BRUEN AS *HELLER*: TEXT, HISTORY, AND TRADITION IN THE LOWER COURTS

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The Constitution and conventional wisdom suggest that lower courts must follow the most persuasive interpretations of U.S. Supreme Court precedent. But that does not always happen. Scholars recognize judicial underenforcement of Supreme Court precedent in several fields. This Essay contributes to this scholarship by analyzing lower court applications of New York State Rifle & Pistol Ass'n v. Bruen*, in which the Supreme Court held that firearm laws must be consistent with the nation's historical tradition of firearm regulation. The lower courts vary widely in their approaches to analyzing gun laws under this standard. On one end, a small handful of courts has required near historical twins or tight analogues to uphold challenged regulations. Other courts feel comfortable upholding modern gun laws based on historical enactments that are only remotely analogous. Finally, some courts have avoided a historical inquiry entirely by fashioning a "*Bruen *Step Zero" or by relying on pre-*Bruen *circuit precedent that they find to be binding.*

One impetus for Bruen *was judicial underenforcement of the Second Amendment in the decade following* District of Columbia v. Heller*. Whether* Bruen *will experience the same fate remains to be seen. Accordingly, to ensure that lower courts properly enforce Second Amendment claims, this Essay suggests that the Supreme Court clarify the level of generality that* Bruen *requires.*

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INTRODUCTION

The Constitution and conventional wisdom suggest that lower courts must follow the most persuasive interpretations of U.S. Supreme Court precedent.[1] But that does not always happen.[2] Scholars recognize judicial underenforcement of Supreme Court precedent in several fields.[3] Perhaps, given the controversial nature of gun rights in the United States, it comes as no surprise that the Second Amendment is included among them.[4] 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."[5] Although the Supreme Court has held that this provision confers an individual right to possess[6] and carry[7] firearms for self-defense, lower courts continue to grapple with the scope of this right. May a nonviolent felon who has completed their sentence possess arms

1. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

2. *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

3. *See, e.g.*, Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451 (2011) (habeas corpus for Guantanamo Bay detainees); Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003) (the Commerce Clause); Jana L. Torok, Comment, *The Undoing of* Old Chief*: Harmless Error and Felon-in-Possession-of-Firearms Cases*, 48 U. KAN. L. REV. 431 (2000) (Federal Rule of Evidence 403); Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 479, 492 (1995) (the Takings Clause); *cf.* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459–60 (2012) (arguing that lower courts "are capable of stopping a 'constitutional revolution' dead in its tracks, making choices between competing doctrinal strands, taking subtle actions to undermine established doctrine, proposing new constitutional rules to address novel situations, acting in willful defiance of existing Court precedent, or dutifully enforcing established rules").

4. *See generally* George A. Mocsary, Comment, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41 (2018); Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009).

5. U.S. CONST. amend. II.

6. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment against the states).

7. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022).

notwithstanding a federal lifetime prohibition?[8] Can someone who uses marijuana, even in a state where its consumption is now legal, own a firearm despite a federal law barring them from doing so?[9] May a state ban firearms on all private property unless the owner explicitly allows them?[10] These are all questions that lower courts continue to confront.

In *District of Columbia v. Heller*,[11] the Supreme Court affirmed that the Second Amendment protects the right of individual citizens to keep and bear arms for self-defense.[12] But because the majority did not explicitly prescribe a level of scrutiny for courts to apply in Second Amendment cases, lower courts filled the void.[13] Under means-end scrutiny, courts had little trouble upholding most firearm regulations.[14] In fact, some scholars argued that their analyses resembled the interest-balancing approach that the dissent advocated in *Heller*.[15] Nearly a decade and a half later, the Supreme Court attempted to halt judicial underenforcement of the Second Amendment in *New York State Rifle & Pistol Ass'n v. Bruen*[16] by clarifying that modern gun laws must be "consistent with the nation's historical tradition of firearm regulation."[17]

What happened after *Bruen*, however, is strikingly similar to *Heller*'s postscript. By way of background, *Bruen* addressed New York's requirement that applicants for concealed-carry licenses show "proper cause" to carry a handgun in public.[18] These "may-issue" laws, formerly in place in a handful of states, are distinct from "shall-issue" laws, which condition carry licenses only on objective criteria, such as background checks or training courses.[19] After the Court decided *Bruen*, officials in many of the may-issue

8. *Compare* Range v. Att'y Gen. U.S., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (yes, as applied to at least some nonviolent felons), *with* United States v. Jackson, 69 F.4th 495, 502 (8th Cir. 2023) (no), *reh'g en banc denied*, 85 F.4th 468 (8th Cir. 2023).

9. *Compare* United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023) (yes), *with* United States v. Espinoza-Melgar, No. 21-CR-204, 2023 WL 5279654, at *9 (D. Utah Aug. 16, 2023) (no).

10. Thus far, courts have unanimously held this rule unconstitutional. *See* Antonyuk v. Chiumento, 89 F.4th 271, 386 (2d Cir. 2023); May v. Bonta, No. CV 23-1696, 2023 WL 8946212, at *16 (C.D. Cal. Dec. 20, 2023), *appeal docketed*, No. 23-4356 (9th Cir. Dec. 22, 2023); Kipke v. Moore, No. 23-1293, 2023 WL 6381503, at *14 (D. Md. Sept. 29, 2023); Wolford v. Lopez, No. CV 23-265, 2023 WL 5043805, at *29 (D. Haw. Aug. 8, 2023), *appeal docketed*, No. 23-16164 (9th Cir. Sept. 8, 2023); Koons v. Platkin, No. 22-7464, 2023 WL 3478604, at *68 (D.N.J. May 16, 2023), *appeal docketed sub nom.* Koons v. Att'y Gen. N.J., No. 23-1900 (3d Cir. May 17, 2023).

11. 554 U.S. 570 (2008).

12. *Id.* at 595.

13. *See infra* Part I.C.

14. *See id.*

15. *See generally* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012); Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223 (2014).

16. 597 U.S. 1 (2022).

17. *Id.* at 24.

18. *Id.* at 12 (quoting N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021) (amended 2022), *invalidated by Bruen*, 142 S. Ct. 2111 (2022)).

