WILL *BRUEN* KILL COPS?

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Criminal procedure is a balancing act. On one hand, it must allow law enforcement officers to protect the public and themselves. On the other hand, criminal procedure must safeguard citizens' individual constitutional rights—privacy, physical liberty, and bodily integrity. And now, the right to bear arms.

There is a serious tension here. Landmark Fourth Amendment cases like Terry v. Ohio*,* Pennsylvania v. Mimms*, and* Chimel v. California *give the police wide latitude to seize firearms on the assumption that guns are dangerous. But these doctrines largely evolved before the Second Amendment's ascendance. In* District of Columbia v. Heller*, the U.S. Supreme Court first recognized that the Second Amendment protects an individual right to possess firearms. And more recently, in* New York State Rifle & Pistol Ass'n v. Bruen*, the Court substantially expanded the scope of that right.*

Thus, the tension: the Fourth Amendment treats firearms as inherently dangerous, subject to regulation on the basis of such dangerousness alone. But Second Amendment doctrine now explicitly rejects that assumption, enshrining a right to possess firearms unless one of a few non-firearms-related risks is present. In this Essay, we argue that something has to give: either Second Amendment rights will have to give way to officer and public safety, or traditional Fourth Amendment doctrines protecting the police and public will fall to the expanding Second Amendment. We expect the Court to prioritize police discretion to protect themselves and the public. But, we argue, such police exceptionalism is doctrinally difficult to justify without also justifying a much broader range of gun regulations.

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INTRODUCTION

New York State Rifle & Pistol Ass'n v. Bruen[1] left many commentators confused on what kinds of gun regulations pass constitutional muster.[2] Indeed, it sowed confusion even about the method that judges should use to determine what is allowed.[3] The U.S. Supreme Court's recent decision in *United States v. Rahimi*[4] did little to resolve the uncertainty. Much has been written about how the *Bruen* framework, such as it is, will or will not impede various statutory gun laws. But what has gone mostly unnoticed is how *Bruen* will affect a body of unwritten law—the law authorizing police officers to disarm citizens for the officers', and the public's, safety. There is a conflict brewing between the post-*Bruen* Second Amendment and the Fourth Amendment.

The Fourth Amendment commands that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[5] Through a number of cases,

1. 142 S. Ct. 2111 (2022). Since we first drafted this Essay, the U.S. Supreme Court decided *United States v. Rahimi*, which upheld the constitutionality of 18 U.S.C. § 922(g)(8), prohibiting possession of firearms by persons subject to domestic violence restraining orders. 144 S. Ct. 1889, 1898 (2024). *Rahimi* ultimately upheld the *Bruen* framework (at least nominally) but made clear that a "historical twin" regulation is not necessary; rather, there must just be a "historical analogue" for the challenged regulation. *See id.* at 1898–99, 1902.

2. *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76 (2023) [hereinafter Charles, *The Dead Hand of a Silent Past*]; Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 104–06 (2023); Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 624 (2023) [hereinafter Charles, *The Fugazi Second Amendment*]; Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of* New York State Pistol & Rifle Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 12 (2023); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post-*Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 22 (2024); Matt Valentine, *Clarence Thomas Created a Confusing New Rule That's Gutting Gun Laws*, POLITICO (July 28, 2023, 4:31 AM), https://www.politico.com/news/magazine/2023/07/28/bruen-supreme-court-rahimi-00108285 [https://perma.cc/LH9M-6Y32]; Scott Burris, Opinion, *One Year On,* Bruen *Really Is as Bad as It Reads*, REGUL. REV. (Aug. 2, 2023), https://www.theregreview.org/2023/08/02/burris-one-year-on-bruen-really-is-as-bad-as-it-reads/ [https://perma.cc/WC8Y-TPP6]; Robert Verbruggen, *A Year After* Bruen, NAT'L REV. (July 31, 2023, 2:17 PM), https://www.nationalreview.com/magazine/2023/07/31/a-year-after-bruen/ [https://perma.cc/7GNT-9B8Y].

3. *See, e.g.*, Charles, *The Dead Hand of a Silent Past*, *supra* note 2, at 95–110 (discussing "puzzles" and "gaps" with *Bruen*'s history and tradition test); Charles, *The Fugazi Second Amendment*, *supra* note 2, at 667–91 (discussing the "problems" with *Bruen*'s test).

4. 144 S. Ct. 1889 (2024).

5. U.S. CONST. amend. IV. The Fourth Amendment reads in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

including *Terry v. Ohio*,[6] *Pennsylvania v. Mimms*,[7] and *Chimel v. California*,[8] the Court has determined that the Fourth Amendment allows law enforcement to frisk ordinary individuals for weapons when officers reasonably suspect that the individuals may be engaged in criminal activity and may be armed.[9] This has been understood as a low bar for a rather high intrusion of individual privacy.[10] But, the Court has held this is justified by the importance of officer safety and, critically, *the dangerousness of firearms*.[11]

The result is a tangle: Are firearms, as *Bruen* would have it, fundamental bulwarks of individual and societal liberty? Or are they, as Fourth Amendment caselaw says, so inherently dangerous that their mere presence constitutes a regulable threat to the safety of law enforcement? Something has to give.[12] As we discuss below, the doctrinal implications could be

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particularly describing the place to be searched, and the persons or things to be seized. *Id.*

6. 392 U.S. 1 (1968).

7. 434 U.S. 106 (1977).

8. 395 U.S. 752 (1969).

9. *See Terry*, 392 U.S. at 27 ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons . . . where [a police officer] has reason to believe that he is dealing with an armed and dangerous individual . . . ."); *Mimms*, 434 U.S. at 110 (holding that an officer may conduct a *Terry* search during a routine traffic stop to ensure officer safety, even in the absence of any evidence of a dangerous crime); *Chimel*, 395 U.S. at 763 (holding that officer safety justified "a search of the arrestee's person and the area 'within his immediate control'").

