, 142 S. Ct. at 2128).

212. *Contrast id.* (holding that historical conceal-carry regulations are "categorically

legislation. Clearly, *Bruen* is no less certain or discretionary than *Marzzarella*. *Bruen* may have flipped the default, but it has not changed the options available to judges who are willing to put in the extraordinary work that the test requires of them.

4. Serial Numbers

Even something as seemingly simple as the federal ban on possession of a firearm without a serial number (18 U.S.C. § 922(k))[213] has produced directly contrasting decisions. In *United States v. Price*, a district court in West Virginia dismissed an indictment under the statute, and found that "serial numbers [for firearms] were not required or even in common use, in 1791," and no law prohibited firearms that had serial numbers removed until 1990.[214] Additionally, the "'societal problem[s]' addressed by [the federal law] appear[ed] to be crime involving stolen firearms, and assisting law enforcement in solving crime."[215] The court found that no similar law had been enacted, and the founders had addressed societal problems associated with gun crimes through "materially different means."[216] Although one might imagine the need for cataloging guns may have increased with the exponential rise in gun ownership in modern times, *Bruen* leaves no room for such contextualization. The judge thus took a very restrictive view of *Bruen*'s application—though not happily, describing himself as "hard pressed" in determining what was "relevantly similar," what was "analogous," and whether the absence of a historical analogue indicated a lack of such past regulations or a failure of research.[217]

Contrarily, the United States District Court for the Northern District of Indiana, in *United States v. Reyna*, came to the opposite conclusion on the same provision of the same legislation.[218] It held that the plain text of the Second Amendment did not require

different" from the regulation at issue and therefore not instructive), *with Bevis*, 657 F. Supp. 3d at 1072-73 (finding that historical conceal-carry regulations established a history and tradition of constitutionally regulating dangerous weapons).

213. 18 U.S.C. § 922(k).

214. 635 F. Supp. 3d 462, 456 (S.D. W. Va. 2022), *rev'd*, 111 F.4th 392 (4th Cir. 2024).

215. *Id.* at 463 (first alteration in original).

216. *Id.* at 464 (quoting *Bruen*, 142 S. Ct. at 2131).

217. *Id.* at 461 n.3.

218. No. 21-CR-41, 2022 WL 17714376, at *1, *4 (N.D. Ind. Dec. 15, 2022).

dismissal of an indictment under § 922(k) because the law prohibited "'possession of a firearm with an obliterated serial number' and not 'mere possession.'"[219] According to the judge, "[l]aw-abiding citizens don't typically possess firearms with obliterated serial numbers for lawful purposes," so the claim failed at the plain-text stage of the Constitutional analysis, and the *Bruen* historical inquiry was unnecessary.[220] Judges looking at the same legislative language, it seems, cannot even agree on whether *Bruen* analysis should be undertaken, let alone on what outcome it leads to, or how to find the evidence to base such analysis upon, if it is undertaken.

5. Minors

Courts have come to similarly conflicting conclusions on state bans on possession by individuals under the age of twenty-one, and this line of cases illustrates an even more fundamental ambiguity inherent in *Bruen*: What is the relevant time period that judges should even be considering? Because the Second Amendment applies to the states by virtue of incorporation through the Fourteenth Amendment,[221] it is arguable that evidence as recent as 1868 might be permissibly considered as the relevant founding period for that Amendment.[222] *Bruen* did not settle this issue,[223] and lower courts have come to inconsistent conclusions on this evidentiary question, as well as on the substantive question of regulations' application to minors.

In *Firearms Policy Coalition, Inc. v. McCraw*, the court struck down such a prohibition in Texas, and held that eighteen-to-twenty-year-olds have a Second Amendment right to carry arms and that the state did not meet its burden of showing such restrictions were part of the nation's historical tradition.[224] In reaching this decision, the court considered Founding-Era traditions to be the relevant

219. *Id.* at *4.

220. *Id.* at *5.

221. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

222. For an analogous persuasive argument of this position, as applied to the original public-meaning analysis of gender discrimination under the Fourteenth Amendment, considering legislation as late as 1866, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination,* 90 TEX. L. REV. 1, 4-11 (2011).

223. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137-38 (2022).

224. 623 F. Supp. 3d 740, 745 (N.D. Tex. 2022).

benchmark.[225] The court found that "by 1923, 22 states had laws imposing general restrictions on 'the purchase or use of firearms' for those younger than 21," but held that those restrictions could not support Texas's prohibition.[226]

By contrast, in *National Rifle Ass'n v. Bondi*, the Eleventh Circuit upheld a Florida statute banning possession by those under twenty-one.[227] Performing *Bruen*'s historical inquiry, the court found that Reconstruction-Era regulations "burdened law-abiding citizens' rights to armed self-defense to an even greater extent and for the same reason as the Act does."[228] Thus, the ban was constitutional.[229]

The contrasting conclusions reached by courts in these cases are not surprising, not only because of the usual ambiguities of *Bruen* discussed so far, but also because the chances of finding an analogous legislative provision—when considering approximately an additional century of legislative enactments by the national government as well as by the states throughout the nation—massively increase simply due to sheer numbers. But, the founding era of the Fourteenth Amendment came on the heels of immense social, political, and economic turmoil and in the aftermath of the most violent period of United States history.[230] Thus, the raw number of provisions make finding analogous regulations more likely, but the nature of the regulations is likely to be broader. Accordingly, we can expect that those who tend to favor gun restrictions are more likely to prefer expanding the range of evidence to include the later historical evidence, and those who disfavor such restrictions will prefer to contract it, restricting the analysis to the older and necessarily more minimal historical record. The availability of this choice belies the claim that *Bruen* constrains judicial discretion.

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225. *See id.* at 748 (quoting United States v. Jimenez-Shilon, 34 F.4th 1042, 1044-45 (11th Cir. 2022)).

226. *Id.* at 756.

227. 61 F.4th 1317, 1320 (11th Cir. 2023), *aff'd on reh'g en banc*, 133 F.4th 1108 (11th Cir. 2025).

228. *Id.* at 1325.

229. *Id.* at 1332; *see also* Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 127 F.4th 583, 586 (5th Cir. 2025) (arriving at a similar holding concerning federal age-dependent firearms statutes); *infra* text accompanying notes 331-36 (discussing *Reese*).

230. *See* Calabresi & Rickert, *supra* note 222, at 37 ("In reality, America's unusual post-Civil War political situation complicated state legislatures' discussions of the Fourteenth Amendment's propriety, meaning, and scope, and undoubtedly confused the public.").

6. Other Cases

Other regulations have faced scrutiny in the federal courts, yielding more occasions for lower-court judges to express their dismay and confusion about *Bruen*'s demands. In *United States v. Daniels*, the defendant admitted to smoking marijuana multiple days per month while possessing a firearm, in violation of 18 U.S.C. § 922(g)(3).[231] The court described whether the ban met the *Bruen* test as "a close and deeply challenging question,"[232] but found that "at no point in the 18th or 19th century did the government disarm individuals who used drugs or alcohol at one time from possessing guns at another."[233] And § 922(g)(3) "was not enacted until 1968, nearly two centuries after the Second Amendment was adopted."[234] Thus, "history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage."[235] In his concurrence, Judge Higginson opined on *Bruen*'s difficulties, writing that it is "increasingly apparent" that courts "are struggling at every stage of the *Bruen* inquiry" to determine what is required to demonstrate a "tradition" and which regulations constitute appropriate analogues.[236] In trying to adhere to *Bruen*'s historical test, courts have taken excessively restrictive approaches that apply analogical reasoning as a "regulatory straightjacket." Judge Higginson concluded:

> I cannot help but fear that, absent some reconciliation of the Second Amendment's *several* values, any further reductionism of *Bruen* will mean systematic, albeit inconsistent, judicial dismantling of the laws that have served to protect our country for generations. Furthermore, such decisions will constrain the ability of our state and federal political branches to address gun violence across the country, which every day cuts short the lives of our citizens. This state of affairs will be nothing less than a

231. 77 F.4th 337, 339 (5th Cir. 2023), *vacated mem.*, 144 S. Ct. 2707 (2024).
232. *Id.*
233. *Id.* at 340.
234. *Id.*
235. *Id.*
236. *Id.* at 358-59 (Higginson, J., concurring).

> Second Amendment caricature, a right turned inside out, against freedom and security in our State.[237]

Other judges have expressed similarly memorable and biting sentiments. In *United States v. Love*, the defendant "pleaded guilty to maintaining a drug-involved premises" and received a "dangerous weapon enhancement" under federal sentencing guidelines.[238] The court rejected his argument that the enhancement violated the Constitution under *Bruen*.[239] According to the court, "'the people' whose right to bear arms is protected by the Second Amendment are the 'law-abiding,' responsible citizens, not those who would violate the nation's laws."[240] The Court went on to explain that the law "punishes firearm possession only when it occurs in relation to a federal drug offense," so it "applies only to those who are actively violating the nation's drug laws."[241] That brought it "well-within this nation's historical limitations of gun ownership."[242] Thus, the application of *Bruen* hinges not only on the court's understandings of history, analogy, representativeness, and relevant evidence, but also on its interpretations of such broad empirical and policy questions as to what can be inferred from a person's use of illegal drugs and the purpose of legislation restricting such use.

The *Love* court provided a multipronged critique of the difficulties *Bruen* created for courts through the complexities and ambiguities involved in finding historical analogues and using them to judge modern regulations. The court critiqued *Bruen*'s representativeness requirement, noting that the Supreme Court's requirement for finding a "historical *analogue*, not a historical *twin*" still leaves open the risk of endorsing historical outliers that were unacceptable by past standards.[243] The court also complained of *Bruen*'s ambiguous probative standards, as not all historical evidence is equally valid: It must be neither too old nor too recent to be relevant, demanding a "goldilocks of historical analogues."[244] The court critiqued *Bruen*'s

237. *Id.* at 362.
238. 647 F. Supp. 3d 664, 667 (N.D. Ind. 2022).
239. *See id.* at 670.
240. *Id.* (quoting Range v. Att'y Gen. U.S., 53 F.4th 262, 283-84 (3d Cir. 2022)).
241. *Id.*
242. *Id.*
243. *See id.* at 669.
244. *Id.*

quantitative ambiguity, and complained that the opinion also suggests variability in the number of analogues needed, with some indications that even multiple historical precedents may be insufficient.[245] And the court complained of *Bruen*'s qualitative ambiguity by noting that the geographical origin of these analogues matters, with different historical contexts, such as those from the original thirteen colonies versus the "wild west," being weighted differently.[246]

The court concluded that, altogether, these problems put lower courts in an impossible position:

> Given all these uncertainties, one could rightfully ask why district courts are being tasked with making piecemeal determinations on each firearm law in the first place. *Bruen* is clear that the Second Amendment "codified a right inherited from our English ancestors," a right that "*pre-exist[ed]*" the Constitution. The entire universe of permissible firearm regulations, then, was set at the adoption of the Bill of Rights, if not earlier. *Bruen* could have delineated regulations that fall within that universe and those that do not. By instead announcing an inconsistent and amorphous standard, the Supreme Court has created mountains of work for district courts that must now deal with *Bruen*-related arguments in nearly every criminal case in which a firearm is found.[247]

This unusually frank denunciation of the Supreme Court and the conundrum it created for lower courts was followed by a sarcastic expression of gratitude that "the problems with *Bruen*'s game of historical Where's Waldo" were merely academic for the Court because the defendant's claim failed at the textual stage of the Constitutional analysis.[248]

The disarray *Bruen* created in lower courts trying to apply the amorphous standard was well articulated by one lower-court judge when addressing—perhaps with ironic foreshadowing—the firearm

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245. *See id.* at 669-70 (citing N.Y. State Rifle & Pistol Assn' v. Bruen, 142 S. Ct. 2111, 2142, 2153 (2022)).

246. *Id.* at 670.

247. *Id.* at 670 (alteration in original) (citation omitted) (quoting *Bruen*, 142 S. Ct. at 2130, 2139).

248. *Id.*

regulation that would ultimately come under Supreme Court scrutiny in *United States v. Rahimi*, discussed below.[249] In *United States v. Perez-Gallan*, the defendant was found to have violated the federal ban on possession of a firearm by persons under a restraining order for domestic abuse (18 U.S.C. § 922(g)(8)).[250] The court struck down the ban because it concluded that all of the government's proffered historical analogues slightly differed from the modern regulation, which disarmed domestic abusers subject to restraining orders.[251] In a passage evincing that its decision to strike down the law was not motivated by ideological preference, the court warned against reading *Bruen* too strictly and predicted the likely inconsistencies that would continue to arise under *Bruen* analysis:

> For one thing, one could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right under *Bruen*. Say the Government in Court A develops an in-depth historical analysis to uphold a regulation, and Court A finds that the Government met the burden imposed by *Bruen* .... The Government in Court B, in contrast, could face the same regulation as in Court A on the same day, but develop no analysis or fail to respond at all. An inflexible reading of *Bruen* then, would require Court B to declare the regulation unconstitutional. On that basis, the same regulation gets different results based on how adept at historical research the Government's attorneys are in a particular location or the time they have to devote to the task.[252]

The Supreme Court would soon feel the repercussions of this lower-court confusion caused by *Bruen*, in an appeal from the Fifth Circuit's ruling in *United States v. Rahimi*.

E. The Supreme Court Faces the Consequences of Bruen*'s Illogic:* Rahimi

249. *See infra* Part I.E.

250. 640 F. Supp. 3d 697, 699 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023), *vacated*, 144 S. Ct. 2707 (2024).

251. *See id.* at 716.

252. *Id.* at 713-14.

Zackey Rahimi perpetrated a series of violent incidents in Texas: He fired shots into a residence after a drug sale, shot at another driver during a road-rage incident, fired at a constable's vehicle, and discharged a firearm publicly when a friend's credit card was declined.[253] Rahimi was identified and apprehended by police officers, who discovered a rifle and a pistol at his home.[254] At the time of his arrest, Rahimi was under a civil protective order stemming from an alleged assault on his ex-girlfriend, which prohibited him from committing family violence, approaching his ex-girlfriend's residence or workplace, engaging in harassing behavior, and possessing a firearm.[255] Having been indicted for possessing a firearm while under a domestic-violence restraining order, Rahimi mounted a facial challenge against § 922(g)(8).[256]

Before *Bruen*, both the district court and a panel of the Fifth Circuit had rejected Rahimi's claim and upheld the constitutionality of § 922(g)(8).[257] After *Bruen*, however, Rahimi's fortunes improved. The Fifth Circuit requested supplemental briefing specifically focused on how *Bruen* should influence its analysis.[258] After re-evaluating the case under the *Bruen* test, the court concluded that the application of § 922(g)(8) to Rahimi must fail.[259] While disarming domestic abusers may serve important government interests, "*Bruen* foreclose[d] any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right."[260] And under the historical scrutiny newly required by *Bruen*, the statute could not be justified as being consistent with the nation's historical tradition of firearm regulation.[261]

The Fifth Circuit panel's historical analysis was a telling indication of just how exacting *Bruen* scrutiny could be. The

253. *See* 61 F.4th 443, 448-49 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).
254. *Id.* at 449.
255. *Id.*
256. *Id.*
257. *See* United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *2 (5th Cir. June 8, 2022) (per curiam), *withdrawn and superseded*, 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).
258. *See Rahimi*, 61 F.4th at 449.
259. *See id.* at 450.
260. *Id.* at 461.
261. *See id.*

government had presented historical analogues to justify the prohibition, which the court categorized into three groups: disarmament of "dangerous" people, "going armed" laws, and surety laws.[262] None of these were sufficient.[263] First, the historical examples of disarming "dangerous" people, including the English Militia Act of 1662, were not persuasive because such laws were often politically motivated and aimed at suppressing opponents rather than at protecting the general public.[264] Thus, they did not provide a relevant analogy to modern regulations preventing domestic violence offenders from possessing firearms.[265] Second, early colonial laws that historically prohibited "going armed" in a manner that could terrorize the public were considered inapposite because they focused on preventing terror, not domestic violence or personal disputes.[266] Finally, the surety laws that allowed individuals to demand a peace bond from those they feared might harm them were deemed closer to the spirit of § 922(g)(8), as they involved preventive measures based on suspicion of future harm.[267] However, the court found that such laws did not typically result in the complete prohibition of weapon possession, but merely imposed conditions (such as posting surety).[268] Therefore, they did not justify the broad restrictions imposed by § 922(g)(8) and therefore did not fully satisfy *Bruen*.[269] Ultimately, the Fifth Circuit concluded that none of the government's numerous historical analogues sufficiently paralleled the modern statute.[270] Thus, § 922(g)(8) imposed a burden on the right of law-abiding citizens to armed self-defense that was not aligned with historical practices, which rendered the statute unconstitutional under *Bruen*.[271]

Because the Fifth Circuit struck down a seminal regulation never previously called into question—one meant, no less, to protect victims of domestic violence—the opinion in *Rahimi* raised alarm

262. *Id.* at 456.
263. *See id.*
264. *See id.* at 456.
265. *See id.*
266. *Id.* at 459.
267. *See id.* at 459-60.
268. *Id.* at 460.
269. *Id.*
270. *Id.*
271. *See id.* at 260-61.

bells among commentators, one of whom said that the opinion "can charitably be described as nuts, and accurately as pernicious."[272] This is because the policy consequences of such an outcome would be so obviously disruptive and severe; after all, more than one million acts of domestic violence are reported in the United States every year.[273] The U.S. Solicitor General, Elizabeth Prelogar, quickly appealed the ruling to the Supreme Court, and argued that the panel "overlooked the strong historical evidence supporting the general principle that the government may disarm dangerous individuals."[274] The Court granted certiorari and set the case for oral argument in November 2023.[275]

Arguing in front of the Justices, Solicitor General Prelogar attempted to argue within the *Bruen* framework, pointing out that *Bruen* did not impose a "demand for a historical twin," and that both *Bruen* and *Heller* "recognized that Congress may disarm those who are not law-abiding, responsible citizens."[276] But the Court's most recently appointed member, Justice Jackson, who had not joined the Court until months after *Bruen*,[277] took opportunities to question the *Bruen* test and suggest that its consequences were untenable. She noted that history included laws "banning firearm possession by disfavored categories of people," such as freed slaves and Native Americans, and that the government had chosen not to rely on those laws in its submission to the Court.[278] Thus, she found herself "troubled by having a history and traditions test that also requires some sort of culling of the history so that only certain people's history counts."[279] She pointedly asked: "Isn't that a flaw with

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272. *See* Linda Greenhouse, Opinion, *We're About to Find Out How Far the Supreme Court Will Go to Arm America*, N.Y. TIMES (Mar. 29, 2023), https://www.nytimes.com/2023/03/29/opinion/guns-supreme-court.html [https://perma.cc/K932-DTPF].