19. *Id.* at 13–15 & 15 n.2.

states expressed fear over the decision's public-safety implications.[20] Predictably, those leaders responded by pushing the envelope on what is constitutional. For instance, despite suggesting that *Bruen* would force New York City to allow permit holders to carry firearms on public transportation,[21] Mayor Eric Adams supported New York state's post-*Bruen* law outlawing firearms in almost all public places; this ban extended to public transportation, places of worship, restaurants that serve alcohol, entertainment facilities such as theaters and stadiums, protests, and Times Square.[22] New Jersey even banned individuals from carrying loaded firearms in their own cars.[23]

Although appellate review of these regulations is just beginning, courts continue to uphold many "sensitive place" restrictions, along with assault weapon bans and criminal disarmament laws, just as they did after *Heller*.[24] In fact, many district courts and courts of appeals find themselves bound by pre-*Bruen* circuit precedent that did not explicitly apply means-end scrutiny, even if it circumvented historical analysis.[25] To be sure, exceptions can be found, but the upshot is that most courts have upheld firearm regulations since *Bruen*.[26]

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20. *See, e.g.*, Nolan Hicks, Sam Raskin & Gabrielle Fonrouge, *Eric Adams Rips Supreme Court Gun Ruling, Says New Yorkers Now 'Less Safe'*, N.Y. POST (June 23, 2022, 8:53 PM), https://nypost.com/2022/06/23/new-york-dems-blast-dangerous-supreme-court-gun-ruling/ [https://perma.cc/C363-KS5V]; Ry Rivard & Daniel Han, *Murphy Vows To 'Do Everything in Our Power To Protect' New Jerseyans After Supreme Court's Gun Ruling*, POLITICO (June 23, 2022, 3:24 PM), https://www.politico.com/news/2022/06/23/murphy-new-jersey-supreme-court-strikes-down-gun-laws-00041745 [https://perma.cc/LE5C-FZZM]; Gavin Newsom (@GavinNewsom), X (June 23, 2022, 11:27 AM), https://twitter.com/GavinNewsom/status/1539993469644447744 [https://perma.cc/H2HN-W5A6] (implying that the decision would lead to people "being gunned down" in public).

21. *See Transcript: Mayor Eric Adams Makes Announcement About NYPD Gun Violence Suppression Division*, NYC (June 6, 2022), https://www.nyc.gov/office-of-the-mayor/news/369-22/transcript-mayor-eric-adams-makes-announcement-nypd-gun-violence-suppression-division [https://perma.cc/LQR7-9JSR] ("[T]his keeps me up at night. If this right to carry goes through the Supreme Court and becomes the law of the land, can you imagine being on the 4 train with someone having a 9mm exposed? Everyone on the train is carrying? This is not the wild, wild west.").

22. N.Y. PENAL LAW § 265.01-e(2) (McKinney 2023); *see New York City Supports New York State in Fight Against Gun Violence*, NYC (Jan. 18, 2023), https://www.nyc.gov/office-of-the-mayor/news/039-23/new-york-city-supports-new-york-state-fight-against-gun-violence [https://perma.cc/HE3B-GSXQ].

23. N.J. STAT. ANN. § 2C:58-4.6(b)(1) (West 2023), *invalidated by* Koons v. Platkin, No. 22-7464, 2023 WL 3478604 (D.N.J. May 16, 2023), *appeal docketed sub nom.* Koons v. Att'y Gen. N.J., No. 23-1900 (3d Cir. May 17, 2023).

24. *See infra* Part III.

25. *See, e.g.*, United States v. Connelly, No. 22-CR-229, 2022 WL 17829158, at *2–4 (W.D. Tex. Dec. 21, 2022) (struggling to find a historical justification for disarmament of unlawful users of controlled substances but finding pre-*Bruen* precedent from the U.S. Court of Appeals for the Fifth Circuit on the issue controlling), *reconsideration granted*, No. 22-CR-229, 2023 WL 2806324 (W.D. Tex. Apr. 6, 2023), *appeal docketed*, No. 23-50312 (5th Cir. May 4, 2023).

26. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 126 (2023) (finding a 40.74 percent success rate on civil Second Amendment claims since *Bruen* and a 3.74 percent success rate on criminal claims within the same parameters).

This Essay proceeds in three parts. Part I discusses the background of the Supreme Court's first in-depth interpretation of the Second Amendment in *Heller* and how lower courts have applied it. Part II addresses *Bruen*, which clarified *Heller*'s methodology and applied it to New York's gun licensing regime. Finally, Part III argues that three relatively distinct camps of judicial decisions applying *Bruen* have emerged. In one camp, courts have employed tight analogical reasoning, perhaps even requiring historical twins, to uphold a challenged regulation. Others have merely required loose analogues or a handful of historical laws to do the same. Finally, other courts—based entirely on either dicta in *Heller* and *Bruen* or pre-*Bruen* circuit precedent—have declined to conduct a historical inquiry entirely. This Essay concludes by suggesting that the Supreme Court clarify the level of generality required under *Bruen*'s reasoning to ensure that lower courts adequately decide Second Amendment claims.

I. *HELLER* AND ITS PROGENY

Heller was a watershed moment in Second Amendment jurisprudence. The case confirmed that the Second Amendment protects an individual right to keep and bear firearms for self-defense outside the context of militia service.[27] But after *Heller*, most Second Amendment challenges to state and federal gun regulations failed.[28] Part I.A discusses the history of the Supreme Court's Second Amendment jurisprudence before *Heller*. Part I.B covers the decision itself. Finally, Part I.C describes how lower courts have applied *Heller*.

*A. Pre-*Heller *Second Amendment Jurisprudence*

Before 2008, the Supreme Court's most comprehensive discussion of the Second Amendment came in *United States v. Miller*.[29] This 1939 decision involved the indictments of two bandits who allegedly transported a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934[30] (NFA).[31] In actuality, the case was likely a fix, involving a corrupt district court judge, to test the NFA's constitutionality.[32] Upholding the indictments, a unanimous Court, speaking through Justice James Clark McReynolds, wrote:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well

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

28. *See infra* Part I.C.

29. 307 U.S. 174 (1939). In other cases, Justices mentioned the Second Amendment but almost always in dicta. *See generally* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

30. 26 U.S.C. §§ 5801–5872.

31. *Miller*, 307 U.S. at 175.

32. *See* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 63 (2008).

> regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[33]

Justice McReynolds went on to discuss the historical understanding of the militia, along with its composition and duties.[34]

Despite its "crabbed analysis,"[35] *Miller* interprets the Second Amendment as conferring an individual right.[36] In its brief, the United States made two arguments in support of the NFA: that the Second Amendment only applies to militia members or, in the alternative, protects the right to keep and bear arms for lawful purposes, excluding those weapons used by criminals.[37] The Court was clearly persuaded by the second argument. In fact, *Miller* cited *Aymette v. State*[38] for the proposition that the amendment protects weapons that have a "reasonable relationship to the preservation or efficiency of a well regulated militia."[39] There, the Tennessee Supreme Court concluded that the state constitution's Second Amendment analogue did not guarantee the right to carry a concealed Bowie knife because the provision protected only those weapons "usually employed in civilized warfare, and that constitute the ordinary military equipment."[40] Thus, properly interpreted, *Miller* suggests that the Second Amendment protects an individual right to keep and bear arms that are commonly possessed and useful for militia service.[41]

Lower courts twisted *Miller* into something it was clearly not, the history of which is well-documented and need not be taken up at length here.[42] But one case is worth mentioning. In *Cases v. United States*,[43] a criminal defendant challenged, on Second Amendment grounds, an indictment that charged him with possessing a firearm after being convicted of a crime of violence.[44] The U.S. Court of Appeals for the First Circuit recognized the actual holding of *Miller*, that is, that Congress "cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia."[45] Deeming this conclusion unacceptable on policy grounds, as it would seemingly protect the private possession of arms like trench mortars and anti-aircraft guns, the