10. *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998) ("After *Terry*, police intrusions would be controlled by a malleable 'reasonableness' standard that gave enormous discretion to the police."); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 53 (describing the government's burden of proof to establish that a search did not violate the Fourth Amendment as "quite low").

11. *See Terry*, 392 U.S. at 23–24 (highlighting the "long tradition of armed violence" in the United States and noting that "many law enforcement officers are killed in the line of duty" by "guns and knives"); *id.* at 24 n.21 (noting that "[t]he easy availability of firearms to potential criminals in this country is well known"); *id.* at 28 ("[T]he record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so."); *Chimel*, 395 U.S. at 763 ("A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.").

12. *See* Niraj Sekhon, *The Second Amendment in the Street*, 112 NW. U. L. REV. ONLINE 271, 272–74 (2018) (identifying the tension between Fourth Amendment law and post-*Heller* Second Amendment doctrine, but recognizing that in practice, officers are able to circumvent the Second Amendment requirements, to the detriment of disadvantaged communities); Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 205 (2021) (stating that "[i]n Fourth Amendment doctrine, the prospect that a person may be armed often expands police authority to conduct searches and seizures and to use force" and asking whether "such authority [can] be sustained after *Heller*, or [whether] we face . . . a possible collision 'at the intersection of Second and Fourth,'" before contending that any doctrinal issues will be resolved in favor of excluding so-called criminals from rights protections (footnotes omitted) (quoting J. Richard Broughton, *Danger at the Intersection of Second and Fourth*, 54 IDAHO L. REV. 379, 379 (2018))); Broughton, *supra*, at 397. For a case raising this scenario, see United States v. Robinson, 846 F.3d 694, 701–02 (4th Cir. 2017) (holding that

dramatic.[13] If the Court wishes to preserve officers' power to disarm for the sake of public safety, any plausible doctrinal path to that conclusion would appear to also authorize much broader gun regulation.[14] The alternative is to bite the bullet and curtail the police's power to disarm—which would, the Court has repeatedly claimed, seriously endanger officers' lives.[15]

This Essay proceeds in five parts. In Part I, we detail the evolution of gun skepticism in Fourth Amendment doctrine. In Part II, we canvass the Court's recent decisions recognizing an individual right to firearms, with a special eye toward its treatment of the factual presumptions underlying the Fourth Amendment caselaw. In Part III, we expose the tension between these two doctrinal bodies, arguing the Court will have to either imperil officer and public safety or find a way to privilege the police in Second Amendment analysis. In Part IV, we contend that, insofar as the Court privileges police—as we predict they might—this is hard to justify doctrinally without justifying a broader swath of gun regulations.

I. OUR GUN-SKEPTICAL CRIMINAL PROCEDURE

For decades, the law of criminal investigations has been characterized by a view of firearms as inherently dangerous. Many of the key cases, discussed below, proceed on the notion that the mere presence of firearms poses a great threat to public safety *and to officer safety*. Based on that assumption, the Supreme Court has expanded law enforcement's discretion to intrude upon civilians' privacy and liberty—even in the absence of a warrant or probable cause.

Consider first the landmark case of *Terry v. Ohio*. A police officer on patrol in Cleveland, Ohio saw two men standing on a street corner.[16] The two took turns walking down the street, looking into a storefront, turning around, and looking in again on their way back to the corner.[17] They repeated this several times.[18] Then a third person joined them, and they all walked toward the store.[19]

The officer approached the three, suspecting that they have been "casing" the store to rob it.[20] He asked them their names, but they did not respond coherently.[21] The officer grabbed one of the men, John W. Terry, turned him around, frisked him, and found a pistol in his pocket.[22] The officer then

officers may conduct a *Terry* frisk of a person lawfully stopped and reasonably believed to be armed, even if lawfully so armed).

13. *See infra* Part III.
14. *See infra* Part III.
15. *See infra* Part III.
16. *Terry*, 392 U.S. at 5.
17. *Id.* at 6.
18. *Id.*
19. *Id.*
20. *Id.* at 6–7.
21. *Id.* at 7.
22. *Id.*

searched the other two men, finding a pistol on one of them.[23] The two men with pistols were arrested for carrying illegally concealed weapons.[24]

At trial, one of the two men challenged the introduction of the pistol, arguing that the search had violated the Fourth Amendment.[25] The Supreme Court ultimately affirmed his conviction, holding that this form of intrusion—this purportedly limited investigative stop and associated frisk—was constitutional.[26] Thus was born the *Terry* stop.

A *Terry* stop has two separate but equally important components. The first component is the stop. In *Terry*, the Court held that an officer, upon "reasonable suspicion" that a person is engaged in criminal activity, may stop that individual, require them to remain there, and question them.[27] Reasonable suspicion is an even lower standard of evidence than "probable cause,"[28] and thus the vast majority of people subject to *Terry* stops are not in fact engaged in any crimes at all.[29]

The second component of a *Terry* stop—which the Court recognized as the greater intrusion on liberty[30]—is the frisk. If the officer "has reason to believe" that the stopped individual may be "armed and dangerous," the officer may conduct a pat down of the individual to search for weapons.[31]

Notice that these two components have completely separate doctrinal justifications. The justification for the stop is investigation. The idea is that law enforcement needs to be able to engage in preliminary investigation without seeking warrants.[32] But the justification for the second component is not investigation at all. It is rather public and officer safety—and, key to our analysis, safety from guns in particular.[33] In *Terry*, the Court justified the frisk on the observation that many officers are killed or injured in the line