273. *See id.*

274. Petition for Writ of Certiorari at 11, United States v. Rahimi, 144 S. Ct. 1899 (2024) (No. 22-915).

275. United States v. Rahimi, 143 S. Ct. 2688, 2688-89 (2023) (mem.).

276. Transcript of Oral Argument at 4-5, *Rahimi,* 144 S. Ct. 1889 (2024) (No. 22-915).

277. The Court issued the *Bruen* decision a week before Justice Jackson was sworn in as an Associate Justice of the Court. *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2111 (2022) (decided on June 23, 2022), *with Oath Ceremony: The Honorable Ketanji Brown Jackson*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/press/oath/oath_jackson.aspx [https://perma.cc/92KD-LGV9] (sworn in on June 30, 2022).

278. *See* Transcript of Oral Argument, *supra* note 276, at 53, 84.

279. *Id.* at 85.

respect to the test?"[280] What if the Court were convinced that "domestic violence was not considered dangerousness back in the day?"[281] Would that not preclude invalidation of the law under *Bruen*? And if not, "what's the point of going to the Founding Era?"[282] Justice Jackson's queries exposed the contradictions inherent in relying on a cherry-picked historical record to determine the constitutionality of modern laws. And her skepticism gave voice to a broader concern—one that views the *Bruen* approach not as a neutral analytical tool, but as a vessel for perpetuating historical inequities in the name of originalism.

Justice Kagan provided Solicitor General Prelogar with an open floor to address the ongoing confusion and division that *Bruen* had engendered, asking for "useful guidance" that might aid the lower courts, not only in this case but in future applications of *Bruen*.[283] In response, Solicitor General Prelogar outlined three fundamental methodological errors that could be addressed. First, she criticized *Bruen*'s narrow focus on regulations, emphasizing that the historical analysis should extend beyond mere regulations to include a broad array of sources that informed the original meaning of the Second Amendment, such as English practice, state constitutional precursors, treatises, and state judicial decisions.[284] Second, Solicitor General Prelogar criticized the lower courts' *Bruen* analyses of historical evidence, in which regulations were scrutinized at an excessively specific level, essentially demanding a "historical twin."[285] She argued instead for a principle-based approach that would use history to discern enduring principles defining the scope of the Second Amendment, urging the courts to adopt a higher level of generality and not to overly scrutinize historical analogues.[286] Finally, Solicitor General Prelogar addressed the problem of courts' attributing significant weight to the *absence* of specific historical regulations, even when such an absence may not be constitutionally relevant.[287] For instance, the lack of historical regulations

280. *Id.*
281. *Id.* at 18.
282. *Id.* at 18-19.
283. *Id.* at 38.
284. *See id.* at 39.
285. *See id.* at 39-40.
286. *See id.* at 40.
287. *Id.*

disarming domestic abusers does not imply a constitutional prohibition against such measures, especially when there is no historical evidence indicating constitutional concerns with such regulations.[288] Justice Kagan's questioning and Solicitor General Prelogar's responses seemed intended to plant seeds of doubt within the conservative majority about the coherence and consequences of *Bruen*, with Solicitor General Prelogar's "guidance" offering a way forward that could preserve the Court's dignity while subtly conceding that the *Bruen* test, as applied, was too brittle to endure.

Most observers expected that the Court would find a way to uphold the federal regulation, allowing the government to continue disarming those under domestic-violence restraining orders.[289] This prediction turned out to be right. In an eight-to-one decision, the Court upheld the law, with only Justice Thomas dissenting.[290] Writing that the lower courts had "misunderstood the methodology of our recent Second Amendment cases," Chief Justice Roberts admonished that *Heller* and *Bruen* were "not meant to suggest a law trapped in amber."[291] The Court concluded that historical laws collectively affirm a principle that aligns with "common sense": Individuals who pose a clear threat to others may be disarmed.[292]

While § 922(g)(8) is not an exact replica of the early surety laws or "going armed" laws, the Court held that the laws nonetheless share their essential characteristics in "why and how [they] burden[] the Second Amendment right."[293] Like its historical antecedents, the statute applies only to individuals subject to judicial findings of dangerousness and imposes a temporary restriction on firearm possession tied to the duration of a restraining order, which satisfies *Bruen*.[294] The Court also reiterated *Heller*'s

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288. *See id.* at 40-41.

289. *See, e.g.*, Amy Howe, *Justices Appear Wary of Striking Down Domestic-Violence Gun Restriction*, SCOTUSBLOG (Nov. 7, 2023), https://www.scotusblog.com/2023/11/justices-appear-wary-of-striking-down-domestic-violence-gun-restriction/ [https://perma.cc/L9QF-QL23]; Robert Barnes, *Court Seems Likely to Allow Gun Bans for Those Under Protective Orders*, WASH. POST (Nov. 7, 2023), https://www.washingtonpost.com/politics/2023/11/07/supreme-court-guns-domestic-violence-rahimi/ [https://perma.cc/WQ9N-JKQW].

290. *See* United States v. Rahimi, 144 S. Ct. 1889, 1903; *id.* at 1930 (Thomas, J., dissenting).

291. *Id.* at 1897 (majority opinion).

292. *Id.* at 1901.

293. *Id.*

294. *See id.* at 1901-02.

explicit identification of prohibitions on gun possession by felons and the mentally ill as "presumptively lawful" and reiterated that *Bruen*'s requirement of a "historical analogue" does not demand a "historical twin."[295] Finally, the Court critiqued the Fifth Circuit's interpretation of *Bruen*, which focused on hypothetical cases rather than its most common and constitutionally permissible applications.[296]

Though the opinion was joined by seven Justices, the Chief Justice's opinion for the Court was followed by no fewer than five separate concurrences, accentuating both the importance of the issue and the eagerness of each Justice to put his or her own "spin" or qualification on the outcome.[297] Justice Sotomayor, joined by Justice Kagan, praised the Court for allowing its historical analysis to be flexible and "calibrated to reveal something useful" to modern contexts.[298] But the concurrence also emphasized Justice Sotomayor's ongoing concerns with *Bruen*'s "myopic focus on history and tradition."[299] She argued that under "means-end scrutiny," of the pre-*Bruen* type embraced by the lower courts and discussed above, the domestic-restraining-order law would "easily pass constitutional muster," as it was narrowly tailored to the government's compelling interest in protecting domestic violence victims from harm, a risk she supported with data on intimate partner homicides and officer fatalities linked to domestic disputes.[300] For the moment, though, Justice Sotomayor acknowledged that the *Rahimi* majority opinion provided "a more helpful model than the dissent for lower courts struggling to apply *Bruen*."[301]

Justice Jackson was less magnanimous. Though she joined the majority opinion, Justice Jackson criticized *Bruen* for imposing a

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295. *Id.* at 1902-03 (first quoting District of Columbia v. Heller, 554 U.S. 570, 626, 627 n.26 (2008); and then quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

296. *See id.* at 1903.

297. *See id.* at 1903-07 (Sotomayor, J., concurring); *id.* at 1907-10 (Gorsuch, J., concurring); *id.* at 1910-24 (Kavanaugh, J., concurring); *id.* at 1924-26 (Barrett, J., concurring); *id.* at 1926-30 (Jackson, J., concurring).

298. *Id.* at 1904 (Sotomayor, J., concurring).

299. *Id.* at 1906.

300. *See id.*

301. *Id.* at 1907.

historical test that had left lower courts "at sea" and struggling to apply it consistently.[302] She argued that *Bruen* had "hobbled" legislatures seeking to balance reform with Second Amendment respect by forcing them to find historical analogues to modern firearms laws.[303] Lower courts had diverged widely in approach and outcome, exposing the test's impracticality and unpredictable results.[304] Justice Jackson emphasized that courts' reports of "confusion" because *Bruen* indicated not only burdensome research demands but a fundamental difficulty in determining what constitutes a "relevantly similar" historical analogue.[305] Unlike means-end scrutiny, *Bruen*'s history-and-tradition test left courts sifting through "troves of centuries-old documentation" without a clear framework for evaluating the sufficiency, similarity, or relevance of the historical examples presented.[306] This complexity, Justice Jackson argued, harms the "Rule of Law," as the ideal of consistent, stable, and predictable legal standards is weakened by *Bruen*'s approach.[307]

Justice Thomas provided the only dissent and clung to *Bruen* with an almost dogmatic zeal. His dissent, a pure distillation of *Bruen*'s originalist ethos, served as a reminder of the ideological rifts within the Court's conservative bloc. He argued that the unconstitutionality of the law at issue in *Rahimi* was, in essence, settled by *Bruen*.[308] According to Justice Thomas, the legislative provision at issue burdened conduct at the core of the Second Amendment—the possession of firearms for self-defense—and the government had failed to identify any historical analogues to support the regulation.[309] Surety laws were not the right analogy because they "did not alter an individual's right to keep and bear arms" but merely provided "financial incentives for responsible arms carrying."[310] "By contrast, § 922(g)(8) strips an individual of his

302. *See id.* at 1930 (Jackson, J., concurring).
303. *Id.*
304. *Id.* at 1927.
305. *Id.* at 1927-28.
306. *Id.* at 1928.
307. *Id.* at 1929.
308. *See id.* at 1930 (Thomas, J., dissenting).
309. *Id.* at 1932.
310. *Id.* at 1939, 1941 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2150 (2022)).

Second Amendment right" entirely, making it a felony to possess a firearm or even ammunition during the restraining order's duration.[311] Justice Thomas also highlighted procedural deficiencies in § 922(g)(8) compared to its purported historical antecedents, and emphasized that the penalties under § 922(g)(8)—felony charges, imprisonment, and a permanent loss of Second Amendment rights—are far more severe than the financial penalties imposed under surety laws.[312] Thus, for Justice Thomas, § 922(g)(8) could not be reconciled with the historical tradition of firearm regulation, which rendered the statute unconstitutional.[313]

Even leaving aside the many critiques of the *Bruen* approach that the concurring opinions provided, the diversity of views on the application of the *Bruen* test in the various opinions is telling. Among other things, the Justices disagreed about if, and to what extent, protection of public safety is an element to be considered in the analysis;[314] whether different methods of discouraging possessing arms—bans compared to financial disincentives—can constitute regulatory analogues;[315] how much different the procedures involved in the application of and how analogous the extent of punishment must be to constitute similar provisions.[316] Ironically, Justice Thomas's vociferous objections to the majority's conclusions on these issues illustrate the essential problem with his creation[317]: *Bruen* does not provide the answer to any of these conflicts. It does not answer even one of the most fundamental challenges in constitutional interpretation: At what level of

311. *Id.* at 1939.

312. *Id.* at 1933, 1939-40.

313. *See id.* at 1944 (discussing how *Bruen* does not account for today's issues).

314. *Compare id.* at 1906-07 (Sotomayor, J., concurring), *with id.* at 1945-46 (Thomas, J., dissenting) (arguing that a principle-based approach would render the Second Amendment hollow).

315. *Compare id.* at 1899-1903 (majority opinion), *with id.* at 1941-42 (Thomas, J., dissenting).

316. *Compare id.* at 1901 (majority opinion), *with id.* at 1940-41 (Thomas, J., dissenting) ("While a breach of a surety demand was punishable by a fine, § 922(g)(8) is punishable by a felony conviction, which in turn permanently revokes an individual's Second Amendment right.").

317. *See, e.g.*, *id.* at 1944 (Thomas, J., dissenting) ("The Court's contrary approach of mixing and matching historical laws—relying on one law's burden and another law's justification—defeats the purpose of a historical inquiry altogether.").

generality should the analysis proceed[318]—at the most specific, microlevel, focusing on every potential difference, or at the more general, policy-focused level, which can draw similarities between different types of provisions?

The Court's opinion in *Rahimi* strongly signaled an implicit acknowledgment that *Bruen* wandered too far into the weeds of Second Amendment absolutism. Chief Justice Roberts's opinion of the Court, with its gentle rebuke that *Bruen* is "not meant to suggest a law trapped in amber,"[319] reads as an effort to soften its rigid history-and-tradition test without openly admitting its faults. But for all its genteel course correction, the decision falls far short of offering a coherent plan for navigating the mess *Bruen* created. The opinion suggests that the problem is one of degree, of seemingly requiring too much specificity.[320] But that is only part of the difficulty.

Justice Barrett's concurring opinion addressed this issue most directly, raising the "level of generality problem" courts have faced in applying *Bruen*'s historical test.[321] She described the lack of certainty as to whether the government must produce a regulation from the Founding Era that is a "twin" or even a "cousin" of the modern law being challenged, or whether historical gun regulations reveal broader "principles that mark the borders of the right."[322] Justice Barrett advocated for the latter approach, and critiqued the idea that modern regulations must replicate late-eighteenth-century policy choices.[323] An overly specific standard, she argued, assumes that Founding-Era legislatures maximally exercised their authority to regulate firearms, creating a "use it or lose it" model that originalism does not demand.[324] Instead, Justice Barrett's version of *Bruen* supports the idea that historical regulations reflect

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318. *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084-85 (1981) (describing the "indeterminacy and manipulability of levels of generality" in how specifically a right ought to be described, which determines whether it will be found in the broad contours of the Constitution).

319. *Rahimi*, 144 S. Ct. at 1897.

320. *See id.* at 1903.

321. *See id.* at 1925 (Barrett, J., concurring).

322. *Id.*

323. *See id.*

324. *Id.*

principles, not rigid molds. But Justice Barrett also acknowledged the risk of interpreting these principles at too high a level of generality, which, for her, could dilute the right protected by the Second Amendment.[325]

This debate over the appropriate level of generality illustrates one of the fundamental problems of *Bruen*. But our review of the lower courts' difficulties in applying the *Bruen* test shows that the concern goes far beyond this general toil of constitutional interpretation.[326] Our catalog of lower court treatment of *Bruen* shows cases going in opposing directions across a range of legislative enactments.[327] In doing so, it reveals not only a striking lack of consistency in outcomes, but the frustration, confusion, and uncertainty of lower-court judges. They have struggled with enormous difficulties in applying *Bruen*, which stem from uncertainty over what evidence to consider; doubts about what time period to consider; hesitation over how representative cases need to be, how many analogues are required, and which evidence should be prioritized; and even straining to answer difficult empirical questions relating to other subject areas, such as why individuals abuse drugs and what policy goals the war on drugs is directed to.[328] Many of those judges have provided exceptionally forthright critiques of the Supreme Court for putting them in an impossible position in which they are uncertain of the reliability of their own rulings for want of evidence or uncertainty about the validity and dependability of the evidence they relied on.[329]

A recent Fifth Circuit case makes clear that *Rahimi* did not solve *Bruen*'s problems. Pre-*Bruen*, the court had previously upheld the federal prohibition on federally licensed firearms dealers selling handguns to eighteen-to-twenty-year-old adults.[330] But when the issue returned to the court, it held that both *Bruen* and *Rahimi* demanded it to reconsider, focusing on the relevant historical

325. *See id.* at 1926.

326. *See supra* Part I.D.

327. *See supra* Part I.D.

328. *See supra* Part I.D.

329. *See, e.g.*, *supra* text accompanying notes 236-47.

330. *See* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 188 (5th Cir. 2012) (interpreting 18 U.S.C. §§ 922(b)(1) and (c)(1)), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

evidence.[331] It held the federal ban unconstitutional because, first, "purchase" and "sale" are "corollary acts necessary" to the exercise of keeping and bearing arms;[332] second, eighteen-to-twenty-year-olds are "part of 'the people' whom the Second Amendment protects";[333] and third, the 1792 Militia Act, which required eighteen-year-olds to enroll in the militia and furnish their own weapons, among other evidence, showed the law was contrary to historical analogues.[334]

The ultimate point provided unusually clear evidence to satisfy *Bruen*'s historical analogue requirement, but in establishing the second point, the circuit court took an extremely narrow generality position. The government had argued that participation in the militia was not enough to establish that the Second Amendment applied because "black men served in the militia but were otherwise barred from possessing arms," but the court rejected that position because "race-based classifications would apply regardless of age."[335] That interpretation imposes an extraordinary restriction on judicial interpretation, requiring that, to be analogous, a historical regulation must be similar not only in purpose but also in the manner and extent of its restriction, making finding a historical analog even less likely. This demanding approach adds to the government's already heavy burden under *Bruen*. And that holding is not surprising, even from a court that previously ruled to the contrary, because the court interpreted *Rahimi* as adding an additional layer of restriction to *Bruen* analysis: "[E]ven when a law regulates arms-bearing for a permissible reason, ... it may not be compatible with the right if it does so to an extent beyond what was done at the founding."[336] Under this reading, *Rahimi* is not a step back from *Bruen* but an *extension* of it, requiring similarity in the scope as well as in the nature of regulation in historical analogues.