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33. *Miller*, 307 U.S. at 178.
34. *See id.* at 178–82.
35. *See* Frye, *supra* note 32, at 71.
36. *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1632–34 (2014).
37. *See* Frye, *supra* note 32, at 66.
38. 21 Tenn. (1 Hum.) 154 (1840).
39. *Miller*, 307 U.S. at 178.
40. *Aymette*, 21 Tenn. (1 Hum.) at 158.
41. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").
42. *See* Nicholas J. Johnson, Heller *as* Miller*: Court Decisions Dealing with Firearms*, *in* 1 GUNS AND CONTEMPORANEOUS SOCIETY: THE PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY 83, 86–91 (Glenn H. Utter ed., 2016) (discussing treatment of *Miller* by federal courts prior to *Heller*).
43. 131 F.2d 916 (1st Cir. 1942).
44. *Id.* at 919 & n.1.
45. *Id.* at 922.

court fashioned a new standard: each case "must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line."[46] As one commentator aptly put it, "While this is not much of a standard, it *is* a broad license for judges to do what they want in right-to-arms cases."[47]

Decisions like *Cases* tore *Miller* apart in a saga that would ultimately be capped by Justice John Paul Stevens's dissent in *Heller*; there, he argued that this view of *Miller* should be affirmed because "hundreds of judges" relied upon it.[48]

B. The Heller *Decision and Its Test*

In *Heller*, the Supreme Court ruled that a Washington, D.C., regulation banning the possession of handguns violated the Second Amendment.[49] Although Justice Antonin Scalia's opinion relied entirely on the text, history, and tradition of the Second Amendment in reaching that conclusion, it failed to establish explicitly a level of scrutiny for Second Amendment cases.[50] Nevertheless, the Court went beyond the facts of the case to include the following paragraph that became a widely cited portion of the case:

> Like most rights, the right secured by the Second Amendment is not unlimited . . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[51]

A trailing footnote added that this list of "presumptively lawful" measures is not exhaustive.[52] Justice Stevens, who dissented, persuaded Justice Anthony M. Kennedy to insist that this language be inserted into the majority opinion as the price of Justice Kennedy's necessary fifth vote.[53]

Although this paragraph became the most influential portion of the opinion, additional aspects of *Heller* are important to recognize. The decision's core holding recognized that a ban on firearms in common use violates the Second Amendment.[54] Additionally, *Heller* (1) implied that the Second Amendment's use of the term "the people" "unambiguously refers to

46. *Id.*
47. Johnson, *supra* note 42, at 88.
48. District of Columbia v. Heller, 554 U.S. 570, 638 (2008) (Stevens, J., dissenting).
49. *Id.* at 635 (majority opinion).
50. The opinion did forbid application of rational-basis review. *Id.* at 628 n.27.
51. *Id.* at 626–27.
52. *Id.* at 627 n.26.
53. *See* Adam Liptak, *'It's a Long Story': Justice John Paul Stevens, 98, Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html [https://perma.cc/RU37-E4CM].
54. *Heller*, 554 U.S. at 627–29.

all members of the political community, not an unspecified subset,"[55] despite recognizing explicitly that the amendment protects "law-abiding, responsible citizens;"[56] (2) relied on nineteenth-century case law recognizing a right to carry firearms in public;[57] (3) rejected the argument that it is permissible to ban one class of firearms in common use so long as the possession of other firearms is allowed;[58] and (4) forbade subjecting the Second Amendment's core protections "to a freestanding 'interest-balancing' approach."[59]

Because *Heller* failed to prescribe an explicit method of review for Second Amendment cases, lower courts filled the void. Prior to *Bruen*, all but one court of appeals adopted the following two-step approach.[60] At step one, courts established whether the challenged activity fell under the plain text and historical scope of the Second Amendment.[61] If it did not, the analysis ended there; the activity was unprotected by the Second Amendment.[62] However, if the activity *did* fall under the historical understanding of the Second Amendment, or if the history was unclear, courts would move to step two.[63] Here, they applied some level of means-end scrutiny to the challenged regulation. If the regulation burdened what courts viewed as the "core" of the Second Amendment—the right to armed self-defense in the home—strict scrutiny applied.[64] Otherwise, courts utilized intermediate scrutiny.[65]

Although variously defined, intermediate scrutiny essentially asks whether a law burdening a constitutional right (1) furthers an important or substantial governmental interest, and (2) whether the restriction on the right is no greater than is essential to the furtherance of that interest.[66] Intermediate scrutiny in the Second Amendment context proved easily malleable and

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55. *Id.* at 580.

56. *Id.* at 635.

57. *Id.* at 629 (first citing Nunn v. State, 1 Ga. 243, 251 (1846); then quoting Andrews v. State, 50 Ten. (3 Heisk.) 165, 187 (1871); and then quoting State v. Reid, 1 Ala. 612, 616–17 (1840)).

58. *Id.*

59. *Id.* at 634 (quoting *id.* at 689 (Breyer, J., dissenting)).

60. *See* Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) (adopting the two-part framework); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) (same); Kachalsky v. County of Westchester, 701 F.3d 81, 93 & n.17 (2d Cir. 2012) (same); Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (same); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (same); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (same); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011) (same); Ezell v. City of Chicago, 651 F.3d 684, 703–04 (7th Cir. 2011) (same); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (same); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); United States v. Marzzarella, 614 F.3d 85, 96–97 (3d Cir. 2010) (same). The exception was the U.S. Court of Appeals for the Eighth Circuit. *See* United States v. Adams, 914 F.3d 602, 607 (8th Cir. 2019) (Kelly, J., concurring).

61. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 18 (2022).

62. *See id.*

63. *See id.*

64. *See id.* at 18–19.

65. *See id.* at 19.

66. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

allowed courts to uphold most gun regulations.[67] This was not necessarily the result of intentional underenforcement of *Heller*. Almost every gun-control regulation satisfies the first prong of intermediate or strict scrutiny, as the government obviously has a compelling interest in preventing crime.[68] Therefore, the analysis necessarily devolved into an interest-balancing inquiry, with the Second Amendment on one hand and public-safety considerations on the other.[69]

C. Lower Court Applications of Heller

In the years following *Heller*, law-abiding individuals, criminal defendants, and public-interest groups filed a barrage of challenges to federal and state gun laws, including may-issue laws,[70] assault weapon bans,[71] and various provisions of the NFA[72] and the Gun Control Act of 1968[73] (GCA).[74]

67. *Compare* 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, 1495 (2018) (finding that plaintiffs' success rates are 19 percent and 10 percent when courts apply strict and intermediate scrutiny, respectively, in the Second Amendment context), *with* Mocsary, *supra* note 4, at 54 (calculating 88 percent and 74 percent success rates in strict and intermediate scrutiny cases, respectively, overall).