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23. *Id.*
24. *Id.*
25. *Id.* at 7–8.
26. *Id.* at 30.
27. *See id.* at 20–22.
28. Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANNALS OF APPLIED STATS. 365, 366 (2016).
29. *See id.* at 374–75 (summarizing results of analysis of *Terry* stops for individuals suspected of criminal possession of a weapon and finding that the overall likelihood of finding a weapon in such stops was 3 percent, with 43 percent of such stops having less than a 1 percent chance of turning up a weapon, and 19 percent of such stops having a 0.5 percent chance of turning up a weapon). In 2019, the New York Civil Liberties Union reviewed twenty years of data on the New York Police Department's (NYPD) stop-and-frisk policy and found that "[t]he overwhelming majority of people stopped by the NYPD have been innocent, meaning the NYPD found no evidence of wrongdoing and the civilian was not given a summons or arrested." *Stop-and-Frisk Data*, NYCLU (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data [https://perma.cc/HFT5-LWH9].
30. *Terry*, 392 U.S. at 23 ("The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.").
31. *See id.* at 27.
32. *See id.* at 20–22.
33. *See id.* at 27; *see also supra* note 11 and accompanying text.

of duty, and a "substantial portion" of those injuries "are inflicted with guns and knives."[34]

Thus, *Terry* bakes the presumption that guns themselves are dangerous enough to justify temporary disarmament directly into Fourth Amendment doctrine. Crucially, the presumption justifying the frisk cannot be that *criminals* are inherently dangerous—or at least not that presumption alone. Again, because of the low standard of evidence, very few people subjected to *Terry* stops are in fact committing any crime.[35] It is instead the possibility of a gun on the scene that authorizes the most invasive component of the most common exertion of authority over individuals by law enforcement.

This legal presumption that firearms are inherently dangerous, and thus regulable, has been continually affirmed in the Court's holdings. In *Adams v. Williams*[36] and *Michigan v. Long*,[37] the Court extended the reach of the *Terry* frisk to the accessible portions of an automobile, again stressing the dangers that weapons—especially guns—pose to officers.[38]

Pennsylvania v. Mimms also considered and affirmed the core holding of *Terry* in routine traffic stops.[39] There, Harry Mimms was stopped for expired plates and asked to exit his vehicle.[40] Upon doing so, an officer noticed a bulge in his jacket, and *Terry* frisked him, finding a revolver.[41] He was arrested and ultimately convicted for carrying a concealed and unlicensed weapon, and he challenged the conviction based on the search of his person.[42] The Court affirmed, again holding that even in routine traffic stops, where there need be no evidence whatsoever of a dangerous crime, officer safety from people with firearms justifies the *Terry* frisk.[43] In so doing, the Court explicitly noted that officers face a danger of being shot when approaching a vehicle.[44]

And finally, in *Chimel v. California*, a man named Ted Chimel was arrested in his home on suspicion of having committed a burglary.[45] After the officers arrested him, they searched his whole house, obtaining evidence that was admitted against him in trial.[46] Chimel objected, claiming that the search of his house was not entailed by the mere arrest warrant.[47] The Court

34. *Terry*, 392 U.S. at 23–24 (citing FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS—1966, at 45–48, 152 & tbl.51 (1966), https://archive.org/details/sim_crime-in-the-united-states_1966/mode/2up [https://perma.cc/HD3Y-ACQY]).
35. *See supra* notes 27–28 and accompanying text.
36. 407 U.S. 143 (1972).
37. 463 U.S. 1032 (1983).
38. *Williams*, 407 U.S. at 146; *Long*, 463 U.S. at 1048.
39. 434 U.S. 106, 112 (1977).
40. *Id.* at 107.
41. *Id.*
42. *Id.* at 107–08.
43. *See id.* at 110–11.
44. *Id.* at 111.
45. 395 U.S. 752, 753 (1969).
46. *Id.* at 753–754.
47. *Id.* at 754.

agreed, but held that law enforcement was entitled to search an arrestee's person and the areas surrounding the arrestee.[48]

Once again, the key to the Court's reasoning was that the arrestee may have weapons on their person or nearby that would endanger the arresting officers.[49] In the Court's words, "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."[50]

What emerges, then, is that core features of our investigative criminal procedure, defining how law enforcement may intrude on our persons, were crafted with a certain view of firearms: that *guns themselves* pose a potent danger to officer safety, and that this danger alone is sufficient to authorize a temporary disarmament. The threat from a gun, on its own, authorizes an invasive search—and often seizure of the weapon—even in contexts where there is no evidence that the person with the gun is unusually dangerous.

All of these core cases—which continue to define the routine behavior of police officers—were decided before the Court's recognition of an individual right to bear arms. We turn to that next.

II. THE INDIVIDUAL RIGHT TO FIREARMS

In 2008, the Supreme Court first recognized in the Second Amendment an individual right to bear arms. In *District of Columbia v. Heller*,[51] the Court held that such an individual right was enforceable against the federal government.[52] Two years later, the Court held in *McDonald v. City of Chicago*[53] that the right was also incorporated against the states.[54] Twelve years later, in *Bruen*, the Court again seemingly expanded the individual right to bear arms.[55] *Bruen* invalidated the State of New York's proper cause requirement for the possession of a concealed weapon, holding that any regulation of firearms must be grounded in "the Second Amendment's text and historical understanding."[56] What that precisely means is in doubt and in flux.[57] But the going theory is that firearm regulations only survive if there is a sufficiently particular historical analogue of such a regulation contemporaneous with the founding.[58]

What is not in doubt is that the post-*Heller* caselaw has now firmly ensconced an individual right to bear arms in our constitutional system.

48. *Id.* at 763.
49. *Id.*
50. *Id.*
51. 554 U.S. 570 (2008).
52. *Id.* at 619.
53. 561 U.S. 742 (2010).
54. *Id.* at 750.
55. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
56. *Id.* at 2131.
57. *See supra* note 2 and accompanying text.
58. *Bruen*, 142 S. Ct. at 2129. Exactly how close the historical match must be was the main topic of disagreement between the majority and dissent in *Rahimi*. *See* United States v. Rahimi, 144 S. Ct. 1889, 1902–03 (2024).