Clearly, there remains a fundamental concern of whether *Bruen*'s historical inquiry is a viable method for addressing contemporary gun regulations. These dilemmas are certain to define the next

331. *See* Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 127 F.4th 583, 586 (5th Cir. 2025).

332. *Id.* at 589-90.

333. *Id.* at 592.

334. *See id.* at 593.

335. *Id.* at 594-95 (citing McDonald v. City of Chicago, 561 U.S. 742, 770-78 (2010)).

336. *Id.* at 596 (second alteration in original) (quoting United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

chapter of Second Amendment jurisprudence at the Court. Understanding how it has previously dealt with a similarly unworkable test that frustrated lower-court judges can offer insight into how the Court may resolve those testing difficulties.

II. FEDERALISM IN FLUX: THE *USERY* EXPERIMENT

The type of tumult caused by *Bruen* is familiar to the Court's jurisprudence. Indeed, it closely mirrors the Court's struggle in the 1980s to recontract the boundaries of federal power under the Tenth Amendment in *National League of Cities v. Usery*.[337] This revealing interlude—in which the Court first struck down federal regulations as intruding on the "traditional governmental functions" of the states,[338] only to repudiate that holding and standard just nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, when that vague test proved "unworkable"[339]—is a potential harbinger of what may happen in the aftermath of *Bruen*. The Court struggled, in several cases, to articulate a coherent standard to adjudicate whether federal power intruded too much on state sovereignty[340]—just as the Court is currently attempting to do with respect to the Second Amendment in cases like *Rahimi*, aiming to find a way to give *Bruen* meaning while avoiding the worst of its theoretical consequences. Should the Court decide to retreat from *Bruen*, it may take a lesson from the Court under Chief Justice Rehnquist, who, despite seeing the demise of his vision of the Tenth Amendment in 1985, was able to resurrect it in the 1990s through a more targeted application of its principles.[341]

In contrast to the Second Amendment, over which there was remarkably little litigation or doctrinal development until the Roberts Court's rapid expansion of the individual right,[342] there was extensive litigation over the Tenth Amendment.[343] The Court's

337. 426 U.S. 833 (1976), *overruled in part by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

338. *See id.* at 852.

339. *See* 469 U.S. at 531.

340. *See infra* Part II.C.

341. *See infra* Parts II.E and II.F.

342. *See supra* text accompanying notes 1-7.

343. *See* John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since*

attitude to that Amendment waxed and waned with the broader judicial and political fight over the role of the federal government vis-à-vis the states in terms of enacting broad social policy.

A. The Tenth Amendment as a Route to Constraining Federal Power

Like much of the Bill of Rights, the Tenth Amendment is succinct: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[344] Judges and scholars have argued over whether that brief phrasing says a lot or a little. Interpretations of its text generally belong to one of two theories.[345] The first theory is that it simply "states a truism," confirming that when a particular power is not specifically assigned to the federal government in the Constitution, that power belongs to the states instead.[346] On this view, there is no separate interpretation of the Tenth Amendment needed, it simply defines the mirror-image of Congress's powers. The Court adopted this "truism" approach in the early- and mid-twentieth century, at the same time that it took a capacious interpretation of the Commerce Clause, the Tax and Spending Clauses, and other federal powers.[347]

The second approach, however, sees the Tenth Amendment as an affirmative provision, giving states an independent sphere of sovereignty and forbidding the federal government from intruding into that sphere.[348] In the late nineteenth and into the early twentieth century, the Court embraced this view at the same time

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United States v. Darby, 27 CUMB. L. REV. 445, 448-77 (1997) (providing a historical account of Tenth Amendment litigation prior to *United States v. Darby*).

344. U.S. CONST. amend. X.

345. *See* Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 AKRON L. REV. 213, 222 (1991) ("The courts and many articles have made one of two assumptions about the Tenth Amendment.").

346. *Id.* at 222-23; *see, e.g.*, United States v. Darby, 312 U.S. 100, 123-24 (1947) (holding that a minimum-wage law was a legitimate exercise of congressional authority over interstate commerce and thus did not violate the Tenth Amendment).

347. *See* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1914-15 (2007) (noting the Court's post-switch-in-time jurisprudence "opened the door to federal legislation governing myriad, diverse activities").

348. *See* Messonnier, *supra* note 345, at 223-25.

that it took a narrow interpretation of federal powers.[349] In the late 1980s, the Court again embarked on a project to enshrine this "sovereignty" theory into constitutional law, reinvigorating the Tenth Amendment's role as an alternate path to constrain and invalidate exercises of federal power.[350]

The "truism" view of the Tenth Amendment has a substantial pedigree. In Justice Story's *Commentaries on the Constitution*, he wrote that the Amendment is "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows, irresistibly, that what is not conferred is withheld, and belongs to the State authorities."[351] Therefore, according to Justice Story,

> It is plain ... that it could not have been the intention of the framers of this amendment to give it effect as an abridgment of any of the powers granted under the Constitution .... The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly," to qualify what is general, and obscure what is clear and defined.[352]

Scholarship has almost uniformly agreed regarding the original intent of the Tenth Amendment. Charles A. Lofgren, who undertook an exhaustive study of the Amendment, concluded that contemporaries at the time of the Constitution's authorship "certainly did not find the Tenth Amendment restrictive; it was instead declaratory of the Constitution's overall scheme."[353] In fact, in the context of the time, the Amendment "probably *reaffirmed* the centralizing tendencies of the new system," relative to the much

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349. *See infra* text accompanying notes 361-73.

350. *See infra* Parts II.C and II.D.

351. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 652 (5th ed. 1891).

352. *Id.* at 653.

353. Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 331, 349 (Ronald K.L. Collins ed., 1980).

looser federal structure that had been imposed by the Articles of Confederation.[354]

The sparse early jurisprudence on the Tenth Amendment aligns with the "truism" understanding. Writing for the Court in *M'Culloch v. Maryland* in 1819, Chief Justice Marshall emphasized that the Tenth Amendment "omits the word 'expressly,'" and thus "leav[es] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument."[355] In other words, the Tenth Amendment is not a substantive limitation on federal authority but a reaffirmation of what was already inherent in the Constitution's structure: the supremacy of the federal government. For decades after *M'Culloch*, the Tenth Amendment stayed mostly in the background, more a philosophical statement than a judicial tool.[356]

Yet, occasionally, the Tenth Amendment stepped onto the stage. In 1870, the Court struck down a federal tax imposed on state judicial salaries, invoking the Tenth Amendment to argue that such taxation would "destroy" the independence of the states[357]—a line of reasoning dressed in the language of state sovereignty that would later come to dominate in discussions of the Amendment. The invocation spoke less to a constitutional principle and more to the politics of the Reconstruction Era—a time when the balance of power between the states and the federal government was in turmoil.[358]

The *Civil Rights Cases* of 1883 offered another rare reference to the Tenth Amendment.[359] There, the Court invalidated key provisions of the Civil Rights Act of 1875 and held that Congress could not regulate private acts of racial discrimination under the Fourteenth Amendment.[360] While the Tenth Amendment was not

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354. *Id.* (emphasis added).

355. 17 U.S. (4 Wheat.) 316, 406 (1819).

356. *See* Lofgren, *supra* note 353, at 331.

357. Collector v. Day, 78 U.S. (11 Wall.) 113, 122-24 (1870).

358. *See* Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2030-31 (1999).

359. 109 U.S. 3 (1883).

360. *Id.* at 11 (holding that the Fourteenth Amendment "does not authorize Congress to create a code of municipal law for the regulation of private rights").

the primary basis for the decision, it loomed in the background as the Court emphasized the states' "reserved" powers to regulate private conduct.[361] Per the Court, allowing federal regulation of racial discrimination by private actors "step[ped] into the domain of local jurisprudence" and would be "repugnant to the Tenth Amendment."[362] It was another moment, infrequent during that era, in which the Amendment was pulled from its modest role as a structural guardrail and tentatively thrust into a new one as a shield against federal power. And here, too, the context was political, with the Court attempting to retreat from Reconstruction's efforts to protect Black Americans by remaking the relationship between federal authority and individual rights. Soon, this would become a much more explicit part of the Court's mission; rather than acting as a mere "truism," the Court would press the Tenth Amendment into service as a weapon to shield state functions from federal oversight.

B. The Era of "Dual Federalism" and the "Switch-in-Time"

From the 1890s to the 1930s, at the same time that the Court imposed significant restrictions on the powers of Congress—an approach aligned with the ideological commitment of the period to protect local control and economic laissez-faire principles against perceived federal overreach—the Court took an expansive view of the Tenth Amendment.[363] In this period, often referred to as the era of dual federalism,[364] the Court invalidated a federal tax on grain futures,[365] a tax imposed on goods produced with child labor,[366] and federal regulations on coal production;[367] restricted Congress's

361. *See id.* at 15.

362. *Id.* at 14-15.

363. *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1093 (2000) (summarizing the traditional account of this era of jurisprudence as one in which "the Justices were at best jurisprudentially disoriented and at worst cynically opportunistic"); PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, at 64 (1970) (describing the "direct-indirect" formula as "a highly subjective test under which the justices retained wide discretion to base decisions on their personal social and economic philosophies").

364. *See* Williams, *supra* note 347, at 1849.

365. *See* Hill v. Wallace, 259 U.S. 44, 66-67 (1922).

366. *See* Child Labor Tax Case, 259 U.S. 20, 44 (1922).

367. *See* Carter v. Carter Coal Co., 298 U.S. 238, 289 (1936).

ability to regulate certain banking practices;[368] struck down a tax on agricultural processors;[369] and held that the Commerce Clause did not authorize federal regulations on poultry slaughter practices.[370]

During this period, *Hammer v. Dagenhart* most directly implicated the Tenth Amendment and epitomized the Court's approach to it.[371] In striking down the Keating-Owen Child Labor Act, which prohibited the interstate shipment of goods produced by child labor, the Court framed the Tenth Amendment as a bulwark against the encroaching tide of federal regulation.[372] The Court deemed labor conditions to be a "purely local" matter, and the effort to regulate them through Congress's commerce power was "an invasion of the powers of the States."[373] The Court decried the act of shipping goods across state lines as irrelevant to the broader issue of child welfare, which was considered better left to the uneven patchwork of state legislatures.[374] The dissent, penned by Justice Holmes, cut to the heart of the matter with characteristic clarity: "The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights."[375] The Court disagreed and elevated an idealized vision of state sovereignty under the Tenth Amendment.

As the New Deal reforms of President Franklin D. Roosevelt took hold, the Court seemed determined to play the role of a disapproving referee, striking down federal efforts to regulate industries that were the beating heart of the Great Depression.[376] The resulting frustrations set the stage for what would become one of the most dramatic turns in the history of American constitutional

368. *See* Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315, 337 (1935).

369. *See* United States v. Butler, 297 U.S. 1, 68 (1936).

370. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543 (1935).

371. 247 U.S. 251 (1918), *overruled by* United States v. Darby Lumber Co., 312 U.S. 100 (1941).

372. *See id.* at 274 ("The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.").

373. *Id.* at 275-76.

374. *See id.* at 273-75.

375. *Id.* at 281 (Holmes, J., dissenting).

376. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550-51 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936).

law. Though it is still debated whether President Roosevelt's court-packing plan caused the "switch in time" by Justice Owen Roberts,[377] 1937 brought an abrupt pivot in the Court's approach to congressional power and state-reserved powers under the Tenth Amendment, with decisions upholding several New Deal programs.[378]

The Court's post-switch approach to the Tenth Amendment reflected a broad shift toward an expansive federal government. A key moment came in *United States v. Darby*, in which the Court reverted to the understanding that the Tenth Amendment was "but a truism that all is retained which has not been surrendered,"[379] and the Amendment would no longer be a judicial barrier against federal legislative authority. In one early iteration of this approach, the Court in *United States v. California* addressed the federal government's ability to impose penalties on a state-owned railroad for violating a federal safety law.[380] Justice Stone articulated a clear delineation of power dynamics under the Constitution, stating that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution," even when it involved traditional state activities.[381] Another case, *New York v. United States*, involved the application of a federal tax to a state-owned enterprise.[382] The Court upheld the tax, reinforcing the principle that, as long as Congress's taxation was generally applicable and not specifically targeting a state, it was permissible under the Tenth Amendment.[383] Ultimately, the switch was a concession by conservatives that they had lost the biggest constitutional battle of the era: the fight to limit the size and

377. *See, e.g.*, Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?,* 2 J. LEGAL ANALYSIS 69, 85-95 (2010) (showing empirically that there was a significant change in behavior by the Court, and by Justice Roberts in particular, in response to the threat by Roosevelt to pack the Court).

378. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act); Steward Mach. Co. v. Davis, 301 U.S. 548, 578-98 (1937) (upholding provisions of the Social Security Act); Helvering v. Davis, 301 U.S. 619, 639-46 (1937) (same); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390-400 (1937) (upholding a state minimum wage law for women).

379. 312 U.S. 100, 124 (1941).

380. *See* 297 U.S. 175, 180-81 (1936).

381. *Id.* at 184.

382. *See* 326 U.S. 572, 573-74 (1946).

383. *See id.* at 583-84.

scope of the federal government and to assert state prerogatives at the cost of federal power.

For over fifty years after that shift, it was the orthodoxy that the states had power only in remainder and could not curtail the breadth of federal action. But starting in the 1990s, under the methodical leadership of Chief Justice Rehnquist, a new conservative revolution took shape. It began with restricting the Commerce Clause in *United States v. Lopez*, in which the Court struck down the Gun-Free School Zones Act, ruling that Congress had overstepped its authority by regulating activity too tenuously connected to interstate commerce.[384] Five years later, in *United States v. Morrison*, the Court invalidated parts of the Violence Against Women Act, doubling down on the argument that purely local matters, however urgent, could not be federally regulated under the Commerce Clause.[385] But directly restricting the commerce power was not the only maneuver in the Rehnquist Court's revolutionary blueprint of "new federalism." Just as it chipped away at the federal government's reach, the Court turned its attention to the counterpart of federal power—the autonomy of the states.[386] By reviving dormant principles of state sovereignty and reinvigorating the Tenth Amendment, the Court set about redrawing the boundaries of governance in a way that sought to recapture what had been surrendered during the New Deal Era.

C. The Beginnings of the Rehnquist Revolution: Usery

Between 1937 and 1992, there was only a single instance in which the Court struck down a federal law for violating the Tenth Amendment: *National League of Cities v. Usery*.[387] This case represented a significant victory for the antifederal faction of the Court—but also marked the beginning of a *Bruen*-like experiment that would ultimately end in retreat.

In *Usery*, the Court reviewed the Fair Labor Standards Act's (FLSA) extension to state and local government employees, which

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384. *See* 514 U.S. 549, 567-68 (1995).

385. *See* 529 U.S. 598, 627 (2000).

386. *See infra* Part II.D.

387. *See* 426 U.S. 833, 851-52 (1976), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

mandated that these employees be paid the federal minimum wage.[388] Congress had included public employees under the FLSA beginning in 1961, initially extending its provisions to those only in commerce-related enterprises.[389] Amendments in 1966 further expanded the Act's scope by including employees of state hospitals, institutions, and schools, effectively removing previous exemptions for state and political subdivisions.[390] Finally, in 1974, amendments broadened coverage even further by defining "employer" to include public agencies and specifying that public agency employees were engaged in commerce or commerce-related activities, thereby subjecting them to wage and hour requirements similar to those in the private sector.[391] These changes eliminated prior state and subdivision exemptions, maintaining only a general exemption for executive, administrative, or professional personnel, while making provisions for unique public-sector roles such as fire protection and law enforcement.[392] The provisions sparked controversy along the usual fault lines of American politics: To conservative critics, the idea of Congress dictating wages and hours for state and local employees was a victory for bureaucratic overreach and an encroachment on local autonomy by an ever-expanding welfare state.[393]

The Court, in a five-to-four opinion written by Justice Rehnquist, ruled that requiring state and local governments to adhere to the federal minimum wage standards was unconstitutional.[394] While acknowledging the "breadth of authority" granted to Congress under the Commerce Clause, the Court nevertheless insisted "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution."[395] The FLSA amendments imposed

388. *See id.* at 835-38.
389. *Id.* at 837.
390. *Id.* at 837-38.
391. *Id.* at 838-39.
392. *Id.*
393. *See, e.g.*, Joseph A. McCartin, *"A Wagner Act for Public Employees": Labor's Deferred Dream and the Rise of Conservatism, 1970-1976*, 95 J. AM. HIST. 123, 125 (2008) (arguing that public-sector issues contributed to the rise of conservatism in the 1970s).
394. *Usery,* 426 U.S. at 855.
395. *Id.* at 841.

significant financial constraints on state and local governments, forcing them to either increase taxes or reduce services to comply.[396] And Congress's actions upended "the manner in which [the states would] structure delivery" of their services.[397] Centrally, Congress could not force states "to structure integral operations in areas of traditional governmental functions."[398] While acknowledging the "truism" language from *Darby*, the Court nonetheless qualified it, somewhat oxymoronically, warning that the Tenth Amendment is "not without significance."[399] Congress cannot "exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[400] And if state sovereignty is to have any real meaning, the Court concluded, surely it includes the "power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions" and the hour and overtime requirements of those employees.[401]

Although *Usery* purported to impose a protected zone of state immunity that would be unreachable by the federal government—namely, the states' "traditional government functions"[402]—it did not elaborate on that standard or delineate a method by which courts could police it. In a blistering dissent, Justice Brennan rejected both the new standard and the Court's authority to articulate one in the first place, writing that the Court was "simply not at liberty to erect a mirror of its own conception of a desirable governmental structure."[403] Justice Brennan lamented that his colleagues had "manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent."[404] The Court's reasoning could "only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree[d]."[405]

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396. *See id.* at 846.
397. *Id.* at 847.
398. *Id.* at 852.
399. *Id.* at 842-43 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
400. *Id.* at 843 (quoting *Fry*, 421 U.S. at 547 n.7).
401. *Id.* at 845.
402. *See id.* at 852.
403. *Id.* at 875 (Brennan, J., dissenting).
404. *Id.* at 860.
405. *Id.* at 867.