68. *See* District of Columbia v. Heller, 554 U.S. 570, 689 (Breyer, J., dissenting).

69. *See id.*

70. *See* Justine E. Johnson-Makuch, Note, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757, 2784–96 (2015). *Compare* Young v. Hawaii, 992 F.3d 765, 773 (9th Cir. 2021) (en banc) (upholding may-issue law), *vacated*, 142 S. Ct. 2895 (2022), Gould v. Morgan, 907 F.3d 659, 677 (1st Cir. 2018) (same), Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (same), Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013) (same), *and* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (same), *with* Wrenn v. District of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017) (holding may-issue law unconstitutional).

71. *See* Worman v. Healey, 922 F.3d 26, 41 (1st Cir. 2019) (upholding ban on assault weapons and magazines holding over ten rounds of ammunition); Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 910 F.3d 106, 122 (3d Cir. 2018) (upholding ban on magazines holding over ten rounds of ammunition); Kolbe v. Hogan, 849 F.3d 114, 137 (4th Cir. 2017) (en banc) (upholding ban on assault weapons and magazines holding over ten rounds of ammunition); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 263–64 (2d Cir. 2015) (same, but striking down provision limiting individuals from inserting more than seven rounds of ammunition into magazines holding up to ten rounds); Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015) (upholding ban on assault weapons and magazines holding over ten rounds of ammunition); *Heller II*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (same).

72. *See, e.g.*, Bezet v. United States, 714 F. App'x 336, 340–41 (5th Cir. 2017) (concluding that machine guns, regulated under the NFA, fall outside the scope of Second Amendment protection); United States v. Cox, 906 F.3d 1170, 1186 (10th Cir. 2018) (same, as to short-barreled rifles and silencers). Claims regarding more exotic items regulated under the NFA have been unanimously rejected. *See, e.g.*, United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009) (pipe bombs).

73. 18 U.S.C. §§ 921–931.

74. *Compare* United States v. Perez, 6 F.4th 448, 456 (2d Cir. 2021) (upholding GCA's prohibition on possession of firearms by individuals in the country illegally), *and* United States v. Boyd, 999 F.3d 171, 189 (3d Cir. 2021) (upholding GCA's prohibition on possession of firearms by individuals subject to domestic violence restraining orders), *with* Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 452 (4th Cir. 2021) (holding unconstitutional GCA's ban on licensed dealers from selling handguns to those aged eighteen through twenty), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

Most of these challenges failed under intermediate scrutiny. Consider the following examples detailing cases concerning assault weapon bans and criminal defendants.

1. "Assault Weapon" Bans

Courts of appeals unanimously upheld bans on "assault weapons" and "high-capacity magazines"[75] after *Heller*.[76] All but one of them applied intermediate scrutiny.[77]

New York State Rifle and Pistol Ass'n v. Cuomo[78] presents a typical example of how these bans were upheld under intermediate scrutiny.[79] The U.S. Court of Appeals for the Second Circuit first assumed that the banned weapons are protected under the Second Amendment because they are in common use.[80] In deciding whether to apply intermediate or strict scrutiny, the court noted that the statutes did not implicate the "core" of the Second Amendment to the same extent as the handgun ban at issue in *Heller*.[81] This is because assault weapons are "not nearly as popularly owned and used for self-defense as the handgun."[82] Furthermore, the bans included "only a limited subset of semiautomatic firearms," so the court found intermediate scrutiny appropriate.[83] Under the court's assessment, the laws passed intermediate scrutiny because they applied to "particularly hazardous weapons" and were "targeted to prevent mass shootings."[84] The court's application of intermediate scrutiny was exceedingly deferential to the legislatures' judgments.[85] By failing to consider less burdensome or

75. A brief note on what exactly "assault weapons" and "high-capacity magazines" are. Although there are no universal definitions, laws banning assault weapons typically define them as semiautomatic rifles with detachable magazines and at least one of the following features: a pistol grip, a telescoping stock, a flash suppressor, a grenade launcher, or a barrel shroud. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/24-1.9(a)(1)(A) (West 2023). "Large-capacity magazines" are often defined as magazines capable of holding more than ten rounds of ammunition. *See, e.g.*, N.Y. PENAL LAW § 265.00(23) (McKinney 2023).

76. *See supra* note 71 and cases cited therein.

77. *Compare* Worman v. Healey, 922 F.3d 26, 41 (1st Cir. 2019) (applying means-end scrutiny), Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 910 F.3d 106, 122 (3d Cir. 2018) (same), N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 264 (2d Cir. 2015) (same), *Heller II*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (same), *and* Kolbe v. Hogan, 849 F.3d 114, 146 (4th Cir. 2017) (en banc) (same, as an alternative holding), *with* Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (asking "whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense" (quoting both District of Columbia v. Heller, 554 U.S. 570, 622 (2008) and United States v. Miller, 307 U.S. 174, 178 (1939))).

78. 804 F.3d 242 (2d Cir. 2015).

79. *See id.* at 260.

80. *Id.* at 257.

81. *Id.* at 258.

82. *See id*.

83. *Id.* at 260.

84. *See id.* at 262.

85. *See id.* at 263.

restrictive alternatives, the analysis arguably resembled rational-basis review.[86]

2. Criminal Defendants

In contrast to the strategic litigation in most of the challenges to may-issue laws and assault weapons bans, cases implicating criminal defendants were often last-ditch—sometimes even borderline frivolous—efforts to dismiss firearms-related charges.[87] Perhaps it was due in part to this backdrop that most of these challenges failed. Take for example one specific provision: called the "centerpiece" of U.S. gun laws, 18 U.S.C. § 922(g)(1) imposes a lifetime ban on firearm ownership for anyone convicted of a crime *punishable* by imprisonment for a term greater than one year.[88] Although *Heller* opened the door to a flood of motions to dismiss § 922(g)(1) charges, courts shut the door almost immediately afterward. Within one year of *Heller*, this law was unanimously upheld by federal courts.[89] Indeed, prior to *Bruen*, only one circuit court granted as-applied relief to § 922(g)(1), and the decision came from a deeply divided U.S. Court of Appeals for the Third Circuit sitting en banc.[90] Moreover, the predicate convictions of the two plaintiffs in that case were both decades old, nonviolent, and classified as state misdemeanors.[91]

Other courts upheld firearm regulations challenged by criminal defendants without any historical analysis or heightened scrutiny, merely referencing *Heller*'s "presumptively lawful" language.[92] A state court in California, for instance, concluded—with no analysis other than a citation to *Heller*—that a residential driveway constituted a sensitive place where the defendant could be charged with unlawfully carrying a concealed weapon.[93] In other cases, courts held, with similarly little analysis, that bans on firearms in certain locations would withstand even strict scrutiny.[94]

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86. *Cf.* Armour v. City of Indianapolis, 566 U.S. 673, 681 (2012) (explaining that a law will be upheld under rational-basis review "if 'there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational'" (quoting Nordlinger v. Hahn, 505 U.S. 1, 11 (1992))).