Because of the constitutional recognition of this individual right to bear arms, certain previously accepted regulations can no longer constitutionally stand. In *Heller* and *McDonald*, that meant that restrictions on the ownership of firearms within the limits of big cities—cities battling fatal epidemics of gun violence[59]—were rendered unconstitutional.[60]

A necessary implication of *Heller* and *McDonald* was that many criminal statutes that prohibited firearm possession per se could not stand. And indeed, there were similar laws in other jurisdictions.[61] This then had the effect of contracting the criminal law and, consequently, the investigatory reach of officers.[62] Practically, it is simply no longer a valid reason to suspect that someone is involved in criminal conduct *merely* because they possess a firearm in some location.[63] After all, general firearm possession is not only legal, it is constitutionally guaranteed.[64] That guarantee is defeasible under certain conditions (e.g., if one has prior qualifying criminal convictions).[65] But today, the investigating officer must have specific justification to believe that one of those conditions is present—and most of them are not directly observable.

This contraction of firearm regulation—and the criminal law related to firearms—was further accelerated by *Bruen*. *Bruen* involved a challenge to the State of New York's scheme for issuing permits that allowed carrying concealed firearms.[66] That scheme required an individual to be of "good moral character" and show "proper cause" for the concealed carry permit.[67] The term "proper cause" remained undefined by the statute,[68] but New York courts had explicated the term as requiring the permit seeker "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[69] The Supreme

59. *See, e.g.*, *Washington D.C. Gun Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/washington-dc [https://perma.cc/L2BP-SPUL] (last visited Nov. 14, 2024) (noting that "[i]n Washington D.C., the rate of gun deaths increased 142% from 2013 to 2022, compared to a 36% increase nationwide"); *Violence Reduction Dashboard*, CITY OF CHI., https://www.chicago.gov/city/en/sites/vrd/home.html [https://perma.cc/4L62-5S5Z] (last visited Nov. 14, 2024).

60. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding District of Columbia's bans on handgun possession unconstitutional); McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (striking down similar bans in Chicago and a Chicago suburb).

61. *See* Kristin A. Goss & Matthew J. Lacombe, *Do Courts Change Politics?* Heller *and the Limits of Policy Feedback Effects*, 69 EMORY L.J. 881, 889–92 (2020).

62. *See* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 6, 34–42 (2015); Broughton, *supra* note 12, at 379; Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1679–81 (2018).

63. *Cf.* Florida v. J.L., 529 U.S. 266, 272 (2000) (suggesting that reliable information that someone has a firearm would, on its own, supply reasonable suspicion for a *Terry* stop).

64. *See supra* notes 51–54 and accompanying text.

65. *See, e.g.*, 18 U.S.C. § 922(g) (federal statute placing restrictions on firearm possession for certain individuals).

66. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2124–25 (2022).

67. *Id*. at 2122–23.

68. *Id.* at 2123.

69. Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981), and *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S.

Court struck down this scheme, holding that the "proper cause" requirement was unconstitutional.[70] In so doing, the Court eschewed interest balancing, or means-end scrutiny, in determining the propriety of firearm regulations.[71] Instead, the touchstone is the text of the Second Amendment and historical understanding of gun regulation in light of the constitutional protection.[72]

Again, what precisely this means is unclear. But what we know from *Bruen* itself is that individuals have a prima facie right to concealed carry.[73] Thus, it is now no longer a reason to suspect that someone is involved in criminal conduct *merely* because they have a *concealed* firearm. That again substantially contracts the criminal law. Indeed, recall that this is the very offense that was at issue in *Mimms*.[74] Had these rights been recognized then, on the factual record we have, the officer would have had no reason to suspect Mimms was engaged in criminal conduct—and presumably then could not have intruded on his person.

Moreover, beyond the holdings, through their description of the individual right, the Court's post-*Heller* cases have substantially changed the constitutional understanding of firearms.[75] The inherent dangerousness of firearms no longer constitutes sufficient constitutional justification to regulate them; instead, firearms are now part of a fundamental individual right and are key to one's inherent right to self-defense.

III. POLICE PERIL OR POLICE PRIVILEGE?

So, which is it? Are guns inherently dangerous such that the mere possibility of their presence justifies serious government intrusions on constitutionally protected grounds? Or are guns themselves the protected grounds, such that their actual presence cannot justify any legal deprivation—especially the deprivation of Second Amendment rights? The former is the traditional view of Fourth Amendment doctrine, the latter the new Second Amendment orthodoxy.

If the latter view trumps the former, it will, by the Supreme Court's own lights, put police officers in serious peril. Over and over, as recounted above,

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Ct. 2111 (2022); *see also* Bernstein v. N.Y.C. Police Dep't, 445 N.Y.S.2d 716, 717 (App. Div. 1981), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

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

71. *See id.* at 2129–31.

72. *Id.* at 2131.

73. *See id.* at 2156 (overturning New York's proper cause requirement for concealed carry). Our reading of *Rahimi* is that this core holding of *Bruen* has not been changed, and it does not resolve the tension between *Bruen* and *Terry*. The Court in *Rahimi* held that individuals subjected to a domestic violence restraining order, through a civil proceeding that required a preponderance of the evidence showing, could be temporarily disarmed. *See* United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024). But that does not suggest individuals could be disarmed through a much less significant showing—reasonable suspicion and reasonable fear of safety—by an officer on the beat.

74. *See* Pennsylvania v. Mimms, 434 U.S. 106, 107–08 (1977).