Providing the fifth vote in favor of the outcome, Justice Blackmun wrote a separate concurrence, describing his understanding of the opinion as adopting a "balancing approach" that did "not outlaw federal power in areas ... where the federal interest is demonstrably greater and where state ... compliance with imposed federal standards would be essential."[406] Justice Blackmun's praise for the majority opinion was noticeably faint: "Although 'not untroubled' by some of [*Usery*'s] implications, he did 'not read [it] so despairingly as [did Justice] Brennan.'"[407] Justice Brennan, in turn, rejected Justice Blackmun's "balancing approach" as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."[408]

In the years following *Usery*, the Court had the opportunity, in four cases, to clarify the contours of its ruling on the Tenth Amendment's protection of state sovereignty from federal overreach.[409] Yet, in each case, the Court upheld the law or regulation that faced a Tenth Amendment challenge, finding increasingly strained ways to avoid grappling with *Usery*'s implications. Rather than reckoning with the contradictions inherent in its reasoning, the Court sidestepped them, patching over the cracks with decisions that quietly eroded *Usery*'s force.

The flaws in *Usery* became quickly apparent. In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977, which established a nationwide program to mitigate the adverse effects of surface coal mining, prescribed environmental standards, and set up a regulatory framework enforceable by the Secretary of the Interior or by state programs aligning with federal standards.[410] The Court held that the Act was justified by the significant interstate-commerce effects of surface mining and was permissibly aimed to address surface mining's environmental and other

406. *Id.* at 856 (Blackmun, J., concurring).

407. Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun,* Garcia*, and the Tenth Amendment,* 32 ARIZ. L. REV. 749, 757 (1990) (second and third alterations in original) (quoting *Usery*, 426 U.S. at 856 (Blackmun, J., concurring)).

408. *Usery*, 426 U.S. at 876 (Brennan, J., dissenting).

409. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985); FERC v. Mississippi, 456 U.S. 742 (1982); EEOC v. Wyoming, 460 U.S. 226 (1983).

410. 452 U.S. at 268-69.

impacts.[411] Moreover, the Act's provisions, such as those regulating mining on steep slopes and requiring land restoration, did not infringe on the Tenth Amendment because they regulated private activities, not those of the states, and did not compel state enforcement of federal standards, thus respecting the division of state and federal authority.[412] *Usery*'s principles would apply only when Congress was regulating the states themselves, rather than private conduct.[413]

One early sign of trouble for *Usery* was not only that the Court favored Congress's commerce power over state sovereignty in *Hodel*, but also that the opinion of the Court elaborated on Justice Blackmun's *Usery* concurrence and echoed his concerns about its overbroad application.[414] The Court explained that to fail under *Usery*, federal laws must meet a three-part test: They must (1) regulate the "States as States," (2) address clear attributes of state sovereignty, and (3) directly impair states' ability to organize fundamental governmental operations.[415] But even if all three elements were present, a regulation could still be upheld if "the nature of the federal interest advanced [was] such that it justifie[d] state submission."[416] The *Hodel* Court reasoned that the federal regulation at issue was unlikely to significantly interfere with the State's ability to perform its essential functions within the federal system, thus not endangering its separate and independent existence.[417] *Hodel* signified that *Usery* was already on shaky ground because it carved out a framework so riddled with qualifiers and exceptions that its practical application was destined to unravel. The Court was signaling that its commitment to *Usery*'s principles was more rhetorical than real, paving the way for a jurisprudence of gradual erosion.

The Court took another step away from *Usery* in *United Transportation Union v. Long Island Rail Road Co.*, unanimously

411. *See id.* at 277.

412. *See id.* at 288.

413. *See id.* at 290.

414. *See id.* at 287-88, 288 n.29 (citing National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring), *overruled by Garcia*, 469 U.S. 528).

415. *Id.* at 287-88 (quoting *Usery*, 426 U.S. at 845, 852, 854).

416. *Id.* at 288 n.29 (first citing Fry v. United States, 421 U.S. 542 (1972); and then citing *Usery*, 426 U.S. at 856 (Blackmun, J., concurring)).

417. *See id.* at 288.

holding that applying the Railway Labor Act to a state-owned railroad did not violate the Tenth Amendment.[418] The case involved the Long Island Railroad, owned by New York State, which faced a labor dispute with its employees.[419] After failed collective-bargaining negotiations and mediation under the Railway Labor Act (RLA), a potential strike loomed following the prescribed cooling-off period.[420] The union sought a declaratory judgment to confirm that the dispute was governed by the RLA, not by New York's Taylor Law, which banned strikes by public employees.[421] The Court held that applying the RLA to a state-owned railroad operating in interstate commerce did not violate the Tenth Amendment.[422] Running a railroad was not a traditional state function immune to federal regulation, and such regulation did not fundamentally impair the State's ability to perform its sovereign functions.[423] *United Transportation Union* marked another nail in *Usery*'s coffin, not because the Court explicitly repudiated the earlier decision, but because it showed how narrow *Usery*'s ambit was: Even state-run enterprises engaged in interstate commerce were fair game for federal regulation. And the unanimous result suggested the Court saw this not as a case testing the boundaries of state sovereignty but as one squarely outside of *Usery*'s reach.

Later that year, the Court grappled with yet another *Usery* problem, and this time, there would be unmistakable signs of a change of heart in Justice Blackmun.[424] *FERC v. Mississippi* dealt with a federal law that required state utility commissions to consider energy conservation proposals from the Federal Energy Regulatory Commission (FERC).[425] The Public Utility Regulatory Policies Act of 1978 (PURPA) was part of a legislative initiative addressing the energy crisis and mandated state utility commissions and nonregulated utilities to consider adopting specific

418. *See* 455 U.S. 678, 690 (1982), *overruled by Garcia*, 469 U.S. 528.
419. *See id.* at 680.
420. *See id.* at 681.
421. *See id.*
422. *Id.* at 686.
423. *Id.*
424. *See* Wildenthal, *supra* note 407, at 761 (calling *FERC v. Mississippi* "[t]he first clear indication that Justice Blackmun might part company" with the pro-*Usery* bloc).
425. *See* 456 U.S. 742, 746-48 (1982).

regulatory and rate design standards.[426] Additionally, PURPA aimed to foster cogeneration and small power production, and directed FERC to establish rules for this purpose, which state authorities were required to implement.[427]

Mississippi and its Public Service Commission challenged PURPA, claiming it overstepped Congress's Commerce Clause powers and infringed on state sovereignty, violating the Tenth Amendment.[428] The Court returned to a five-to-four split, and importantly, Justice Blackmun authored the opinion upholding PURPA's provisions.[429] The opinion recognized the immediate impact of the regulated activities on interstate commerce and the necessity of federal regulation in the energy sector.[430] The Court also determined PURPA did not violate the Tenth Amendment, as it merely preempted state law in areas with significant interstate effects and did not compel state regulatory bodies to exercise sovereign powers beyond their traditional activities.[431] The requirements to "*consider*" federal regulations were simply part of customary adjudicatory activities, not an overreach into state sovereignty.[432]

Justice O'Connor, a then-recent addition to the Court who would eventually be revealed as being strongly committed to broadly interpreting the Tenth Amendment,[433] fiercely dissented. She wrote that the majority opinion was "antithetical to the values of federalism, and inconsistent with our constitutional history."[434] Justice O'Connor charged the majority with, among other things, "conscript[ing] state utility commissions into the national bureaucratic army"[435] and "permit[ting] Congress to kidnap state utility commissions."[436] This marked a new level of vigor, and even

426. *Id.* at 745-46.
427. *See id.* at 750-51.
428. *See id.* at 752.
429. *See id.* at 745.
430. *See id.* at 758.
431. *See id.* at 771.
432. *Id.* at 765.
433. *See infra* Part II.F (discussing her resurrection of the Tenth Amendment with the anticommandeering doctrine).
434. FERC v. Mississippi, 456 U.S. at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).
435. *Id.*
436. *Id.* at 790.

acrimony, in the modern debate over the Tenth Amendment.[437] While the Court had previously approached *Usery* with a measured pragmatism, marked by near consensus and a willingness to carve out exceptions, *FERC v. Mississippi* laid bare an ideological fracture over the future of federalism. Justice O'Connor's dissent cast federal regulation as a threat to state autonomy and signaled an emerging ideological realignment: conservatives rallying around state sovereignty, liberals embracing a broad and dynamic federal power.

Finally, in *EEOC v. Wyoming*, the Court gave up on *Usery* in all but name. Writing for a five-to-four majority, Justice Brennan upheld the application of the Age Discrimination in Employment Act of 1967 (ADEA) to state employees, finding no Tenth Amendment violation.[438] The ADEA, which prohibited age-based employment discrimination of those between forty and seventy years old, was expanded in 1974 to include state and local governments.[439] The Wyoming Game and Fish Department challenged the law after a supervisor was forced into retirement at age fifty-five, in line with state law, but in contravention with the ADEA.[440] The Court held that applying the ADEA to state and local governments was not a violation of the Tenth Amendment.[441] The Court reasoned that, while the Act did regulate states as employers, it did not directly impair their ability to perform traditional governmental functions because it allowed states to demonstrate age as a "bona fide occupational qualification" if necessary.[442]

The holding was particularly difficult to square with *Usery*. If regulating the minimum wage of state employees was an invalid exercise of Congress's power, then why was it proper to regulate their retirement age? Indeed, the Court explicitly distanced itself from *Usery*. "[W]e are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an

437. *See* Joseph F. Kobylka, *The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications*, 19 CREIGHTON L. REV. 9, 37 (1985) ("It was with *FERC v. Mississippi* ... that the hidden tensions of [*Usery*] began to emerge.").

438. *See* 460 U.S. 226, 228-29 (1983).

439. *See id.* at 232-33.

440. *Id.* at 234-35.

441. *See id.*

442. *Id.* at 239-40.

exercise of an 'undoubted attribute of state sovereignty.'"[443] The Court was walking back not only a broad reading of *Usery*, but arguably its most direct application and implication. In a concurring opinion, Justice Stevens explicitly called for *Usery* to be overturned, writing that "Congress had ample power to enact this statute, as well as the statute at issue" in *Usery*.[444]

The Court had found it difficult to reconcile its own decisions with *Usery*, leading to the gradual rejection of *Usery*'s principles even before its explicit overruling. As the next Section describes, a major catalyst was that lower courts had tried and failed to develop principled methods of applying *Usery*, leading to inconsistency in outcomes and jurisprudential uncertainty.

D. Lower Courts Struggle with Usery

Just as lower courts have strained to fit complex and often incomplete historical records into the vague contours of *Bruen*'s demand for a historical analogue, resulting in judicial expressions of frustration and contradictory outcomes,[445] so it was with *Usery*. The attempts of the lower federal courts to apply the *Usery* prohibition on Congress regulating states in areas involving "traditional governmental functions" involved judicial improvisation, uncertainty, and, ultimately, defeat. Lower-court judges tried to develop multiple different principled means of differentiating between government functions—from the nature, size, and importance of the industry; its intra- versus inter-state operation; and the identity of the traditional regulator of the industry—but nothing proved workable. No consistent factor emerged to explain why some services would earn the protection of *Usery*'s shield and others would not. Ultimately, what had started as an ambitious conservative project to protect state power would turn into a cautionary tale about the dangers of abstract judicial line-drawing and the difficulties of describing and applying broad constitutional history.

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443. *Id.* at 239 n.11.
444. *Id.* at 250 (Stevens, J., concurring).
445. *See supra* Part I.D.

The unpredictability of the doctrine was immediately apparent in the inconsistency of outcomes reached by lower courts. In *Amersbach v. City of Cleveland*, the Sixth Circuit, reviewing a pay dispute under the FLSA, concluded that operating a municipal airport was a traditional government function, reasoning that airports were "indispensable" to modern life.[446] The court complained that *Usery* "[did] not contain a specific outline of the dimensions of the state sovereignty limitation" and "[did] not articulate a specific test to be applied in determining whether a particular government function should be deemed to be within this protected area of state sovereignty."[447] Nonetheless, the court ruled that because "[a]irports are indispensable in a nation where airplanes are relied upon as a principal mode of passenger transportation," airports "must be maintained by municipal corporations or other units of government"; accordingly, their maintenance was an "integral function of government."[448]

The First Circuit reached a similar conclusion with regard to a highway authority in *Molina-Estrada v. Puerto Rico Highway Authority*.[449] In an opinion written by future-Justice Breyer, the court held that Puerto Rico's highway authority was an "integral part of the Commonwealth government" because it performed such activities as building and repairing roads, operating tolls, and managing parking lots.[450] Thus, its activities fell within the category of "traditional" or "integral" governmental functions, and so the minimum wage law's application to the states violated the Tenth Amendment.[451]

Another victory for state power came in *United States v. Best*, in which the Ninth Circuit held that licensing drivers was also a traditional state government function protected by the Tenth Amendment.[452] The defendant had pleaded guilty to operating his car on a federal enclave while under the influence of alcohol in

446. 598 F.2d 1033, 1034, 1037-38 (6th Cir. 1979).

447. *Id.* at 1097 (citing National League of Cities v. Usery, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985)).

448. *Id.* at 1037-38.

449. *See* 680 F.2d 841, 845 (1st Cir. 1982).

450. *Id.* at 845.

451. *Id.* at 846.

452. *See* 573 F.2d 1095, 1103 (9th Cir. 1978).

violation of the California Vehicle Code; he moved to correct his sentence on the ground that the federal magistrate who suspended his license lacked the power to do so.[453] The court agreed, holding that by ordering the suspension of a California driver's license, the federal magistrate had improperly encroached on California's sovereign authority to regulate its highways, contravening the limits imposed by the Tenth Amendment under *Usery*.[454] The court wrote that "while it is true that in some respects, such as air pollution, the regulation of traffic takes on a 'strong regional and interstate character' permitting the cooperation of city, state, and federal authorities," nonetheless "there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.'"[455]

This series of cases suggests that the size and importance of the industry in question could hold the key to the *Usery* analysis. And yet, even though state airport management, highway maintenance, and driver's licensing qualified for constitutional protection,[456] neither the seemingly analogous state functions of providing mental-health services nor operating a telephone company earned the same treatment. In *Williams v. Eastside Mental Health Center, Inc.*, the Eleventh Circuit ruled that mental-health facilities served a "limited class of persons" and therefore did not rise to the level of an integral state function under *Usery*.[457] In that case, a former employee of a mental-health institution brought an action against his employer to recover an award of back pay allegedly owed under the minimum wage provisions of the FLSA.[458] The court held that, even if the state had chosen to operate the institution as a state agency, it was not performing an integral state function and thus would not be exempt from the federal statute.[459]

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453. *Id.* at 1097.

454. *See id.* at 1102.

455. *Id.* at 1102-03 (first quoting Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977); and then quoting National League of Cities v. Usery, 426 U.S. 833, 855 (1976), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985)).

456. *See supra* notes 444-53 and accompanying text.

457. 669 F.2d 671, 681 (11th Cir. 1982).

458. *Id.* at 672.

459. *See id.* at 681 ("Any effect the FLSA will have if applied to Eastside is not one that is so extensive that it will be felt by the entire citizenry of Alabama.").

Part of the problem lay in *Usery*'s seemingly sending mixed messages to lower courts. Similar to the Eleventh Circuit, the First Circuit, in *Puerto Rico Telephone Co. v. FCC*, had no difficulty declaring that running a telephone system was not a protected state function.[460] A government-owned telephone company had petitioned for review of a declaratory order by the FCC which determined that the company was bound by a tariff that required the company to permit the interconnection of private branch exchange equipment and the company's telephone system.[461] Per the court, the FCC's actions did not violate the immunity of state governmental functions under *Usery*.[462] But this was not because of anything *Usery* explicitly held; rather, it was because the *Usery* Court favorably cited the earlier case of *United States v. California*,[463] which had held that the operation of a railroad engaged in "common carriage by rail in interstate commerce" was not one of the integral parts of the State's governmental activities.[464] It followed that Puerto Rico Telephone Company's ownership and control of the telephone equipment were not exempt from federal regulation.[465] But if running a telephone system in the 1970s did not relate to an essential function due to being a large and significant industry, then lower courts' attempts to use that as a principled distinction stemming from *Usery* falls into absurdity.

The analogy to railroads under *California*, and *Usery*'s refusal to disturb that holding, were also enough for the Ninth Circuit to reject a Tenth Amendment challenge to airline regulations in *Hughes Air Corp. v. Public Utilities Commission*.[466] There, air carriers that had been exempted by the Civil Aeronautics Board from most of the Board's economic regulations, including from the requirement to obtain a certificate challenged the refusal of the California Public Utilities Commission to accept cancellations to interstate tariffs on file with the agency.[467] The court held that the federal-preemption

460. *See* 553 F.2d 694, 700-01 (1st Cir. 1977).

461. *Id.* at 696.

462. *See id.* at 700-01 (citing United States v. California, 297 U.S. 175 (1936)).

463. *See* National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

464. United States v. California, 297 U.S. at 182.

465. *See P.R. Tel. Co.*, 553 F.2d at 700-01.

466. *See* 644 F.2d 1334, 1341 (9th Cir. 1981).