87. *See, e.g.*, United States v. Tagg, 572 F.3d 1320, 1322–23 (11th Cir. 2009) (individual who set off a pipe bomb at Disney World).

88. *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1574 (2022). Despite its coverage of state misdemeanors punishable by imprisonment over one year, *see e.g.*, Range v. Att'y Gen. U.S., 69 F.4th 96, 98 (3d Cir. 2023) (en banc), § 922(g)(1) is commonly called the "felon-in-possession" ban and is referred to as such here. *See* Stevenson, *supra*, at 1576.

89. *See, e.g.*, Denning & Reynolds, *supra* note 4, at 1248 nn.22–24 (collecting cases).

90. Binderup v. Att'y Gen. U.S., 836 F.3d 336, 356 (3d Cir. 2016) (en banc).

91. *See id.* at 340.

92. *See supra* notes 51–52 and accompanying text.

93. People v. Yarbrough, 86 Cal. Rptr. 3d 674, 682 (Ct. App. 2008).

94. *See, e.g.*, United States v. Dorosan, 350 F. App'x 874, 876 (5th Cir. 2009) (post offices and their parking lots); United States v. Lewis, 50 V.I. 995, 1001 (D.V.I. 2008) (school zones).

While Part I detailed the progeny of *Heller* in the lower courts, Part II turns to *Bruen*, which aimed to clarify Second Amendment jurisprudence.

II. *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*

Bruen rejected means-end scrutiny in Second Amendment challenges, but it did not spring out of thin air. The routine rejection of Second Amendment claims frustrated some Justices who saw it as evidence that the right was being relegated to second-class status.[95]

The decision can thus be seen as an attempt by the Supreme Court to place some limits on firearm regulations. Part II.A addresses the test put forth by *Bruen*. Part II.B discusses how lower courts may apply it.

A. Bruen*'s Test*

Bruen's methodology explicitly rejected means-end scrutiny in the Second Amendment context and held that:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[96]

When a modern regulation "addresses a general societal problem" that has existed throughout the nation's history, a lack of firearm regulations addressing that problem—or the presence of regulations that addressed the problem in a materially different way—is evidence of the challenged regulation's invalidity.[97] At the same time, "unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[98] When a modern regulation would have been "unimaginable at the founding," judges should use analogical reasoning to determine whether a historical regulation and a modern regulation are "relevantly similar."[99] The Court identified two metrics of central importance in this inquiry: "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense."[100] Although "how and why" sounds somewhat reminiscent of "means and ends," the purpose of this test is to prevent "historic, burdensome

95. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) (joined in part by Justice Kavanaugh); Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari); Peruta v. California, 582 U.S. 943, 943 (2017) (Thomas, J., dissenting from denial of certiorari) (joined by Justice Gorsuch); Friedman v. City of Highland Park, 577 U.S. 1039, 1039 (2015) (Thomas. J., dissenting from denial of certiorari) (joined by Justice Scalia).

96. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961)).

97. *Id.* at 26–27.

98. *Id.* at 27.

99. *Id.* at 28–29 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

100. *Id.* at 29 (emphasis added).

laws that were enacted for one purpose from being used as a basis to impose burdens for other purposes."[101] The Court further clarified that analogical reasoning "is neither a regulatory straightjacket nor a regulatory blank check."[102] The government need only identify "a well-established and representative historical *analogue*, not a historical *twin*."[103]

When engaging in this historical inquiry, the relevant time period matters. Courts should be wary of evidence that significantly predates or postdates the Second Amendment's and Fourteenth Amendment's ratification in 1791 and 1868, respectively.[104] Evidence from around the time of the Founding in 1791 is particularly probative because the Fourteenth Amendment incorporates the Bill of Right's protections against the states to the same extent as those protections originally existed against the federal government.[105] Moreover, territorial regulations should not be given much weight, particularly when they contradict earlier evidence, due to their transient nature, lack of judicial scrutiny, and miniscule population coverage.[106]

Applying this test to New York's may-issue law, the Court considered evidence offered from "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[107] Although New York presented ample historical evidence, the Supreme Court found it inapposite because the historical laws did not limit "public carry only to those law-abiding citizens who demonstrate[d] a special need for self-defense" as New York's did.[108]

Justice Stephen G. Breyer's dissent saw matters differently, concluding that "[t]he historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular."[109] This is instructive. The gap between the majority's and the dissent's applications of analogical reasoning suggests that courts following *Bruen* should require strong historical analogues before upholding a challenged firearm regulation.

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101. *See* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 89 n.34 (3d ed. Supp. 2022).

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

103. *See id.*

104. *Id.* at 34–37.

105. *Id.* at 37; *see also id.* at 83 (Barrett, J., concurring) ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.").

106. *Id.* at 67–68 (majority opinion); *cf.* George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 360 (2021) ("One fourteen-year period excepted, Wyoming followed the Western tradition of public carry from before its inception.").

107. *Bruen*, 597 U.S. at 34.

108. *Id.* at 38.

109. *Id.* at 115 (Breyer, J., dissenting).

B. How To Apply Bruen

Although means-end scrutiny no longer applies, the jury is still out on just exactly how to employ *Bruen*'s test.[110] Some courts have treated it almost mathematically by head counting historical analogues to the challenged provision and then judging whether those analogues were representative based on census data from the time of their enactment.[111] Other courts have treated the analysis more liberally by categorizing historical regulations—from sometimes even a small handful of laws—and then determining whether the modern regulation fits within that category.[112]

Scholars are also beginning to weigh in. Joseph Blocher and Eric Ruben argue that courts should "operate at a high level of generality when evaluating traditions of rights and regulations."[113] Blocher and Reva Siegel contend that *Bruen* provides governments with "broad authority" to pass sensitive-place legislation.[114] On the other hand, Eugene Volokh suggests that *Bruen* leaves room for "certain regulations that impose only minor burdens."[115] William Baude and Robert Leider argue that *Bruen* marks a return to the general law approach, under which courts look "to history and custom to understand the right."[116] For example, under this view, legislatures could not create sensitive places that "effectively deny people most of the right to bear arms outside the home," like regional public transportation that many individuals rely on daily.[117]

Ultimately, the Supreme Court will likely weigh in when it decides *United States v. Rahimi*,[118] a challenge to the federal ban on possession of firearms by someone subject to a domestic violence restraining order.[119] At oral argument, the Solicitor General suggested that the Court establish a level of generality so that lower courts need "not nit-pick" historical analogues.[120]

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110. Amazingly, some trial courts in New York continue to apply intermediate scrutiny to Second Amendment challenges to the state's red-flag law. *See* Melendez v. T.M., No. 62564-2023, 2023 WL 7291778, at *4–5 (N.Y. Sup. Ct. Nov. 3, 2023); People v. R.L., No. 71794-23, 2023 WL 6887164, at *2 (N.Y. Sup. Ct. Oct. 17, 2023).