75. *See supra* notes 51–58 and accompanying text.

the Court has said that guns are a danger to the police.[76] They are a danger when an officer wishes only to briefly question someone whom they merely suspect has committed *some* crime.[77] Not a felony. Not a crime of violence. But *any* crime. Guns are a danger to an officer even after the target of their arrest warrant is already in handcuffs.[78] Guns are even a danger when an officer pulls over a driver for failure to signal.[79] In the past, that danger was enough to justify invasive searches, even without evidence of firearm possession, and temporary confiscation of any guns discovered.[80]

Perhaps no longer. After all, handguns' presumptive dangerousness was exactly why the State of New York required a showing of proper cause before residents could carry them.[81] The *Bruen* Court, however, decisively rejected the view that handguns can be regulated because they are "dangerous and unusual," writing that the idea "provide[s] no justification for . . . restricting" their use.[82] It meant what it said: *no* justification. Recall that *Bruen* rejected constitutional balancing outright.[83] It was not, for example, that guns' inherent dangerousness provides *some* reason to regulate them, but the burden of New York's law outweighed its benefit. It was that the dangerousness of firearms, *qua* firearms, can never, on its own, constitute sufficient reason for regulating them.

What about the police, then? It is difficult to see how the constitutional invasion *Terry* authorized can survive *Bruen*'s revolution in gun jurisprudence. Indeed, after *Heller* and *Bruen*, *Terry* now authorizes not just one, but two distinct constitutional invasions. The first is the frisk itself—and the Fourth Amendment interest in bodily autonomy it overrides.[84] The second, post-*Heller*, is a distinct Second Amendment injury.[85]

Terry authorizes not only a search to find a concealed weapon, but the confiscation, at least temporarily, of any weapons discovered.[86] Indeed, *Terry* authorizes the confiscation of *all* weapons discovered, even those possessed in compliance with all applicable laws.[87] This is again because the *Terry* frisk does not serve an investigatory purpose, but a safety purpose.[88] And under *Terry*, a gun poses a threat to the stopping officer

76. *See, e.g.*, *supra* notes 30–34 and accompanying text (discussing the Court's invocation of officer safety to justify *Terry* stops).

77. *See supra* notes 27–29 and accompanying text (discussing *Terry*'s "reasonable suspicion" standard).

78. *See supra* notes 45–50 and accompanying text.

79. *See supra* notes 39–44 and accompanying text.

80. *See supra* notes 45–48 and accompanying text.

81. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142. S. Ct. 2111, 2191 (2022) (Breyer, J., dissenting) ("New York's Legislature considered the empirical evidence about gun violence and adopted a reasonable licensing law to regulate the concealed carriage of handguns in order to keep the people of New York safe.").

82. *Id.* at 2143 (majority opinion).

83. *See id.* at 2129–30.

84. *See supra* notes 27–29 and accompanying text.

85. *See supra* notes 30–31, 63–64 and accompanying text.

86. *See supra* notes 27, 30–31 and accompanying text.

87. *See supra* notes 27, 30–31 and accompanying text.

88. *See supra* notes 33–34 and accompanying text.

irrespective of whether it is legally possessed and irrespective of whether the possessor has committed any other crimes.[89] This logic is all about the gun. It treats guns as dangerous, per se, and treats that danger as the justification for the regulation of—indeed, the confiscation of—guns. That is exactly the logic *Bruen* said can no longer hold.

If all of this is right, it is hard to see how the *Terry* frisk remains constitutional after *Bruen*. The *Terry* stop—a brief episode of custody and questioning—remains justified via reasonable suspicion of a crime.[90] But absent the legal presumption of firearms' inherent dangerousness that would justify regulation, the logic of the frisk falls apart. And if the *Terry* frisk is no longer constitutional, police will be put in serious peril, unable to avoid close, contentious interactions with armed citizens.

Or perhaps the police are special. Here is one argument for police exceptionalism under *Bruen*: the police can constitutionally seize firearms in the course of their investigative stops not on the presumption that *guns* are dangerous, but that the *people they are stopping* are. *Bruen*, *Heller*, and *McDonald* all countenance this kind of thinking. Even if guns must legally be treated as inherently safe, people need not be. All three cases reaffirm the government's ability to prohibit "the possession of firearms by felons and the mentally ill," on the theory that such persons, not the guns they carry, are inherently dangerous.[91]

Applying this logic to policing, one might argue the people subjected to *Terry* stops are just as dangerous as felons and the mentally ill. But that is simply false. As discussed above, all that is needed to effectuate a *Terry* stop is reasonable suspicion of *some* crime—not a felony.[92] And because the evidentiary standard is so low, very few people stopped turn out to have committed *any* crime at all.[93] True, the reasonable suspicion standard, if judiciously enforced, would render the subjects of *Terry* stops somewhat more likely than random to have committed some crime. But it is a long walk from there to "convicted felon." It simply strains credulity to argue that these two groups of people are comparably dangerous, such that both may be constitutionally subjected to gun control.

Nor, indeed, is this an analytic move that the current Court would likely endorse. The Court in *Rahimi* allowed the government to temporarily disarm someone found to be dangerous—in that case, subject to a domestic violence restraining order—through a civil proceeding.[94] In so doing, the Court

89. *See supra* notes 27, 30–31 and accompanying text.
90. *See supra* notes 27–28 and accompanying text.
91. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142. S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring) (quoting both District of Columbia v. Heller, 554 U.S. 570, 626 (2008); and McDonald v. City of Chicago, 561 U.S. 742, 786 (2010)).
92. *See supra* note 27 and accompanying text.
93. *See supra* notes 28–29 and accompanying text.
94. *See* United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024).

emphasized the importance of process.[95] But a *Terry* stop and frisk is very likely insufficient on process; a civil proceeding with a preponderance of the evidence standard is a far cry from disarmament by an officer on the streets having reasonable suspicion that the individual committed some crime—even a trivial one.

Here is another argument for a police privilege to disarm, even when other government officials cannot: the deprivation imposed by a *Terry* stop is temporary, imposing a much smaller burden on constitutionally protected activity than, for example, *Heller*'s total handgun ban. This would be a very sensible kind of argument to make in other constitutional contexts. Elsewhere, the weight and character of a constitutional burden are balanced against the legitimate government goals that the burden serves.[96] But not in the Second Amendment context, not after *Bruen*. This seems like exactly the kind of pragmatic balancing that the *Bruen* Court rejected. *Bruen* is categorical: a gun's general dangerousness supplies *no* free-standing justification for a constitutional burden, large or small.