467. *Id.* at 1336-37.

provision did not violate the Tenth Amendment under *Usery* because, taking *California* as settled law, "[t]here is little difference between state regulation of air transportation and state regulation of railroad transportation," and in fact, *California* had "presented a more compelling reason for asserting Tenth Amendment rights than the cases before [the court] since a state-owned railroad was involved as opposed to private corporations."[468] Airlines, then, would be subject to a "*California* carveout," and the federal government would be able to regulate them without a Tenth Amendment obstacle.[469] This made the size and importance of the industry emphasis developed by the Sixth, First, and Ninth Circuits all but impossible to maintain.

Likewise, looking neither to the traditional area of control of the industry, nor to the interstate versus intrastate operation, could lead to greater consistency between case outcomes. The regulation of intrastate gas sales also failed to earn immunity as a traditional government function in two circuit-level cases. In *Oklahoma ex rel. Derryberry v. FERC*, gas-producing states challenged the constitutionality of the Natural Gas Policy Act, which regulated, and imposed price controls on, wholly intrastate gas.[470] The Tenth Circuit held that the "power to regulate gas produced and sold intrastate" was not a traditional state government function for which *Usery* offered protection, because "[i]t is not the states' roles as providers of roads, education, and similar traditional state functions which is infringed by the Act, but, if anything, their choice of methods by which to fund such functions."[471] Similarly, in *Public Service Co. of North Carolina v. FERC*, the Fifth Circuit declared that Texas's oil and gas business—a massive industry intertwined with state interests—was indistinguishable from a private enterprise and thus not a traditional governmental function.[472]

In contrast, other courts deemed localized municipal services to be traditional governmental functions under *Usery*, leading them to shield those activities from federal antitrust laws. In *Hybud Equipment Corp. v. City of Akron*, the Sixth Circuit found solid-

468. *Id.* at 1340-41.
469. *See id.* at 1341.
470. *See* 494 F. Supp. 636, 643-44 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981).
471. Oklahoma *ex rel.* Derryberry v. FERC, 661 F.2d 832, 836 (10th Cir. 1981).
472. *See* 587 F.2d 716, 721 (5th Cir. 1979).

waste disposal—a highly localized service involving garbage collection and recycling—to be integral to state sovereignty.[473] Landfill operators brought suit seeking relief against several actions taken by an Ohio home-rule city to guarantee the feasibility of an energy recycling plant.[474] The court held that because solid waste disposal—including the regulation of garbage collection, incineration, and recycling—was a customary area of local concern long reserved to state and local governments, under the Tenth Amendment, the Sherman Act did not apply.[475] The City's and State's "plenary, governmental power to deal with such local problems affecting the public interest should not be preempted or displaced by general statutory policies favoring an economic model of competition for businessmen and industrialists operating in private markets."[476]

Similarly, in *Gold Cross Ambulance v. City of Kansas City*, a district court shielded the regulation of ambulance services—often outsourced to private companies—from federal antitrust laws, citing their local character.[477] According to the court, the antitrust laws would prevent the state and city from enacting regulations they otherwise preferred and "which they would otherwise have the right to enact under their general police power."[478] They were therefore regulating the "'states as states' and the 'municipalities as municipalities'"; thus, the Tenth Amendment, as interpreted by *Usery*, precluded their enforcement.[479]

But if trash collection and ambulance services could ascend to the pantheon of state sovereignty, it is hard to fathom any principled distinction that would render traffic regulation in one of the country's most congested urban regions as not falling in that category. Yet, in *Friends of the Earth v. Carey*, the Second Circuit held that enforcing a metropolitan transportation control plan—arguably a far more complex and collaborative state activity—was

473. *See* 654 F.2d 1187, 1196 (6th Cir. 1981).

474. *See id.* at 1188-90.

475. *See id.* at 1195.

476. *Id.* at 1196.

477. *See* 538 F. Supp. 956, 965-67 (W.D. Mo. 1982), *aff'd sub nom.*, Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983).

478. *Id.* at 968.

479. *Id.* (citing National League of Cities v. Usery, 426 U.S. 833, 856 (1976), *overruled by* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985)).

not sufficiently "traditional" to warrant protection under *Usery*.[480] A suit was brought under the federal Clean Air Act to compel New York State and New York City to enforce a metropolitan transportation control plan, which it had submitted to the EPA pursuant to the Act.[481] The court held that *Usery* did not apply because the plan neither interfered with the integral functions of the City nor "usurp[ed]" the decision-making of the city or the state.[482] The "prospect that the City may be required to take action in the area of transportation control" did not qualify as an interference with sovereignty, especially when the regulation of roads in the New York City area had "long been considered to be a cooperative effort between City, State and federal authorities."[483]

By the time the Supreme Court revisited the issue in *Garcia v. San Antonio Metropolitan Transit Authority*, discussed below, the inscrutability of how best to enforce *Usery*'s imprecise standard, and the courts' difficulties in doing so, had become clear. In *Garcia*, the district court ruled that municipal ownership and operation of a mass-transit system qualified as a traditional governmental function and therefore was immune from compliance with the FLSA.[484] Reviewing the "historical reality" of state involvement in mass transit, the district court held that although state ownership of mass-transit systems did not have a long pedigree on its own, state *regulation* of such systems did have a significant historical tradition, which gave rise to an "inference of sovereignty."[485] The district court also stacked mass transit up against the state functions the Supreme Court had specifically enumerated as immune from federal interference under the Tenth Amendment in *Usery*: fire prevention, police protection, sanitation, public health, and parks and recreation.[486] In a colorful and damning conclusion, the court held that, if mass transit is "to be distinguished from the exempt *Usery* functions it will have to be by identifying a traditional

480. 552 F.2d 25, 37-38 (2d Cir. 1977).

481. *See id.* at 28.

482. *See id.* at 37.

483. *Id.* at 38.

484. *See* S.A. Metro. Transit Auth. v. Donovan, 557 F. Supp. 445, 454 (W.D. Tex. 1983), *rev'd sub nom.*, Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

485. *Id.* at 448.

486. *See id.* at 450.

state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it."[487]

Three other circuits, however, ruled directly to the contrary. In *Kramer v. New Castle Area Transit Authority*, the Third Circuit held that local mass transit systems did not qualify as "traditional governmental functions" because they had historically been operated by private companies, with minimal state involvement until the mid-twentieth-century.[488] In fact, federal involvement had been integral to the development and operation of public transit systems, making states "late comer junior partners," rather than originators, of mass transit services.[489] Therefore, states could not claim mass transit as a traditional governmental function to shield it from federal regulation, as the historical reality reflected a primarily federal initiative rather than an exclusively state-driven activity.[490]

The Eleventh Circuit agreed in *Alewine v. City Council*, adopting very similar reasoning: Mass transit systems were not traditional governmental functions because they had historically been owned and operated by private companies, with public ownership emerging only recently and largely driven by federal funding.[491] The transition to public ownership did not retroactively make mass transit a traditional state function.[492] Thus, applying federal regulations to these systems did not impair the ability of cities to function as municipalities or threaten their independent existence, which reinforced the conclusion that mass transit is not inherently a state responsibility.[493] And the Sixth Circuit agreed in *Dove v. Chattanooga Area Regional Transportation Authority* that it would "be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations."[494]

So, on one hand, airports, highways, car licensing, solid waste and trash disposal, and ambulance services were all deemed to be

487. *Id.* at 453.
488. 677 F.2d 308, 310 (3d Cir. 1982).
489. *Id.* at 310.
490. *See id.*
491. *See* 699 F.2d 1060, 1068 (11th Cir. 1983).
492. *See id.* at 1069 (citing *Kramer*, 677 F.2d at 310).
493. *See id.*
494. 701 F.2d 50, 53 (6th Cir. 1983).

traditional state services, but in contrast, airline certification and tariffs, as well as railroads, telephone systems, mental-health services, and even intrastate gas, were not. The nature of the industry, including its size and importance, did not seem to hold the answer as to how to apply *Usery*. Nor did its intra- versus interstate operation, nor which body traditionally regulated the industry. Nor, seemingly, did the ideology of the courts attempting to apply the amorphous *Usery* standard.[495] The First, Sixth, Eighth, and, repeatedly, Ninth Circuits—including the not-at-all-states-rights-focused future Supreme Court Justice, Judge Breyer[496]—ruled in favor of expansive interpretations of the Tenth Amendment under *Usery*, whereas the First, Second, Fifth, Tenth, and Eleventh Circuits all ruled to the contrary.[497] These divisions appeared to be a product of lower-court judges genuinely trying their best to apply *Usery*'s unstructured test and failing to reach any consistent, principled basis for determining which state actions were protected, and which federal actions were prohibited. The problem lay with *Usery* and its nebulous distinction, not with disingenuousness on the part of lower-court judges.

By the time *Garcia* reached the Supreme Court, it was obvious that *Usery*'s reliance on tradition to demarcate state and federal authority was untenable, and that the line between "essential state responsibilities" and "ordinary public services" looked more like a chalkboard scribble than a principled constitutional boundary. The lower-court judges were less forthright in their critiques of *Usery* and the failure of the Supreme Court to provide proper guidance as to how to apply it than in *Bruen*, about which lower court judges have been extraordinarily frank.[498] Yet, the district court's quip comparing the definition of mass transit's status to identifying pornography was more than just rhetorical flair;[499] it reflected the

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495. *See, e.g.,* Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 524-25 (2007).

496. *See* Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 637 (2000) ("Justice[ ] ... Breyer ... generally voted in favor of national power and against protecting the states in cases that raise federal issues.").

497. *See supra* notes 444-92 and accompanying text.

498. *See, e.g.*, United States v. Holden, 638 F. Supp. 3d 931, 941 (N.D. Ind. 2022) ("This opinion was drafted with an earnest hope that its author has misunderstood [Bruen]."), *rev'd*, 70 F.4th 1015 (7th Cir. 2023).

499. *See* S.A. Metro. Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1983),

practical impossibility of consistently policing such an amorphous standard.

E. "Both Impracticable and Doctrinally Barren": The Fall of Usery

The *Usery* experiment ended nine years after it began, when the Court overturned it in *Garcia v. San Antonio Metropolitan Transit Authority*.[500] The case concerned the application of the same FLSA amendments at issue in *Usery*—setting forth overtime and minimum-wage requirements—to the San Antonio Mass Transit Authority, a publicly-owned transportation system in Texas.[501] Retreating entirely from *Usery*'s holding, the Court held that the FLSA's requirements "contravened no affirmative limit" on Congress's commerce power, including the Tenth Amendment.[502] The Court dismissed *Usery*'s "traditional governmental function" standard, which had proved so vexing in the four intervening cases and in the lower courts, as "unworkable" and "inconsistent with established principles of federalism."[503]

Indeed, the Court declared that it would remove itself from the state-sovereignty line-drawing business altogether. While writing for the Court, Justice Blackmun recognized the special place that states occupy in the constitutional system,[504] and declared that state-sovereign interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[505] In other words, the structure of Congress would protect state interests because "senators and representatives will be mindful of and support their own states."[506] The Court was not just overturning *Usery*, it was entirely abandoning the principle that *Usery* had tried to erect. The

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rev'd sub nom., Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528 (1985).

500. 469 U.S. at 531.

501. *See id.* at 531, 533.

502. *See id.* at 556.

503. *Id.* at 531.

504. *Id.* at 547.

505. *Id.* at 552.

506. John E. DuMont, Comment, *State Immunity from Federal Regulation—Before and After* Garcia*: How Accurate Was the Supreme Court's Prediction in* Garcia v. SAMTA *that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391, 396 (1993).

Court deemed that the states were adequately protected by virtue of their representation in Congress and influence in the federal process.[507] The ambition of *Usery* to carve out a substantive zone of state immunity from federal reach was dismissed in favor of a pragmatic, procedural vision of federalism, wherein states negotiate their sovereignty in Congress, not the courts.

This was a remarkable turn for the Court. According to Justice Blackmun's papers, after the first *Garcia* oral argument, he was assigned to write a majority opinion *reaffirming* the rule in *Usery*, rather than overruling it.[508] As he drafted the opinion, he assigned one of his law clerks to design a "workable set of standards by which courts can sort out one governmental function from another for purposes of state immunity from federal regulation."[509] The clerk, Scott McIntosh, was unable to do so, concluding it was a fool's errand to try "to provide a constitutional safe harbor for some governmental functions and not for others."[510] In a memo to Justice Blackmun, McIntosh highlighted the lower courts' struggle in applying *Usery,* "including the problem of what role history should play in determining whether a governmental function is 'traditional.'"[511] The *United Transportation Union v. Long Island Railroad Co.* decision, after all, had rejected "a static historical view of state functions generally immune from federal regulation."[512] And if history were not the anchor for that inquiry, then the requirement that a function be "traditional" was essentially meaningless.[513]

In part due to the persuasion and careful reasoning of McIntosh, Justice Blackmun eventually circulated a draft that strongly questioned the rationale of *Usery*, though without expressly overruling it.[514] Due to this new development, the Court set the case for reargument, after which Justice Blackmun changed his vote,

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507. *See Garcia*, 469 U.S. at 552.

508. *See* David Scott Louk, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 YALE L.J. 682, 716 (2016).

509. *Id.* at 718 (quoting Memorandum from Scott McIntosh, Clerk, U.S. Sup. Ct., to Justice Blackmun, U.S. Sup. Ct. (May 8, 1984) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-3)).

510. *Id.* at 719 (quoting Memorandum from Scott McIntosh, *supra* note 509).

511. *Id.*

512. *Id.* (quoting United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686 (1982)).

513. *Id.*

514. *See id.* at 720.

leading Justice Brennan to assign him the majority opinion overturning *Usery*.[515] By then, Justice Blackmun was fully convinced that *Usery* was, as he wrote in *Garcia*, "both impracticable and doctrinally barren," and that, with its misbegotten adventures in Tenth Amendment line-drawing, the Court had "tried to repair what did not need repair."[516] At that point, a majority of the Supreme Court agreed.

F. Commandeering and Coercion: The Rehnquist Resurrection

In his short *Garcia* dissent, then-Justice Rehnquist declared that he was "confident" that *Usery*, and its vision of a vigorous Tenth Amendment, would "in time again command the support of a majority of this Court."[517] Justice O'Connor shared that confidence, predicting "this Court will in time again assume its constitutional responsibility" to affirm that "our federal system requires something more than a unitary, centralized government."[518] Both writings correctly foreshadowed a judicial pivot that would, under Chief Justice Rehnquist, realign the Court's stance on the balance between federal power and state autonomy.

The first step in that revival came in 1992. In *New York v. United States*, the Court, pursuing the Rehnquist-O'Connor vision, re-asserted the principle of state sovereignty but in a narrower and more clearly defined form, ruling that Congress could not compel states to enact or enforce federal regulatory programs.[519] Congress had passed a statute mandating that states, individually or through regional compacts, manage the disposal of waste produced within their boundaries; the statute used monetary incentives to ensure compliance, as well as escalating fees and potential denial of disposal site access for noncompliant states, and a controversial "take title" provision,[520] which required noncompliant states or

515. *Id.* at 722.
516. *See* 469 U.S. 528, 557 (1985).
517. *Id.* at 580 (Rehnquist, J., dissenting).
518. *Id.* at 589 (O'Connor, J., dissenting).
519. *See* 505 U.S. 144, 161 (1992).
520. *See id.* at 151-53.

regional compacts to take possession of the waste and assume liability for any resulting damages.[521]

In her opinion for the Court, Justice O'Connor wrote that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[522] She insisted that "[w]hatever the outer limits of ... [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[523] This language was reminiscent of her dissent in *FERC v. Mississippi*, which arguably had been "a trial run for her opinion in *New York*."[524] The difference was that now she commanded a Court.[525] But it was command over a Court ruling on a much narrower question than *Usery*, specifically addressing the power of the federal government to force state actors to do its bidding directly. And it was a Court acting through more directed means, focusing on specific limits on what the federal government could do—prohibiting specific methods of indirect functioning—rather than trying to immunize all "integral" and "traditional" state functions.

The Court further expanded the new reach of the Tenth Amendment, augmenting Justice O'Connor's "anticommandeering" principle, in *Printz v. United States*, when it struck down federal provisions requiring state officers to conduct background checks on prospective handgun purchasers as part of the Brady Handgun Violence Prevention Act.[526] Unlike the law at issue in *New York*, the Brady Act did not conscript the states as legislators or regulators in service of a federal mandate; instead it imposed temporary administrative duties on state and local law enforcement officials.[527] Nonetheless, the Court found that the law violated the Tenth Amendment because it required state officials to act, which

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521. *Id.* at 153-54.

522. *Id.* (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

523. *Id.* at 188.

524. Louk, *supra* note 508, at 725.

525. On the unusual power of Justice O'Connor, who was one of the Court's five most powerful Justices since 1953, see Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 67 (2008).

526. *See* 521 U.S. 898, 902, 933 (1997).

527. *See id.* at 929-30.

the Court held impermissibly muddied the lines of political accountability.[528] By compelling states to bear the expense of regulatory programs, federal lawmakers could "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[529] On this reading, commandeering is a constitutional sleight of hand that obscures the federal government's role in shaping policy and leaves citizens unable to properly hold it accountable.

The decisions in *New York* and *Printz* marked a significant revival of the Tenth Amendment, which appeared dormant following *Garcia*. That revival would be far more lasting than the original run. In *Murphy v. National Collegiate Athletic Ass'n*, the Roberts Court struck down the Professional and Amateur Sports Protection Act (PASPA) as a violation of the anticommandeering doctrine established in *New York* and *Printz*.[530] The Court reasoned that PASPA's prohibition on states "authorizing" or "licensing" sports gambling amounted to an unconstitutional directive to state legislatures that compelled them to refrain from enacting laws that would otherwise regulate or permit such activities.[531] Writing for the Court, Justice Alito dismissed the distinction between forcing states to legislate (as in *New York*) and forbidding them from *repealing* legislation, finding both forms of federal intrusion equally violative of the Tenth Amendment's structural protections: "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."[532] The Court reiterated the Rehnquist-O'Connor view that the Tenth Amendment "promotes political accountability" because "if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred."[533]

528. *See id.*
529. *Id.* at 930.
530. 138 S. Ct. 1461, 1481 (2018).
531. *See id.* at 1481-82.
532. *Id.* at 1478.
533. *See id.* at 1477 (first citing New York v. United States, 505 U.S. 144, 168-69 (1992); and then citing *Printz*, 521 U.S. at 929-30).