111. *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232, 255–56 (N.D.N.Y. 2022), *aff'd in part, vacated in part, and remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023).

112. *See, e.g.*, *Chiumento*, 89 F.4th at 303–04.

113. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 164 (2023).

114. Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795, 1830 (2023).

115. Eugene Volokh, *Implementing the Right To Keep and Bear Arms After* Bruen, 98 N.Y.U. L. REV. 1950, 1978 (2023).

116. William Baude & Robert Leider, *The General Law Right To Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350 [https://perma.cc/EFZ3-Q8TE].

117. *Id.* at 35.

118. 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

119. *Id.* at 448; *see* 18 U.S.C. § 922(g)(8).

120. Transcript of Oral Argument at 40, United States v. Rahimi, No. 22-915 (Nov. 7, 2023).

Until that decision, lower courts are left to reckon with *Bruen* itself, and the following part explores just how they have done this.

III. LOWER COURT APPLICATIONS OF *BRUEN*

Adherence to *Bruen* lies on a continuum. At one end are courts requiring tight analogues, potentially even historical twins, to uphold a challenged regulation. Others are comfortable upholding modern laws based on loose, or only a few, historical predecessors. Yet other courts have jettisoned historical inquiry entirely by fashioning a *Bruen* "Step Zero" or by relying on pre-*Bruen* circuit precedent. This Part proceeds in three sections that address each camp individually.

A. Requiring Tight Analogues

Several courts have engaged in rigorous analogical reasoning under *Bruen* by requiring tight historical analogues to uphold a challenged firearm regulation. One such decision perhaps goes even beyond what *Bruen* requires by searching for historical twins.

The defendant in *United States v. Price*[121] was charged with possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k).[122] In dismissing the indictment, the court took a relatively cramped view of analogical reasoning, holding that the only reasonable analogies to § 922(k) are regulations requiring "firearm owners to keep an identifiable mark on their firearm and never change or remove that mark, with criminal penalties levied against violators."[123]

Price is probably an example of uncivil obedience, which is characterized by hyperbolic or literalistic adherence to a legal command with the purpose of changing that law.[124] At times, the court questions *Bruen* by invoking its dissent,[125] and it uses somewhat terse language by claiming that a separate portion of its decision is "[i]n keeping with Justice Thomas' insistence that 'law-abiding' citizens are protected by the Second Amendment."[126] By comparison, another case addressing § 922(k) after *Bruen* held it constitutional, and that court found several arguably close analogues in eighteenth-century registration and taxation requirements that applied to firearm owners.[127] Although *Price* appears vulnerable to reversal by the U.S.

121. 635 F. Supp. 3d 455 (S.D. W. Va. 2022), *appeal docketed*, No. 22-4609 (4th Cir. Oct. 26, 2022).
122. *Id.* at 457.
123. *Id.* at 461 n.3.
124. *See* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 810, 820 (2015).
125. *See Price*, 635 F. Supp. 3d at 461 n.3.
126. *See id.* at 466–67.
127. United States v. Holton, 639 F. Supp. 3d 704, 711 (N.D. Tex. 2022).

Court of Appeals for the Fourth Circuit sitting en banc, it is an early look into how rigidly a court can treat *Bruen*'s historical inquiry.[128]

Consider also the aforementioned case of *United States v. Rahimi*.[129] There, the U.S. Court of Appeals for the Fifth Circuit held that 18 U.S.C. § 922(g)(8), which prohibits those subject to domestic violence restraining orders from possessing firearms, violates the Second Amendment.[130] The Fifth Circuit rejected analogizing § 922(g)(8) to historical laws disarming certain disloyal or dangerous individuals and to antebellum laws that authorized officials to arrest anyone who carried arms in public in a terrifying manner.[131] Unlike § 922(g)(8), the purpose of those historical regulations was to protect society at large from armed rebellions rather than to protect a particular individual from interpersonal violence.[132] In other words, the Fifth Circuit thought § 922(g)(8) flunked the "why" portion of *Bruen*'s "how and why" test.[133] This decision falls squarely within the tight analogical reasoning camp. Other courts reviewing the same historical analogues concluded that they sufficed to facially uphold § 922(g)(8).[134] The Supreme Court will likely decide this split.[135]

B. Requiring Loose Analogues

In contrast to the cases cited in the previous section, other courts have interpreted *Bruen* as merely requiring that the government identify loose analogues or a small handful of historical twins. Consider *Antonyuk v. Chiumento*,[136] in which the Second Circuit upheld most of New York's post-*Bruen* designation of many sensitive places.[137] For instance, New York pointed to six nineteenth-century laws that the court ultimately found sufficient to uphold New York's ban on firearms in bars and restaurants that serve alcohol.[138] Only two of the state's proffered analogues, however, actually banned firearms in locations that serve alcohol.[139] If New York had cited only those two laws, that clearly would not have been enough to uphold the ban, as both were territorial enactments.[140] The other four laws either prohibited intoxicated people themselves from carrying firearms or banned

128. After a Fourth Circuit panel heard oral argument in *Price*, but before it could issue an opinion, the court ordered rehearing en banc. *See* Order Granting Rehearing En Banc, United States v. Price, No. 22-4609 (4th Cir. Jan. 12, 2024), 2024 WL 163084.

129. *See supra* notes 118–20 and accompanying text.

130. United States v. Rahimi, 61 F.4th 443, 460–61 (5th Cir. 2023), *cert. granted*, 142 S. Ct. 2688 (2023).

131. *Id.* at 456–59.

132. *Id.* at 457, 459.

133. *See supra* notes 100–01 and accompanying text.

134. *See, e.g.*, United States v. Brown, No. 22-CR-239, 2023 WL 4826846, at *9–14 (D. Utah July 27, 2023).

135. *See supra* notes 118–20 and accompanying text.

136. 89 F.4th 271 (2d Cir. 2023).

137. *See* N.Y. PENAL LAW § 265.01-e(2) (McKinney 2023).

138. *Chiumento*, 89 F.4th at 367–69.

139. *See id.* at 367 (first quoting Defining and Punishing Certain Offenses Against the Public Peace, 1889 Ariz. Sess. Laws 17–18; then quoting 1890 Okla. Sess. Laws 496).