This just leaves the uncertain core of the *Bruen* analysis: history and tradition.[97] In the American (and pre-American British) history of policing, was there a traditional power to search for weapons incident to a stop premised on reasonable suspicion? We do not purport to answer the question in full here. We do, however, note what seem to us like two important facts.

First, we call it a "*Terry* stop." *Terry* was decided in 1968, not 1768. True, the fact that the Supreme Court first endorsed frisks for weapons in the twentieth century does not mean that such a practice did not exist in the eighteenth. But second, the dissent in *Terry*, by Justice William O. Douglas, went searching for such a historical practice and found none.[98] On the contrary, the Fourth Amendment's whole purpose was to outlaw general warrants, which had allowed police to search and seize based on mere "suspicion," not probable cause.[99] At least in Justice Douglas's view, the *Terry* stop was very much an invention of *Terry* itself.[100]

Suppose, however, that in light of *Rahimi*, the Court were to find that there was historical backing for *Terry* stops and frisks. It might be that the Court would hold that the historical practice of officer patrol, and common sense, allows officers to engage in *Terry* stops and frisks during their patrol. But that would still leave open important outstanding questions about the constitutional contours of *Terry* firearm confiscations. For example, one

95. *See id.* at 1901–02 (noting that the federal statute at issue "matches" historical laws that "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon" before taking weapons away from that defendant).

96. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 172–73 (2015) (striking sign law for violating the First Amendment because the law failed strict scrutiny).

97. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142. S. Ct. 2111, 2131 (2022).

98. *See* Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

99. *See id.* (quoting Henry v. United States, 361 U.S. 98, 100 (1959) (footnotes omitted)).

100. *See id.* ("In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*.").

question would be for how long an officer could hold an individual's firearm. Consider the prototypical situation: an officer has reasonable suspicion that an individual is engaging in criminal wrongdoing. As a result, the officer subjects the individual to a *Terry* frisk and engages in questioning pursuant to the *Terry* stop. The officer's questioning does not result in incriminating information that would justify an arrest. But the officer remains worried about handing back the individual their firearm—the officer still perceives a fear for their safety. Is the officer permitted to retain the firearm—perhaps taking it back to the station and requiring the individual to pick it up after a cooling off period?

Even if one believed *Terry* frisks to be a constitutional allowance to officers—justified perhaps by common sense and general law enforcement practice—that would still not answer this further question about the duration of the retention of the firearms. And this question raises again the conflict between Second Amendment rights and officer safety. Here too, we contend it is unlikely that the *Bruen* method of analysis, even as refined by *Rahimi*, gives us any genuine resolution. The tension endures.

IV. POLICE PRIVILEGE AND GENERAL REGULATION

We do not expect the courts, including the Supreme Court, to outlaw *Terry* frisks. Instead, we predict that they will find some arguments that frisks, and the temporary disarmaments that come with them, are allowed, Second Amendment notwithstanding. The question is what those arguments will be, and what they will imply about gun regulation more broadly. That is, are there any doctrinally sound arguments that can justify *Terry* frisks without authorizing much broader gun regulations for the sake of public safety?

One potential avenue might be to take a holistic view of policing as a profession, especially the risks it entails. Above, we gave strong doctrinal reasons to reject the theory that reasonable suspicion alone is constitutionally sufficient to disarm someone.[101] Reasonable suspicion is not much evidence that the person has committed any crime at all, much less the paradigmatic crimes—like violent felonies—that authorize disarmament under the Court's post-*Heller* caselaw.[102] So, the gun owner-specific argument won't work.

Courts might instead observe that policing, by its nature, puts officers in high-risk environments. For better or worse, policing resources are concentrated in places that the police, and to a large degree the public, perceive as being high-crime.[103] Insofar as those perceptions are correct—insofar as certain crimes, like homicides, are concentrated in highly policed

101. *See supra* Part III.

102. *See supra* notes 28–29, 61 and accompanying text.

103. *See generally* CODY W. TELEP & JULIE HIBDON, CTR. FOR PROBLEM-ORIENTED POLICING, UNDERSTANDING AND RESPONDING TO CRIME AND DISORDER HOT SPOTS (2019), https://popcenter.asu.edu/sites/default/files/understanding_responding_to_crime_disorder_hot_spots_spi_final.pdf [https://perma.cc/2DV4-89D7]. We do not mean to endorse police or public judgments about which places are "high crime." We are merely pointing out the salience of the category in the law and practice of policing. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

areas—then the risk of gun violence against officers is elevated. This is perhaps especially true insofar as police officers' jobs require them to spend significant time in such areas, engage extensively with people there, and sometimes do so in confrontational ways.

A constitutional ruling allowing gun restrictions for these sorts of geographic reasons might theoretically be grounded in the "sensitive places" doctrine. Recall that *Heller* and its descendants rejected the idea that gun regulations could be imposed based on the idea that firearms are dangerous in general.[104] But they endorsed the idea that gun ownership could be restricted as to certain *people*.[105] Likewise for certain "sensitive places."[106] *Heller's* paradigmatic examples were schools and government buildings.[107]

But what makes such areas sensitive? And whatever it is, are high-crime areas sensitive in the same ways? If not, the sensitive places doctrine cannot ground *Terry* frisks. The parallels between schools and government buildings, on the one hand, and high-crime areas, on the other hand, are difficult to draw.

Presumably, one account of the former places' sensitivity would be that they are sites for conducting important public business—governance and education. Not so for the typical city block experiencing a rash of burglaries. True, one could argue that, wherever the police go, so too goes public business. But that risks proving too much. Not even *Terry* contemplates the ability of the police to temporarily disarm anyone they interact with for *any* reason in the course of their duties—there must be a genuine basis for the *Terry* stop and a reason to believe the person poses some danger.