III. WHAT *GARCIA* PORTENDS FOR *BRUEN* AND THE SECOND AMENDMENT

Usery's overruling teaches that ambitious, subjective constitutional standards are likely to be unwieldy and short lived. Determining "traditional government functions" turned out to be an unprincipled and futile endeavor.[534] Similarly, under *Bruen*'s "historical analogue" requirement, courts are tasked with the near-impossible feat of unearthing historical justifications for every conceivable gun regulation, leading to inconsistent rulings and an immense burden on judicial resources.[535] And the Fifth Circuit's ruling in *United States v. Rahimi*, allowing gun possession for a demonstrably violent domestic abuser, exemplifies the absurdity *Bruen* can produce.[536] The Supreme Court seemed to recognize as much in reversing the Fifth Circuit, but without the opinion of the Court addressing the fundamental problem that some of the concurring opinions recognized: that the test involves an amorphous and subjective analysis that renders it all but unworkable.[537] The Court was forced to come to that realization for the Tenth Amendment, and for that same reason, it ultimately rejected that path and overturned *Usery*.[538]

The revival of the Tenth Amendment in *New York* and *Printz* proved to be a more strategically astute gambit than the doomed effort in *Usery* because the new effort approached the ideological project of limiting federal power with a clearer focus and a keener sense of optics. It swapped out the abstract and unworkable for a more rhetorically compelling set of ideas: commandeering, coercion, and political accountability. In *New York*, Justice O'Connor's opinion zeroed in on the straightforward indignity of Congress compelling states to take title to radioactive waste, framing it as a violation of state sovereignty.[539] The argument was tidy and easily digestible, bypassing the broader reality that federal and state

534. *See supra* Part II.E.
535. *See supra* Part I.D.
536. *See supra* Part I.E.
537. *See supra* text accompanying notes 316-23.
538. *See supra* Part II.E.
539. *See* 505 U.S. 144, 188 (1992).

governance has always been a messy, collaborative effort. The focus on "commandeering" gave the decision the appearance of defending a noble constitutional principle, even as it advanced a vision of federalism that fully aligned with conservative policy priorities.[540] *Printz* went a step further, focusing on the concern for political accountability.[541] In doing so, the Court traded *Usery*'s clunky abstractions for a framework that was easier to sell and harder to dismantle. And, almost three decades later, in *Murphy*, the anti-commandeering doctrine proved its staying power.[542] The project that began in *New York* and *Printz* endured because it was shrewd—better framed, better argued, and better packaged as constitutional fidelity.

The current Court may find a lesson in this as it approaches a post-*Bruen* landscape. Very similar to the impracticality of *Usery*, *Bruen* invites courts into a thicket of historical inquiry that has proven unworkable in practice. The challenge of discerning which gun regulations align with a narrowly conceived historical tradition echoes the same judicial hubris: an insistence on finding clarity in places where constitutional doctrine is better served by deference and pragmatism.[543] Justice Blackmun's journey, ultimately concluding in *Garcia*, suggests that even the most fervent doctrinal experiments can yield to the practical realities of governance—and that the Court's legitimacy is better preserved by retreating from impossible standards than by doggedly standing by them.[544] But the *New York* and *Printz* revival revealed that the Court could achieve much of the same ideological ends with more cunning. What the Court will do next with *Bruen*—whether it will take note of the problem and adopt a more workable standard or instead forge an extreme path on the Second Amendment—remains to be seen. This Section explores some of the most plausible ways that the post-*Bruen* Court, armed with the lessons of *Usery*, might move forward.

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540. *See supra* text accompanying notes 520-23.

541. *See* 521 U.S. 898, 930 (1997).

542. 138 S. Ct. 1461, 1477 (2018).

543. Some have said that this insistence is the hallmark of the Roberts Court. *See, e.g.*, Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 76 (2022) (describing the Roberts Court's approach to separation-of-powers issues as "carefully narrow, calibrated[,] ... and with a preference for subconstitutional approaches").

544. *See supra* Part II.E.

A. Abandon Bruen *Entirely*

The most radical, and thus least likely, step would be to abandon *Bruen*. But the Court cannot return to the pre-*Heller* days: The public reaction to the Court's disavowing the right to reproductive freedom shows the legitimacy harms of taking away a constitutional right once it has been recognized.[545] Instead, such an approach would inevitably start by returning to the looser standard of *Heller*. It might, then, require defining, on a case-by-case basis, what constitutes "common use" weapons and then setting a standard for "reasonable regulations," based on public safety needs, without requiring exhaustive historical comparison.[546] This would, of course, look a lot like the "means-end" *Marzzarella* framework which all the lower courts used before *Bruen* put a stop to it.[547] Post-*Bruen,* lower courts have also used *Heller*'s "presumptively lawful" and "law-abiding, responsible citizen[ ]" language to avoid engaging with the *Bruen* framework.[548] In one case, a California federal court declined to invalidate a law that deprived persons of firearms after their release from involuntary commitment in psychiatric facilities, holding that *Bruen* "does not affect the application of California law" due to *Heller*'s mention of mental illness as a basis for the prohibition, upon which *Bruen* did not "cast doubt."[549] In another

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545. *See* James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. 1041, 1041 (2023) (concluding based on qualitative investigation that, "unlike almost all previous research on the impact of events on the Court, *Dobbs* materially undermined the institution's legitimacy" and "is quite likely the most legitimacy-consequential decision of our generation"). However, the Court could rely on *Dobbs*-like reasoning to abandon its current Second Amendment jurisprudence, amending Justice Alito's words merely to substitute "gun rights" for "abortion, and "*Bruen*" for "*Roe* and *Casey*": "[F]ar from bringing about a national settlement of the [gun] issue, [*Bruen*] ha[s] enflamed debate and deepened division. It is time to heed the Constitution and return the issue of [gun rights] to the people's representatives." *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

546. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (limiting constitutional protection to weapons in "common use").

547. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (describing "means-end scrutiny"); *see also supra* Part I.B (describing lower courts' adoption of the test).

548. *See Heller*, 554 U.S. at 627 n.26, 635; Leo Bernabei, Bruen *as* Heller: *Text, History, and Tradition in the Lower Courts*, 92 FORDHAM L. REV. ONLINE 1, 18 (2024), http://fordhamlawreview.org/wp-content/uploads/2024/02/Vol.-92_01_Bernabei-001-021.pdf [https://perma.cc/F59E-5HBW].

549. Pervez v. Becerra, No. 18-cv-02793, 2022 WL 2306962, at *1, *9 & n.2 (E.D. Cal. June 27, 2022) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022)

case, a federal court in Georgia rejected a challenge to the prohibition on unlicensed firearm dealing, holding that even under *Bruen*, the "*central component*" of the Second Amendment is "individual self-defense," and that the right to bear arms "simply does not extend to the commercial sale of firearms."[550] One scholar has called this "*Bruen* Step Zero."[551] The Supreme Court could bless or adopt this approach.

Such a move would not only discard *Bruen*'s rigid framework but would signal a willingness to undo a major precedent from the Court's own recent history. It would be a tacit admission that *Bruen*'s historical-analogue test—marketed as a principled commitment to originalism—was, in fact, a misstep. But this would require the kind of institutional self-awareness and political insulation that this Court has rarely displayed.[552] Retreating from *Bruen* would not be just an act of jurisprudential correction; it would be an act of self-effacement, a repudiation of the Court's own authority cloaked in the rhetoric of democratic deference. In other words, it would be the Court admitting it got the test wrong—and that, perhaps more than anything, makes this outcome the least likely of all.

B. Do Nothing

Another likely outcome is not a grand pivot or a principled rethinking, but something far simpler: The Court may quietly do nothing. It may sit back, allow *Bruen*'s historical-analogue test to stand, and occasionally swat away the most egregious outliers, as in *Rahimi*, while leaving the lower courts to flounder. This approach requires no admission of error, no dramatic declarations, and above all, no real effort. It would mean striking down only the most absurd lower-court applications of the historical-analogue test—cases in which the facts so obviously offend common sense or public safety

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(Kavanaugh, J., concurring)).

550. United States v. Kazmende, No. 22-CR-236, 2023 WL 3872209, at *5 (N.D. Ga. May 17, 2023) (quoting *Heller*, 554 U.S. at 599).

551. *See* Jeff Campbell, *There Is No* Bruen *Step Zero: The Law-Abiding Citizen and the Second Amendment*, 26 U.D.C. L. REV. 71, 72 (2023).

552. *See, e.g.*, Bridges, *supra* note 164, at 53 ("[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis.").

that the Court has no choice but to act.[553] But beyond those moments of error correction, it would leave the *Bruen* test untouched, its problems left in the hands of overburdened district and circuit judges.

The results would be predictable. Lower courts would continue to churn out rulings that vary wildly in logic and outcome, depending on the creativity of the judges and the availability of historical tidbits to support their reasoning.[554] Gun rights would become a matter of geographic luck, with some circuits treating the Second Amendment as a fortress against all regulation and others straining to preserve the few rules that keep public safety afloat. This is not clarity or consistency; it is fragmentation, the exact situation that *Bruen* claimed to resolve but seems destined to perpetuate. And indeed, there is some indication that the Court may be headed down this path: In June 2025, over the dissenting votes of Justices Thomas, Alito, and Gorsuch, the Court declined to hear a challenge to Maryland's ban on the AR-15, a semiautomatic rifle that would seem to fall squarely within *Heller*'s criteria that a protected weapon be in "common use."[555]

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553. Although it was decided outside the context of the Second Amendment, the Court's decision in *Bondi v. VanDerStok* is an example of this "selective correction" approach. 145 S. Ct. 857, 865-66 (2025). In *VanDerStok*, faced with a gun industry challenge to a federal agency rule regulating "ghost gun" kits and unfinished frames, the Court avoided any discussion of gun rights and instead upheld the rule on narrow textual grounds. *See id.* at 864-66. Reversing the Fifth Circuit, the Court held that some kits clearly met the statutory definition of a "firearm," and thus could be regulated under the statute. *Id.* at 864-66, 876.

554. One vivid example of the unpredictability, and occasional theatricality, that has emerged in the lower courts post-*Bruen* is the dissenting opinion of Judge Lawrence VanDyke in a recent Ninth Circuit case upholding California's ban on large-capacity gun magazines. *See* Duncan v. Bonta, 133 F.4th 852, 860 (9th Cir. 2025), *petition for cert. filed*, No. 20-198 (U.S. Aug. 19, 2025); *id.* at 927 (VanDyke, J., dissenting) ("To sum it up: the majority's rationale in this case, followed to its (il)logical conclusion, means that now—perhaps even more so than before *Bruen*—only the jankiest guns are even facially protected by the Second Amendment."). As part of his dissent, Judge VanDyke released an eighteen-minute YouTube video in which, while wearing his judicial robe, he demonstrated the mechanics of various firearms to argue against the majority's decision. *See id.* at 916 (linking to video dissent); UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *Dissent Video in 23-55805* Duncan v. Bonta, (YouTube, Mar. 20, 2025), https://www.ca9.uscourts.gov/media/23-55805/opinion [https://perma.cc/M998-CMQJ] (VanDyke, J., dissenting by video to *Duncan*). This unconventional approach drew criticism from some of his colleagues. Judge Berzon, in a concurring opinion, described the video as "wildly improper," stating that it introduced facts outside the judicial record and positioned Judge VanDyke as an expert witness. *Duncan*, 133 F.4th at 884 (Berzon, J., concurring).

555. *See* Snope v. Brown, 145 S. Ct. 1534, 1534 (2025) (citing Heller v. District of Columbia,

One irony is that this scattershot approach does nothing to bolster the Court's legitimacy. On the contrary, it amplifies the sense that the Court's Second Amendment jurisprudence is a patchwork of ideology and improvisation, lacking the coherence needed to help the nation navigate one of its most contentious issues. Another irony is that it also undermines the Second Amendment rights that *Bruen* is meant to protect because a legal entitlement is hard to characterize as a "right" if it is uncertain, unreliable, and subject to geographic variations and ideological preferences.[556] And yet, for the Court's current majority, chaos might be preferable to concession. Admitting that *Bruen* was a misstep, or that something else is better, would require acknowledging, at least to some degree, that the test is unworkable, that lower courts are overwhelmed, or even that the project of originalism might need to be seriously revised. This Court may simply be unwilling to do that work and lose the face required to do more than nothing.

C. Raise the "Level of Generality" for the Bruen *Test*

A more pride- and precedent-maintaining, minimalist approach than jettisoning *Bruen* would be to better calibrate it. The Court could follow the prescription of Professors Joseph Blocher and Eric Ruben and affirm "the importance of operating at a high level of generality."[557] That is, the Court could articulate a broad understanding of what qualifies as a historical analogue. Such an approach would avoid, for instance, the dual absurdities of "rejecting a gun-rights claim because there was no right to carry a semiautomatic handgun in 1791, or upholding the claim because in 1791 there was no law specifically forbidding it."[558] Indeed, lower courts have indulged in some "anachronistic" rulings of that sort,

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670 F.3d 1244, 1286-88 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

556. The first element defining a right is that it is universal, that all "are universally entitled by virtue of having the status of persons, or of citizens." *See* Luigi Ferrajoli, *Fundamental Rights*, 14 INT'L J. FOR SEMIOTICS LAW 1, 1 (2001). That is, rights are fundamental and create a duty for legislators and judges to remedy their violation. If the Second Amendment right is permitted to be interpreted in highly varying ways, it is not a right per se.

557. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 162 (2023).

558. *Id.* at 164.

including one case in which a court invalidated New York's requirement that permit applicants produce a list of their social media accounts on the grounds that there was no historical analogue to, for example, "requiring persons to disclose the pseudonyms they have used while publishing political pamphlets or newspaper articles."[559] A high level of generality would, for instance, account for the absence of regulations against domestic abusers because it would include "asking *why* earlier generations disarmed certain groups of people, rather than asking only *whom* they disarmed."[560]

It is extraordinarily unlikely that Justice Thomas would ever sign on even to such a minimalist reform, as his dissent in *Rahimi* made clear.[561] Justice Thomas is committed to *Bruen*, refusing to acknowledge the difficulties lower courts have had in operationalizing his test, and to a maximalist interpretation of gun rights, and to the correlated minimalist interpretation of legislative power to control gun violence.[562] The very specificity of the application of his own test in both *Bruen* and *Rahimi* is not a coincidence: Just as the more broadly a right is conceived, the easier the right is to find within the broad contours of the Constitution, requiring a more specific and detailed historical analogy achieves the reverse. This can be seen in multiple different areas of law,[563] including in the definition of constitutional rights. Compare Justice White's characterization of the constitutional issue presented in *Bowers v. Hardwick*, as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"[564]—despite the legislation in question applying equally to

559. *See* Antonyuk v. Hochul, 635 F. Supp. 3d 111, 136 (N.D.N.Y. 2022).

560. *See* Blocher & Ruben, *supra* note 557, at 165.

561. *See* United States v. Rahimi, 144 S. Ct. 1889, 1946 (2024) (Thomas, J., dissenting) ("[T]he Court should remain wary of any theory in the future that would exchange the Second Amendment's boundary line ... for vague (and dubious) principles with contours defined by whoever happens to be in power.").

562. *See id.* at 1941 ("*Bruen*'s conclusion is inescapable and correct.").

563. Consider also the availability of *Bivens* claims, which is notoriously specific in the need to find an exact precedential twin before the Court will deem it present. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020) (holding that no cause of action was available under *Bivens* against a Border Patrol agent who shot and killed a Mexican national across the U.S.-Mexico border because no prior case presented sufficiently similar facts to clearly establish a constitutional violation).

564. 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). The

homosexuals and heterosexuals, and to both anal and oral sex[565]—to Justice Blackmun's gentler and more forgiving search for the right of individuals "to decide for themselves whether to engage in particular forms of private, consensual sexual activity."[566] Unsurprisingly, the former was deemed missing from the Constitution, whereas the latter was easily discovered.[567] Likewise, for a gun rights expansionist like Justice Thomas, the more specific the analogue must be, the better, as the fewer are the possible forms of regulation and control.[568] *Rahimi* does suggest, however, that there may be numerous Justices either less extreme on the issue or more practical, perhaps closer to Justice Blackmun in the *Usery-Garcia* line of cases.[569]

In direct contrast to Justice Thomas, Justice Sotomayor, joined by Justice Kagan, stated explicitly in her *Rahimi* concurrence that she continues "to believe that *Bruen* was wrongly decided,"[570] as does Justice Jackson.[571] Accordingly, all three of the liberal Justices would likely support either of the reform proposals described here. The concurrences made clear their willingness to embrace a return to the *Marzarella* framework, with Justice Jackson describing the "discord" created by *Bruen* as "striking when compared to the relative harmony" of *Marzarella*.[572] But Justice Barrett might also join such an approach. As discussed, her concurrence most pointedly

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justification for this was presumably that Hardwick had been charged as a result of an act of homosexual sodomy. *See id.* at 192-94.

565. *See id.* at 187-88, 188 nn.1-2.

566. *See id.* at 199 (Blackmun, J., dissenting).

567. *Contrast id.* at 191 (majority opinion) ("[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."), *with Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives.... Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

568. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

569. *Contrast* United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) ("Historical regulations reveal a principle, not a mold." (citing *Bruen*, 142 S. Ct. at 2132)), *with id.* at 1944 (Thomas, J., dissenting) ("The Court's contrary approach of mixing and matching historical laws—relying on one law's burden and another law's justification—defeats the purpose of a historical inquiry altogether.").