140. *See supra* note 106 and accompanying text.

the sale of arms to intoxicated people.[141] Whether New York's law is "analogous enough" to those *additional* nineteenth-century laws is up for debate.[142] Even assuming that it is, however, these six late nineteenth-century laws only applied to 9.5 percent of the nation's population.[143] Whether that makes them "well-established and representative" is far from clear.[144] Indeed, other courts analyzing similar historical analogues have struck down state laws prohibiting firearms in locations that serve alcohol.[145]

The constitutionality of assault weapon bans under *Bruen* reflects a similar division with respect to the level of generality required in analogical reasoning. Recall that prior to *Bruen*, the courts of appeals upheld such bans under intermediate scrutiny.[146] The only court of appeals to consider an assault weapon ban since *Bruen*, the U.S. Court of Appeals for the Seventh Circuit, held that it is likely constitutional.[147] Although the decision's main holding was that assault weapons are military weapons that fall outside the arms protected by the Second Amendment,[148] it also addressed the historical record.[149] The court found a broad tradition of restricting certain dangerous weaponry like cannons, Bowie knives, small concealable arms, and machine guns.[150] The dissent, on the other hand, found the same analogues inapposite because they only prohibited the concealed carry of certain weapons rather than their public carry—let alone possession in the home—altogether.[151] Additionally, the dissent criticized the majority's invocation of twentieth-century regulations, such as that of machine guns, as too distant from the Founding in 1791 or the Fourteenth Amendment's ratification in 1868 to illuminate the scope of the Second Amendment.[152]

The daylight between the majority and the dissent is illustrative. The majority considered provisions regulating the *carriage* of certain weapons to be analogous to a *ban*, while the dissent would not stretch the analogical reasoning that loosely. Clearly, the majority is comfortable applying a much looser form of analogical reasoning than the dissent is.

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141. *See Chiumento*, 89 F.4th at 367.

142. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022); *see* Leo Bernabei, Note, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. 103, 138 (2023) (arguing that it is not analogous enough).

143. *See Chiumento*, 89 F.4th at 367 & n.92 (citing DEP'T OF INTERIOR, COMPENDIUM OF THE ELEVENTH CENSUS: 1890, at 2 tbl.1 (1892)).

144. *See Bruen*, 597 U.S. at 30.

145. *See, e.g.*, May v. Bonta, No. CV 23-1696, 2023 WL 8946212, at *9–10 (C.D. Cal. Dec. 20, 2023), *appeal docketed*, No. 23-4356 (9th Cir. Dec. 22, 2023); Wolford v. Lopez, No. CV 23-265, 2023 WL 5043805, at *17–18 (D. Haw. Aug. 8, 2023), *appeal docketed*, No. 23-16164 (9th Cir. Sept. 8, 2023).

146. *See supra* Part I.C.1.

147. Bevis v. City of Naperville, 85 F.4th 1175, 1203 (7th Cir. 2023).

148. *Id.* at 1195.

149. *See id.* at 1197–98.

150. *See id.* at 1201–02.

151. *See id.* at 1227–28 (Brennan, J., dissenting).

152. *See id.* at 1227.

C. Avoiding History

In many criminal cases, courts have avoided the analogical reasoning prescribed by *Bruen* in one of two related ways. First, some have seized on *Heller*'s "presumptively lawful" and "law-abiding, responsible citizen" language, which they interpret as binding, despite *Bruen* announcing a new test for Second Amendment claims. One academic has dubbed this "*Bruen* Step Zero."[153] Relatedly, other courts consider themselves bound by pre-*Bruen* circuit precedent that upheld the constitutionality of the firearm regulation at issue so long as it did not directly apply means-end scrutiny. That precedent, in turn, is typified by its sole reliance on *Heller*'s "presumptively lawful" or "law-abiding, responsible citizen" language. Part III.C.1 explores *Bruen* Step Zero cases. Part III.C.2 discusses courts that have considered themselves bound by pre-*Bruen* precedent.

1. *Bruen* Step Zero

The very first case to cite *Bruen* typifies *Bruen* Step Zero. *Pervez v. Becerra*[154] concerned an individual who alleged that a past defective psychiatric certification wrongly deprived her of her right to bear arms.[155] The court dismissed the impact that *Bruen* might have on the validity of the California law in a single footnote that simply quoted Justice Kavanaugh's concurrence, which itself quoted *Heller*'s "presumptively lawful" language.[156]

Since *Bruen*, courts have almost uniformly rejected challenges to 18 U.S.C. § 922(g), the federal statute banning firearm possession by felons, fugitives, drug users, and unlawful immigrants, among others.[157] Some of these challenges have been dismissed with passing citations to *Bruen* and *Heller*, generally by referencing (1) statements recognizing that the Second Amendment applies to law-abiding and responsible citizens, (2) *Heller*'s "presumptively lawful" language, or (3) Justice Kavanaugh's *Bruen* concurrence repeating *Heller*'s assurances.[158] In other words, these courts

153. 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).

154. No. 18-CV-2793, 2022 WL 2306962 (E.D. Cal. June 27, 2022).

155. *Id.* at *1.

156. *Id.* at *2 n.2.

157. *See* Charles, *supra* note 26, at 127 (finding a 2.9 percent success rate on § 922(g) claims within one year of *Bruen*); *cf.* Sean Phillips, Note, *Long Range Analogizing After* Bruen*: How to Resolve the Circuit Split on the Federal Felon-in-Possession Ban*, 92 FORDHAM L. REV. (forthcoming 2024) (manuscript at 49–74) (on file with author) (discussing the circuit split over allowing as-applied challenges to § 922(g)(1)). There have been some notable exceptions apart from the Fifth Circuit's opinion in *Rahimi*. *See, e.g.*, United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023) (holding § 922(g)(3) (ban on users of controlled substances from possessing firearms) unconstitutional as applied to a marijuana user); Range v. Att'y Gen. U.S., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (holding felon-in-possession ban unconstitutional as applied to an individual convicted of fraudulently obtaining food stamps).

158. *See, e.g.*, United States v. Ingram, 623 F. Supp. 3d 660, 662–63 (D.S.C. 2022) (citing all three points of authority while rejecting a challenge to § 922(g)(1)); United States v. Walter, 20-CR-0039, 2023 WL 3020321, at *2–3 (D.V.I. Apr. 20, 2023) (finding *Heller* and

find that non-law-abiding individuals are not included in "the people" protected by the Second Amendment.[159]

As emblematic of *Bruen* Step Zero, take *People v. Brown*,[160] which rejected a Second Amendment challenge by a defendant in New York City accused of possessing a firearm without a license.[161] First, the court essentially limited *Bruen* to its facts by concluding that the decision had no impact on New York's firearm laws other than the may-issue provision specifically at issue in that case.[162] Because Brown did not apply for a license, the court reasoned, he both lacked standing to challenge the relevant licensing statute and was not law-abiding.[163] As an alternative holding, the court noted that Brown did not attempt to show that he possessed a firearm in "a place that would not be considered 'sensitive' under the dicta in *Bruen* or under federal statutory location restrictions."[164] In a footnote, the court observed that the intersection at which Brown was arrested with a firearm is "within two blocks" of "three churches, a public school, and a day care center."[165] Pause on this analysis. First, the court placed the burden *on Brown* to show that he was not in a "sensitive" location at the time of his arrest, notwithstanding *Bruen*'s clear instruction that the *government* shoulders the burden of establishing the constitutionality of its firearm regulations.[166] Further, its view of the scope of sensitive places is perplexing. At the time of Brown's arrest, neither state nor federal law prohibited firearms at two of the three locations that the court identified.[167] In any event, *Bruen* makes it clear that governments cannot simply designate a place as sensitive and prohibit firearms there ipse dixit.[168]

Brown is a masterclass in *Bruen* Step Zero. In fact, the court seems to rely on every part of *Bruen* except its historical analysis. The following section briefly addresses a related phenomenon: courts avoiding *Bruen* by relying on pre-*Bruen* circuit precedent.