A better way of tying high-crime areas to paradigmatic sensitive places might be to conceive sensitivity in terms of the risk of violence. Government buildings are at elevated risk for at least certain kinds of political violence.[108] And tragically, schools, among other public places, have in recent decades been sites of large-scale mass shootings.[109] This conception of what it means

104. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142. S. Ct. 2111, 2143 (2022).

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

106. *Id.* at 626.

107. *Id.*

108. *See* Lindsay Wise, Catherine Lucey & Andrew Restuccia, *'The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J., https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654 [https://perma.cc/D3B9-XT5V] (Jan. 6, 2021, 11:53 PM).

109. *See, e.g.*, Janie Boschma, Curt Merrill & John Murphy-Teixidor, *Mass Shootings in the U.S. Fast Facts*, CNN, https://edition.cnn.com/us/mass-shootings-fast-facts [https://perma.cc/TM7H-5CHL] (Sept. 17, 2024, 11:08 AM); Reuven Blau, *Texas Church Gunman Used Same Rifle as Las Vegas, Newtown, Aurora, San Bernardino Mass Shooters*, N.Y. DAILY NEWS, https://www.nydailynews.com/2017/11/06/texas-church-gunman-used-same-rifle-as-las-vegas-newtown-aurora-san-bernardino-mass-shooters/ [https://perma.cc/PE7L-TDQ3] (Apr. 7, 2018, 12:45 PM); *'Cop Killer' Gun Used in Ft. Hood Shooting, Officials Said*, ABC NEWS (Nov. 6, 2009, 6:32 PM), https://abcnews.go.com/Blotter/cop-killer-gun-thought-ft-hood-shooting/story?id=9019521 [https://perma.cc/7R3D-9HHD]; *Thousand Oaks: Ex-Marine Ian David Long Identified as Suspect*, BBC (Nov. 8, 2018), https://www.bbc.com/news/world-us-canada-46135459 [https://perma.cc/2CWR-UGB7]; Aamer Madhani, *What Happened in 2013 Navy Yard Mass Shooting*, USA TODAY

for a place to be sensitive—and thus amenable to gun regulation—could conceivably justify *Terry* frisks in high-crime areas.

But this argument would authorize a much wider range of gun regulations as well. If high-crime areas can be subjected to gun controls for the sake of police officers' safety, why not for the safety of ordinary people as well? Indeed, the very regulations that the Court struck down in *Heller* and *McDonald* were designed to protect ordinary people living in unusually dangerous places. Both laws outlawed handgun possession citywide.[110] But both bans were in large cities with per capita homicide rates over twice as high as the median.[111] The legislatures of Chicago and Washington, D.C. were trying to protect their residents from the very same harms, in the very same kind of environment, that *Terry* sought to protect officers from.

One could argue that it is not high rates of crime alone that make police patrol routes sensitive, but rather the activity of policing. Police are not merely in sensitive places; they do risky things there. They must interact directly with people who might wish them harm, and those interactions will often necessarily be contentious.

This, however, does not make police special. If anything, everything just said about police is even more true of ordinary people who live in places experiencing high levels of violence. To conduct their daily business, those ordinary people must often interact with the very same people whom the police deem dangerous enough to frisk. Those interactions will sometimes be necessarily contentious—as, for example, when economic interactions are sharpened by conditions of poverty. And unlike the police, ordinary people living in areas with high rates of violent crime do not get to go home at night. They are on duty 24/7, without inherent authority and protection of the badge.

At any rate, this entire line of argumentation about the police's activities in high-crime neighborhoods feels like the kind of balancing that *Bruen* rejected. Under *Heller*, a place is either sensitive or it isn't. It is not sensitive

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(July 2, 2015, 11:19 AM), https://www.usatoday.com/story/news/2015/07/02/what-happened-in-2013-navy-yard-shooting/29614339/ [https://perma.cc/257X-ETWS]; Lou Michel, Ben Tsujimoto & Maki Becker, *Buffalo's Worst Mass Shooting Takes 10 Lives, Leaves 3 Wounded; Attack Called 'A Racially Motivated Hate Crime'*, BUFFALO NEWS (May 15, 2022), https://buffalonews.com/news/local/ten-killed-in-mass-shooting-at-jefferson-avenue-supermarket-shooter-in-custody/article_6e8132fa-d3b7-11ec-a714-2b3fbeaf848c.html [https://perma.cc/9YXR-2ZHJ].

110. *Heller*, 554 U.S. at 574–75; McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

111. *See 2019—Crime in the United States: Murder*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/murder [https://perma.cc/DE7W-6UHX] (last visited Nov. 14, 2024) (reporting the murder rate in the United States in 2019 as 5 per 100,000 people); *2019—Crime in the United States: District of Columbia*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-8/table-8-state-cuts/district_of_columbia.xls [https://perma.cc/DSA9-B66U] (last visited Nov. 14, 2024) (reporting that the murder and nonnegligent manslaughter rate in Washington, D.C. in 2019 was over 23 per 100,000 people); *2019—Crime in the United States: Illinois*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-8/table-8-state-cuts/illinois.xls [https://perma.cc/8WXN-JK9P] (last visited Nov. 14, 2024) (reporting that the murder and nonnegligent manslaughter rate in Chicago in 2019 was over 18 per 100,000 people).

for just some of its occupants. That latter kind of reasoning might suggest that a state capitol was a sensitive place, but only when the legislators were present. Then, the Second Amendment might demand that guns be allowed during legislative recesses.

How, then, to thread the needle? How to preserve *Terry* for the police's sake without implying that *Heller* and *McDonald* (and *Bruen*) were wrongly decided? One option would be to say that places with high rates of violent crime are sensitive, and thus amenable to *Terry* frisks. This would imply that other regulations, imposed in those areas for the general public's safety, should be allowed, too. Just not the citywide handgun bans struck down in *Heller* and *McDonald*. Perhaps those were simply too broad in both place and time? After all, those laws included parts of Washington, D.C. and Chicago without high rates of violent crime. And they imposed much longer-term disarmament than the temporary disarmament of a *Terry* frisk.