570. *Id.* at 1904 (Sotomayor, J., concurring).

571. *Id.* at 1926 (Jackson, J., concurring) ("I would have joined the dissent had I been a Member of the Court at that time.").

572. *See id.* at 1927.

focused on managing levels of generality.[573] She embraced *Bruen*'s originalist approach while acknowledging that it does not provide certain answers, and recognizing that "reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[574] She ended her opinion by saying, "Here, though, the Court settles on just the right level of generality.... Harder level-of-generality problems can await another day."[575]

This suggests that there could be at least four votes for this resolution. But that final line illustrates the problem with this approach: It simply delays finding a principled and certain solution. Levels of generality are always manipulable to ensure a desired outcome;[576] as such, tinkering with them would be akin to Scott McIntosh's description of *Usery*: "an open invitation for the judiciary to make *Lochner*-esque decisions about which state policies they favor and which ones they dislike."[577] In keeping the Court's options open, Justice Barrett has proposed making the country wait to know what its rights are and the government wait to know what it may permissibly regulate.[578] *Bruen* left some critics saying that "maybe only two people in the world know" what its test means and that "some of the majority justices seem satisfied with essentially saying, 'We'll let you know when you get it wrong.'"[579] Justice Barrett seems content to let that situation continue for now.

D. A New York*-Like Approach: A "Safe Hands" Doctrine?*

Finally, the Court could engage in a more thorough rethinking of the problems at the heart of *Bruen*. If *Heller* laid the foundation by identifying self-defense as the core of the Second Amendment,[580] a

573. *See id.* at 1925 (Barrett, J., concurring).

574. *Id.* at 1926.

575. *Id.*

576. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 944 (1978) ("[I]t makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim.").

577. *See* Louk, *supra* note 508, at 720 (quoting Memorandum from Scott McIntosh, *supra* note 509).

578. *See Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring).

579. Dahlia Lithwick, *Keynote Address at the Conference on U.S. Supreme Court Nominations & Confirmations: Yesterday, Today, & Tomorrow*, University of Georgia, Athens, Ga., Feb. 16, 2024.

580. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

post-*Bruen* Court might build upon this foundation by formalizing a new doctrinal principle: protecting the right to bear arms for self-defense while ensuring that firearms remain in the "safe hands" of responsible, law-abiding individuals. Under such a doctrine, those who pose a danger to society could be disarmed in accordance with due process. In doing so, the Court could take a page from the playbook it used in *New York v. United States* and *Printz v. United States*, crafting a conceptually clean framework that emphasizes principle over abstraction and directly addresses the main concern[581]—protecting the core right of self-defense in the Second Amendment without sacrificing public safety.

A "safe hands" doctrine would allow the Court to maintain its commitment to the individual right to bear arms while sidestepping the absurdities that *Bruen*'s historical method has produced. Instead of chasing phantom analogues in the historical archives, the Court could shift to a principle that sounds both modern and pragmatic: The Second Amendment protects the rights of responsible, law-abiding citizens but permits the government to disarm individuals who pose a credible threat to others. This framing would allow the Court to keep *Heller*'s promise—preserving the individual right to self-defense[582]—while quietly discarding the more impractical elements of *Bruen*. This would mirror the anticommandeering principle that the Court conjured in *New York* and *Printz*, which ensured accountability by preventing the federal government from using state actors as puppets but did not overreach for broader state power and immunity.[583] And similar to that more modest "anticommandeering" principle, a "safe hands" doctrine is easy to explain and hard to argue against. Just as anticommandeering framed federalism not as a theoretical abstraction but as a matter of state dignity and autonomy,[584] the "safe hands" doctrine distills the Second Amendment into a clear and rhetorically appealing rule: Guns belong in safe hands, not in dangerous ones. Embracing this principle neatly sidesteps *Bruen*'s more ludicrous implications without ever admitting that *Bruen* was

581. *See* New York v. United States, 505 U.S. 144, 188 (1992); Printz v. United States, 521 U.S. 898, 933 (1997).

582. *See Heller*, 554 U.S. at 628.

583. *See New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 933.

584. *See, e.g.*, *Printz*, 521 U.S. at 918-19.

wrongheaded, as it draws on the concessions Justice Scalia began to articulate in *Heller*, such as permitting prohibiting guns in sensitive places and keeping them out of the hands of felons and the mentally ill.[585] This blend of principle, pragmatism, and pedigree makes it a realistic option for the Court to adopt.

Under this doctrine, the Court could harmonize its greatest Second Amendment hits. *Heller* remains secure, standing as the guarantor of self-defense in the home. *Bruen*'s rejection of New York's discretionary permitting system still holds, reasserting the right to carry firearms beyond the home without arbitrary interference. And the Fifth Circuit's adventure in *Rahimi*, with its unsavory implications, becomes an outlier, easily overturned on the grounds that domestic abusers fail the "safe hands" test. The Court would, in effect, clean up its mess without disturbing its narrative of constitutional fidelity.

In this way, a "safe hands" doctrine would provide a political solution as well as a legal one. Its likely success lies in part on its ability to provide a retreat from *Bruen* that feels less like an acknowledgment of error and more like an exercise in damage control. Just as the anticommandeering doctrine allowed the Court to revive federalism in a way that was politically advantageous and rhetorically tidy, the "safe hands" doctrine would allow it to salvage the Second Amendment from the morass of its own making. And similar to anticommandeering, it would likely endure, not because it is uniquely principled—there are, no doubt, other moderate, pragmatic dividing lines that could be drawn—but because it is exceptionally sellable as a doctrine that feels self-evident and unobjectionable, even as it quietly rewrites the rules. The "safe hands" doctrine may not resolve every tension in the Second Amendment, but it gives the Court a chance to gracefully climb down and claim the high ground on the way out.

For all its sense, the success of the "safe hands" doctrine—or anything resembling it—hinges on the temperament of the current Court. The anticommandeering doctrine thrived under the stewardship of Justice O'Connor, who was well known for approaching her job with a politician's instincts and a pragmatist's eye for the art

585. *See Heller*, 554 U.S. at 626.

of the possible.[586] Justice O'Connor understood that judicial success often depends on crafting rules that work as much in the court of public opinion as in the chambers of the judiciary.[587] She wrapped federalism's old abstractions in the tidy, sellable package of anticommandeering,[588] a concept that felt principled while advancing conservative priorities without looking overly ideological. But the current Court—so enamored of its own self-image as principled textualists, originalists of the most rigorous kind[589]—may see a doctrine such as "safe hands" as an unseemly concession to reality. To acknowledge that *Bruen* was an overreach, or to replace it with a doctrine grounded in modern pragmatism, would be to admit that law is, after all, a tool of governance rather than a purely intellectual exercise.

The "safe hands" doctrine could appeal to the pragmatist Chief.[590] He began the substance of the *Rahimi* opinion with a simple, practical conclusion: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."[591]

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586. *See* Jeffrey Toobin, Opinion, *Sandra Day O'Connor's Other Legacy*, N.Y. TIMES (Dec. 1, 2023), https://www.nytimes.com/2023/12/01/opinion/sandra-day-oconnor-death-supreme-court.html [https://perma.cc/MG9H-DNDK] ("[Justice O'Connor] was a practical problem solver, and she was guided by a keen sense of the political center, where she thought the court always belonged.").

587. Justice O'Connor not only held the middle, pivotal position on the Court for much of her time there, she was a "super-median": a Justice "so powerful that they are able to exercise significant control over the outcome and content of the Court's decisions." Epstein & Jacobi, *supra* note 525, at 41, 43 (identifying Justice O'Connor as one of the six most powerful Justices from 1953-2006).

588. *See New York*, 505 U.S. at 188.

589. *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1924 (2024) (Kavanaugh, J., concurring) (praising the Court for "properly tak[ing] account of text, pre-ratification and post-ratification history, and precedent").

590. *See, e.g.*, Jo Becker & Amy Argetsinger, *The Nominee as a Young Pragmatist*, WASH. POST (July 22, 2005), https://www.washingtonpost.com/archive/politics/2005/07/22/the-nominee-as-a-young-pragmatist/99b27495-78b8-442f-92f2-499dd7bb83dc/ [https://perma.cc/8SNV-FS6M] (describing Chief Justice Roberts before his time on the Court as "a savvy political pragmatis[t]"); Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1674 (2016) (showing Chief Justice Roberts sits high on a judicial decision-making dimension likely to prefer pragmatic methodology).

591. *Rahimi*, 144 S. Ct. at 1896-97.

Despite the many concurring opinions in *Rahimi*, Chief Justice Roberts managed to forge an eight-to-one majority for that sensible conclusion.[592] He may just be able to convince a majority, even if not such a super-majority, to accept this lifeline out of *Bruen*'s thicket.

E. Looking Ahead: Signals from Two Recent Cases

This Section looks ahead to interpret the most recent signals about the likely direction of the Court in future cases—in particular, whether the Justices are likely to be amenable to the "safe hands" doctrine or any other reform of *Bruen*. This requires some speculation, but we have some quite strong indications of potential for change as the Court heads back into the *Bruen* mire in the wake of *Rahimi* in two October 2025 Term cases which are pending as of the publication of this Article: *Wolford v. Lopez*[593] and *United States v. Hemani*.[594]

1. The Second Amendment Meets Property Law: Wolford

Wolford v. Lopez concerns a Hawai'i law that prohibits the carrying of a firearm on another's private property without explicit authorization from the property owner, essentially a reversal of the default rule which would permit such carrying unless specified.[595] The questions many of the Justices asked during oral argument were reminiscent of their positions and emphases in *Rahimi*, but some differences suggest some Justices may be changing their positions. Commentators expect the Court to strike down the law.[596]

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592. *Id.* at 1889.

593. 146 S. Ct. 79 (mem.) (granting certiorari) (2025).

594. 146 S. Ct. 326 (mem.) (granting certiorari) (2025).

595. *See* 116 F.4th 959, 971 (9th Cir. 2024), *cert. granted*, 146 S. Ct. 79 ("The law also flips the default rule on all private property: Whereas the old rule allowed a person with a carry permit to bring firearms onto private property unless the owner prohibited it, the new rule generally prohibits the carry of firearms onto private property unless the owner allows it.") (citing HAW. REV. STAT. § 134-9.5(a) (2023)).

596. *See, e.g.*, Akhil Amar & Vikram Amar, *Four Answers to the Justices in* Wolford v. Lopez, SCOTUSBLOG (Jan. 21, 2026, at 16:35 ET), https://www.scotusblog.com/2026/01/four-answers-to-the-justices-in-wolford-v-lopez/ [https://perma.cc/UYE5-BLTK] (responding to "four sets of questions that various justices who seemed skeptical of the Hawaii law asked at oral argument"); Melissa Quinn, *Supreme Court Seems Skeptical of Hawaii Law Limiting Guns on Private Property That's Open to the Public*, CBS NEWS (Jan. 20, 2026, at 13:23 ET),

Justice Gorsuch mirrored the emphasis in his *Rahimi* concurrence on judicial restraint,[597] saying "there's been some suggestion that this is just, oh, redefining property rights and it has nothing to do with the Second Amendment. And, of course, we don't allow governments to redefine property rights in other contexts that would infringe other constitutional rights."[598] Also seemingly supportive of the challenge to Hawai'i's law, unsurprisingly, was Justice Thomas, who asked: "Are there any other constitutional rights … on which you could place similar limitations?"[599]

This view of the Second Amendment as needing special protection was reiterated by Justice Alito,[600] and interestingly, Chief Justice Roberts.[601] But more to type, the Chief seemed interested in also re-emphasizing the existence of some practical limits on the reach of the Second Amendment, such as differentiating a property owner's choice over allowing or prohibiting bringing firearms onto publicly accessible private property from the same choice regarding ordinary private property.[602]

Of those Justices who seemed likely to strike down the Hawai'i law, it was Justice Kavanaugh who most seemed to stray from his position in *Rahimi*. In his concurrence in that case, he pursued a modern and practical approach, emphasizing the flexibility of *Bruen* while defending its overall approach—and, significantly, acknowledging the difficulty and ambiguity in reading history and conforming constitutional interpretation to that history.[603] In

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https://www.cbsnews.com/news/supreme-court-hawaii-gun-law-wolford-v-lopez/ [https://perma.cc/45QH-2L27].

597. *See* United States v. Rahimi, 144 S. Ct. 1889, 1908 (2024) (Gorsuch, J., concurring) ("If changes are to be made to the Constitution's directions, they must be made by the American people.... [A] court may not 'extrapolate' from the Constitution's text and history 'the values behind [that right], and then … enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.'" (third and fourth alterations in original) (quoting Giles v. California, 554 U.S. 353, 375 (2008))).

598. Transcript of Oral Argument, *supra* note 14, at 44 (statement of Gorsuch, J.).

599. *Id.* at 78-79 (statement of Thomas, J.).

600. *Id.* at 92 (statement of Alito, J.) ("Mr. Katyal, you're just ... relegating the Second Amendment to second-class status.").

601. *Id.* at 83 (statement of Roberts, C.J.) (referring to the Second Amendment as "a disfavored right").

602. *See id.* at 22-23.

603. United States v. Rahimi, 144 S. Ct. 1889, 1923-24 (2024) (Kavanaugh, J., concurring) ("Deciding constitutional cases in a still-developing area of this Court's jurisprudence can sometimes be difficult.... Of course, difficult subsidiary questions can arise about how to apply

contrast, at oral argument in *Wolford*, Justice Kavanaugh adopted an approach that allowed for much less nuance, describing the necessary analysis as "simple"[604] and determinative,[605] so much so that he queried Principal Deputy Solicitor General Sarah Harris who argued for the United States on behalf of the petitioners as to why she did not "lead with that?"[606] Justice Kavanaugh may just see the *Wolford* case as an easy one on the historical record, despite the existence of Black Codes that arguably provide analogues, but his position read as more hardline than his concurrence in *Rahimi* and less cognizant of the complexity of *Bruen*, of the complexity of the history that must be analyzed in at least some cases, and of the indeterminacy of some historical analysis.

On the other side of the bench, ideologically, Justice Jackson once again explicitly challenged the *Bruen* test, saying that Petitioner's challenge to the Hawaiian law relied on denying that postbellum Black Codes were available as historic analogues, which signals "a problem with the *Bruen* test, that to the extent that we have a test that relates to historical regulation, but all of the history of regulation is not taken into account, … I think there might be something wrong with the test."[607] Justice Sotomayor in turn challenged *Bruen* on that Court's treatment of "outliers"—historical analogues that do not count as such because they are not representative.[608] She[609] and Justice Kagan[610] also picked up on Justice Barrett's emphasis in *Rahimi* on defining a higher level of generality, which Justice Barrett explored again.[611]

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those tools, both generally and in particular cases. And in some cases, text, history, and precedent may point in somewhat different directions. In law as in life, nothing is perfect.").

604. Transcript of Oral Argument, *supra* note 14, at 42; *see also id.* at 41 (statement of Kavanaugh, J.) ("Why are we making it complicated?").

605. *Id.* at 42 ("Here, there's no sufficient history supporting the regulation, end of case.").

606. *Id.* at 43.

607. *Id.* at 34 (statement of Jackson, J.).

608. *See id.* at 114 (statement of Sotomayor, J.) ("I have never quite understood the Court's recent jurisprudence on outliers don't count.").

609. *See id.* at 7 ("My question is very simple. Is there a constitutional right to enter private property with a gun without an owner's express or implied consent?").

610. *Id.* at 27 (statement of Kagan, J.) ("[T]he idea that these are antipoaching laws. I mean, okay, Hawaii's is not an antipoaching law. But I suppose I'm sort of stuck on the fact that that doesn't seem to me to be the relevant similarity. In *Rahimi*, we said ... you can go up a level of generality. You don't have to have a historical twin. There can be differences.").

611. *See id.* at 17, 31, 67-69 (statement of Barrett, J.) (differentiating publicly accessible private lands from private lands not open to the public and asking how the Court is "supposed

But Justice Barrett's probing questions to those challenging Hawai'i's law extended beyond just levels of generality. She posited that there could be a rash of gas station robberies and responding to such a problem by making a law allowing gas station owners to prohibit guns would be responding to a problem of the time, much like the antipoaching historic analogues that existed in support of the Hawaiian legislation.[612] From that, she drew a more general critique of *Bruen*, although not framing it as such. When Deputy Solicitor General Harris responded by focusing on what the anti-poaching laws were regarding, Justice Barrett asked: "How do you know that's the relevant distinction? I mean, it could just be that, well, that is an incidental of the problem. I mean, that just happens to be where the problem of poaching arose."[613] And from that logic, she drew out a significant limit of *Bruen*'s capacity to address modern questions: "I think this is this problem of just because the legislature didn't address a problem because it didn't exist at the time, why does that mean that the analog ties the legislature's hands now?"[614]

As described, this is an inherent problem of the *Bruen* approach: It assumes that legislatures covered the field of possible legislation, that founding legislatures maximized all their power that existed at the time of the framing in exercising the power of writing legislation.[615] That assumption is simply impractical as well as unlikely. Even without modern-day gridlock, there is still a limit as to how much legislation a Congress can pass or would even think to pass, even if it has the power. Justice Barrett gave no indication that she was challenging *Bruen* in the *Wolford* oral argument, but the logic of her questions contain some of the seeds of *Bruen*'s considerable limitations.

Most intriguingly, Justice Barrett seemed to be approaching a "safe hands" analysis in her oral argument questioning in *Wolford*.[616] She said to Deputy Solicitor General Harris, arguing in support of Petitioner's challenge to the Hawaiian law:

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to distinguish that analogue").

612. *Id.* at 65.

613. *Id.* at 66.