Bruen's "law-abiding citizen" language sufficient to reject a challenge to § 922(g)(1)); *cf.* People v. Baker, 2023 IL App (1st) 220328, ¶ 37 (rejecting a Second Amendment challenge to a state law banning firearm possession by felons on the ground that *Bruen* referenced "law-abiding citizens" eighteen times).

159. *See* United States v. Riley, 635 F. Supp. 3d 411, 424 (E.D. Va. 2022) ("A plain reading of the [Second Amendment] demonstrates that 'the people' remains limited to those within the political community and not those classified as felons.").

160. No. 71673-22, 2022 WL 2821817 (N.Y. Sup. Ct. July 15, 2022).

161. *Id.* at *1–2.

162. *Id.* at *3.

163. *Id.* at *2, *4.

164. *Id.* at *5.

165. *Id.* at *5 n.2.

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

167. Although both state and federal law generally prohibited firearms in school zones at the time, *see* N.Y. PENAL LAW § 265.01-a; 18 U.S.C § 922(q)(2)(A), no federal nor state law banned firearms at churches or day care centers then. New York's *Bruen*-response legislation, which *does* ban firearms at these places, *see* PENAL § 265.01-e(2)(c), (e), took effect months after Brown's arrest. *See* Concealed Carry Improvement Act, ch. 371, § 26, 2022 N.Y. Sess. Laws 1463 (McKinney).

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

2. Pre-*Bruen* Precedent as Binding

Some courts have avoided a historical analysis of firearm regulations by treating pre-*Bruen* circuit precedent as binding. This method is quite similar to *Bruen* Step Zero because the precedent upon which these courts rely is itself based on *Heller*'s dicta regarding presumptively lawful regulations.

Take *Vincent v. Garland*,[169] in which the U.S. Court of Appeals for the Tenth Circuit affirmed after *Bruen* that as-applied challenges to § 922(g)(1) are off the table.[170] The panel in *Vincent* viewed itself as bound by its precedent in *United States v. McCane*,[171] a post-*Heller* decision that categorically upheld § 922(g)(1).[172] *McCane*'s relevant analysis, contained in one sentence, relied solely on *Heller*'s "presumptively lawful" language and did not analyze whether that presumption could be rebutted.[173] *Vincent* relied on *Bruen*'s endorsement of background checks and permitting regimes that clearly exclude felons as evidence that it did not "indisputably and pellucidly abrogate" *McCane*.[174]

Scores of district courts have applied similar logic in § 922(g)(1) cases. The precedent these cases rely upon is similar to *McCane*: it features no means-end scrutiny and relies solely upon *Heller*'s dicta. For example, a federal court in New York upheld § 922(g)(1) against a facial challenge based solely upon pre-*Bruen* Second Circuit precedent, which itself was based only on *Heller*'s presumption that bans on felons possessing arms are constitutional.[175]

Although panels of the courts of appeals—not to mention district courts—are bound by the decisions of prior panels unless they are overruled by the court sitting en banc or by the Supreme Court,[176] there is nevertheless significant tension between a textual analysis of *Heller*'s "presumptively lawful" safe harbor provision and the historical inquiry that *Bruen* demands.

CONCLUSION

If one thing is certain about *Bruen*, it is that lower courts have not interpreted it consistently.[177] Although claims of *Bruen*'s unworkability are overblown,[178] and doomsday predictions that *Bruen* would eviscerate wide

169. 80 F.4th 1197 (10th Cir. 2023).
170. *Id.* at 1202.
171. 573 F.3d 1037 (10th Cir. 2009).
172. *Id.* at 1047.
173. *See id.* ("The Supreme Court, however, explicitly stated in *Heller* that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'" (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008))).
174. *Vincent*, 80 F.4th at 1202.
175. *See* United States v. Garlick, No. 22-CR-540, 2023 WL 2575664, at *5 (S.D.N.Y. Mar. 20, 2023) (citing United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013)).
176. *See, e.g.*, Matthews v. Barr, 927 F.3d 606, 614 (2d Cir. 2019).
177. *See* Transcript of Oral Argument, *supra* note 120, at 38–40.
178. *Contra* Charles, *supra* note 26, at 154 ("Without significant refinement by the courts of appeals and a uniformity among them that seems elusive, *Bruen*'s method will continue proving unworkable in practice.").

swaths of gun laws have proven markedly false,[179] lower courts have failed to come to a consensus regarding *Bruen*'s methodology.[180] Inevitably, some degree of confusion in the lower courts is to be expected after the Supreme Court announces a new legal standard.[181] However, to prevent lower courts from misinterpreting or minimizing *Bruen* as they did to *Heller* and *Miller*, the Supreme Court should clarify two key points. First, analogical reasoning applies to all firearm regulations, regardless of whether they are being challenged in a civil or criminal setting, notwithstanding *Heller*'s presumptive safe harbor for some regulations such as felon disarmament. Second, the Court should identify a particular level of generality to which courts can analogize modern gun laws and historical antecedents. By defining the categories of acceptable analogues broadly, decisions like *Chiumento* uphold schemes that have the capacity to eviscerate one's right to bear arms. On the more seldom flip side, courts that rigidly cabin analogues run the risk of striking down modern firearm regulations that lack well-established and representative "historical twins," as was arguably the case in *Price*.[182] Neither of these outcomes are required under *Bruen*. The Supreme Court just needs to make that clear.

179. *See supra* notes 20–21, 26 and accompanying text. For instance, at oral argument in front of the Supreme Court in *Rahimi*, the Solicitor General pointed out a handful of district courts that have invalidated § 922(g)(1)—without acknowledging the overwhelming majority of courts that have upheld that provision against facial and as-applied challenges—as well as *Price*, which, as noted, is vulnerable to reversal. Transcript of Oral Argument, *supra* note 120, at 101–02; *see also supra* note 128 and accompanying text.

180. *See supra* Part III.

181. *See generally, e.g.*, Alex Reinert, *The Impact of* Ashcroft v. Iqbal *on Pleading*, 43 URB. L. 559 (2011) (motions to dismiss following *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (judicial review of agency action after *United States v. Mead Corp.*, 533 U.S. 218 (2001)). *Cf.* SUP. CT. R. 10(a) (citing circuit splits as a factor in favor of granting certiorari).

182. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022) (disclaiming the requirement that a modern firearm regulation possess a historical twin).