Suppose, then, a city imposed a gun control rule that looked much more like a *Terry* frisk, as justified by the idea that high-crime areas are constitutionally "sensitive." Suppose that the law forbade possessing a firearm during a direct interaction with a stranger. And suppose it was limited to just those places within a half mile of the site of a shooting within the last six months.[112]

If *Terry* stops are still allowed post-*Bruen*, it is difficult to see why such a law shouldn't also pass constitutional muster. True, such a law might end up covering most of the city.[113] And true, it would therefore require many more people to temporarily disarm themselves than are disarmed annually in *Terry* frisks. But it is not clear how or why either of those should matter under *Bruen*'s self-conscious nonbalancing test. The law applies only in sensitive places—as "sensitive" would need to be understood to justify *Terry*. And it requires disarmament of the same time and scope needed to justify *Terry*. Under the kind of categorical analysis *Bruen* appears to require, it seems that both *Terry* frisks and the hypothetical statute must be constitutional. Or neither.

Perhaps all of these analytical contortions feel a bit silly. We think so, too. The reason is that it is difficult to shoehorn any particular gun policy into the narrow categories of acceptable regulation that *Heller*, *McDonald*, and *Bruen* supply.

If one is opposed to gun regulation in general, this may seem at first like a feature, not a bug. The harder it is to fit gun rules into a sanctioned category, the harder it is to regulate guns. But the appeal quickly wears off if one encounters, to one's surprise, a gun control law that one happens to think is reasonable. Some such laws might be easy to slot into a historical tradition. For example, tort damages for accidental shootings "are as traditional and

112. *See* Alexander Din, *Proximity to Homicide Exposure in Washington, D.C., 2021*, D.C. POL'Y CTR. (June 23, 2022), https://www.dcpolicycenter.org/publications/homicide-exposure-maps/ [https://perma.cc/D3FU-RJ8U] (noting that 80 percent of District of Columbia residents lived within a half mile of a homicide that occurred in 2021).

113. *See id.*

long-standing as any legal [rules] can be."[114] But others, like the *Terry* frisk, are far harder to make fit.

For judges who disfavor gun regulations but support law enforcement—officers' ability to do their jobs, and to do them safely—there are just two choices. The first is to figure out a way to make the *Terry* frisk fit into a category of authorized regulation. But as demonstrated above, this is difficult to do without authorizing other broader rules—rules that would protect members of the general public who face the same kinds of threats from guns in the same kinds of places. The other choice is to bite the bullet: to concede that the *Terry* frisk does not readily fit into a category of authorized regulation, and to accept the expected consequences of officer injuries and deaths.

There is, of course, a third option, but it is not a *legal* option, per se. Judges could ignore the doctrinal problems and authorize *Terry* frisks and related measures while rejecting cognate regulations enacted for the benefit of the general public. This approach would be good only from the perspective of the judges' own policy perspectives. From the perspective of Second Amendment law—its coherence, workability, and perceived legitimacy—such decisions would be damaging indeed.

V. CONCLUSION

The Supreme Court is in a bind. As we have shown, its Second Amendment jurisprudence, recognizing a robust individual right to firearms, is in a head-to-head confrontation with its Fourth Amendment doctrine, geared toward protecting officer safety. Specifically, it is not clear how *Terry* stops and frisks, which critically enable officers to temporarily disarm individuals while investigating criminal activity, remain constitutional. That is, while *Bruen* authorizes only those kinds of regulations that are grounded in our nation's history and tradition, *Terry* stops are a creation of relatively recent vintage.

Thus, the Court must choose a path forward, and its choice is unlikely to be harmonious. Either it sticks to its guns in *Bruen*, restricting regulations to only those with close analogues in our history and tradition, or it ditches that strict framework and allows for broader regulation of firearms. Something's got to give.

The Court's opinion in *Rahimi* may suggest the likely path forward. Chief Justice Roberts, writing for an eight-Justice majority, nominally affirmed the *Bruen* framework, but clarified that in assessing firearms regulations, we need not find a historical twin; instead a "historical analogue" is sufficient to uphold a regulation.[115] Consequently, the Court determined that surety laws and "going armed" laws were sufficient to supply that historical analogue.[116]

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114. Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 336 (2016).

115. *See* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

116. *See id.* at 1901.

This appears to allow courts reviewing firearms regulation more flexibility and plasticity than a plain reading of *Bruen* would suggest. Commentators are already arguing *Rahimi* represents an about-face from the *Bruen* framework, albeit a quiet one.[117] Our early prediction is that this will ultimately be correct. Most significantly, *Bruen*'s dismissal of means-end reasoning will be only formally true. Jurists will reason as they always have with firearms. Means-end thinking will make a comeback. But the new battleground will be over which conceptions of means and ends, characterized by which levels of generality, best match the historical record.

117. *See, e.g.*, Amy Davidson Sorkin, *The Supreme Court Steps Back from the Brink on Guns*, NEW YORKER (June 22, 2024), https://www.newyorker.com/news/daily-comment/the-supreme-court-steps-back-from-the-brink-on-guns [https://perma.cc/SL2P-FF38]; Mark Joseph Stein, *The Supreme Court Walks Back Clarence Thomas' Guns Extremism*, SLATE (June 21, 2024, 12:18 PM), https://slate.com/news-and-politics/2024/06/supreme-court-clarence-thomas-guns-extremism-rahimi-bruen.html [https://perma.cc/C8XL-9GMA]; Dana Bazelon, *The Supreme Court Hasn't Actually Fixed the Mess Clarence Thomas Created on Guns*, SLATE (June 26, 2024, 4:47 PM), https://slate.com/news-and-politics/2024/06/supreme-court-scotus-thomas-barrett-gun-control-rahimi.html [https://perma.cc/F2CV-3ZKW].