614. *Id.* at 67.

615. *See supra* notes 319-23 and accompanying text.

616. Transcript of Oral Argument, *supra* note 14, at 70 (statement of Barrett, J.).

> You say: "A law is per se unconstitutional if it broadly prevents ordinary Americans from carrying protected firearms in public." Who is an ordinary American? And why—kind of throughout your brief, you used that formulation, but, as I recall in *Heller*, it says ordinary law-abiding Americans. Why not the law-abiding[,] and what is an ordinary American?[617]

The Court was shortly faced with that question more directly.

2. The Court Addresses Dangerousness: Hemani

Even more recently, in March 2026, the Supreme Court heard oral argument in *United States v. Hemani*.[618] Ali Danial Hemani challenged his conviction under a federal law that prohibits any "unlawful user" or addict of a controlled substance from possessing a firearm.[619] Commentators have suggested that the law is likely to be struck down—notably not because the Justices will reject the concept of keeping guns out of unsafe hands, but rather because the statute is overly vague as to what it means to be an unlawful or habitual user.[620] The government, once again represented by Principal Deputy Solicitor General Sarah Harris, this time was arguing in favor of upholding the law based on it being a "tailored restriction [that] easily fits within the historical tradition of disarming categories of people who present a special danger of misuse," including habitual drunkards and the mentally ill.[621]

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617. *Id.*

618. *See* Transcript of Oral Argument at 1, United States v. Hermani, No. 24-1234 (U.S. Mar. 2, 2026).

619. *See* United States v. Hemani, No. 24-40137, 2025 WL 354982 at *1 (5th Cir. Jan. 31, 2025) (per curiam), *cert. granted*, 146 S. Ct. 326. The challenged statute provides: "It shall be unlawful for any person … who is an unlawful user of or addicted to any controlled substance … [to] possess in or affecting commerce, any firearm." 18 U.S.C. § 922(g)(3). In this statute, a "controlled substance" is one listed on any of the established five schedules of controlled substances. *See id.*; 21 U.S.C. §§ 802(6), 812; 21 C.F.R. §§ 1308.11-1308.15.

620. *See, e.g.*, Amy Howe, *Supreme Court Skeptical of Law Banning Drug Users from Possessing Firearms*, SCOTUSBLOG (Mar. 2, 2026, at 17:00 ET), https://www.scotusblog.com/2026/03/supreme-court-skeptical-of-law-banning-drug-users-from-possessing-firearms/ [https://perma.cc/N58S-7DAK].

621. Transcript of Oral Argument, *supra* note 618, at 3-5 (statement of Sarah Harris, Principal Deputy Solicitor General).

The oral argument presented some unusual coalitions of Justices. For instance, Justice Sotomayor and Justice Gorsuch each questioned what it meant to be a "habitual" user. Justice Sotomayor voiced concern that the same analysis could apply to the homeless,[622] and Justice Gorsuch voiced concern that it would have condemned many of the Founders.[623] On the other side, Justice Alito also seemed ready to switch sides. In defense of the law, he explained that the government's historic analogue of gun restrictions for habitual drunkards was apt because "the most commonly used illegal drugs either had not been invented at the time of the adoption of the Second Amendment or the adoption of the Fourteenth Amendment."[624]

Equally contrarily to her previous positions, in this case, Justice Jackson embraced the *Bruen* test, using its high bar for a historic analogue to challenge congressional judgments based on a person's status. Responding to Deputy Solicitor General Harris's argument that "it is a fair judgment to make that you are exceptionally dangerous" if regularly using heroin, even if not an addict, Justice Jackson said: "[I]t might be a fair judgment, but, conceptually, that is precisely what the *Bruen* test prohibits, that we don't credit the judgments of the modern legislature about who is dangerous and who needs to be disarmed," but instead may follow only those policy judgments history shows the Founders had.[625] In another surprising defense of *Bruen*, Justice Jackson suggested that whereas *Bruen* looks at the founding history, the legislature has an incentive to make things illegal considering current notions of illegality.[626]

Similarly inversely to his rigidity in *Wolford*, Justice Kavanaugh refocused on complexity in *Hemani*. He explored fine distinctions between different groups, querying Deputy Solicitor General Harris about the difference between an addict, a "simple" user, a habitual user, and "a habitual user who endangers the public morals."[627] And he seemed to be favoring a moderate position, recognizing that there

622. *See id.* at 6 (statement of Sotomayor, J.) .

623. *See id.* at 10 (statement of Gorsuch, J.).

624. *Id.* at 33 (statement of Alito, J.).

625. *Id.* at 25; *see also id.* at 65-66 (statement of Jackson, J.) ("[Y]ou say there's a really good reason to do this and Congress's judgments are, you know, grounded in important policy determinations. All that's true, but that's not what the *Bruen* test is asking us to do.").

626. *See id.* at 29.

627. *See id.* at 49-51 (statement of Kavanaugh, J.).

is a tradition of prohibiting gun possession by addicts,[628] but stressing that "endangering the public morals" can "mean[] anything."[629]

Chief Justice Roberts worried about practicalities, as is common for him, but his concern was that Respondent's argument for striking down the law could extend to dangerous drugs[630] and encourage numerous as-applied challenges to gun restrictions,[631] a concern reiterated by Justice Alito.[632]

These changing positions illustrate the porousness of the *Bruen* test, and how, rather than providing clarity and getting away from policy judgments, as Justices Thomas,[633] Gorsuch,[634] and Kavanaugh[635] have each claimed, its variation coincides with ideological proclivities. Justice Jackson summed up the problem of the emerging inconsistency at the Supreme Court mirroring the high variation described in the lower courts, saying to Solicitor General Harris:

> I'm concerned that *Bruen* and *Rahimi* are going to be allowing for arbitrary identifications of analogues and producing inconsistent results. You were here in January with respect to the *Wolford* case when you argued that historical antipoaching laws were different enough from what Hawaii was doing that it's unconstitutional. Here, you're arguing that historical laws that have nothing to do with guns, very little to do with unlawful users of intoxicants, as, you know, was going on in the history,

628. *Id.* at 90-91 ("I think [Respondent] and the government agree that there is a tradition of prohibiting gun ownership, possession, by those who are addicted to drugs, correct?").

629. *Id.* at 92.

630. *Id.* at 73 (statement of Roberts,C.J.) ("Why doesn't [Respondent's argument] apply to any drug, whether it's PCP, methamphetamine, whatever?").

631. *Id.* at 75-76 (worrying courts would be faced with as-applied challenges to determine which drugs are "particularly dangerous or particularly addictive.").

632. *Id.* at 111 (statement of Alito, J.) ("Yeah, ... I struggle to figure out how these individualized determinations can be made in the context of a criminal prosecution. The ... way in which criminal prosecutions are conducted makes this extremely difficult."); *see also id.* at 35, 77.

633. *See* United States v. Rahimi, 144 S. Ct. 1889, 1946 (2024) (Thomas, J., dissenting) (asserting that it is "the Founders' and ratifying public's ... policy judgment—not that of modern and future Congresses—'that demands our unqualified deference'" (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022))).

634. *See, e.g.*, *id.* at 1909 (Gorsuch, J., concurring) ("In *Bruen*, we rejected [an approach that encouraged judicial policymaking] for one guided by constitutional text and history.").

635. *See id.* at 1912 (Kavanaugh, J., concurring) ("History, not policy, is the proper guide.").

> are similar enough to cause this law to be unconstitutional[sic]. I don't understand how this works anymore in any meaningful way.[636]

The most consistent Justice was Justice Barrett. Not only was she consistent with her position in *Wolford*—again testing a concept reminiscent of our "safe hands" doctrine—but she was also consistent in addressing that issue almost exclusively throughout the oral argument. Justice Barrett queried how the law would apply to drugs that can be taken lawfully or unlawfully, such as a spouse taking their partner's prescribed Ambien.[637] She said to Solicitor General Harris: "I agree with you, and I think this is what *Rahimi* says, that legislatures can regulate to keep guns out of the hands of dangerous people," and only she queried whether Ambien and marijuana are dangerous.[638] Justice Barrett went on to specify that she would not be satisfied with a rule that hinged on legality, but she would be satisfied with a rule that hinged on dangerousness.[639] Further, she went on to specify that this determined the constitutionality of a law, saying: "I think that the principle is, if you have reason to know that someone would pose a risk of violence, is dangerous, … the legislature can disarm."[640]

Concerned to differentiate drugs associated with violence from "Robitussin, Ambien, Tylenol with codeine, testosterone, [and]

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636. Transcript of Oral Argument, *supra* note 618, at 67-68 (statement of Jackson, J.).

637. *See id.* at 16 (statement of Barrett, J.).

638. *Id.* at 16-17.

639. *Id.* at 17 ("And the example that I just gave you about the Ambien is important to me because it's not the drug itself in this circumstance that's causing the dangerousness.… It's the lawfulness. And so too here with the marijuana, I just don't see anything in the scheme that actually reflects Congress's judgment that this makes someone more dangerous."). She used her seriatim time to follow up again on the dangerousness question, asking whether "proclivity to violence [is] expressly one of the things that's taken into account." *Id.* at 55.

640. *Id.* at 56. Justice Barrett repeatedly expressly stated that whether there is evidence of dangerousness would determine whether the law would violate the Second Amendment. *See e.g.*, *id.* at 20-21 (statement of Barrett, J.) ("What about each kind of drug? Is it the government's position that if I unlawfully use Ambien or I unlawfully use Xanax, then I become dangerous? … [T]he question is would it violate the Second Amendment, and what is the government's evidence that using marijuana a couple times a week makes someone dangerous?").

Adderall,"[641] Justice Barrett suggested a solution that also hinged on a showing of dangerousness:

> What about an as-applied challenge just to that particular drug? Why … can't Mr. Hemani simply say, you don't have to take into account all of my personal circumstances, but, you know, government, I would like to put you to your proof about whether marijuana has an established link to violence?[642]

But while Justice Barrett exclusively stressed dangerousness, in contrast to the other Justices, much of the rest of the bench, for all of their variation—both between one another in this case and with their positions previously expressed—all seemed to accept the dangerousness notion, indicating that they, too, could be amenable to a "safe hands" doctrine.[643] Chief Justice Roberts suggested that if "Congress and the executive in statutes … want to categorize this particular drug as something that's dangerous," that should be enough.[644] Justice Alito, too, made clear that he accepted the dangerousness notion, saying to Respondent: "I'm just puzzled … by most of your argument.… Suppose someone regularly takes a drug, and during the period when that person is taking the drug, that person is super dangerous.… [T]he Second Amendment would not permit Congress to say that's too risky?"[645]

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641. *Id.* at 56. Justice Barrett asked Respondent to consider a hypothetical scenario in which Congress had held hearings and found that modern concentrations of THC in marijuana were such that those who "use it several times a week have a proclivity for violence, violence with firearms," and asked whether the statute banning these users from possessing firearms would be constitutional. *Id.* at 95-96. She followed up by asking the equivalent for meth and cocaine, saying, "But you concede that there are some substances that the government would have a pretty easy time on a categorical basis?" *Id.* at 97-98.

642. *Id.* at 61.

643. Justice Thomas, however, is on record opposing such a concept. *See* United States v. Rahimi, 144 S. Ct. 1889, 1945 (2024) (Thomas, J., dissenting) ("[T]he Government's 'law-abiding, dangerous citizen' test—and indeed any similar, principle-based approach—would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets 'unfit' persons.").

644. Transcript of Oral Argument, *supra* note 618, at 82-83 (statement of Roberts, C.J.).

645. *Id.* at 112-13 (statement of Alito, J.). Justice Alito also referred to his dissent in *Rehaif v. United States*, 139 S. Ct. 2191, 2208-09 (2019) (Alito J., dissenting)—where he argued Congress was permitted to make it illegal for certain categories of people to possess guns, and the government should only have to prove they knowingly possessed the gun, not that they knew their legal status put them in a prohibited category—stressing again at oral argument that disabling certain people from having guns, such as felons, does much to protect public

In what is typically the other side of the Bench, Justice Kagan proposed distinguishing

> between statutes that go to public safety, like we're really afraid that this person is going to commit crimes against other people, and statutes that go to what we might call public order, so there's a person who keeps on falling down dead drunk in the town square, and we want to remove that person from our environment,

indicating potential amenability to the "safe hands" argument in a more constrained fashion.[646] Justice Sotomayor seems clearly a vote to strike down the legislation, but, again, in a way that rests on accepting the notion of dangerousness. She said: "I think the government gave this away when it said that there was no determination by the legislature on the dangerousness of the drug with guns in terms of listing it on the schedules."[647] And, ultimately, Justice Jackson looks to be taking a similar position, agreeing that the crux of the problem with the law at issue in *Hemani* is "that Congress's purpose here, which is to prevent dangerous people from having guns, is not … furthered by including this kind of person [regular marijuana users] in that statute"—that is, the problem is the statute is overbroad, not that this type of category hinging on dangerousness is problematic.[648]

* * *

Wolford is unlikely to be the case that develops a "safe hands" doctrine, or any other reform to *Bruen*, both because a majority of Justices seem inclined to strike down the law, and because the Hawai′i law did not raise directly a question of who is granted access to firearms. But the oral argument in *Wolford* provided a

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safety. Transcript of Oral Argument, *supra* note 618, at 117-18 (statement of Alito, J.).

646. Transcript of Oral Argument, *supra* note 618, at 40 (statement of Kagan, J.). Justice Kagan described respondent's position as "somewhat problematic" because it accepts that while someone is in the grip of a dangerous drug, they are dangerous, but that otherwise they are not. *See id.* at 122. She also used the example of the drug Ayahuasca to stress that even something that is not addictive can be dangerous when there are guns around. *Id.* at 79.

647. *Id.* at 86 (statement of Sotomayor, J.).

648. *Id.* at 103 (statement of Jackson, J.).

forum for some Justices, notably Justice Barrett, to voice concerns about the *Bruen* test and to stress that a version of the "safe hands" doctrine can be discerned from *Heller*.[649]

The Justices also seem inclined, though with more reservation, to strike down the law in *Hemani*, too.[650] As such, it may not provide the perfect forum to develop a "safe hands" doctrine either. However, it could lay the groundwork for a vehicle that is directly on point: one that clearly impacts the Second Amendment but is permissible because of its narrow restriction on those who fail a "safe hands" test. All the Justices, across the Court's political spectrum, bar Justice Thomas—who also stood alone in dissent in *Rahimi*—seemed receptive to, almost seemingly assuming the acceptability of, a person's dangerousness being a legitimate basis on which to deny ordinary Second Amendment rights. As such, the "safe hands" doctrine appears to be a likely shift, offering a conservative way to amend *Bruen* and address some of the difficulties described herein.

CONCLUSION

At oral argument in *Hemani*, Justice Gorsuch—in considering whether a founding-era ban on firearms being inaccessible to habitual drunkards constituted a useful historical analogue—challenged the government's defense of the law in these terms:

> John Adams took a tankard of hard cider with his breakfast every day. James Madison reportedly drank a pint of whiskey every day. Thomas Jefferson said he wasn't much of a user of alcohol, he only had three or four glasses of wine a night, okay? Are they all habitual drunkards who would be properly disarmed for life under your theory?[651]

Remarkably, this did not mark the moment when Justice Gorsuch realized the futility of applying *Bruen*'s test, nor was it a satire of such test. Rather, it appeared to be a genuine basis to challenge a law as not analogous and thus not constitutional under *Bruen*,

649. *See supra* Part III.E.1.
650. *See supra* Part II.E.2.
651. Transcript of Oral Argument, *supra* note 618, at 10 (statement of Gorsuch, J.).

despite the seeming similarities between the two laws, and despite his own characterization of the Founders, whose intentions are, under *Bruen*, considered paramount.

This may be because *Bruen* sits alongside the long-sought achievements for the conservative legal movement of reversal of the right to abortion,[652] the abolishment of affirmative action policies,[653] and the expansion of religious exemptions to civil rights laws.[654] But there is a difference. Rather than taking itself out of a controversial public policy dispute, as it claimed to do with respect to abortion, the *Bruen* Court expressly inserted itself *into* one. And it did so in the area of gun violence, which implicates urgent, essential, and broadly shared concerns about public safety and community welfare.[655]

In its eagerness to inscribe into American law a broad understanding of the right to bear arms, the Court in *Bruen* overreached. The *Bruen* test is "too sharp a sword to be unsheathed,"[656] and, borrowing Justice Blackmun's words in *Garcia*, the Court "tried to repair what did not need repair."[657] We have offered here one pragmatic solution, and there are likely others, crafted along different dividing lines but treading the balance between respect for the Second Amendment and the need for a safe society. *Usery* teaches that the Court and the country will suffer if the fractures and failures of *Bruen* are ignored. *Usery*'s aftermath illustrates that humility goes a long way in crafting constitutional principles.

The Court's two most recent oral arguments yield support for potential reform of the *Bruen* test, and chiefly along the lines proposed here: permitting "safe hands" restrictions. And so the hope remains that, starting with *Rahimi*'s soft backpedaling, and

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652. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

653. *See, e.g.*, Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2166 (2023).

654. *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023).

655. *See, e.g.*, John J. Donohue, *The Supreme Court's Gun Decision Will Lead to More Violent Crime*, WASH. POST (July 8, 2022), https://www.washingtonpost.com/outlook/2022/07/08/guns-crime-bruen-supreme-court [https://perma.cc/BPN7-BAGA].

656. *See* Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine,* 99 HARV. L. REV. 84, 118 (1985).

657. *See* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528, 557 (1985) (criticizing the Court's earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

continuing with development of a "safe hands" doctrine that hinges on dangerousness of potential gun users, the Court will assess the problems *Bruen* has created and recalibrate its approach to an area where the need for careful, nuanced, and judicially deferential consideration is at its height.